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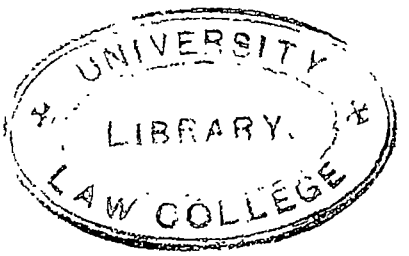

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395 (1)	Jamun v. Secretary of State for India ...	A I R 1935 Lah. 669; 37 P L R 370; 7 R L 704.
395 (2)	Katikineni Venkata Gopala Naraimha Rama Rao v. Chitrluri Venkataramayya ...	(1934) M W N 1173; 41 L W 280; 68 M L J 282; A I R 1935 Mad. 257 (2); 36 Cr. L J 781 (2); (1935) Cr. Cas. 331 (2); 58 M 430; 7 R M 578.
396	Sundar Singh v. Narain Das ...	A I R 1934 Lah. 920; 35 P L R 619; 7 R L 706.
406	Sadlu v. Emperor ...	A I R 1934 All. 374; (1934) Cr. Cas. 438; 7 R A 926; 36 Cr. L J 742.
408	Thirupathuran v. Emperor ...	A I R 1934 Mad. 722; 67 M L J 674; 40 L W 777; (1934) M W N 1358; (1934) Cr. Cas. 1398; 36 Cr. L J 790; 7 R M 579.
409	Patel Chhotabhai v. Jnan Chandra Basak ...	1935 O W N 627; 7 R P C 201; 61 C L J 285; 39 C W N 865; (1935) M W N 625; A I R 1935 P C 97; 69 M L J 1; (1935) A L J 775; 42 L W 188; 37 Bom. L R 567; 57 A 330 P C.
416 (1)	Abdul Jabbar Sarkar v. Emperor ...	A I R 1935 Cal. 251; 39 C W N 141; 60 C L J 474; 36 Cr. L J 736; (1935) Cr. Cas. 333; 7 R C 585.
416 (2)	Baqa Ullah Khan v. Ghulam Siddique Khan	7 R A 928; 1935 R D 591; (1935) A L J 647; A I R 1935 All. 616.
419	M. D'Silva v. Minnie Lal ...	7 R P 584; A I R 1935 Pat. 267.
421 (1)	Dina Nath v. Emperor ...	A I R 1935 Lah. 191 (1); 35 P L R 758; 36 Cr L J 736 (1); 7 R L 715.
421 (2)	Ram Singh v. Emperor ...	16 P L T 295; 7 R P 580; 36 Cr. L J 714; A I R 1935 Pat. 214; (1935) Cr. Cas. 577 S B.
426	H. Hunter v. Rani Kaniz Abid ...	1935 O W N 610; 7 R P C 137; 68 M L J 744; 61 C L J 274; (1935) M W N 669; A I R 1935 P C 104; (1935) A L J 785; 42 L W 146; 37 Bom. L R 874 P C.
430	Surja Narain, *In the matter of* ...	16 P L T 223; 7 R P 586; 36 Cr. L J 730; A I R 1935 Pat. 195; (1935) Cr. Cas. 534; 14 Pat. 442 S B.
435	Nowshirwan Irani v. Emperor ...	A I R 1934 Sind 206; (1934) Cr. Cas. 1411; 28 S L R 330; 7 R S 189; 36 Cr. L J 718.
438	Emperor v. Muthuswami ...	(1934) M W N 1355; 68 M L J 176; 41 L W 181; A I R 1935 Mad. 198; (1935) Cr. Cas. 211; 36 Cr L J 793; 58 M 707; 7 R M 581.
439	Bhikchand Gangaram v. Emperor ...	A I R 1934 Sind 22; (1934) Cr. Cas. 220; 28 S L R 84; 7 R S 191; 36 Cr L J 818.
444 (1)	Durga Pada Chatterji v. Nilmani Ghose ..	A I R 1935 Cal. 252; 39 C W N 143; 60 C L J 472; 36 Cr L J 740 (1); (1935) Cr. Cas. 334; 7 R C 586.
444 (2)	Conductor Alfred Beedham, Quetta, *In the matter of*	A I R 1934 Lah. 845; (1934) Cr. Cas. 1185; 36 Cr L J 737; 7 R L 717.
447	Kalyan Das v. Emperor ...	A I R 1935 Lah. 188; 15 Lah 782; 37 P L R 19; (1935) Cr. Cas. 272; 36 Cr. L J 735; 7 R L 716.
448	Rahimbux Karimbux v. Emperor ...	A I R 1935 Sind 1; (1935) Cr. Cas. 42; 28 S L R 347; 7 R S 196; 36 Cr. L J 824.
450	Diwan Singh v. Emperor. ...	A I R 1935 Nag 90; (1935) Cr. Cas. 418; 36 Cr L J 744; 7 R N 176.
469	Hassan Muhammad v. Hukam Chand ...	A I R 1934 Lah. 872; 36 P L R 112; 7 R L 719.
470	Soney Lall Jha v. Darbdeo Narain Singh ...	16 P L T 199; 7 R P 590; A I R 1935 Pat. 167; 14 Pat. 461 F B.
478	Sardar Ahmad v. Emperor ...	A I R 1934 Lah. 693; 35 P L R 697; (1934) Cr Cas. 1008; 36 Cr. L J 778; 7 R L 721.
479	Balqis Begam v. Muhammad Hamdam ...	A I R 1934 Lah. 973 (1); 36 P L R 135; 7 R L 723.
480	Biswambar Biswas v. Aparna Charan Mohary ...	A I R 1935 Cal. 290; 39 C W N 490; 61 C L J 165; 62 C 715; 7 R C 587 F B.
487	Benares Bank Ltd., Agra v. Rajnath Kunzru ...	(1935) A L J 352; A I R 1935 All. 374; 7 R A 931 F. B.

490	Ibn Ali v. Emperor ...	(1935) A L J 395; 7 R A 935; 36 Cr. L J 781 (1); A I R 1935 All. 608 (1); (1935) Cr. Cas. 605; L R 16 A 49 Cr.
491	Faqir Chand v. Municipal Committee, Ludhiana ...	A I R 1934 Lah. 1021; 36 P L R 121; 7 R L 722.
492	Sheonandan v. Emperor ...	(1935) A L J 393; 7 R A 934; 36 Cr. L J 777; A I R 1935 All. 597; (1935) Cr. Cas. 622.
493	Vijaysingji Chhatrasingji v. Shivsangji Bhimsangji ...	1935 O W N 645; (1935) M W N 531; A I R 1935 P C 95; 7 R P C 207; 68 M L J 701; (1935) A L J 690; 39 C W N 682; 61 C L J 336; 42 L W 1; 37 Bom. L R 562; 59 B 360 P C.
495	Bahal Singh v. Chameli ...	(1935) A L J 289; 7 R A 936; A I R 1935 All. 606.
496	Public Prosecutor v. Subramania Sastri ...	(1934) M W N 1170; 68 M L J 421; 36 Cr. L J 799; A I R 1935 Mad. 648; 41 L W 679; (1935) Cr. Cas 927; 7 R M 582.
498	Salik Ram v. Jangjit Bahadur Singh ...	A I R 1935 Oudh 411; 1935 O W N 684; 7 R O 595.
500	Mam Chand v. Ali Muhammad ...	A I R 1934 Lah. 1023; 36 P L R 119; 7 R L 726.
501	Anandpal Singh v. Ram Charan ...	1935 O W N 555; A I R 1935 Oudh 415; 7 R O 594.
503	Kashmiri Lal v. Chuni Lal ...	A I R 1934 Lah. 349; 7 R L 724.
505	Khushi Ram v. Ram Sumer ...	A I R 1935 Oudh 430; 1935 O W N 672; 7 R O 592.
506	Mahammad Ali Fakir v. Karam Ali ...	A I R 1935 Cal. 134; 38 C W N 1202; 7 R C 594.
511	Daw Min Baw v. A. V. P. L. N. Chettyar Firm ...	A I R 1935 Rang 39; 7 R Rang. 346.
514 (1)	Hukam Chand v. Mani Shibrat Dass ...	A I R 1934 Lah. 984; 36 P L R 63; 7 R L 727.
514 (2)	Karam Chand v. Lokoo Ram ...	A I R 1934 Lah. 607; 35 P L R 563; 7 R L 729.
516	Rachotappa v. Konher ...	A I R 1935 Bom. 41; 36 Bom. L R 1083; 7 R B 433; 59 B 194.
522	Nihal Chand v. Shanti Lal ...	1935 O W N 582; A I R 1933 Oudh 349; 7 R O 597.
526	Jamna Dhar Potdar & Co, Lyallpur v. Commissioner of Income Tax, Punjab ...	A I R 1935 Lah 201; 36 P L R 480; 7 R L 728.
527	Mathura v. Emperor ...	1935 O W N 561; A I R 1935 Oudh 351; 36 Cr. L J 767; (1935) Cr. Cas. 791; 7 R O 602.
533	Krishna Chamber of Commerce, Ltd. v. Firm Prem Singh-Kishen Chand ...	A I R 1934 Lah. 1019 (1); 36 P L R 283; 7 R L 732 (1).
534	Bhabhuti Prasad v. Parbati Kuar ...	1935 O W N 533; A I R 1935 Oudh 366; (1935) R D 243; 7 R O 608.
536	Indian Companies Act VII of 1913, *In the matter of*	A I R 1935 Lah. 464; 7 R L 731.
537	Santabir Lama v. Emperor ...	A I R 1935 Cal. 122; 39 C W N 285; (1935) Cr. Cas. 156; 7 R C 598; 36 Cr. L J 794; 62 C 399.
540 (1)	Dip Chand v. Emperor ...	A I R 1934 All. 872; (1934) Cr. Cas. 1081; 7 R A 939; 36 Cr L J 766.
540 (2)	Shiv Narain Singh v. Muni Lal ...	A I R 1934 Lah. 881; 36 P L R 105; 7 R L 730.
541	Ganga Singh v. Emperor ...	(1935) A L J 423; 7 R A 937; 36 Cr. L J 763; A I R 1935 All 647; (1935) Cr. Cas. 650.
544	Chava Ramanayudu v. Suryadeara Seetharamayya...	(1935) M W N 343, 41 L W 521; 7 R M 583; 68 M L J 570; A I R 1935 Mad. 440; 58 M 727 S B.
546	Ishwar Dayal v. Amba Prasad ...	(1935) A L J 498; 7 R A 942; A I R 1935 All. 667.
548	Wajid Ali Shah v. Emperor ...	A I R 1935 Pesh. 16; (1935) Cr. Cas. 158; 36 Cr. L J 806; 7 R Pesh 103.
550	Humela v. Ori Sahoo ...	(1935) A L J 429; 7 R A 940; A I R 1935 All. 688.
552	Karam Singh v. Ram Kaur ...	37 P L R 136; A I R 1935 Lah. 452; 7 R L 736.
553	Rai Bari Stree v. Rassinga Naik Bissing Stree ...	(1935) M W N 339; 41 L W 534; 58 M L J 606; A I R 1935 Mad. 511; 58 M 684; 7 R M 587 F B.

554	Raghunath Das v. Gajpat Rai ...	A I R 1934 Lah. 449; 35 P L R 443; 7 R L 733.
557	Bade v. Emperor ...	A I R 1935 Nag. 125 (1); 36 Cr. L J 765; (1935) Cr. Cas. 564; 7 R N 195.
558	Fateh Singh v. Mauj Rai ...	A I R 1934 Lah. 739; 35 P L R 656; 7 R L 732 (2).
559	Kalapati Peda Pitchamma v. Chiruvella Pedamuneyya ...	(1935) M W N 57; 41 L W 482; 68 M L J 466; A I R 1935 Mad. 380; 58 M 687; 66 M L J 466; 7 R M 586 F B.
560	Bhagwan Das v. Emperor ..	(1935) A L J 385; 7 R A 944; 36 Cr L J 773; A I R 1935 All. 717; (1935) Cr. Cas. 919.
563	Keshab Deo v. Rajendra Kumar Bhatacharji ..	7 R A 949; A I R 1935 All. 687.
564	Lallubhai Rupchand v. Mohanlal Sakarchand ...	A I R 1935 Bom. 16; 36 Bom. L R 1041; 59 B 83; 7 R B 439.
569	Anrudh Rai v. Sant Prasad Rai ...	(1935) R D 182; 7 R A 947; A I R 1935 All. 746 (2); (1935) A L J 838.
571	Firm Sansarchand Lachhman Das v. Dina Nath Dube	7 R A 950; A I R 1935 All 645.
574	Lakshmana Chettiar v. Muthuchellia Goundan ...	41 L W 61; (1935) M W N 38; 68 M L J 104; A I R 1935 Mad. 145; 7 R M 590.
575	Sannidhi Chinnasubbarayulu v. Godasi Veeraswami ...	41 L W 117; (1935) M W N 110; A I R 1935 Mad. 196; 7 R M 589.
576	Sher Mohammad v. Karam Chand ..	A I R 1935 Lah. 515; 37 P L R 392; 7 R L 737.
577	Rahman v. Emperor ...	A I R 1935 Pat. 66; 15 P L T 833; 36 Cr. L J 815; 14 Pat. 318; 7 R P 598.
579	Roshan Jahan Begam Sahiba v. Secretary of State for India ...	1935 O W N 557; A I R 1935 Oudh 364; 7 R O 610.
581	Yeluri Satyanarayana v. Yeluri Mallayya ...	(1935) M W N 349; 41 L W 514; 68 M L J 540; 7 R M 591; A I R 1935 Mad. 447; 58 M 735 F. B.
584	Emperor v. Nur Ahmed ...	A I R 1934 Cal. 7; (1934) Cr. Cas. 23; 38 C W N 108.
587	Sheoga v. Dhanna ...	A I R 1934 Lah. 839; 35 P L R 610; 7 R L 740.
588	Balwantrao v. Balmukund ..	A I R 1935 Nag. 109; 7 R N 196.
590	Emperor v. Gurbaksh Singh ..	A I R 1934 Lah. 840; 35 P L R 753; (1934) Cr. Cas. 1182; 16 Lah. 51; 36 Cr L J 785; 7 R L 738.
591	Vedagiri Sastriar v. Jagathguru Sankarachariar	41 L W 40; (1935) M W N 120; A I R 1935 Mad. 128; 68 M L J 132; 7 R M 594.
593	Muhammad Mustafa Ali Khan v. District Board, Bareilly ...	7 R A 952; A I R 1935 All. 663.
595	Sain v. Emperor ...	A I R 1934 Lah. 945; 36 P L R 209; (1934 Cr. Cas. 1333; 36 Cr. L J 789; 7 R L 742.
596	Ramji Lal v. Roshan Singh ...	(1935) A L J 587; 7 R A 957; A I R 1935 All. 692.
599	Mukunda Murari Pal v. Emperor ...	A I R 1934 Cal. 10; (1934) Cr. Cas. 26; 61 C 190; 7 R C 603; 36 Cr. L J 803.
602	Badloo v. Nanu ..	(1935) A L J 509; 7 R A 956; A I R 1935 All. 640.
603	Buti Ram v. Sardar Singh ...	A I R 1935 Lah. 875; 36 P L R 101; 7 R L 741
605	Qasim Raza v. Emperor ...	(1935) A L J 386; 7 R A 954; 36 Cr. L J 782; A I R 1935 All. 657; (1935) Cr. Cas. 665.
607	Shriram v. Mohanlal ...	A I R 1935 Mad. 127; 31 N L R 243; 7 R N 198.
609	Nur Muhammad v. Hajran ...	A I R 1934 Lah. 946; 36 P L R 181; (1934) Cr. Cas. 1334; 36 Cr. L J 792; 7 R L 743.
610	Pir Bakhsh v. Kidar Nath ...	A I R 1935 Lah. 478; 37 P L R 400; 7 R L 747.
611	A. L. S. P. P. L. Subramanian Chettiar v. Subbaraya Gounden ...	(1934) M W N 801; A I R 1935 Mad. 246; 7 R M 596.
615	Sarbuland v. Prem Das ..	A I R 1934 Lah. 947; 35 P L R 709; 16 Lah. 56; 7 R L 744.
617	Ramkinkar Singh v. Jogendar Nath Singh ...	16 P L T 158; 7 R P 601; A I R 1935 Pat. 186.
619	Muhammad Naziruddin v. Raja Ram ...	16 P L T 309; 7 R P 600; A I R 1935 Pat. 274.

620	Nihal Chand v. Narain Das ...	A I R 1934 Lah. 949; 36 P L R 162; 7 R L 748.
629	Nihera Kahar v. Emperor ...	A I R 1935 Pat 129; 7 R P 606; (1935) Cr. Cas. 329; 36 Cr. L J 829.
631	B. B. & C. I. Railway Co. v. Dwarka Nath	7 R A 963; A I R 1935 All. 669.
633	Karunakar Tikait v. Purna Chandra ...	16 P L T 279; 7 R P 605; A I R 1935 Pat. 266.
634	Banaphal Singh v. Noor Mohammad ...	7 R A 962; (1935) A L J 664; 1935 R D 263; A I R 1935 All. 662.
635	Bhekdhari Mahton v. Radhika Koer ...	A I R 1934 Pat. 648; 16 P L T 78; 13 Pat. 364; 7 R P 603.
638	Wahid Ullah Ahrari v. Emperor ...	7 R A 961; 36 Cr. L J 816; (1935) A L J 676; A I R 1935 All 743; (1935) Cr. Cas. 887.
639	Jugal Kishore-Gulab Singh v. Dina Nath-Siri Ram ...	A I R 1934 Lah. 958; 35 P L R 565; 15 Lah. 893; 7 R L 757.
641	Anglo-Indian Drug and Chemical Co. v. Swastik Oil Mills Co., Ltd. ...	A I R 1935 Bom. 101; 36 Bom. L R 1165; 7 R B 444; 59 B 373.
651	Ramunni Kitav v. Chalikkara Kunhayan ...	40 L W 857; 68 M L J 112; A I R 1935 Mad. 125; 7 R M 599.
653	Chatar Sen v. Mitter Sen ...	L R 15 A 40 Rev.; 18 R D 12; 7 R A 966.
654	Bhagwana v. Shadi ...	A I R 1934 Lah. 878; 36 P L R 114; 16 Lah. 408; 7 R L 758.
657	Raja Ram v. Emperor ...	7 R A 967 (2); (1935) A L J 668; 36 Cr. L J 823; A I R 1935 All. 691; (1935) Cr. Cas 788.
658	Muhammad-ud-Din v. Bhupan ...	7 R A 967 (1); 1935 R D 282; A I R 1935 All. 642 (2); (1935) A L J 955.
659	Bhagwana v. Gopi ...	A I R 1935 Lah. 202; 7 R L 761 F. B.
661	Bhagwan Das v. Lakshmi Chand ...	7 R A 970; (1935) A L J 673; A I R 1935 All. 643.
662	Narain v. Emperor ...	7 R A 969; (1935) A L J 670; 36 Cr. L J 826; A I R 1935 All. 665; (1935) Cr. Cas, 664.
663	Ramnandan Prasad Singh v. Ram Das ...	A I R 1934 Pat. 70; 7 R P 608.
667	Braj Kishore Upadhia v. Panchaiti Akhara Maha Nirwani Firqa Goshaiyan Naga	7 R A 971; 1935 R D 265; A I R 1935 All. 666; (1935) A L J 819.
668	Chandra Shekhar v. Sri Thakurji Maharaj ...	(1935) A L J 548; 7 R A 975; A I R 1935 All. 642 (1)
669	Municipality of Ahmedabad v. Ravjibhai Bhailal ...	A I R 1935 Bom. 127; 37 Bom. L R 69; 7 R B 453; 59 B 268.
673	Official Receiver, Aligarh v. Hira Lal ...	(1935) A L J 642; 7 R A 973; A I R 1935 All. 727.
676	Amna v. Ratan Lal ...	(1935) A L J 632; 7 R A 979; A I R 1935 All. 660.
677	Dev Samaj Council, Lahore v. Amritlal Motilal ...	A I R 1934 Sind 123; 28 S L R 54; 7 R S 200.
684	Amir Ahmad v. Syed Hasan ...	(1935) A L J 573; 7 R A 976; A I R 1935 All. 671.
687	Rafiqueuddin Ahmad v. Emperor ...	A I R 1935 Cal. 184; 39 C W N 368; (1935) Cr. Cas. 241; 36 Cr. L J 808; 62 C 572; 7 R C 606 F. B.
693	Gurbakhsh Singh v. Sardar Singh ...	A I R 1935 Lah. 268; 16 Lah. 173; 37 P L R 402; 7 R L 766 F B.
694	Kuppini Naiken, *In re* ...	(1934) M W N 922; 68 M L J 493; 36 Cr. L J 830; A I R 1935 Mad. 572 (1); 41 L W 697; (1935) Cr. Cas, 875 (2); 7 R M 602 (1)
695	Contempt of High Court, *In the matter of* ...	A I R 1935 Lah. 212; 37 P L R 73; (1935) Cr. Cas. 383; 36 Cr L J 837; 16 Lah 266; 7 R L 765 S. B.
696	Nirendra Lall v. Bepin Chandra ...	A I R 1935 Cal. 224; 38 C W N 1081; 7 R C 613
697	Emperor v. Kodumal Ochiram ...	A I R 1935 Sind 90; (1935) Cr. Cas 376; 36 Cr L J 827; 7 R S 198.
699	Took Chand v. Radha Kishen ...	A I R 1935 Lah 503; 37 P L R 249; 7 R L 763.
701	Mohammad Agha v. Baijnath Singh ...	1935 O W N 652; A I R 1935 Oudh 372; 1935 R D 270; 7 R C 613.
702	Hari Saday Saha v. Mahendra Narain Raj ...	A I R 1935 Cal. 267; 39 C W N 164; 7 R C 612.
703	Commissioner of Income Tax, Burma v. V. S. U. R. Firm, Rangoon ...	A I R 1935 Rang. 109; 7 R Rang. 350; 13 R 231 S. B.

705	Commissioner of Income Tax, Madras v. Muthukarupan Chettiar ...	(1934) M W N 807; 67 M L J 401; A I R 1934 Mad. 633; 40 L W 509; 7 R M 602 (2) S. B.
706	Shankar Prasad v. Sheo Narain ...	1935 O W N 619; 7 R O 614; A I R 1935 Oudh 392.
708	Gurusami Nadar v. Irulappa Konar ...	67 M L J 389; A I R 1934 Mad. 630; 40 L W 502; (1934) M W N 1197; 7 R M 603.
710	R. C. Curties v. Emperor ...	A I R 1935 Cal. 212; 39 C W N 56; 62 C 169; (1935) Cr. Cas. 305; 36 Cr. L J 842 (2); 7 R O 616.
711	Popat Virji v. Damodar Jairam ...	A I R 1934 Bom. 390; 36 Bom. L R 844; 7 R B 457.
719	Sheikh Fakir v. Moslem Mandal ...	A I R 1935 Cal. 253; 60 C L J 321; 7 R O 614.
720	Mati Lal Das v. Aditya Chandra Das ...	A I R 1935 Cal. 179; 60 C L J 18; 38 C W N 1209; 7 R O 617.
721	Debji Ghelabhai & Brothers v. R. D. Mehta & Co, Asansol ...	A I R 1935 Cal. 255; 39 C W N 139; 60 C L J 396; 7 R O 622.
722	Bakhshi Singh v. Bachan Singh ...	A I R 1935 Lah. 112; 36 P L R 478; 7 R L 768
723	Rafatulla Farazi v. Kundarmal Agarwalla ...	A I R 1935 Cal. 210; 38 C W N 1144; 7 R O 621.
724	Emperor v. Mr. B. A. Peters ...	11 O W N 717; A I R 1934 Oudh 276; (1934) Cr. Cas. 773 (1); 36 Cr. L J 842 (1); 7 R O 616 (2).
725	Radhanath Das v. Sadhan Chandra Dey ...	A I R 1935 Cal. 245; 60 C L J 286; 7 R O 620.
726 (1)	Dulare v. Sundaria ...	11 O W N 718; A I R 1934 Oudh 278; (1934) Cr. Cas. 774; 36 Cr L J 838 (1); 7 R O 616 (1)
726 (2)	Ghulam Ali v. Rahimuddin Kajimuddin ...	A I R 1935 Nag. 122; 31 N L R 211; 7 R N 199.
727	B. N. Ry. Co. Ltd. v. Ruttanji Ramji ...	A I R 1935 Cal. 250; 39 C W N 52; 7 R O 619
728	Ramchand v. Central Flour Mills of Kasur ...	A I R 1935 Lah. 192; 35 P L R 506; 7 R L 767.
729	Emperor v. Bishi Sahara ...	A I R 1935 Pat. 69; 15 P L T 836; (1935) Cr. Cas. 139; 36 Cr L J 846; 7 R P 611.
733	Sundar Ali v. Nur Mamud ...	A I R 1935 Cal. 210; 60 C L J 225; 7 R O 618.
734	Bansi Ram v. Anandi Ram Mohan ...	A I R 1935 Pat. 273; 7 R P 615.
736	Shahu v. Emperor ...	A I R 1935 Sind 84; (1935) Cr. Cas. 370; 36 Cr. L J 831; 7 R S 206 F B.
742	Maung Soe Hlaing v. Ma Thein Khin ...	A I R 1934 Rang. 82; (1934) Cr. Cas. 514; 7 Rang. 353; 36 Cr. L J 850.
743	Fanny Skinner v. Bank of Upper India Ltd.	7 R P C 214; 39 C W N 834; A I R 1935 P C 108; (1935) M W N 726; 1935 O W N 711; 42 L W 172; 69 M L J 158; 37 Bom L R 625; 57 A 314; 61 C L J 477 P C.
749	Atul Chandra Sen v. Kaunammal ...	A I R 1935 Cal. 271 (1); 39 C W N 117; 62 C 272; 7 R O 623.
750	Ramjhari Kuer v. Sheonarain Singh ...	A I R 1934 Pat. 609; 13 Pat. 297; 16 P L T 125; 7 R P 616.
752	Bulaqi Das v. Lal Chand ...	A I R 1934 Lah 865; 36 P L R 104; 7 R L 769;
753	Hori Lal v. Emperor ...	1935 O W N 592; A I R 1935 Oudh 402; 36 Cr. L J 841; (1935) Cr. Cas. 928; 7 R O 617.
756	Birendra Keshri Prasad v. Bahuria Saraswati Kuer ...	A I R 1934 Pat. 622; 13 Pat. 356; 16 P L T 147; 7 R P 619.
759	Sheo Behari Lal v. Makrand Singh ...	A I R 1935 Oudh 358; 1935 O W N 654; 7 R O 619 F. B.
763	Secretary of State v. Rajaram Parashram ...	A I R 1935 Bom. 47; 38 Bom. L R 1055; 7 R B 465.
769	Chandmal Marwari v. Raja Shib Prasad Singh ...	A I R 1934 Pat. 192; 13 Pat. 21; 15 P L T 513; 7 R P 622.
772	R. M. A. R. A. R. R. M. Arunachalam Chettiar v. Official Assignee, Madras ...	A I R 1935 Mad. 60; (1934) M W N 979; 7 R M 605.
776	Ma Joo Tean v. Collector of Rangoon ...	A I R 1934 Rang. 321; 12 R 437; 7 R Rang. 356.
778	Mohanlal Marwadi v. Gyaniram ...	31 N L R 250; 7 R N 200.
781	Ram Das v. Ram Sewak Tewari ...	1935 O W N 596; A I R 1935 Oudh 362; 7 R O 623.

783	Sivagnanathammal v. Nallaperumal Pillai ...	A I R 1935 Mad. 165; (1934) M W N 1325; 67 M L J 880; 7 R M 609.
791	Afzal Husain v. Chhedi Lal ...	(1935) A L J 217; 7 R A 981; A I R 1935 All. 792.
799	Ganga Sahai-Bhagmal v. Molar ...	A I R 1935 Lah. 147: 36 P L R 477; 7 R L 770.
800	Mitthu Lal v. Chameli ...	L R 15 A 391 Rev; 18 R D 316; 7 R A 989; A I R 1935 All. 777.
801	Fazalally Jivaji Raja v. Khimji Poonji & Co. ...	A I R 1934 Bom. 476: 36 Bom. L R 1005; 7 R B 471.
811	Dewangunj Bank & Industry, Ltd., *In the matter of*	A I R 1935 Cal. 117; 38 C W N 1171; 7 R C 624
812	Srish Chandra Pal Choudhury v. Kanta Biswas ...	A I R 1935 Cal. 278; 60 C L J 458; 7 R C 627.
813	Abdul Rahman v. Abdul Wahab ...	A I R 1935 Nag. 120; 7 R N 202.
815	Tulsi Bibi v. Farrak Bibi ...	A I R 1935 Cal. 273; 60 C L J 377; 7 R C 625.
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PRIVY COUNCIL

Appeal from the Rangoon High Court

February 21, 1935

LORD TOMLIN, LORD RUSSELL OF KILLOWEN AND SIR LANCELOT SANDERSON

DAWSONS BANK, LIMITED—APPELLANTS

versus

NIPPON MENKWA KABUSHIKI KAISHA (JAPAN COTTON TRADING COMPANY, LIMITED)—RESPONDENTS

Evidence Act (I of 1872), s. 115—Estoppel—Conditions for operation of the rule—Estoppel and waiver—Distinction—Estoppel by waiver, if possible—Statement to ground estoppel must be clear and unambiguous—Letters "O. K." on delivery orders and bills—Construction—Whether operate as estoppel—Company—Claim against Company—Liquidation—Subsequent termination of liquidation—Company, how to be represented—Parties—Pleadings.

Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf, (*b*) with the intention that the plaintiff should act upon the faith of the statement, and (*c*) the plaintiff does act upon the faith of the statement. On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement on behalf of his principal, agrees to waive his principal's rights, then (subject to any other question such as consideration) the principal will be bound, but he will be bound by contract, not by estoppel. There is no such thing as estoppel by waiver.

Held, that the letters O. K. on certain delivery orders and bills meant that the details contained in those documents were correctly given and that the statement being one which the maker was entitled to make, it bound his principal; but as it was not a representation that in fact the goods covered from the documents were free of all encumbrances, it could not ground an estoppel so as to prevent the principals from asserting and proving their rights as encumbrancers. [p. 5, cols. 1 & 2.]

A statement to ground an estoppel must be clear and unambiguous. *Low* v. *Bouverie* (1), referred to. [p. 5, col. 2.]

Where a limited Company is defendant in a suit, the liquidation of the Company cannot make any difference. The change brought about by the liquidation in regard to the suit is merely that in the conduct of its defence, the Company before liquidation will act through the directors but during liquidation through the liquidators and after the termination of the liquidation through the directors once more. [p 5, col 1.]

Messrs. *L. De Gruyther, K. C.*, and *Pennell*, for the Appellants.

Messrs. *A. M. Dunne, K. C.*, and *A. M. Talbot*, for the Respondents.

Lord Russell of Killowen.—The appellants are a limited Company incorporated under the Indian Companies Act. They carry on the business of bankers in Burma through the head office at Pyapon and various branches, one of which was at Bogale. They may be conveniently referred to as the Bank. The respondents to the appeal are a trading Company incorporated in Japan. They carry on business in Burma, and in the course thereof they purchase rice from paddy traders. They may be conveniently referred to as the Japanese Company, or as the plaintiffs.

In the neighbourhood of Bogale are to be found rice mills to which the traders bring their paddy for the purpose of having it milled. One of these mills, the Natchaungwa Mill, had been mortgaged by its owner to the Bank, and at all times relevant to this appeal, the Bank were mortgagees in possession of this mill and were milling paddy there for various paddy traders. For brevity's sake this mill will be referred to as the N. mill. It was managed by one Ba Maw, under the general supervision of the Bank's branch manager at Bogale, one Pya Cho.

Paddy traders are, not unnaturally,

desirous of anticipating to some extent the realisation of the value of the produce which they bring to be milled; and in order to do so they obtain advances from the Bank on the security of the produce, the advances being re-paid when the produce is sold as rice.

The procedure was as follows:—When a trader desired an advance on the security of his produce, the mill owner or his manager would fill in a printed form (called warrant of goods) showing the amount of paddy held on behalf of the trader and its value. The warrant of goods recites (anticipatively) that the Bank has granted to the trader an advance, and contains undertakings to hold the produce with the consent of the trader (who had to sign the document), on behalf of the Bank as security for the advance not to deliver up possession of the produce except under the written directions of the Bank and to affix lables on or near the produce so as to identify it as the Bank's security. On receipt of this warrant the Bank manager would visit the mill and verify the quantity of produce. If satisfied, the Bank would then make an advance to the trader, the trader signing in favour of the Bank (1) a letter of hypothecation which after acknowledging the warrant of goods as constituting a security for the advance, authorised the Bank in default of payment to sell, and (2) a promissory note for the amount of the advance. Before the mill-owner or his representative (in this case Ba Maw) parted with any rice to a purchaser he would require authority from the Bank manager so to do which would only be given after the security had been cleared.

The facts which gave rise to the present litigation may now be stated. One of the traders who brought his paddy to be milled at the N. mill was one Saw Kai. On April 18, 1930, a contract in writing was entered into between Saw Kai and the Japanese Company by which the former sold to the latter 1,200 bags of Ngasein big mill special rice at a price therein mentioned, to be delivered on May 15, 1930, and to be milled at the N. mill. This contract was witnessed by Ba Maw, describing himself as manager of the N. mill. It is not in dispute that Saw Kai's produce at the N. mill was in fact subject to securities (of the nature hereinbefore described) in favour of the Bank for advances made to him, though it is denied that that fact was known to the Japanese Company. All Saw Kai's produce at the N. mill was noted in the paddy register kept at the mill as being under security to the Bank.

By April 30, 1930, the milling of Saw Kai's produce had proceeded so far as to have produced 700 bags of the contract rice which lay at the N. mill subject to the Bank's security. On that day two documents were signed by Saw Kai. One was a delivery order addressed to "the Godown Master" at the N. mill requesting him to deliver to the Japanese Company or order "700 bags Ngasein big mill special rice, each bag weighing 224 lbs. nett." The other was an invoice or bill to the Japanese Company for Rs. 8,310 6-6, the price of the 700 bags, and stating that each bag weighed 224 lbs. net. Each document had on it a reference to the identifying mark which was on the bags containing the rice, *viz*, "Mark B.M.S.—**B4.**" On each document were placed the letters O. K., and Ba Maw signed his name underneath those letters.

It would seem that those two documents were handed to R. D. Patel, the agent of the Japanese Company, by their vendor, Saw Kai, and that thereupon the Japanese Company paid to Saw Kai the amount shown on the invoice. This document has written on it the words and figures "Checked and paid. R. D. Patel. 30-4-30."

A further block of 350 bags was the subject-matter of a similar delivery order and invoice dated, respectively, May 1 and 2, 1930, payment of the invoice price (Rs. 4,155-3-0) being made to Saw Kai on the latter date. The final block of 150 bags was the subject-matter of a similar delivery order and invoice dated May 10, 1930, payment of the invoice price (Rs. 1,780-13-0) being made to Saw Kai on May 11, 1930.

Saw Kai, having received the money, absconded without having paid off the Bank's security, with the result that Ba Maw received no authority from Pya Cho to release the 1,200 bags of rice. On May 26, 1930, Ba Maw wrote Patel a letter refusing to deliver the rice. On June 5, the Bank telegraphed to the Japanese Company that as Saw Kai had not cleared his produce loan, they could not deliver. This was followed by a letter of the same date, asserting their security but making alternative suggestions to relieve the situation. These suggestions were not acceptable to the Japanese Company, and on June 25, 1930, the plaint in this suit was issued by the Japanese Company

as plaintiff against Saw Kai and the Bank, as co-defendants.

The claim was for Rs. 14,905-7-0, made up as follows:— (1) Rs. 14,449 7 0 being the contract price with interest at 12 per cent. from May 15, 1930, to the date of the plaint, and (2) Rs. 456-0-0 the value of bags and twine supplied for bagging the contract rice. The cause of action alleged was, as against the Bank, wrongful conversion, the Bank having sold the rice; but the vital issue between these parties was whether the Bank was entitled to assert its security against the claim of the Japanese Company to delivery of the 1,200 bags.

In view of the divergent allegations made by or on behalf of the Japanese Company in the course of the litigation, their Lordships think it advisable to examine the plaint and the evidence with some care.

The plaint alleges (paragraph 2) that the contract of April 18, 1930, was made with the approval of Ba Maw, and that it was agreed that the Japanese Company on payment of the contract price would be given delivery of the rice. Particulars delivered allege that this agreement was made between Ba Maw and Patel at the same time as the contract for purchase, that it was oral, and that as evidence of it. Ba Maw attested the contract for 1,200 bags. The whole of this appears to be fiction, for Patel, according to his own evidence, was not present.

The plaint further alleges (paragraph 5) that when the delivery order and invoice of April 30, 1930, were signed by Saw Kai and signed by Ba Maw with the letters O.K., Ba Maw gave the Japanese Company "to understand" or "an undertaking" that the 700 bags would be delivered on presentation of the delivery orders. It would seem as if a similar allegation is intended to be made in paragraph 6 in relation to the later delivery orders and invoices. These are allegations of contracts made on those respective dates by Ba Maw, presumably on behalf of and binding the Bank.

In paragraph 7 the allegation is made that Ba Maw represented that delivery would be made in terms of the delivery orders; and in the alternative, that Ba Maw's conduct led the Japanese Company to believe that on making payments they would be receiving delivery according to the delivery orders without any claim being made by the Bank. Finally, in paragraph 8 it is pleaded that the Bank's claim to security had been "waived," or that the Bank were estopped from asserting the claim, the representation alleged to ground the estoppel being thus defined: "that on payment of the several sums aggregating Rs. 14,246-6-6, delivery of the 1,200 bags in suit would be given."

Patel in his evidence had a very different story to tell. According to him, Ba Maw, on behalf of the Bank, guaranteed the due performance of all contracts entered into with the Japanese Company by traders whose paddy was milled at the N. mill: Ba Maw was to countersign the trader's contract "because if the contract was not fulfilled by the trader, he would fulfil the contract." He added that he would not have entered into the contract with Saw Kai if Ba Maw had not guaranteed its due performance. He gave no evidence of any such verbal representation by Ba Maw as to delivery as is referred to in paragraphs 7 and 8 of the plaint, or of any such contract or waiver as are alleged in paragraphs 5, 6 and 8 of the plaint.

Although some of the other witnesses for the Japanese Company gave evidence supporting the story of a guarantee by Ba Maw of the due performance by the traders of their contracts, no one gave evidence of any such verbal representation or contract or waiver as aforesaid.

Ba Maw denied the story of the guarantee of the contracts. He further denied that by words or conduct did he guarantee that the rice would be delivered.

The District Judge who tried the case, dealt with a multitude of issues, some sixteen in number. He rejected the whole story about the alleged guarantee. He found that there was no agreement by Ba Maw to deliver the rice on payment of the contract price of the 1,200 bags. He found that Ba Maw did not represent to the plaintiffs that the rice would be delivered in terms of the delivery orders or lead the plaintiffs by his conduct to believe that such delivery would be made. He found that the Bank had not waived their claim by way of security, nor were they estopped from asserting the same by the conduct of Ba Maw. He dismissed the suit as against the Bank.

The Japanese Company appealed to the High Court of Judicature at Rangoon, which varied the decree of the District Court by directing that there should be a

decree in favour of the Japanese Company against the Bank, the exact details of which need not be set out. It is sufficient to say that the decree proceeds upon the footing that the Japanese Company was entitled to recover from the Bank the full amount claimed in the plaint.

The learned Judges of the High Court allowed the appeal upon (to quote the language of Cunliffe, J.) "a point of estoppel, what may be termed a double estoppel." The learned Judge, in the first place, held that whatever might have been the real authority of Ba Maw, as between himself and the Bank, in regard to parting with rice which was still subject to the Bank's security, persons dealing with the mill assumed that Ba Maw had the full power of an ordinary mill manager, which would include the power "to deliver rice and to deal with delivery orders." Accordingly, he held the Bank bound by the consequences of Ba Maw's representations and precluded from denying his apparent general authority.

It is unnecessary for their Lordships to say whether this ruling fits in with the actual facts of this case; but they understand it to mean that as between the Bank and the plaintiffs, the Bank were bound by and estopped from denying the truth of representations made to the plaintiffs by Ba Maw. The learned Judge having established the first limb of "the double estoppel," then dealt with its second limb. This part of the judgment is crucial, and as their Lordships read it, it depends entirely upon the meaning and effect of the letters O.K. which Ba Maw placed upon the delivery orders. Cunliffe, J., holds that they amount to a statement "that there will be no insistence upon any check on delivery;" and he then proceeds thus :—

> "In this connection the only check ... was the operation of the lien, the effect of which is waived by the letters O.K. In other words, I take the view that the second part of the estoppel consists of an estoppel of a principal by the waiver of his agent, in this case the estoppel of Dawson's Bank by the waiver of Ba Maw."

These words, which are the true foundation of the judgment, disclose, in their Lordships' opinion, a confusion of thought upon the subjects of estoppel and waiver.

The question of estoppel is governed by s. 115 of the Indian Evidence Act, which for the present purpose seems to their Lordships not to differ from the law in England in regard to estoppel *in pais*.

Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact, the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf, (*b*) with the intention that the plaintiff should act upon the faith of the statement, and (*c*) the plaintiff does act upon the faith of the statement. On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement on behalf of his principal, agrees to waive his principal's rights, then (subject to any other question such as consideration) the principal will be bound, but he will be bound by contract, not by estoppel. There is no such thing as estoppel by waiver.

Baguley, J., bases his judgment also on estoppel, but upon a different estoppel, which he established thus:—A firm called Tata's had been in the habit of buying rice milled at the N. mill. Tata's banked with the Bank and paid the traders through or at the Bank, with the result that the Bank's security was always discharged and the rice was always delivered to the purchaser. At some time Ba Maw is said to have told Tata's agent that if he put O.K. on the delivery order "Tata's were certain to get the rice free of lien." The learned Judge, accepting the view that the arrangement was that the plaintiffs "should do business with Ba Maw on the same lines as Tata's did business with Ba Maw;" held that because Ba Maw did not tell the plaintiffs that the letters O.K. on their delivery orders bore a different meaning from the meaning which they bore on Tata's delivery orders, the Bank were estopped from denying that they had the same meaning.

Their Lordships think it unnecessary to consider whether the actual circumstances of this case could justify the grounding of an estoppel upon this alleged omission on the part of Ba Maw. It will, however, be seen that both judgments ultimately depend upon the meaning of the letters O.K. on the delivery orders.

Without some assistance in the way of evidence their Lordships might have

found themselves in a difficulty, and all the more so since the origin of this commercial barbarism (which, according to the Oxford Dictionary, was already in use as far back as 1847) is variously assigned in different works of authority. The general view seems to be that the letters hail from the United States and represent a spelling, humorous or uneducated, of the words "All correct." Another view is that they represent the Choctaw word *okeh*, which signifies "So be it."

The evidence in this case as to the meaning of the letters O. K. is sometimes confused with the witness's contention as to what Ba Maw intended them to denote. Thus Patel says, "The words O. K. were put to indicate that payment had been made . . . and that he was bound to make the delivery mentioned in the delivery order." He added later, "I think the meaning of the letters O. K. is 'all correct,' because these letters are in general use. The initials O. K. are in general use by all sorts of people, and it is not limited to any trade." Prabhulal, one of the plaintiffs' rice brokers, said, in regard to other transactions, "By the letters O. K. Ba Maw meant that the number of bags specified on the delivery orders went over into the safe custody of the mill, and that we would have sole lien over the bags—so much so that not even a sample would be given out of those bags to anybody else" : which, if true, would indicate a triumph of conciseness. Ba Maw explained the meaning of the letters O. K. thus: "The letters O. K. signify the existence of the seller's rice at the mill. . . . I meant to signify that the bills had been checked and found correct. I put the letters on the bills and delivery orders to show that it is more business-like and also for the satisfaction of the buyers and the sellers regarding the existence of the rice and the correctness of the calculations." Later he said, "I simply meant that the particular quantity of bags was in existence in the mill."

The question is not what Ba Maw intended to represent by placing the letters on the delivery orders, but what the letters mean when placed there.

The only conclusion at which, in their Lordships' opinion, it is possible to arrive, is that the letters O. K. on the delivery orders and bills mean substantially what Ba Maw said that they meant, *viz.*, that the details contained in those documents were correctly given; in other words, they constituted a statement by Ba Maw that there was at the N. mill the specified number of bags of the supecified rice with the specified mark, and of the specified weight, the property of Saw Kai. This was a statement which Ba Maw was entitled to make, and it therefore binds the Bank; but it is in no wise a statement that the rice is unencumbered. It is certainly not a representation that in fact the rice is free of all encumbrances, and it therefore cannot ground an estoppel so as to prevent the Bank from asserting and proving their rights as encumbrancers. A statement to ground an estoppel must be clear and unambiguous. [*Low* v. *Bouverie* (1)].

But even if their Lordships were to accept the meaning attributed to the letters O. K. by the plaintiffs and the High Court, it would be impossible to hold that they constitute a representation which could ground an estoppel : for the meaning so attributed, is not a representation of an existing fact, but a representation of a future intention, which might or might not be enforceable in contract. "The words O. K. must mean that the actual delivery of the goods would not be opposed, and that the Bank would waive their lien upon the goods so that the purchaser could obtain delivery" : that is the High Court's statement of the plaintiff's contention : and in his judgment, Cunliffe, J., states that the letters O. K. imply "that there will be no insistence upon any check on delivery."

But the difficulties of the plaintiffs on this appeal do not end there. There is complete absence of any evidence that Patel, when he paid the money to Saw Kai, relied upon the presence of the letters O. K. on the delivery orders or bills, and this is an essential element in establishing the plaintiffs' plea of estoppel. Indeed, it is difficult to see how Patel could have given any such evidence, for his contention throughout was that the Bank, through Ba Maw, had guaranteed the due fulfilment by the traders of all their contracts with the plaintiffs; and if that were so, there could be no reason for Patel to place any reliance upon the letters O. K., whatever their meaning, in parting with the purchase money. According to him, the Bank were liable for any default by Saw Kai.

It was conceded and properly conceded, by Counsel for the Japanese Company, that as the case had developed at the trial,

(1) (1891) 3 Ch. 82; 60 L J Ch. 594; 65 L T 533; 40 W R 50.

they could only successfully resist this appeal if the Bank were estopped from asserting their rights under their security. For the reasons given, their Lordships are of opinion that the estoppel has not been established, with the result that the appeal must succeed.

Before indicating the order which their Lordships think should be made, they desire to call attention to a series of mistakes which have occurred in the course of this litigation as regards joinder of parties, due apparently to a misapprehension on the part of all concerned as to the legal position of a limited Company incorporated under the Indian Companies Act, which has gone into liquidation. The plaintiffs sued to enforce causes of action against Saw Kai and a limited Company, *viz.*, the Bank, and these two were rightly made the only two defendants to the suit. The plaint adds in the title of the suit after the name and description of the Bank, the words:— "by its General Manager, E. A. Heaton." This addition may perhaps be necessary under the local procedural rules; but it does not make Mr. Heaton a party to the suit. The second defendant is the Bank and the Bank alone.

Issues were settled on September 29, 1930. Subsequently the Bank went into voluntary liquidation, and Mr. Laurence Dawson and Mr. Heaton were appointed liquidators. Thereupon the plaint was amended by striking out the name of the Bank as second defendant, and inserting the name of Mr. Laurence Dawson as second defendant and the name of Mr. Heaton as third defendant, but being jointly described as "Liquidators of Dawson's Bank, Ltd. (in liquidation), Pyapon." The Bank thus ceased to be a defendant to the suit. The only defendants then, were first defendant Saw Kai, second defendant Mr. Laurence Dawson, and third defendant Mr. Heaton; and so constituted the suit was tried, the suit being dismissed against the second and third defendants with costs by a decree dated October 6, 1932. There had been no fresh settlement of issues; these had been framed, and were answered by the Judge, on the footing that the second defendant to the suit was the Bank. After the trial, as their Lordships were informed, the liquidation of the Bank was stayed or otherwise put an end to, so that the limited Company was able to carry on its business as before the liquidation.

On January 4, 1933, a memorandum of appeal was presented by the plaintiffs and an application was made by them praying that the cause title might be amended. This was acceded to by an order of the High Court, and the title of the proceedings on the hearing of the appeal disclosed the Japanese Company as appellants against the Bank by their Secretary, Hugh Dawson, as sole respondents: in other words, an appeal by the plaintiffs from a decree in a suit to which the Bank were not parties, is brought by the plaintiffs against the Bank as sole respondents. The decree made by the High Court on the hearing of the appeal is thus entitled:—

"NIPPON MENKWA KABUSHIKA KAISHA (The Japan Cotton Trading Company, Ltd.) Incorporated in Japan, 554, Merchant Street, Rangoon, represented by their Manage, Mr. T. Saito ... .APPELLANT (PLAINTIFF)

versus

DAWSONS BANK, LTD., a public company incorporated under the Indian Companies Act having its Head Office at Pyapon by its Secretary Hugh Dawson... ..RESPONDENTS (2ND & 3RD DEFENDANTS)"

By its operative part it provides for a decree, "against the respondents the second and third defendants" for a large sum; it further orders "the respondents, second and third defendants" to pay a sum for the appellants' costs of the appeal; and finally it orders "the respondents second and third defendants" to pay the plaintiffs' costs in the lower Court.

Their Lordships feel grave doubts as to the exact effect of such a decree. The second and third defendants in the suit were Mr. Laurence Dawson and Mr. Heaton; but they were not respondents to the appeal. The only respondents to the appeal were the Bank, who were not parties to the suit when the decree which is appealed from was pronounced. Mr. Laurence Dawson and Mr. Heaton cannot be the victims aimed at by the High Court decree; yet if "the second defendant" referred to in the High Court decree means the Bank, it would seem that the Appellate Tribunal is exercising original jurisdiction over a Company which was not a party to the suit when the decree appealed from was pronounced, and is even ordering that Company to pay the costs of the original hearing. Further, if "the second defendant" means the Bank, then "the third defendant" can only mean Mr. Hugh Dawson, who is no party either to the action or the appeal, and against whom no claim has ever been made.

Here, indeed, is a comedy of errors, all of which might have been avoided if the

Bank had remained throughout the sole co-defendant with Saw Kai. The liquidation could make no difference in this regard: the claim of the plaintiffs was a claim against the Bank, and not against the liquidators. The change which was brought about by the liquidation in regard to the suit was merely this, that in the conduct of their defence the Bank would, before liquidation, act through the directors, during liquidation through the liquidators, and after the termination of the liquidation through the directors once more. If these considerations had been kept in mind, the present tangle could never have arisen.

Their Lordships have thought it right to call attention to these errors in order that in the future such mistakes may be avoided. In the present case these mistakes might well have made it difficult to proceed with the hearing of the appeal, but for the fact that, as their Lordships were informed, the decree of the High Court had actually been enforced upon the footing that it was an effective decree made against the Bank as sole co-defendant to the suit with Saw Kai; and that the Bank were willing to waive any irregularity and treat the decree as an effective decree, as indicated above.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court set aside, and the decree of the District Judge restored without variation. The respondents must pay the appellants' costs of the appeal to the High Court, and of this appeal.

N. *Appeal allowed.*

Solicitor for the Appellants.—Mr. *J. E. Lambert.*

Solicitors for the Respondents.—Messrs. *Bramall & Bramall.*

BOMBAY HIGH COURT

First Civil Appeal No. 198 of 1931
July 3, 1934
MURPHY, AG. C. J. AND MACKLIN, J.

CHIMANLAL GANPATRAM GHANCHI —DEFENDANT—APPELLANT
versus
NATVARLAL MAGANLAL —RESPONDENT

Hindu Law—Widow — Compromise — Reversioner, when bound by it—Legal necessity—Spiritual benefit of husband—Benefit must be anterior to alienation—Mortgage for such benefit—Alienee's duty—Civil Procedure Code (Act V of 1903), s. 11—First suit dismissed for multifariousness—Suit between landlord and tenant—Second suit on title—Res judicata *if applies.*

A suit for partition of certain undivided property between two widows was compromised and the main term of this settlement was that each widow should have absolute power to dispose of her own share in the suit property subject to her giving the other widow the right of making the first offer for it. A decree followed in the terms of the compromise, but no reference to a shop which was kept undivided was made in the decree. Subsequently one of the widows adopted the plaintiff The other widow mortgaged her share in the shop for 999 years to defendant No. 1 but on the day after the mortgage both the widows took registered rent note from one tenant for three years. The adopting widow then sued on behalf of the adoptee to recover the possession of the shop from both the tenant and the mortgaging widow. The suit was dismissed for multifariousness and misjoinder of parties. The plaintiff (adoptee) next sued to set aside the mortgage and to evict the tenant. Defendant No. 1 contested the suit on the ground that the mortgaging widow under the compromise had absolute authority to dispose of her property as she liked. He further contended that the previous suit was conclusive against plaintiff as regards his title to the property and that it was not open to him to raise that question again in this suit. Lastly, he contended that the alienation to him was justified by legal necessity and was, therefore, binding upon the plaintiff:

Held, (i) that the effect of the compromise was not in any way to enlarge the estate or to benefit the estate: its only effect was to increase the powers of the widows themselves adversely to the reversioner, and hence could not be recognised as binding upon the reversioner; [p. 8, col. 2]

(ii) that *res judicata* did not apply as the first suit was dismissed without consideration on the merits and it having been a suit between landlord and tenant no question of the plaintiff's rights as against the rights of the mortgagor or mortgagee could have been raised there. *Fateh Singh* v. *Jagannath Bakhsh Singh* (1), explained. [p 9, col. 1.]

(iii) that since the husband's spiritual benefit was complete before the alienation took place and since no debts had been incurred for the alleged spirltual benefit, the mortgage could he not be justified for legal necessity; [p. 9, col. 2.]

(iv) that the defendant No. 1 could not resist the suit he having failed to make proper inquiries before concluding the mortgage.

F. C. A. from the decision of the Joint First Class Sub-Judge, Ahmedabad, in Civil Suit No. 1519 of 1929.

Messrs. *H. C. Coyajee* and *P. A. Dhrvua* for the Appellant.

Messrs. *G. N. Thakor* and *I. B. Desai*, for the Respondent.

Judgment.—In the action which has given rise to this appeal the plaintiff sued for a declaration that a deed of mortgage executed in 1921 by a widow Bai Muli in favour of defendant No. 1 is not binding upon him as reversioner, and for possession of the suit property after the eviction of the person who is in possession of the property as tenant of the mortgagee of

1921. The property in suit is a shop. This property and several others belonged to one Balgovind, who died many years ago leaving a widow Kashi, and three sons, Chimanlal, Himatlal and Maganlal. After a suit for partition between the sons in the year 1894, certain of the properties were divided but certain other properties including the suit property were left undivided. The eldest son Chimanlal died two years later (in 1896) and left no heirs. The second son Himatlal died in 1905 leaving a widow Muli and a daughter Shivlakshmi. The third Maganlal died in 1917 leaving a widow Divali. A month after Maganlal's death Kashi also died. Muli's daughter Shivlakshmi was married in 1910 and died in 1920.

In 1918 Muli brought a suit against Divali for partition of such of the family property as remained undivided except the property in the present suit. That suit was compromised as the result of a settlement, Ex. 23. The main term of this settlement was that each widow should have absolute power to dispose of her own share in the suit property subject to her giving the other widow the right of making the first offer for it. A decree followed in the terms of the compromise; but, as the property in this suit was not concerned in that suit, naturally no reference to the suit shop was made in the decree. On July 21, 1919, Divali adopted the present plaintiff. In October 1921, Muli mortgaged the suit property for 999 years to the present defendant No. 1; but on the day after the mortgage both Muli and Divali are said to have taken registered rent note from one Kalidas for three years. This appears to have been in continuation of a previous rent note for three years admittedly executed by Kalidas in favour of both the widows in 1918. In 1922 Divali on behalf of the present plaintiff sued both the tenant Kalidas and Muli, claiming that the plaintiff was owner of the whole shop and not only of half, and also stating that the tenant was holding over under the previous rent note of 1918. The second rent note purporting to have been executed jointly in favour of the mortgagee and Divali was repudiated in that suit by Divali. The suit was, however, dismissed for multifariousness and for misjoinder or non-joinder of parties, and the Court did not go into the merits. In 1923 Muli died, and towards the end of 1929 plaintiff has brought this suit to set aside Muli's mortgage of her half share and to evict the tenant.

Defendant No. 1 contended that the plaintiff's adoption was not proved, or, if proved, was not valid and that by the arrangement of 1918 between the two widows Muli had absolute authority to dispose of her property as she liked. He further contended that the suit of 1922 was conclusive against plaintiff as regards his title to the property and that it was not open to him to raise that question again in this suit. Lastly, he contended that the alienation of 1921 by Muli to defendant No. 1 was justified by legal necessity and was therefore binding on the plaintiff. The question of adoption was decided in the plaintiff's favour, and so were the other three defences raised. In the present appeal by defendant No. 1 the question of adoption is not pressed, and we are concerned only with the last three contentions. On all three points we uphold the findings of the lower Court.

The first question is as to the validity of the agreement of 1918 and whether the plaintiff is bound by it. Admittedly, if it was a settlement of a *bona fide* dispute, or if it was a compromise by the widows for the benefit of the estate in a matter where the widows were representing the estate, then it would be binding upon the reversioner. But that does not seem to be the case here, because the property in suit was definitely not in dispute in that case; and, although this by itself would not necessarily preclude an arrangement regarding the suit shop from being a *bona fide* settlement, still in the present case it cannot be taken to be a *bona fide* settlement because that part of the agreement which deals with the suit shop finds no place in the decree which purports to have been based upon the agreement. The decree in fact was confined to the other properties, and the present suit property was excluded. Again, the arrangement, in so far as it purported to give each widow the powers of a full owner over her share of the property, went beyond the capacity of either of them, since under the law they were only limited owners. Lastly, the effect of the compromise was not in any way to enlarge the estate or to benefit the estate; its only effect was to increase the powers of the widows themselves adversely to the reversioner. It cannot, therefore, be recognised as binding upon the reversioner.

The next point is the question of *res*

judicata. The suit of 1922 brought by Divali on behalf of the plaintiff was regarded by the Judge who tried the suit as primarily a suit between landlord and tenant. The plaint in that suit says that Muli has been impleaded because she is obstructing the plaintiff in recovering possession from the tenant. It has been contended before us that it was open to the plaintiff in that suit to raise the question of his title to the property as against Muli's title to the property and to raise the further question of the validity of the alienation of 1921. But it appears from the judgment in the suit that this suit was dismissed for misjoinder of causes of action and for misjoinder of parties. The learned Subordinate Judge who tried it held that it was not open to Divali or the present plaintiff to claim reliefs both against the tenant, in a suit of landlord and tenant, and against Muli, in a suit which would really involve the determination of the plaintiff's right as between himself and Muli. The Court, therefore, advised that Muli's name should be omitted as a defendant and that the suit should be confined to the question of landlord and tenant alone. But the plaintiff refused to omit Muli, and the result was the dismissal of the suit without going into the merits at all. There is authority to show that s. 11, Civil Procedure Code, is not exhaustive, and a matter constructively in issue can be as much *res judicata* as a matter directly and substantially in issue. It has, therefore, been argued that plaintiff's title as against Muli or her successor-in-title was a matter which ought to be regarded as having been directly and substantially in iesue in that case, inasmuch as it was open to the plaintiff as heir presumptive to sue at that time for a declaration that the alienation was void beyond the lifetime of Muli. It was held in *Fateh Singh* v. *Jagannath Bakhsh Singh* (1), that where a matter which might and ought to have been set up in a former suit was not set up, that matter could not be taken in another suit because it was *res judicata*. But on reading the judgment in that case it can be seen that the former suit was really decided upon the merits. The plaintiffs had come to Court claiming certain property on the ground of their relationship. It was contended that the defendants were nearer relatives; and the plaintiffs then wanted to set up a family custom which would make the plaintiffs the nearer relatives. It was held that this made out a new case and that the plaintiffs were not entitled to proceed. The suit was accordingly dismissed. The plaintiffs then brought a further suit alleging the new custom. When the matter went to the Privy Council, it was held that they ought to have based their former suit upon the family custom and that was not open to them to do so now. But here the facts are very different. Here we have a Court refusing to consider the merits of the case at all, it dismissed the suit upon the threshold. Moreover, we do not see how in the circumstances it was possible for the plaintiff, in a suit which was primarily a suit between landlord and tenant, to raise the question of his rights as against the rights of Muli or the mortgagee. To do so would have made the suit bad for multifariousness, and again it would have been dismissed without being considered on the merits. This question was therefore not constructively in issue in the suit of 1922, and on that ground we hold that there is no substance in the contention as regards *res judicata*.

The last question is the question of legal necessity. Much has been said to us of a widow's right to alienate property for her husband's spiritual benefit; and it has been argued on the other side that there is nothing on the record to show that the various expenses in which the widow is said to have indulged for her husband's spiritual benefit were really for her husband's benefit at all. But it is not necessary to go into the question of spiritual benefit; that is a question that would arise only if the alienation took place in order that spiritual benefit might be conferred in the future, and here the spiritual benefit (if it occurred at all) was complete before the alienation took place. The justification for the alienation must, therefore, be based upon actual debts contracted for purposes of spiritual benefit. On this point the mortgage deed itself Ex. 19 merely mentions as a necessity for the alienation, "caste dinner, etc." But in the examination of defendant No. 1, we find that the items which are said to justify the sale are debts incurred in consequence of the death of Muli's husband in 1905, of the marriage of her daughter in 1910, of the death of that daughter in 1920 at a time when she was already married, of Muli's own *jivatkriya* or

(1) 91 Ind. Cas. 280; A I R 1925 P C 55: 52 I A 100; 47 A 158; 27 C C 334; 48 M L J 64; 2 O W N 25 12 O L J 117; L R 6 A P C 50; 27 Bom. L R 725 29 C W N 749; 23 A L J 739; 22 L W 58 (P C.)

funeral ceremony performed in her own lifetime, and lastly of a minor matter, the distribution of brass pots among Brahmins. Whether these acts were indeed for spiritual benefit or not, the fact remains that there is no reliable evidence upon the record to show that they gave rise to any debts; and if no debts were incurred for these purposes, then it is difficult to see how they could justify the mortgage.

On the question of debts the evidence of defendant No. 1 himself is vague in the extreme, and his three witnesses take us very little further. The first witness (Ex. 66) is a nephew of Muli herself, and he professes to give details of some of the expenses to which Muli was put. But he was dismissed from Government service as a *Talati*, and a criminal case was brought against him at the same time. He is clearly an unreliable witness in so far as he is testifying in favour of the defendant; but he admits that Muli's late husband was possessed of ornaments worth Rs. 3,000 or Rs. 4,000, and there is nothing on the record to show that those ornaments were not still in Muli's possession. He also admits that he has no personal knowledge of the expenses to which Muli was put. His evidence proves nothing. Another witness (Ex. 68) gives evidence as to the existence of debts, but he admits that he knew nothing of those debts until, he says, defendant No. 1 came to ask him about them about a week before the execution of the mortgage deed. He further admits that he never knew how much those debts amounted to. The last witness (Ex. 72) admits that he does not know of any debts incurred on account of a caste dinner for Himatlal and he knows nothing about the marriage expenses of Himatlal's daughter. Clearly this evidence is not enough to establish the existence of debts.

It might be possible nevertheless for defendant to resist the suit if he could show that he had made all proper inquiries before concluding the alienation. But he does not seem to have done so. He admits that he did not inquire as to whether Muli herself had any land or ornaments. It is true that Muli would not have been required to spend her own money for her husband's spiritual benefit; but if she had land or ornaments, then it is all the more unlikely that she incurred debts for these purposes and defendant No. 1 would have been on his guard. Nor did he ask when she gave a caste dinner to her husband's memory, or how much that dinner cost; and he says that he does not remember how much she told him that she still owed upon it. His evidence was vague as to his inquiries regarding the marriage and funeral expenses of the daughter; and it also appears that he asked for no details as to the date or the amount of the expenses incurred by Muli on her own *jivatkriya*, except that he was told that Rs. 3,000 was owing on that account to some one whose name he does not remember. He does admit, however, that he was never told by Muli that the creditors were pressing. If his inquiries had been really thorough, it is probable that he would have made a note of them or seen that they were incorporated in the deed of mortgage itself. The defence fails on all points. The order of the lower Court must, therefore, be upheld and this appeal be dismissed with costs.

D. *Appeal dismissed.*

RANGOON HIGH COURT

Second Civil Appeal No. 167 of 1934
August 14, 1934
MACKNEY, J.

A. P. L. PALANIAPPA CHETTIAR —APPELLANT

versus

A. K. R. M. S. FIRM—RESPONDENT

Mortgage—Property subject to mortgage not sold subject to it—Auction-purchaser, if can dispute its validity—Civil Procedure Code (Act V of 1908), s. 107—Remand—Pleadings and issues clear—Parties not producing evidence—Case, if to be remanded for re-hearing.

Where a property which was subject to a mortgage is not sold subject to the mortgage in execution of a decree, the auction-purchaser can dispute its validity. *Kalidas Chaudhuri* v. *Prasanna Kumar Das* (1), relied on.

Where the pleadings and issues are clear and the parties cannot have failed to appreciate what the real issues were that fell for determination in the suit, but plaintiff has not produced evidence, the case should not be remanded to the trial Court for re-hearing. *R. M. A. R. M. Chettiar Firm* v. *U Htaw* (3), distinguished.

S. C. A. against a decree of the District Court, Pyapon, dated April 10, 1934.

Mr. *E. Hay*, for the Appellant.

Mr. *K R. Venkatram*, for the Respondent.

Judgment.—The A. P. L. Firm in execution of a decree against Maung Po Htin and Ma Shwe Pu in Exection Case No. 142 of 1932, of the Township Court of Pyapon attached a house and site belonging to

the judgment-debtors. The A. K. R. M. S. Firm, put in an objection that the property was subject to a mortgage in their favour. In reply the A. P. L. Firm stated that granted that the property had been mortgaged, the mortgage had been redeemed. I notice also that subsequently in the proceedings both Maung Po Htin and Ma Shwe Pu stated that the property was free from mortgage. The Township Judge directed that the mortgage should be mentioned in the proclamation of sale, and this was done. He has also recorded in his Diary on August 30, 1932 (the date on which the A. P. L. Firm put in their objection), that that firm stated that the said mortgage was a sham mortgage. It is, in my opinion, quite clear that the A. P. L. Firm cannot have been deemed to have admitted the mortgage as being a valid mortgage of the property. Their objection was based on information received. The property was not sold subject to the mortgage and the auction purchaser could dispute its validity: see *Kalidas Chaudhuri* v. *Prasanna Kumar Das* (1):

"Where, however, the purchaser merely buys an estate which is under mortgage, but does not take it subject to the encumbrance or undertakes to discharge it, he is not precluded from impeaching the validity of the mortgage. The distinction between the two classes of cases depends upon the question, whether the property has been sold subject to the mortgage or whether mere notice of the alleged mortgage has been given in the proclamation of sale The former contingency is provided for by O. XXI, r. 62, the latter is contemplated by O. XXI, r 66."

It cannot be shown in the present case that the decree-holder agreed to have the property sold subject to a mortgage. Compare also *Roshan Lal* v. *Lallu* (2). In effect, when the Judge refrained from directing a sale subject to the mortgage he was passing an order against the A. K. R. M. S. Firm. The A. K. R. M. S. Firm then brought a suit, Civil Suit No. 125 of 1933, of the Township Court of Pyapon, impleading Maung Po Htin and Ma Shwe Pu and the A. P. L. Firm as defendants, (the A. P. L. Firm having purchased the property at the Court auction), for recovery of Rs. 1,000, due on a mortgage-bond. There were several adjournments before the case was heard. On October 17, 1933, the Township Judge noted that the parties were present with all their witnesses and the that the Advocate for the plaintiff stated that would not adduce any evidence whereupon the Advocate for the defendants stated that in that case he also would not adduce any evidence. Arguments were heard and the Judge decreed the suit in favour of the plaintiff, A. K. R. M. S. Firm. He framed the following issues: (1) Was there a valid mortgage existing at the time the defendant bought the house at the auction? (Maung Po Htin and Ma Shwe Pu had admitted the allegations in the plaint, but the A. K. R. M. S. Firm had put the plaintiff to strict proof of his allegations and averred that the suit was a fraudulent and collusive one); (2) If so, what amount was due on it? (3) To what relief is the plaintiff entitled?

The Township Judge had held that the A. P. L. Firm had admitted in the execution case that there was a mortgage and therefore had notice of the mortgage at the time it purchased the house. It was for it to show that the mortgage-deed was a fraudulent one, but no evidence had been adduced in support of that contention. On the second issue the Judge found that there was no evidence of payment towards the debt due and he therefore decided that the plaintiff was entitled to his original claim. Against this order the A. P. L. Firm appealed to the District Court of Pyapon. The learned District Judge also held that the A. P. L. Firm had bought the house with full knowledge of the A. K. R. M. S. Firm's mortgage. He therefore dismissed the appeal. The A. P. L. Firm now comes before this Court in second appeal.

It is quite clear that the lower Courts have erred in law in holding that the A. P. L. Firm made an admission of the mortgage in the execution case and are estopped from now disputing its validity. The learned Advocate who appears for the A. K. R. M. S. Firm does not attempt to argue that the A. K. R. M. S. Firm need not have produced any evidence of the mortgage. He asks that the case be remanded for trial inasmuch as the A. K. R. M. S. Firm has been misled by the advice of the Advocate who appeared for it. It is also urged that the issues framed were ambiguous. For instance, on the first issue it was not clear whether it had to be proved that there had been a mortgage or whether the existence of the mortgage was accepted and it had to be shown that it was still effective. I am unable to see that the parties could have been in any way confused by the form in which the

(1) 55 Ind. Cas. 189; A I R 1920 Cal. 354; 47 C 446; 31 C L J 496; 24 C W N 269.
(2) 68 Ind Cas. 790; A I R 1922 All. 443; 44 A 714; 20 A L J 722.

issues were framed. It was clearly incumbent on the plaintiff to prove his mortgage and prove that what he stated to be due thereon was due on it. He had all his witnesses present in Court, and if he chose to examine none of them nor even to go into the box himself, the natural conclusion to draw is that he did not feel it safe to do so and was prepared to risk success on the contention that the mortgage had been admitted by the A. P. L. Firm. It was not for the Court to insist that the plaintiff should produce evidence. The plaintiff has only himself to blame if it now turns out that this was a fatal course to pursue. The pleadings and the issues were clear and in my opinion the parties could not have failed to appreciate what the real issues were that fell for determination in the suit. I, therefore, do not think that this case is similar to *R. M. A. R. M. Chettiar Firm* v. *U Htaw* (3), where the case was remanded to the trial Court in order that the suit might be re-heard.

For these reasons this appeal is allowed with costs. The plaintiff's suit against the A. P. L. Firm is dismissed with costs throughout. Maung Po Htin and Ma Shwe Pu having admitted the plaintiff's claim, the decree so far as it concerns them is valid, but the A. P. L. Firm must be deemed to hold the property free from the alleged mortgage.

D. *Appeal allowed.*

(3) 141 Ind. Cas. 700; A I R 1933 Rang 6; 11 R 26; Ind. Rul. (1933) Rang. 22.

BOMBAY HIGH COURT
Full Bench

First Civil Appeal No. 256 of 1923
September 5, 1934
BEAUMONT, C. J., RANGNEKAR AND DIVATIA, JJ.

BRIJBHUKANDAS DAMODARDAS AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
GHASHIRAM MULCHAND AND OTHERS—DEFENDANTS—RESPONDANTS

Hindu Law -Mitakshara—Joint family—Guardian —Co parcenary consisting of an adult and minor members — Only adult co-parcener, if can appoint guardian of co-parcenary property of minor.

It is not competent to an only adult co-parcener of a Hindu Mitakshara family to appoint by will or otherwise, a trustee, guardian or manager of the co-parcenary property of a minor co-parcener during his minority. *Chidambara Pillai* v. *Rangasami Naicker* (3), followed, *Harilal Bapuji* v. *Bai Mani* (1), approved, *Mahableshwar Krishnappa* v. *Ramchandra Mangesh* (2), overruled.

F. C. A. from a decision of the First Class Sub-Judge, Ahmednagar, in Civil Suit No. 505 of 1926.

Messrs. *H. C. Coyajee* and *K. A. Pandye*, for the Appellants.

Messrs. *W. B. Pradhan, Ramnath Shivlal* and *U. A. Pardeshi* and *P. V. Nijsure*, for the Respondents.

Beaumont, C. J.—The question referred to a Full Bench is,

"whether it is competent to an adult co-parcener of a Hindu Mitakshara family to appoint by will or otherwise a trustee, guardian or manager of the co-parcenery property of a minor co-parcener during his minority"

The facts which gave rise to the reference are that there was an adult member of a joint family, his co-parceners being a minor son and a minor nephew, and the question is whether on the death of the adult he can appoint a guardian or manager of the co-parcenary property. The question should, I think, be confined to the case of an only adult co-parcener, because there could be no suggestion but that, if there were surviving adult co-parceners, the deceased co-parcener could not appoint a guardian of the joint property. The question has been referred to a Full Bench because of a difference of opinion in this Court between the decision in *Harilal Bapuji* v. *Bai Mani* (1) and *Mahableshwar Krishnappa* v. *Ramchandra Mangesh* (2). On principle the question would seem to admit of no doubt. It is of the essence of Hindu Law, in cases governed by the Mitakshara school, that on the death of one co-parcener the joint property vests in the surviving co-parceners, and the deceased co-parcener has no interest in the property, and no power of disposition over it. If that is so, it is difficult to see on what principle he is to be at liberty to appoint somebody to manage the joint property. That was really the basis of the decision of this Court in *Harilal Bapuji* v. *Bai Mani* (1) where it was held that the adult member of a Mitakshara family could not appoint a guardian of the joint property on his death. It was also the basis of the decision of a Full Bench of the Madras High Court in *Chidambara Pillai* v. *Rangasami Naicker* (3). The latter case is really on all fours with the present case, because there the surviving members of the joint family were minor sons and nephews of

(1) 29 B 351; 7 Bom. L R 255.
(2) 21 Ind. Cas. 350; A I R 1914 Bom. 300; 38 B 94; 15 Bom. L R 882.
(3) 45 Ind. Cas. 905; A I R 1919 Mad. 1046; 41 M 561, 34 M L J 383; 23 M L T 263; (1918) M W N 265; 7 L W 454 (F B).

the deceased co-parcener. The view to the contrary, which prevailed in this Court in *Mahableshwar Krishnappa* v. *Ramchandra Mangesh* (2) was frankly based on convenience. The Court expressed the view that it was very convenient that on the death of a father leaving only minor members of the joint family of which he was a member, he should have a power to say who was to manage it during the minority; and to meet this convenience the Court held that the father had the power. No doubt there is some force in the view that it would be a convenient power for the father to possess, but if the law is to be altered in order to meet the convenience of the public or any section of it, it is for the legislature to make the alteration. The argument as to convenience, and the answer to it, were expressed very pithily by Coutts Trotter, J. in *Chidambara Pillai* v. *Rangasami Naicker* (3) in language which I cannot hope to improve upon. What he says is (page 572*)

"... his argument seemed to come merely to this. The thing is convenient, it is consonant with all right notions of what a father ought to be able to do for his children; it is nowhere expressly prohibited; therefore it can be done. To me on the contrary it seems that to put a person in a definite legal relation to property of which he is not the owner, is a step which cannot be taken unless there is legal authority for taking it. Its convenience and justice may be admirable reasons for the legislature to take action. They cannot in my opinion suffice to set in motion a Court of law."

That seems to me to dispose of the case of *Mahableshwar Krishnappa* v. *Ramchandra Mangesh* (2) and apart from that case, there is really no authority in support of the contention that this power exists. Certainly there are some cases which deal with the right of a Hindu father to appoint a guardian of the person and property of his son, but we are not dealing here with a case of that nature. In my opinion, therefore, the question should be answered in the negative. We amend the question by substituting "the only adult co-parcener" for "an adult co-parcener."

Rangnekar, J.—The question raised—and which we have slightly amended—is referred to this Bench as there is some conflict of judicial opinion on it, not only in this Court but in the other High Courts. So far as our Court is concerned, two different views are expressed in *Harilal Bapuji* v. *Bai Mani* (1) and *Mahableshwar Krishnappa* v. *Ramchandra Mangesh* (2). In *Harilal Bapuji* v. *Bai Mani* (1) it was held that a Hindu father who had a son living with him is not competent to appoint trustees to administer ancestral properties until the son should reach the age of 21 years, on the ground that at the moment of the testator's death the whole of the property was and became the property of the son by right of survivorship. In *Mahableshwar Krishnappa* v. *Ramchandra Mangesh* (2) it was held that a dying adult Hindu might appoint a manager and trustee for the minor members of the family without interfering with the succession to the family. In this case Sir Basil Scott, C. J., went upon firstly, the decision of the Privy Council in *Raj Lukhee Dabea* v. *Gakool Chunder Chowdhury* (4) and, secondly, upon the ground of practical convenience. As regards the first point, it may be pointed out that the case of *Raj Lukhee Dabea* v. *Gakool Chunder Chowdhury* (4) was under the Dayabhaga under which it is competent to a Hindu to dispose of the property even if he has a son. The law in this respect under the Mitakshara is different. As to the ground of practical convenience, all I need say is that it might well be left to the legislature to deal with. The only question before us is to see if there is any principle of Hindu Law which would justify us in answering the question referred in the affirmative.

The question we have to answer arose in the Full Bench decision in *Chidambara Pillai* v. *Rangasami Naicker* (3), and the answer of the Full Bench was that it was not competent to the only adult coparcener of a Mitakshara family consisting of himself and his minor co-parceners to appoint a testamentary guardian of the co-parcenery properties of the minor co-parceners. The judgment proceeds upon the ground that as it is not competent to a Hindu to dispose of co-parcenery property by will, he cannot make arrangements for the management of that property by will after his death or appoint a guardian to manage the property. It has been conceded by the learned Counsel on behalf of the appellants that that case is on all fours with the present case.

It is said that there are no texts of Hindu Law dealing with this question and that, undoubtedly, is true. According to Manu, however, the duty of protecting the person and property of a minor vests in the sovereign as *parens patriae*, and that duty is now discharged by the Courts:

* Page of 46 M.—[*Ed.*]

(4) 13 M I A 209; 12 W R 47; 2 Suther 275; 2 Sar 518 (P C).

Although there is no text of Hindu Law which precisely deals with the question now raised, the principles of the law of joint family governed by the Mitakshara are too clear to give rise to any doubt as regards the answer to the question before us, and I can do no better than refer to a passage in *Gharib-ullah* v. *Khalak Singh* (5). This undoubtedly was a case under the Guardians and Wards Act, but, I think, what Sir Arthur Wilson said with regard to the principle underlying the system of joint family under the Mitakshara correctly embodies the spirit of the Hindu Law on the subject. This is what his Lordship said (p. 170*).

"It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. And in their Lordships' opinion those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore, a guardian, if appointed, would have nothing to do with the family property."

In this view it is not necessary for me to refer to the various decisions to which our attention has been drawn by Mr. Coyajee, but as far as I can see, the balance of the authorities referred to by him is certainly against him, excepting the decisions in *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh* (6), *Mahableshwar Krishnappa* v. *Ramchandra Mangesh* (2) and *Deba Nand* v. *Anandamani* (7) In *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh* (6) the question was disposed of on the mere ground that the appointment of a guardian was not shown to have been prohibited by any texts of Hindu Law—a ground which, in my opinion, is not convincing. Apart from that, the case has, I think, been properly distinguished by Sheshagiri Aiyar, J., in *Chidambara Pillai* v. *Rangasami Naicker* (3). As to *Deba Nand* v. *Anandamani* (7) all I need say is that the Full Bench decision of the Madras High Court was not brought to the notice of the learned Judges of the High Court nor were the two Bombay cases referred to. This has been pointed out in *Venkataraman Mukund* v. *Janardhan Baburao* (8), by Marten, C. J., who, it may be stated, seemed to favour the view which we are taking here. Finally, Mr. Coyajee relied on the referring judgment of Kumaraswami Sastriar, J., in *Chidambara Pillai* v. *Rangaswami Naicker* (3), but the view expressed by him was negatived by the Full Bench. For these reasons, I think the question must be answered in the negative.

Divatia, J.—I agree. Section 6, Guardians and Wards Act, expressly saves, in the case of a minor who is not an European British subject, the power to appoint a guardian of his person or property or both, which is valid by the law to which the minor is subject. In order to test whether there is a valid power given under the personal law of the minor we have to look to the positive test as to whether it is expressly granted, and not whether it is not prohibited. Judged from that standpoint, the answer, in my opinion, to the question should be in the negative, because it is quite clear on the texts as well as authorities, and it is also conceded, that under the Mitakshara school of Hindu Law, in the case of a join family with the incidence of survivorship, there is no such express power given to the only adult co-parcener with regard to the appointment by a testamentary instrument either of trustees or of guardians of property of the minor co-parceners as is sought for on behalf of the appellants. Therefore, the only test being whether there is such express power, any question of convenience or expediency would be irrelevant, and for this reason, I think, the decision in *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh* (6), which proceeds on the ground that there is nothing in the Hindu Law to prohibit such an appointment, and the decision in *Mahableshwar Krishnappa* v. *Ramchandra Mangesh* (2), which proceeds only on the ground of convenience, do not correctly lay down the law as it is, and that the decision of the Full Bench of the Madras High Court in *Chidambara Pillai* v. *Rangasami Naicker* (3) follows the right principle to be applied to a case like the present one. I, therefore, agree that the answer to the question as amended should be in the negative.

D. *Answered in the negative.*

(5) 25 A 407; 30 I A 165; 8 Sar. 483; 5 Bom. L R 428; 7 C W N 681 (P C).
(6) 7 W R 43.
(7) 59 Ind. Cas. 909; A I R 1921 All. 343; 43 A 213; 18 A L J 1127; 2 U P L R (A) 431.
(8) 105 Ind. Cas. 79; A I R 1928 Bom. 8; 52 B 16; 29 Bom. L R 1522; I L T 40 Bom. 19.

*Page of 30 I. A.—[*Ed.*]

LAHORE HIGH COURT

Letters Patent Appeal No. 64 of 1926
February 8, 1933
SHADI LAL, C. J., AND BROADWAY, J.
FIRM HARJAS MAL-MEHR CHAND
—PLAINTIFFS—APPELLANTS
versus
FIRM BHAGAT RAM-ANAND RAM—
DEFENDANTS—RESPONDENTS

Contract Act (IX of 1872), s. 62—Accounts settled—Some amount paid in cash, some given up and hundi *for rest—Receipt stating no accounts left except liability on.* hundi—Hundi, *inadmissible not being stamped—Held, original cause of action was put to an end to.*

When a cause of action for money is once complete in itself, whether for goods sold or for money lent or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may sue for the original consideration ; but when the bill or note is the only existing contract between the parties and for want of proper stamp or some other reason it is not admissible in evidence, the creditor must lose his money. It is a question of fact to be decided in each case whether the parties intended the bill or note to be an absolute or a conditional payment of the original debt.

The parties settled their accounts, and a sum of Rs. 834-3-3 was found due by the defendants to the plaintiffs. Of this sum, Rs. 234-3-3 were given up by the plaintiffs, and the balance of the liability was discharged by the defendants paying Rs. 100 in cash and executing a *hundi* for Rs 500 in favour of the plaintiffs; they executed on that very date a receipt making it clear that there remained no other account between them except the liability arising upon the *hundi*. The plaintiffs brought the present action for the recovery of a certain sum of money on the basis of the *hundi*, and it was found that the *hundi* being unstamped could not be admitted in evidence:

Held, that there was a novation of contract, and the original cause of action put an end to

L. P. A. from the decree of Addison, J., dated January 19, 1928.

Messrs. *Achhru Ram* and *Anant Ram Khosla*, for the Appellants.

Mr. *Mehr Chand Mahajan*, for the Respondents.

Shadi, Lal, C. J.—The plaintiffs were commission agents for the defendants. On August 29, 1924, the parties settled their accounts and a sum of Rs. 834-3-3 was found due by the defendants to the plaintiffs. Of this sum, Rs. 234-3-3 were given up by the plaintiffs and the balance of the liability was discharged by the defendant paying Rs. 100 in cash and executing a *hundi* for Rs. 500 in favour of the plaintiffs. On March 19, 1926, the plaintiffs brought the present action for the recovery of a certain sum of money on the basis of the *hundi* and it has been held by the Courts below that the *hundi* being unstamped cannot be admitted in evidence. The question, however, arises whether the plaintiffs are entitled to fall back upon the original transaction namely, the account between the parties, which resulted in the balance of Rs. 834-3-3. The rule of law is firmly established that when a cause of action for money is once complete in itself whether for goods sold or for money lent or for any other claim and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may sue for the original consideration but when the bill or note is the only existing contract between the parties and for want of proper stamp or some other reason it is not admissible in evidence, the creditor must lose his money.

It is a question of fact to be decided in each case whether the parties intended the bill or note to be an absolute or a conditional payment of the original debt, and the learned Single Judge, from whose judgment this appeal has been preferred under cl. 10 Letters Patent, in view of all the circumstances of the case, has reached the conclusion that there was a novation of contract and that the transaction entered into on August 29, 1924, put an end to the original cause of action. It will be observed that on that date, part of the money was given up by the plaintiffs, and it is futile to suggest that they can fall back upon the original transaction which would entitle them to sue also for the money which was expressly given up. Moreover, they executed on that very date a recepit which makes it clear that there remained no other account between them except the liability arising upon the *hundi*.

Upon the facts of the case I have no hesitation in endorsing the conclusion of the Single Judge. I would, therefore, dismiss the appeal with costs.

Broadway, J.—I concur.

D. *Appeal dismissed.*

LAHORE HIGH COURT

Miscellaneous First Civil Appeal No. 1383 of 1933

June 19, 1934

TEK CHAND, J.

POKHAR MAL AND OTHERS—APPELLANTS

versus

THE FLOUR AND OIL MILLS Co. LTD. (IN LIQUIDATION)—RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 112—Company in liquidation—Liability of member to pay calls which are barred under Art. 112—Companies Act (VII of 1913), s 156.

A member of a company in liquidation is liable in respect of unpaid calls even though the calls were made by the company before it went into liquidation and the suit of the company for its realization had become barred by time under Art. 112 of the Limitation Act. The principle is that when a company goes into liquidation, s. 156, Companies Act, creates a new liability on the share-holders in respect of such calls, which is distinct from and independent of the rights which the company had against them before the winding up. *Sorabji Jamsetji* v. *Iswar Das-Jugjvandas* (1), *In re Vaidiswara Aiyar* (2), *Jagannath Prasad* v. *U. P. Flour and Oil Mills Co.* (3), *In the matter of Panalal* (4), *Prayan Prasad* v. *Gaya Bank and Trades Association, Ltd.* (5), *Delhi Woollen Mills Co.* v. *Durga Prasad* (6), *Hansraj Gupta* v. *N. P. Asthana* (7) and *In re Whitehouse & Co.* (8), referred to.

M. F. C. A. from an order of the District Judge, Karnal, dated July 29, 1933.

Mr. *Shamair Chand*, for the Appellants.

Mr. *Bhagwat Dyal*, for Mr. *Kishen Dyal*, for the Respondent.

Judgment.—The Flour and Oil Mills Company, Ltd., Sonepat, went into voluntary liquidation on June 20, 1928. Subsequently an order was passed by this Court that the winding up be done under the supervision of the Court, and it was ordered under s. 164 that all further proceedings be taken in the Court of the District Judge, Karnal. It is admitted that the Company has made calls from the share-holders, which were payable on February 28, 1925, and November 30, 1925. It appears that the appellants did not pay the amount due on these calls and, as already stated, the Company went into liquidation in June 1928. In 1930 and 1931 the liquidators issued notices to the appellants requiring them to pay the amount of the above calls for which they were shown liable in the books of the Company. The appellants objected, (1) that the claim was time-barred under Art. 112 of the Indian Limitation Act and (2) that they were not liable as their shares had been forfeited in 1925.

The question of limitation is concluded by authority. It is settled in a long course of decisions that a member of a company in liquidation is liable in respect of unpaid calls even though the calls were made by the Company before it went into liquidation and the suit of the Company for its realization had become barred by time under the Art. 112 of the Indian Limitation Act: *Sorabji Jamsetji* v. *Iswar Das Jugjivandas* (1), *In re Vaidiswara Aiyar* (2), *Jagannath Prasad* v. *U. R. Flour and Oil Mills Co.* (3), *In the matter of Panalal* (4), and *Prayan Prasad* v. *Gaya Bank and Trades Association Ltd.* (5), *Delhi Woollen Mills Co.* v. *Durga Prasad* (6). The principle of these decisions is that when a Company goes into liquidation, s. 156 creates a new liability on the share-holders in respect of such calls, which is distinct from and independent of the rights which the Company had against them before the winding up: *Hansraj Gupta* v. *Asthana* (7) and *In re Whitehouse & Co.* (8). Mr. Shamair Chand for the appellant has not been able to cite any authority to the contrary. The decision of the lower Court on this point is therefore correct.

The second objection urged is that the appellants are not liable because in the notices issued to the appellants by the directors in 1925, before the Company went into liquidation, it was stated that if the amounts called were not paid on the dates specified, their shares would be forfeited. It is, however, admitted that no resolution was passed by the directors actually forfeiting the shares as was necessary under Art. 52 of Articles of the Association of the Company. There was, therefore, no valid forfeiture of the shares: *Prayan Prasad* v. *Gaya Bank and Trades Association, Ltd.* (5).

No other point was raised. The appeal fails and is dismissed.

D. *Appeal dismissed.*

(1) 20 B 651.

(2) 31 M 66.

(3) 35 Ind. Cas. 159; 38 A 347; A I R 1916 All. 317; 14 A L J 349.

(4) 113 Ind. Cas 91; A I R 1928 All. 272; 50 A; 476; 26 A L J 256.

(5) 130 Ind. Cas. 531; 10 Pat. 209; A I R 1931 Pat. 44.

(6) 12 Ind. Cas. 958; 67 P R 1911.

(7) 139 Ind Cas. 552; A I R 1932 P C 249; 54 A. 827; Ind. Rul (1932) P C 291; 9 O W N 839; (1932) M W N 1141; 36 M L J 859; 35 Bom. L R 312; 33 L W 5'9 (P C)

(8) (1879) 9 Ch. D 595; 47 L J Ch. 801; 27 W R 181; 39 L T 415.

MADRAS HIGH COURT

Second Civil Appeal No. 295 of 1929

May 1, 1934

WALSH, J.

SUPPAN ASARI—PLAINTIFF—APPELLANT

versus

ALIMA BIBI AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Suit by claimant—Judgment-debtor if a necessary party—Dismissal of claim after investigation—Onus—Whole of judgment-debtor's property purchased—No provision made for decree-holder—Purchaser himself not creditor—Part of consideration genuine—Alienation if wholly invalid—Purchaser if can be given charge on property—Extent of charge.

A judgment-debtor is not a necessary party in a suit by the claimant under O XXI, r. 63, Civil Procedure Code. *Maryam Bibi* v. *Ram Das* (2), followed. *Ghasi Ram* v. *Mangal Chand* (1), explained.

In a suit under O. XXI, r. 63, Civil Procedure Code, by an unsuccessful claimant where the claim petition is dismissed after investigation, the onus is on the plaintiff.

[Case-law referred to.]

The plaintiff was not a creditor. He had bought property consisting of the whole of the judgment-debtor's immovable properties and no provision was made for payment of the decree debt. The Court found that only a portion of the consideration was genuine:

Held, that an alienation having been made to defeat or delay creditors was wholly invalid even though consideration might have been given for some part and must be set aside in its entirety. The purchaser could however be given a charge on the property to the extent of the encumbrance which he has discharged. *Chidambaram Chettiar* v. *Srinivasa Sastrigal* (16), *Polamalai Mudaliar* v. *South India Export Co.* (17) and *Ponnuswami Pillai* v. *Quadir Mohideen Rowther* (18), relied on. *Deoki Nandan Singh* v. *Jawad Husain* (14), distinguished. [p. 21, col. 2.]

S. C. A. against the decree of the Sub-Judge, Coimbatore, dated August 28, 1928.

Messrs. *A. C. Sampath Ayyangar* and *T. R. Srinivasa Ayyar*, for the Appellant.

Mr. *T. M. Ramaswami Ayyar*, for the Respondents.

Judgment.—The plaintiff is the appellant in this second appeal. The suit was to set aside an order dismissing a claim petition. The defendants were the decree-holders. They obtained a decree in O. S. No. 204 of 1925 on the file of the District Munsiff's Court of Coimbatore and attached the properties of the judgment-debtor Pachianna Pannadi. The plaintiff then preferred his claim under a sale deed Ex. A, dated May 13, 1925, from Pachianna Pannadi. This sale was after the decree but about two months before the date of the attachment. The Court of first instance decreed the plaintiff's suit but its decree was reversed in the lower Appellate Court which, however, gave the plaintiff a charge with regard to a certain mortgage Ex. C which it held that he had discharged. Against this decree the present second appeal is filed.

The trial Court found that the land purchased comprised the whole property of the judgment-debtor. The purchase price was Rs. 3,500. It is not contended that this was an under-estimate and in fact the decree-holders refused to take the land from plaintiff for Rs. 4,000 and transfer the decree to plaintiff. The consideration under Ex. A was stated to be made up as follows: Rs. 2,000 to discharge a mortgage to one Subbiah Pillai (Ex. C); Rs. 1,168 to discharge a mortgage in favour of one Veera Pannadi; Rs. 100 received in cash; and the discharge of a promissory-note for Rs. 200 executed by the vendor in favour of the appellant. The trial Court found that all the consideration as per terms of the sale deed was paid, that the plaintiff got delivery of the documents on the date of the sale deed and also got possession of the property, and that the decree-holder was not entitled to proceed against the land. The Subordinate Judge found that as far as the first mortgage Ex. C in favour of Subbiah Pillai was concerned, it had been discharged by the plaintiff and that the consideration was good. As regards the second mortgage Ex. C-1 he found that the debt was not genuine. The mortgagee under Ex. C-1 was the father-in-law of the judgment-debtor. With regard to the payment of Rs. 100 in cash and the promissory-note debt of Rs. 200 alleged to be due to the plaintiff, he found that this was a fictitious consideration. He, therefore, dismissed the plaintiff's suit except that he gave him a charge to the extent of Rs. 2,000 in respect of the mortgage, Ex. C. These being the findings of fact, it is clear that the plaintiff was not a creditor of the judgment-debtor, the vendors at the time of the sale. I shall first deal with the objection which was raised in both the lower Courts and is also raised here and which, if correct, would suffice for dismissing the appeal. The objection is that the plaintiff's suit is not maintainable because the judgment-debtor-vendor was not joined as a party. For this, reliance is placed on a remark in *Ghasi Ram* v. *Mangal Chand* (1), where it was said:

"If an unsuccessful claimant brings a suit and

(1) 28 A 41; 2 A L J 491; 1 A W N 1905, 172.

he seeks to establish his claim against both the decree-holder and the judgment-debtor, the latter is of course a necessary party."

The trial Court found that this remark does not apply to the present case because the plaintiff did not claim any relief against the judgment-debtor. Assuming for purposes of argument that he can be held to have claimed relief against the judgment-debtor, it is to be observed that the remark in *Ghasi Ram* v. *Mangal Chand* (1), is *obiter*. Besides it was a case decided under the old Code. Section 31 of the old Code which corresponds to O. I, r. 9, did not contain the words "or non-joinder" which were introduced for the first time in the Code of 1908. Moreover, in a later decision of the same Court, *Maryam Bibi* v. *Ram Das* (2), the learned Judge dissents from the view that the judgment-debtor is a necessary party in such a suit. In that case the matter was directly in point and the learned Judge, after observing that the *dictum* was *obiter* and was passed under the old Code says:

"It is sufficient for the purposes of to-day to hold that O. I, r. 9, covers the case and distinguishes it from the *dictum* relied upon by the Courts below".

I have been shown no decided case where it is held that the judgment-debtor is necessary party and I must, therefore, dismiss this objection. The next matter with which I should like to deal is the question of onus. It has been argued that the lower Appellate Court has wrongly thrown the onus upon the plaintiff. This being a suit under O. XXI, r. 63, by an unsuccessful claimant, it is unnecessary to discuss what the position would be if the suit were simply by the plaintiff under s. 53, Transfer of Property Act. The recent Privy Council decision in *Mohammad Ali Mohammad Khan* v. *Bisimilla Begum* (3), is clear on the point that the onus is on the defendant-claimant to establish by cogent evidence that the deeds in question were *bona fide* and it was held in *Perayya* v. *Venkayamma* (4), that it was not sufficient for him to rely merely upon the deed which shows his ostensible title. The Privy Council decision in *V. E. A. R. M. Firm* v. *Maung Ba Kyin* (5), is quoted in the opposite sense, but as observed in *Appathurai Chettiar* v. *Vellayan Chettiar* (6), there is nothing in the judgment about onus and the headnote is misleading in this matter. This Rangoon case was also considered in *Maha Deo Misir* v. *Ram Prasad* (7), and the same conclusion was reached that no proposition of law casting the onus upon the defendant was laid down in that case. The learned Judges make some observations on the matter of onus in *Appathurai Chettiar* v. *Vellayan Chettiar* (6), which may be quoted. They say:

"In cases under O. XXI, r 63, Civil Procedure Code, the burden of proving the validity of the alienation is on the plaintiff The defendant, however, cannot escape the burden at some stage or, other. If the plaintiff produces his deed, and swears that it is genuine and for full consideration and the defendant has nothing to say to the contrary, the plaintiff will succeed, and where the burden of the plaintiff is so light, it is scarcely worth arguing whether it is more correct to say that the burden is originally on the defendant, or on the plaintiff. But where the defendant has something substantial to say to the contrary, the real burden must inevitably fall on the plaintiff to establish the right which he claims."

It has also been ruled in *Ramaswami Chettiar* v. *Mallappa Reddiar* (8), overruling a previous Full Bench decision, that the contention that an alienation is not valid may be put forward by way of defence in a suit and need not be made the subject of a separate suit by the decree-holder. In *Elaya Perumal Thalainar* v. *Vellaikannu Thevar* (9), Sundaram Chetty, J., held that when a claim under O. XXI, r. 63, was rejected as time-barred and was not investigated, the onus in the suit subsequently instituted by the claimant would fall on the defendant. That decision is alluded to in *Appathurai Chettiar* v. *Vellayan Chettiar* (6). As the claim petition in this case was dismissed after investigation, it is unnecessary to discuss its correctness. I hold, therefore, that the onus was on the plaintiff in the present case. It was argued that the lower Appellate Court was confused with regard to the payments under Ex. C and Ex. C-1 but

(2) 70 Ind. Cas. 613: A I R 1922 All. 404.
(3) 128 Ind. Cas. 647; A I R 1930 P C 255; 7 O W N 821; 33 Bom. L R 155; 35 C W N 324; 60 M L J 341; 33 L W 397; (1931) M W N 1 (P C).
(4) 79 Ind. Cas. 899; A I R 1924 Mad. 770; 34 M L T 201; 19 L W 627; 47 M L J 14.
(5) 105 Ind. Cas. 788; A I R 1927 P C 237; 5 R 852; 4 O W N 926; 53 M L J 388; 29 Bom. L R 1481; 32 C W N 28; 46 C L J 349; 27 L W 447 (P C)
(6) 137 Ind. Cas. 879; A I R 1932 Mad. 302; (1932) M W N 97; 62 M L J 236; 35 L W 276; Ind. Rul. (1932) Mad 475; 55 M 748.
(7) 119 Ind. Cas. 74; A I R 1929 Pat. 579; 8 Pat. 390.
(8) 59 Ind. Cas. 947; A I R 1920 Mad 748; 43 M 760; (1920) M W N 572; 39 M L J 350; 28 M L T 170; 12 L W 475 (F B.).
(9) 128 Ind. Cas. 453; A I R 1931 Mad. 40; 32 L W 57.

whatever may be said about the correctness of the conclusions of the Subordinate Judge, there was no confusion. The plaintiff withdrew on May 12, 1925, a sum of Rs. 2,000 from a deposit account some months before it was due to mature. Exhibit A was executed the next day and on the date of Ex. A Rs. 1,168 are endorsed as paid towards the mortgage, Ex. C-1, which the lower Appellate Court has found to be a sham transaction. Ten days later Rs. 1,035-10-0 was paid towards the mortgage, Ex. C, which the lower Appellate Court has found to be genuine; and a year afterwards on May 18, 1926, another sum of Rs. 1,160 was paid towards Ex. C and the mortgage was discharged.

The learned Subordinate Judge feels some doubt about the truth of this second payment on Ex. C, but in the end he gives the plaintiff the benefit of it. It is not permissible to argue here that the payment towards Ex. C-1 of Rs. 1,168 on the date of the sale deed was out of the sum of Rs. 2,000 withdrawn by the plaintiff. However much the dates may support such a view, the learned Subordinate Judge has in fact held that only Rs. 1,035-10-0 under Ex. C was discharged at that time from the Rs. 2,000 drawn out. Therefore, there is no confusion in this matter in this finding of the lower Appellate Court and I am bound by that finding of fact. The next objection is that the learned Subordinate Judge has failed to keep in mind the distinction between a sham transaction and a *benami* transaction. There is of course a distinction between the two things. A sham transaction is one in which no title passes or is intended to pass and the title still vests in the transferor. In a *benami* transaction title passes for certain reasons to the name of a third party who could bring a suit, give a discharge, etc., on his title, *vide Rangayya* v. *Rangaswami* (10), at pp. 1007 and 1008*, a Privy Council case and *Gur Narayan* v. *Sheolal Singh* (11), at p. 574† another Privy Council case. This distinction it not disputed on behalf of the respondents but it is argued that the learned Sub-Judge clearly meant that the transaction was *benami* as he observes in para. 4:

"Taking advantage of the circumstances that Ex. C is a real transaction, the judgment-debtor Pachianna Pannadi seems to have got up Ex. A nominally in favour of the plaintiff to screen his properties from the creditors in view of his impending insolvency"

It is very easy to use incorrect terms in a matter of this sort, and I may point out that in *Appa Dhond* v. *Babaji Krishnaji* (12), a case quoted for the appellant to show that a document cannot be partly genuine and partly *benami* the learned Judge has applied the term "unreal" in describing an alleged *benami* transaction, while one of the objections to the lower Appellate Court's judgment in this case is that he says:

"Even assuming that the plaintiff is in possession it does not establish the reality of the transaction in his favour."

I do not think there is any doubt that the Court really regarded Ex. A as a *benami* document for which there was genuine consideration to the extent of the discharge of the mortgage, Ex. C. It is objected further that when the Subordinate Judge says:

"Pachianna Pannadi (the vendor) has now absconded and his whereabouts are not known. Therefore it cannot be said that plaintiff has really become entitled to the suit properties by reason of purchase under Ex. A."

and that while, admitting that Ex. E series, the *kist* receipts show that the plaintiff did get into possession of the properties, he says that these are of very little value as they are subsequent to the claim but has failed to notice that the plaintiff got *patta* for the property on May 29, 1925, (Ex. E 8), and that in the remarks column of the *patta* it is stated that

"the old *pattadar* Pachai's name has been removed according to the petition for transfer filed by him."

It appears from the evidence that Pachianna Pannadi stabbed his wife and absconded and that he was also adjudicated insolvent. It must be admitted that as regards this objection the learned Subordinate Judge has certainly failed to mention with regard to possession the important evidence of the *patta* and of its having been obtained on the application of the vendor. But a more serious objection is that there is no definite finding as to whether the plaintiff did make the payment of discharge under Ex. C-1. If he made this payment thinking the debt to be really due then he would still be a

(10) 88 Ind. Cas. 249; A I R 1925 Mad. 1005; (1925) M W N 232.

(11) 49 Ind. Cas. 1; A I R 1918 P C 140; 46 I A 1; 46 C 566; 17 A L J 66; 36 M L J 68; 9 L W 335; 23 C W N 521; 1 U P L R (P C) 1; 12 Bur. L T 122 (P C.)

(12) 64 Ind. Cas. 364; A I R 1922 Bom. 107; 46 B 85; 2 Bom. L R 873.

*Pages of A. I. R. 1925 Mad.—[*Ed.*]

†Page of 46 Cal.—[*Ed.*]

transferee in good faith even though the debt was a fictitious one and the mortgage got up by the vendor with his father-in-law. The debt for which the mortgage, Ex. C (1), was executed was due under the promissory note Ex. C (7). The learned Subordinate Judge observes that Ex. C (7) was not produced at the time of the claim enquiry, and that P. W. No. 7, the mortgagee, was not, as found also by the trial Court, in a position to lend such an amount; and he says :

"Therefore there can be no doubt that Ex. C-1 is a sham document for which no consideration passed and which was apparently got up to screen the properties of Pachianna Pannadi from his creditors."

He goes on then to deal with the endorsement on Ex. C-1 and he says on that matter that

"P. W. No. 4 admits that he does not know whether the mortgage in favour of Veera Pannadi is a true or a nominal transaction though he himself has written the endorsement of discharge thereon."

But he does not say expressly whether the endorsement is true or not. For a proper decision of the case the matter will have to go back for a finding as to whether the plaintiff paid the amount entered on the mortgage, Ex. C-1, as having been paid by him. The lower Appellate Court will therefore submit a finding on the following issue : "Was the discharge on Ex. C-1 genuinely made by the plaintiff". (Onus on plaintiff). Time for finding, one month. Objection 10 days. In pursuance of the directions contained in the above judgment, the Subordinate Judge of Coimbatore submitted the following

Finding.—I am asked by the High Court to submit a finding on the following issue, placing the onus on the plaintiff. "Was the discharge on Ex. C-1 genuinely made by the plaintiff". * * * *The suit is to set aside an order dismissing a claim petition of plaintiff, Defendants are the attaching decree-holders. Plaintiff bases his claim upon a sale deed Ex. A, dated May 13, 1925, executed by the judgment-debtor Pachianna Pannadi in his favour for Rs. 3,500. The consideration consists of Rs. 2,000 reserved for the discharge of a prior mortgage bond, Ex. C, dated January 9, 1924, in favour of one Subbiah Pillai for Rs. 1,700 Rs. 1,168, reserved for the discharge of another mortgage debt, Ex. C-1, dated February 23, 1924, in favour of Pachianna Pannadi's father-in-law Veeran Pannadi for Rs. 1,000, Rs. 232 adjusted towards a pro-note, Ex. C-2, executed in favour of plaintiff himself on February 12, 1923, and Rs. 100 received on the date agreement for sale of the Ex. C-3, dated May 10, 1925. There is an endorsement of discharge Ex. C-1, dated May 13, 1925, to the effect that Rs. 1,168 being the principal and interest due under that bond was paid by plaintiff and the bond was completely discharged. This endorsement purports to bear the mark of Veera Pennadi and to be signed by his son Vyapuri and to be written by Muthukumaraswami Pillai, P. W No. 4. It is this discharge which is now in question. * * * *

On the whole, I am not able to say that the discharge of Ex. C-1 is satisfactorily proved to be genuine. The oral evidence is quite incoherent and full of discrepancies. The amount mentioned in the endorsement is not correct according to any calculation. The provision for interest in Ex. C was more onerous than in Ex. C-1 and there is no sufficient reason why Ex. C-1 was discharged before Ex. C. In both cases the time for repayment fixed in the bonds had not expired. It is true that there is no reason to doubt the genuineness of the account, Ex. G. But the withdrawal of the money was a day prior to even the purchase of the stamp paper for Ex. A, and long before the expiry of the one year for which period the deposit was made. The payment for Ex. C-1 is also said to have been made even before the registration of Ex. A and Ex. A appears to have been presented for registration by the vendor Pachianna Pannadi. The production of Ex. C-1 by plaintiff is a circumstance in his favour, but I cannot attach the usual importance to it on account of the other suspicious circumstances in the case. I find that the discharge of Ex. C-1 is not genuinely made by the plaintiff. (This second appeal coming on for final hearing after receipt of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

Judgment.—The lower Court has now returned a finding that the discharge on Ex. C is not satisfactorily proved to be genuine. This finding is well supported by evidence and it is not open to me to canvass a finding for which there is evidence. I may, however, say that I should come to the same conclusion myself. Even the fact that the mortgage deed Ex. C-1 is with the plaintiff, which would be a strong circumstance otherwise to prove that the discharge was real, loses all its force when we find the mortgagee, the uncle of the mortgagor, deposing that it was the mort-

gagor who got the document registered and kept it himself. Now Ex. C-1 being shown to be a sham transaction and when we find plaintiff making a false entry of discharge on it when in fact he did not pay anything, nothing more is needed to prove want of consideration and good faith on his part as regards this branch of the transaction specially when as noted above the onus lies heavily on him to prove good faith and consideration.

The plaintiff was not a creditor of the judgment-debtor at the time of Ex. A. Consequently all cases dealing with a transfer taken by a creditor are irrelevant. A useful summary of the position of transferees will be found in *Pakkiri Mohideen Tharagan* v. *Muhammad Mustappah Rowther* (13), by Anantakrishna Ayyar, J. Dividing these transferees into two classes; (1) creditors (2) non-creditors, an alienation in favour of the first class, *i. e.*, creditors, to defeat the other creditors will not be invalid, even though the alienee knows this is the object of the transaction, provided of course that he does not satisfy anything more than his own debt. As regards non-creditors, it will be invalid if they had knowledge of the fraudulent object but if they had not that knowledge, the alienation will be good. As I said above, we are not here concerned with a creditor alienee. With regard to strangers a distinction has repeatedly been drawn between case where the property is converted into cash which is more easily secreted from creditors and cases where this is not done. Anantakrishna Ayyar, J, states:

"If the transfer is for valuable consideration and is made with the full intention that the title to the property should pass to the transferee, and if no benefit be intended to be retained to the grantor, then the transfer will be valid as against an attaching creditor even though the object of the transfer might have been to defeat an impending execution. The general creditors of the transferor are not defeated in such a case since, instead of the property of the debtor which has been transferred, there remains the money representing the price paid for the property in the hands of the debtor and the creditors could proceed against the same."

It is really a question of fact in the case of money consideration whether the transferee knew or did not know the fraudulent object of the transfer. But as observed above, the onus on the defeated claimant is very heavy to establish by cogent evidence that the deeds are *bona fide*. In the present case the facts as found are these. The plaintiff is not a creditor. He has bought property of the value of Rs. 3,500 and it has not been shown that that is an under-valuation. But the properties consist of the whole of the judgment-debtor's immovable properties and no provision is made for payment of the decree debt. For this purchase the plaintiff has paid Rs. 2,195-10-0 as genuine consideration to discharge the mortgage bond Ex. C. Rs. 300 made up of an alleged promissory note debt to himself of Rs. 200 and cash consideration at the time are not found to be genuine. But it is argued that the plaintiff is entitled to possession even though he has not paid the whole of the purchase price. Only one of the cases quoted appears to be relevant as the others do not involve any question under s. 53, Transfer of Property Act. That case is *Deoki Nandan Singh* v. *Jawad Husain* (14). But in that case the only point raised against the plaintiff-purchaser was that he had not paid the full amount of the consideration. There is something much more here. He has entered as part of the consideration a fictitious payment of a mortgage which has itself been found to be a fictitious transaction.

This, as I said above, is quite enough to show want of good faith and consideration. It has been laid down in *Chidambaram Chettiar* v. *Sami Ayyar* (15) confirmed by the Privy Council in *Chidambaram Chettiar* v. *Srinivasa Sastrigal* (16) that an alienation made to defeat or delay creditors is wholly invalid even though consideration may have been given for some part and must be set aside in its entirety. The lower Appellate Court has given the plaintiff a charge on the property to the extent of the encumbrance Ex. C which he has discharged. This is in accordance with *Polamalai Mudaliar* v. *South India Export Co.* (17) and *Ponnuswami Pillai* v. *Quadir Mohideen Rowther* (18). By mistake this has not been incorporated into the decree but it is not disputed by the respondent. In the result the appeal must be dismissed with costs but the necessary alteration will be made in the decree to bring it into conformity with the judgment of the lower appellate Court, namely, giving the plaintiff

(13) 126 Ind Cas. 601; A I R 1930 Mad. 665; Ind. Rul. (1930) Mad. 876.

(14) 106 Ind. Cas. 356; A I R 1928 Pat. 199.

(15) 30 M 6; 16 M L J 427.

(16) 23 Ind. Cas 714; A I R 1914 P C 137; 37 M 227; 26 M L J 474; 18 C W N 841; 16 M L T 286; 10 C L J 571; (1914) M W N 754; 16 Bom. L R 783; 1 L W 963 (P C.)

(17) 5 Ind. Cas. 33; 33 M 34; 7 M L T 167; 20 M L J 211; (1910) M W N 239.

(18) (1930) M W N 1145.

a charge over the property to the extent of the mortgage which he has discharged (Ex. C.)

A.-D. *Appeal dismissed.*

PATNA HIGH COURT

Appeal from Appellate Decree No. 628 of 1930

January 3, 1935

AGARWALA AND ROWLAND, JJ.

KAMLA PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BAMDEO MISSIR AND OTHERS—DEFENDANTS—RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 76 (g), (h), 77—Mortgagee in possession—Liability to account—Whether exists only in absence of contract to contrary—Circumstances under which no liability exists—Only part of interest to be paid out of usufruct—S. 77, if applies—Mortgage before coming into force of Transfer of Property Act—Liability of mortgagee to account, if recognized before the Act.

Under s. 76, cls. *(g)* and *(h)*, Transfer of Property Act the mortgagee in possession must keep full and accurate accounts, and all his receipts from the mortgage property (subject to allowance for certain specified and permissible expenses) are to be credited in favour of the mortgagor in reduction of the amount due for interest or in reduction of the principal if the receipts exceed the interest due; and if, there is still a *surplus*, it is repayable to the mortgagor. These clauses are not qualified by any such proviso as "in the absence of a contract to the contrary"; therefore they apply in all cases, contract or no contract to the contrary excepting those in which s. 77 makes them inapplicable. Section 77 only comes in where the mortgagor is from the outset safe from being confronted at the time of redemption with a demand for anything more than the principal sum advanced, and does not cover the case in which only a part of the interest is to be paid out of the usufruct; and the omission must have been intentional. *Ishaq Khan* v. *Rup Narain Singh* (2), relied on.

The liability of the mortgagee to render account was well recognised even before the coming into force of the Transfer of Property Act. Consequently, even if the document dates from before the Act, these provisions will apply.

A. from a decision of the Subordinate Judge of Shahabad, dated February 24, 1930, reversing that of the Munsif of Arrah, dated February 13, 1929.

Messrs. *Baldeo Sahay* and *Gaindhari Lal*, for the Appellants.

Messrs. *Parmeshwar Dayal* and *B. P. Varma*, for the Respondents.

Rowland, J.—This appeal is presented by the plaintiffs in a suit to redeem a property held by the defendants in usufructuary mortgage, and to recover possession of the property.

The principal sum secured was Rs. 300 and the suit was brought on the footing that the mortgagees were, under the terms of the mortgage, to remain in enjoyment of the usufruct in lieu of interest and accordingly the claim was to redeem on payment of the sum of Rs. 300, only. The deed, however, which being in the custody of the defendants has been produced by them, shows that in fact the terms were otherwise. The principal sum of Rs. 300, was to bear interest at the rate of Re. 1-5, per cent. per month bringing the gross annual interest to Rs. 47-4-0. The property was at the time of the hypothecation in temporary lease to a *thicadar* at an annual *jama* of Rs. 39 of which Rs. 9-8-0 was to be paid by the *thicadar* to Government as revenue and the balance Rs. 29-8-0, way payable to the proprietor. (This temporary lease terminated in 1279 *F. S.* so that from the year 1280 onwards the usufructuary mortgagee was to be in *khas* possession of the property). The defendants claim that they are entitled to add to the principal each year the sum of Rs. 17-12-0 the difference between Rs. 29-8-0 and Rs. 47-4-0 which totals Rs. 1,072-14-0 for 60 years and two months. This claim the lower Appellate Court has allowed. The defendants further claimed to add to the principal Rs. 240 on account of road-cess paid by them year by year and Rs. 894-2-6 as interest thereon, but this has been disallowed.

The lower Appellate Court rejected the plaintiff's contention that the *rehandar* should be called on to give an account of the actual profits received by him from the time that he came into *khas* possession of the property. Hence the appeal. The learned Subordinate Judge thought the demand for account was a new claim not set up by the parties in proper time and for this reason he disallowed it. It will be convenient to consider first the rights of the parties under the law; and then whether the state of the pleadings justifies depriving the plaintiffs of any relief they might be in law entitled to.

Section 76 of the Transfer of Property Act, cls. *(g)* and *(h)* are quite clear; the mortgagee in possession must keep full and accurate accounts, and all his receipts from the mortgage property (subject to allowance for certain specified and permissible expenses) are to be credited in favour of the mortgagor in reduction of the amount due for interest or in reduction of the principal if the receipts exceed the interest

due; and if there is still a surplus, it is repayable to the mortgagor. These clauses are not qualified by any such proviso as "in the absence of a contract to the contrary"; therefore, they apply in all cases, contract or no contract to the contrary excepting those in which s. 77 makes them inapplicable. See *Kishun Lal* v. *Hira Lal* (1),

"Every mortgagee in possession in bound to account under s 76 (*h*) of the Transfer of Property Act unless he establishes a contract in terms of s. 77 of that Act."

Now the cases falling within s. 77 are those in which under the contract between the parties the receipts from the mortgaged property are deemed sufficient to satisfy all the interest from time to time according (so as to prevent there being any increase in the total sum due) or are deemed sufficient to do more than this, that is to say, to satisfy, year by year, not only all the interest but a specified part of the principal. In short s. 77, only comes in where the mortgagor is from the outset safe from being confronted at the time of redemption with a demand for anything more than the principal sum advanced.

Section 77, does not cover the case in which only a part of the interest is to be paid out of the usufruct; and the omission must have been intentional, as pointed out in *Ishaq Khan* v. *Rup Narain Singh* (2). It follows that in such a case the mortgagee in possession is liable to account.

Such are the rights of the parties under the Transfer of Property Act. But it is said for the respondents that the document under consideration dates from before the Act. In answer I may point out that the Allahabad case just cited was a case of a transaction entered into before the passing of the Act, but nevertheless was held to be governed by the principle of ss. 76 and 77, it was said:

"The liability of the mortgagee to render account was well recognised even before the coming into force of the Transfer of Property Act."

Such being the rights of the parties, it remains to see whether the decision should go otherwise in consequence of the state of the pleadings. The Munsif thought that the suit should be dismissed altogether when he found the plaintiffs not entitled to redeem on payment of Rs. 300. This extreme position is not now supported by any one; but that taken by the Subordinate Judge is really no more tenable when examined closely. He says "no case for accounting was set up" in the plaint, and we should not "make out a case not contemplated by the parties." On the strength of these well worn platitudes he gives the defendants a decree for over a thousand rupees without demanding of them any proof whatever of the correctness of their claim. The result is startling enough to suggest a fallacy in the reasoning. In substance, the plaint claimed that the interest on the debt was fully satisfied out of the income of the property; and it is true to say that, if the defendants admitted that, no case for accounting need arise. But when the defendants alleged that year by year the income fell short of the interest accruing, then (on the face of the written statement) s. 77, became inapplicable, s. 76 cls. (*g*) and (*h*) governed the case and a position arose in which the defendants were bound to account. The issues were badly framed in the Munsif's Court, thus:

6. Is the defendant entitled to get interest under the terms of the *zerpeshgi* deed in suit?
7. Are the plaintiffs entitled to redeem without paying interest?

A proper form in which to frame these issues was:

6. Is anything due to defendant on account of interest?
7. If anything is due, how much?

Issue No. 10.—To what relief are the plaintiffs entitled? is in order.

I would under O. XLI. r. 25, Civil Procedure Code, refer these issues to the lower Appellate Court for taking an account from the defendants and, on taking account for a proper determination of the issues as amended; the burden of proof being on the defendants on both issues. The finding and evidence to be returned to this Court within 3 months.

Agarwala, J.—I agree.

N. *Order accordingly.*

(1) 120 Ind. Cas. 768; 10 P L T 487; A I R 1929 Pat. 571; Ind. Rul. (1930) Pat. 80.

(2) 136 Ind. Cas. 363; 5 A 203; A I R 1931 All 582; (1931) A L J 977; Ind. Rul. (1932) All. 187 (F. B.).

OUDH CHIEF COURT

Second Civil Appeals Nos. 276 and 277 of 1933

February 21, 1935

NANAVUTTY, J.

Musammat RAJANA—PLAINTIFF—APPELLANT

versus

MUSAHEB ALI—DEFENDANT—RESPONDENT

Estoppel—Principle underlying the rule—Representation—Absence of representation by one person

to make another believe in certain facts—Estoppel, if operates—Evidence Act (I of 1872), s. 115—Adverse possession—One co-owner, when can claim adverse possession against another—Plea of adverse possession—Whether mixed question of law and fact—Plea not advanced specifically in trial Court—Whether can be entertained in appellate stage—Civil Procedure Code (Act V of 1908), s. 100.

The principle upon which the rule of estoppel rests is that it would be most inequitable and unjust if a person by a representation made or by conduct amounting to a representation has induced another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it. Where there has been no representation on the part of the defendants to make the plaintiff believe that she was really the owner of a 14 annas share in the property in dispute, there can be no estoppel against them when they show clearly that the plaintiff is in law entitled only to an 8 annas share in the property left by her father and not to the 14 annas share in that property. *Deokali* v. *Ranchor Bakhsh* (9) and *Sri Dhar* v. *Dharam Das* (10), relied on. [p. 27, cols. 1 & 2]

There can be no adverse possession by one co-owner against another until there is an ouster or something equivalent to an ouster of the latter. *Pahlad Singh* v. *Kalka Singh* (11), relied on. [p. 27, col. 1.]

The plea of adverse possession is a mixed question of law and fact and where a person wants to base his title on it, he should specifically advance the plea in the trial Court and an issue framed and finding given. Unless it is done, the plea is untenable and cannot be entertained [p. 28, col. 1]

S. C. A. against the decree of the Subordinate Judge, Mohanlalganj, Lucknow, modifying that of the Munsif, Lucknow District, dated March 10, 1932.

Mr. *Narain Lal*, for the Appellant.

Mr. *D. K. Seth*, for the Respondent.

Judgment.—These are two connected appeals filed by the plaintiff-appellant, *Musammat* Rajana against the appellate judgment and decrees of the Court of the learned Subordinate Judge of Mohanlalganj, in the District of Lucknow, partially modifying the judgments and decrees of the Court of the Munsif of Lucknow, dated March 10, 1932.

The facts out of which these appeals arise are briefly as follows:—*Musammat* Rajana brought three suits against three sets of defendants praying that the alienations made by her mother *Musammat* Sundar during her, (the plaintiff's), minority in favour of the defendants be set aside. By consent of parties the proceedings in all three suits were consolidated and disposed of by one judgment. These appeals also by consent of parties will be decided by one and the same judgment. One Ghulam Dastgir Khan owned property in village Mahdoli as well as in village Kanakahar in the district of Lucknow. He died on April 7, 1907, leaving as his heirs under the Hanafi Muhammadan Law his widow *Musammat* Sundar, his mother *Musammat* Nasiban, and his sister *Musammat* Mashiran. At the time of his death Ghulam Dastgir Khan left no son or daughter, but the appellant *Musammat* Rajana was born posthumously on August 2, 1907. On the death of Ghulam Dastgir Khan mutation of names of the entire property owned by him was made in favour of his widow *Musummat* Sundar, and she also obtained possession of it. In 1915 *Musammat* Sundar applied to be appointed guardian of the person and property of her minor daughter *Musammat* Rajana, (see Ex. 6, dated April 19, 1915). The District Judge by his order, dated May 19, 1915, (Ex. 8), appointed *Musammat* Sundar as the guardian of *Musammat* Rajana, and the certificate of guardianship in her favour is Ex. 9. In her application for guardianship *Musammat* Sundar stated that her minor daughter *Musammat* Rajana owned a 14 annas share in both villages owned by Ghulam Dastgir Khan. *Musammat* Sundar died on September 4, 1923. *Musammat* Nasiban, the mother of Ghulam Dastgir, and *Musammat* Mashiran, his sister, had predeceased *Musammat* Sundar. On the death of *Masammat* Sundar the husband of *Musammat* Rajana applied to be appointed as guardian of his minor wife, (see Ex. A-1, dated February 16, 1924). Exhibit 1, dated March 15, 1924, is the order of the District Judge appointing Muhammad Ilahi Khan, the husband of *Musammat* Rajana, as guardian of the person and property of his wife. On the death of *Musammat* Sundar mutation in respect of the entire property of Ghulam Dastgir Khan was effected in favour of *Musammat* Rajana. The latter attained majority on August 2, 1928. On April 18, 1918, whilst *Musammat* Sundar was acting as guardian of her minor daughter *Musammat* Rajana she executed a usufructuary mortgage, (Ex. 1, in Mata Din's case—Appeal No. 277 of 1933) in favour of Mata Din, respondent No. 1, and Ganesh Singh, the father of respondent No. 2, Gur Bakhsh Singh, for Rs. 1,200. By this deed she mortgaged the entire property owned by her husband, namely, a 9 pies 15 *karants*, 10 *jau* share with an area of 81 *bighas* 2 *biswas* 5 *biswansis* (see Ex. 4 *khewat*), in village Mahdoli, and she delivered possession over 22 *bighas* 14 *biswas*

to the mortgagees. By this mortgage *Musammat* Sundar purported to mortgage not only her own share inherited from her husband but also the share which her daughter *Musammat* Rajana had inherited from her father, acting as the certificated guardian of her minor daughter, although she had not obtained the permission of the District Judge for entering into this mortgage on behalf of the minor. On September 28, 1920 *Musammat* Sundar executed a deed of further charge, (Ex. 2) in favour of Mata Din for Rs. 100 carrying interest at 2 per cent. per mensem hypothecating the entire property left by her husband in village Mahdoli. Exhibit 2 was also executed by her as guardian of her minor daughter, without obtaining the permission of the District Judge. On June 19, 1922, *Musammat* Sundar executed a usufructuary mortgage, (Ex. 11 in Musahib Ali's case Second Civil Appeal No. 276 of 1933), in respect of 10 *bighas* 5 *biswas* and 10 *biswansis* in village Mahdoli on her own behalf and on behalf of her daughter *Musammat* Rajana. *Musammat* Sundar only owned a two annas share out of the 16 annas which she mortgaged to Musahib Ali. *Musammat* Sundar also executed other mortgages and leases with which we are not concerned in the present appeals.

In the three suits filed by the plaintiff-appellant *Musammat* Rajana she alleged that, as the alienations made by her mother were made without the permission of the District Judge, and as the consideration of those mortgage-deeds was not applied for her benefit she was not bound by them, and she accordingly claimed a decree for possession of the properties in suit. The defence was that the consideration of the mortgages in suit was advanced and applied for the benefit of the plaintiff, and that she was estopped from challenging the validity of the deeds in suit and that the alienations were binding on her. Upon the pleadings of the parties the learned Munsif framed the following issues:—

1. Were the mortgages in suit executed and the money applied for the benefit of the minor as alleged?
2. If so, is the minor bound by the mortgages in suit?
3. Is the plaintiff estopped from challenging the validity of the mortgages in suit as alleged?
4. Was the mother of the plaintiff the owner of the whole of the property as alleged?
5. If not, was the plaintiff entitled only to an eight annas share as alleged?
6. To what relief, if any, is the plaintiff entitled?
7. Has the suit been properly valued and is the court-fee paid insufficient?

The learned Munsif held that none of the deeds executed by *Musammat* Sundar is binding on the plaintiff *Musammat* Rajana. On Issue No. 3 he held that the plaintiff was not estopped from challenging the validity of the mortgage-deeds in suit. His finding on Issue No. 4 was that *Musammat* Sundar, the mother of the plaintiff, was not the owner of the whole property left by Ghulam Dastgir Khan. His finding on the 5th issue was that plaintiff must still be deemed to be the owner of the entire 14 annas share. His finding on the 7th issue was that the court-fee paid was sufficient. He accordingly decreed the plaintiff's suit for possession over the entire 14 annas share, subject to payment of certain sums of money to the various defendants, which on his finding had been proved to have been utilised for the benefit of the plaintiff.

The defendants appealed and the learned Subordinate Judge of Mohanlalganj, in the District of Lucknow, held that the plaintiff *Musammat* Rajana was only entitled to get an 8 annas share in the property in suit and not 14 annas as decided by the learned Munsif. He accordingly allowed the appeals of the defendant and modified the decree of the trial Court to this extent that he held that the plaintiff *Musammat* Rajana was to get possession over 8 annas only in place of the 14 annas share decreed by the trial Court. In all other respects the appeals of the defendants were dismissed. The cross-objections filed by the plaintiff were also dismissed. Dissatisfied with the judgment of the lower Appellate Court, the plaintiff has come up in second appeal.

I have heard the learned Counsel of both parties at great length and perused the evidence on the record. The first question of law argued before me by the learned Counsel on behalf of the plaintiff-appellant was that the defendants-respondents are estopped from challenging the appellant's title to a 14 annas share in the property in suit, inasmuch as they took the mortgages from the certificated guardian of the plaintiff in respect of her 14 annas share. In support of his contention the learned Counsel for the appellant has cited a passage from Caspersz on Estoppel,

4th Edition, para. 400, p. 367, which runs as follows:—

"It is, of course, the general rule that a mortgagee, as in the case of a tenant, cannot dispute his mortgagor's title unless that title is determined, when he is permitted to show that the title is at an end. Neither mortgagor nor mortgagee can deny the title of the other for the purposes of the mortgage. The doctrines discussed in the Chapter on landlord and tenant apply to the case of mortgagor and mortgagee."

The learned Counsel for the plaintiff-appellant also cited a ruling of the Calcutta High Court reported in *Baiganti Bewa* v. *Himmat Badyakar* (1) in which it was held that a lessee so long as he retained the possession he obtained from the lessor could not, even after his term has expired, set up in the lessor's suit for ejectment the defence that the lessor had no title at the time when the lease was granted, and that ss. 115, 116 and 117 of the Indian Evidence Act are not exhaustive as to the rules of estoppel in force in British India.

In *Surendra Nath Mitra* v. *Kshitindra Mohun Mitra* (2), it was laid down that when a mortgagee takes a mortgage from a person and obtains possession from him, he is not permitted to question his mortgagor's title. In this case Sir Ashutosh Mukerji, in delivering the judgment of the Court made the following observation:—

"The District Judge in concurrence with the Subordinate Judge has held that, as the mortgagees took the mortgage from the plaintiff and obtained possession from him, they cannot be permitted to question his title in view of the rule of estoppel enunciated in s. 116 of the Indian Evidence Act. This view is clearly well founded. As explained in the case of *Baiganti Bewa* v. *Himmat Bidyakar* (1) enjoyment by permission is the foundation of this doctrine Two conditions are essential to the existence of the estoppel, namely, first, possession, secondly, permission; when these conditions are present, estoppel arises and the estoppel prevails so long as such possession continues. Apart from this, the contention of the appellant that a redemption suit cannot be maintained except by the real owner, is too broadly formulated and is against the balance of judicial authority".

In *Jangi Ram* v. *Sheoraj Singh* (3), it was held by a Bench of the late Court of the Judicial Commissioner of Oudh that a mortgagee cannot go behind the mortgage to dispute the mortgagor's right to enforce redemption.

In *Gobind* v. *Chokhe* (4) the facts were as follows:- A mortgagee brought a suit for possession of the mortgaged property against a person whom he treated as the successor of the original mortgagor and won his case. Subsequently, when the said person sued the mortgagee for redemption of the mortgage, the mortgagee pleaded that that person was not the successor of the original mortgagor, and it was held that the mortgagee was estopped from raising that plea.

In *Bhairon* v. *Balak* (5) it was held by the Court of the late Judicial Commissioner of Oudh that it was not open to the mortgagee to plead that the mortgage was invalid or to set up a right by trespass if he originally obtained possession under the mortgage, that is to say, by license and permission of the mortgagor.

In *Hellaya Subbaya Hedge* v. *Narayana Timmaya* (6), it was held that as between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage, and that a mortgagor cannot derogate from his grant so as to defeat his mortgagee's title, nor can the mortgagee deny the title of his mortgagor to mortgage the property.

Similarly, in *Raja Ram Dhar Dube* v. *Jadunandan Dhar Dube* (7), it was held that it was not open to the mortgagee to say that at the time when the mortgage was made any one other than the mortgagor had also an interest in the mortgaged property, and that in a suit by the mortgagors to redeem the mortgage, the mortgagees are estopped from setting up the interest of a third party, and that they cannot do so, solong as they do not hand over possession to the representatives of their mortgagors. This ruling was specially relied upon by the learned Counsel for the plaintiff-appellant.

Similarly in *Ahad Ashraf* v. *Inayat Ullah* (8) it was held that a mortgagee cannot deny the title of his mortgagor during the continuance of his mortgage.

On the other hand the learned Counsel for the defendants-respondents contended that, as the plaintiff was not suing for possession on the basis of a mortgage, but was really suing for possession by avoidance of the mortgage executed on her behalf by her mother, no question of estoppel arises, and that, as the relationship of mortgagor and mortgagee was not asserted by

(1) 35 Ind Cas. 7; 20 C W N 1335; 24 C L J 103.
(2) 53 Ind Cas. 59; 29 C L J 434.
(3) 30 Ind. Cas 234; 2 O L J 338.
(4) 49 Ind. Cas. 356; 6 O L J 1; 1 U P L R (O) 22.
(5) 68 Ind. Cas. 538; 9 O L J 331; 4 U P L R (O) 88; A I R 1922 Oudh 287.
(6) 12 Ind. Cas. 913; 35 B 185; 13 Bom. L R 1200
(7) 88 Ind. Cas. 539; A I R 1925 All 758; L R 6 A 196 Rev.
(8) 80 Ind. Cas. 62; 11 O L J 722; 10 O & A L R 697; A I R 1925 Oudh 273; 1 O W N 346.

the plaintiff, the defendants also were at liberty to assert that plaintiff was not the owner of a 14 annas share in the property in suit but only of an 8 annas share. It is conceded by the learned Counsel for the plaintiff-appellant that at the time of the death of Ghulam Dastgir Khan, the widow, the mother and the sister of Ghulam Dastgir were alive and were undoubtedly his legal heirs under the Muhammadan Law. The daughter who was born posthumously was also entitled to a share in that inheritance, and according to the Hanafi Law her share came to 8 annas, the widow's share being two annas, and the share of the mother *Musammat* Nasiban and the sister *Musammat* Mashiran together being 6 annas.

In my opinion the rulings cited by the learned Counsel for the plaintiff-appellant on the question of estoppel are inapplicable to the present case for the simple reason that the plaintiff *Musammat* Rajana has not filed this suit on the basis of the mortgage-deeds executed by her mother on her behalf. Had she done so, then no doubt the mortgagees would be estopped from challenging her right to the 14 annas share mortgaged to them. The plaintiff however bases her case on the provisions of ss. 29 and 30 of the Guardians and Wards Act, (Act No. VIII of 1890). Section 29 of this Act lays down that where a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court, mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of his ward, and s. 30 of the Act lays down that a disposal of immovable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby.

In the present case the three suits filed by the plaintiff *Musammat* Rajana were not based on the mortgages executed by her mother *Musammat* Sundar. The principle upon which the rule of estoppel rests is that it would be most inequitable and unjust if a person by a representation made or by conduct amounting to a representation has induced another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it. In *Deokali* v. *Ranchor Bakhsh*, 92 Ind. Cas. 90 (9), a learned Judge of this Court declined to give effect to the plea of estoppel raised by the defendants in that case and observed as follows :—

"It is true that as between the mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage, but the present suit is not a suit based on or connected with the mortgage. In my opinion the plaintiff is not estopped from challenging the validity of the mortgage in the present suit"

Similarly in *Sri Dhar* v. *Dharam Das* (10), it was held that there could be no estoppel against the plaintiff where the defendant acted with full knowledge of the facts and where there was no misrepresentation on the plaintiff's party.

Similarly, in the present case, there has been no representation on the part of the defendants to make the plaintiff *Musammat* Rajana believe that she was really the owner of a 14 annas share in the property in dispute, and, therefore, there can be no estoppel against them when they show clearly that the plaintiff is in law entitled only to an 8 annas share in the property left by her father, and not to a 14 annas share in that property. I am, therefore, clearly of opinion that, in the circumstances of this case, since the plaintiff does not sue on the basis of the mortgages executed by her mother, but rather seeks to avoid them, no question of estoppel arises.

For the reasons given above, I uphold the finding of the lower Appellate Court on the question of estoppel and hold that it was open to the defendants to show that the plaintiff *Musammat* Rajana was only entitled to an 8 annas share in the property left by her father and not a 14 annas share.

I come next to discuss the plea of adverse possession set up on behalf of the plaintiff-appellant There is, to my mind, no force in this plea. *Musammat* Sundar, the widow of Ghulam Dastgir Khan, was in possession of the entire property left by her husband not only on her own behalf but also on behalf of her other co-sharers, namely, *Musammat* Nasiban and *Musammat* Mashiran, the mother and sister of Ghulam Dastgir Khan, as also on behalf of her minor daughter *Musammat* Rajana. It has been held in *Pahlad Singh* v. *Kalka Singh* (11), that there can be no adverse possession by one co-owner against another until there is an ouster or something equivalent to an ouster

(9) 92 Ind. Cas. 90.
(10) 3 Ind. Cas. 549; 12 O C 236.
(11) 132 Ind. Cas. 139; 8 O W N 710; Ind. Rul. (1931) Oudh 299.

of the latter. It is clear, therefore, that neither *Musammat* Sundar nor *Musammat* Rajana could claim to have become owner of the property in suit by adverse possession against *Musammat* Nasiban and *Musammat* Mashiran. As noted by the learned Subordinate Judge, the heirs of *Musammat* Nasiban and *Musammat* Mashiran have not been impleaded by *Musammat* Rajana in the present suits, and this plea of adverse possession really affects those persons rather than the defendants-respondents. I, therefore, reject this plea of adverse possession. Moreover the mortgage, Ex. 1, is of April 18, 1918, and possession to the mortgagees was delivered under the mortgages executed within 12 years from the date of the death of Ghulam Dastgir Khan, and this is another reason for holding that no question of adverse possession arises, and it cannot be argued that *Musammat* Rajana had perfected her title by adverse possession. Moreover, this plea of adverse possession is a mixed question of law and fact, and if the plaintiff wanted to base her title on it, she should have specifically advanced this plea in the first Court and an issue would have been framed and a finding given. As it is, no issue was framed by the trial Court on this plea of adverse possession, and no evidence was given as to the alleged ouster of *Musammat* Nasiban and *Musammat* Mashiran. In these circumstances the plea of adverse possession is untenable and cannot be entertained.

I come next to discuss the plea of *res judicata*. To my mind there is no force in this contention also. The parties to the present suit were not the same as those in Ex. 16, which is relied upon by the plaintiff-appellant, nor are they litigating under the same title. The plea of *res judicata* was not urged in the trial Court and no issue was framed, nor was this plea advanced by the plaintiff-appellant before the learned Subordinate Judge when he disposed of the appeals of the defendants. In my opinion there is no force in this plea of *res judicata*.

For the reasons given above these appeals fail and are dismissed with costs.

N. *Appeals dismissed.*

PATNA HIGH COURT

Civil Appeals Nos. 429, 500 and 501 of 1931

September 3, 1934

FAZL ALI AND JAMES, JJ.

SRINANDAN PRASAD SINGH AND OTHERS—APPELLANTS

versus

MITHAN MAHTON AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 88, 105 109—Landlord in s. 88, if means entire body of landlords—Absence of effective splitting of holding—Plaintiffs becoming sole landlords on partition—Holding, if to be treated as sub-divided—Division of holding—What constitutes—Application for settlement of rent—Withdrawal of application—Subsequent application for enhancement on ground of rise in price—Whether barred by s 109.

A 'landlord' in s. 88, Bengal Tenancy Act, means the entire body of landlords. Where there has been no effective splitting up of the holding as required by s. 88, Bengal Tenancy Act before the partition so as to be binding upon the entire body of landlords, they are not bound to treat the holdings as sub-divided after the partition, merely because they became the sole landlords as a result of the partition. [p. 29, col. 2.]

Section 88, speaks of a division of a tenure or holding. A mere undivided parcel or parcels of land is not a holding within the meaning of the Bengal Tenancy Act. Consequently so far as the division of the holding is concerned, what is contemplated by s. 88 is the actual division of the holding into two or more definite units and not a mere notional division of the shares held by the tenants in the holding. [p. 30, col. 1.]

Where the plaintiff applied for settlement of rent under s. 105, Bengal Tenancy Act, in a certain year before the Settlement Officer but the application was withdrawn and he subsequently applied for enhancement on the ground of rise of the average local price of local staple food crops:

Held, that the application for enhancement was not barred under s. 109, Bengal Tenancy Act.

A. from appellate decrees of Additional District Judge, Bhagalpur, dated December 11, 1930.

Mr. *G. P. Singh*, for the Appellants.

Messrs. *S. N. Rai*, *P. Jah* and *B. N. Rai*, for the Respondents.

Fazl Ali, J.—These appeals arise out of three suits which were instituted by the appellant to recover rent for the years 1334 and 1335 in respect of three holdings and for the enhancement of the existing rent of those holdings under s. 130-B, Bengal Tenancy Act. The learned Munsif of Bhagalpur in whose Court the suits were instituted decreed them and allowed enhancement at the rate of 4 annas 6 pies in the rupee, but his decision has been reversed on appeal by the learned Additional District Judge who has dismissed all the suits with costs.

It appears that the holdings which are the subject-matter of the present suits

originally belonged to two persons, namely, Ram Sahay and Kishun Mahto whose heirs and descendants are the defendants in these suits. One of the pleas upon which the suits were contested by the defendants was that each of the three holdings in question had been partitioned sometime before the years 1325 into two equal halves between the descendants of Ram Sahay and Kishun Mahto and that the plaintiffs had agreed to the division of the holdings and accepted rents from the two sets of denfendants separately. This plea was not accepted by the learned Munsif, but it was accepted by the learned Additional District Judge who held that two separate suits should have been instituted in respect of the two sub-divided portions of each holding. In arriving at the decision that the holding had been split up as contended by the defendants, the learned Additional District Judge has relied upon a series of rent receipts (Exs. A to A-41), which are said to have been granted by the plaintiffs to the two sets of defendants between the years 1325 and 1333; certain summonses issued in 1919 in certain rent suits which were alleged to have been instituted by the plaintiffs against some of the defendants upon the basis that the holding had been sub-divided, a receipt (Ex. B) which purports to have been granted on behalf of the plaintiffs on the 1st *Fagun* 1331 and which contains a recital that the rent for which the suits had been brought had been paid by the defendants; the oral evidence adduced by the defendants and a recital said to be contained in some of the rent receipts which was to the effect that the holding had been split up. The learned Additional District Judge has also referred to certain so-called admissions made by some of the plaintiff's witnesses, but as I shall presently show he has entirely misconstrued these statements.

Now, the material findings of the learned Additional District Judge are that the plaintiff had accepted rent from the two sets of defendants upon the basis that the holding had been split up and that the holdings in question had been in fact partitioned by the defendants. The learned Additional District Judge, however, overlooked certain important facts which had been duly emphasised by the learned Munsif, namely, that at the time when the receipts Exs. A to A-41 were granted, the plaintiffs were mere co-sharer landlords, that there was no proof on the record that the alleged sub-division of the holding had been assented to by the remaining co-sharer landlords and that there had been a partition since of the village under the Estates Partition Act, and in the partition records the sub-division of the holding was not recognized and the holdings in question were treated as entire holdings. Section 88, Bengal Tenancy Act, clearly lays down that a division of a tenure or holding or distribution of the rent payable in respect thereof shall not be binding on the landlord, unless it is made with his express consent in writing or with that of his agent duly authorized in that behalf. A landlord in this section obviously means the entire body of landlords and as the learned Munsif has pointed out in his judgment there is nothing on the record to show that any of the landlords other than the plaintiff consented to a division of the holding or to the distribution of the rent in respect thereof. The true position thus was that the plaintiffs who were mere co-sharer landlords before the partition had done what they could to accommodate the defendants by receiving rent separately from the heirs of Ram Sahay and Kishun Mahto, but as the other landlords did not consent to the arrangement, there was no effective splitting up of the holding in the sense in which it would be binding upon the entire body of landlords under s. 88. Meanwhile the partition proceedings began and each of the holdings in question were allowed by the parties to be treated as one holding and allotted to the estate of which the plaintiffs became the sole landlords.

Now, if there was no effective splitting up of the holding as required by s. 88, Bengal Tenancy Act, before the partition so as to be binding upon the entire body of landlords, I do not think that the plaintiffs were bound to treat the holdings as sub-divided after the partition, merely because the plaintiffs became the sole landlords as a result of the partition. The matter may here be examined a little more closely. The first question is whether there was any actual division of the holding by metes and bounds. The learned Munsif has very pertinently referred to the fact that one of the defendants who gave evidence in the case stated in his evidence that he could not say which portion of each of the holdings in question and which plot had been allotted to each branch of the family. The learned District Judge has ignored this

statement altogether and indeed he observes that in his opinion the question of actual division of the holding by metes and bounds between the co-sharer-tenants is not of much importance for determining whether there was really a sub-division of the holding under s. 88, Bengal Tenancy Act. In my opinion this view of the learned District Judge is erroneous in law. Section 88 speaks of a division of a tenure or holding and as has been pointed out in *Indrasan Pande* v. *Kabutra Kuer* (1), a mere undivided parcel or parcels of land is not a holding within the meaning of the Bengal Tenancy Act. It is to be remembered that s. 88 deals with two classes of cases, *viz.*: (1) cases where rent is distributed and (2) those where the holding is divided. It appears to me that so far as the division of the holding is concerned, what is contemplated by s. 88 is the actual division of the holding into two or more definite units and not a mere notional division of the shares held by the tenants in the holding. If that were not so, the landlord would have considerable difficulty in giving particulars of the sub-divided holdings when he proceeds to bring separate suits for rent under s. 148-A, Bengal Tenancy Act, in respect of the new holdings. It appears to me, therefore, that the first premise formulated by the learned District Judge was not correct.

The learned Judge has held in the alternative that even if it were assumed that the division of the holding by metes and bounds was a condition precedent to its sub-division under s. 88, there was satisfactory evidence on the record in the shape of admissions of the witnesses examined by the plaintiffs to prove that there was such a division of the holdings between the two branches. The admissions that he relied upon consisted of certain statements made by the plaintiffs' witnesses Nos. 1 and 2. These statements, however, are merely to the effect that the rental of the defendant was split up upon their promising to execute an *ekrarnama* which was never executed. This statement did not amount to an admission that there was a final and unconditional splitting up of holdings so as to permanently bind the plaintiffs, but the learned Judge has treated these statements as amounting to some such admission. It appears to me that the mere fact that the plaintiffs tried to accommodate the defendants by accepting rent separately from the heirs of Ram Sahay and Kishun Mahto before the partition or even the fact that in the suits that they brought as co sharers they sued these parties separately in consequence of some provisional arrangements arrived at by them, is not sufficient to compel them to treat the holdings as split up when in the partition to which the defendants as tenants were parties, they did not contend that the holding had been split up and allowed the holdings in question to be allotted to the plaintiffs' estate as entire holdings. In one of the appeals (S. A. No. 429), the holding as it originally stood was 10 *bighas* odd bearing a rental of Rs. 25 odd, but by partition only 7 *bighas* odd have been allotted to the plaintiffs' estate bearing a rental of Rs. 19, s. 81, Estates Partition Act, lays down that no holding shall be split up for the purpose of a partition unless it is reasonable to do so in order to effect an equitable partition and that when it is proposed to split up a tenure or holding and apportion the rent thereof as aforesaid, the Deputy Collector shall cause a notice to be served on the tenants concerned and after hearing the objections, if any, may order that the tenure or holding be split up and that the rent thereof be apportioned as aforesaid. I think that it may be assumed that before the splitting up of this holding notices must have been served upon the tenants by the partitioning Deputy Collector, but there is no proof that any objections were raised on behalf of the defendants to the effect that even the 7 *bighas* odd which were allotted to the plaintiffs' estate by partition had been split up among the defendants into two parcels of land.

It appears to me therefore that the learned Judge was wrong in the circumstances of the case in holding that two separate suits were necessary to recover rent for the lands covered by each of the present suits and that the suits of the plaintiffs were liable to be dismissed on that ground. As I have shown, the findings on which the learned Judge has based this conclusion are vitiated by errors of law and as the present litigation has been going on for a long time and the issues which have not been legally determined by the learned Judge can be decided by us, we have considered it unnecessary to remand the case.

It may be stated that during the hearing of the appeal while the Advocates for the parties were discussing certain terms of compromise, the plaintiffs offered to treat

(1) 119 Ind. Cas. 556; A I R 1929 Pat. 237; Ind. Rul. (1929) Pat. 604.

the holding as already sub-divided, if the respondents supplied the particulars as to the lands in possession of the two sets of defendants. The defendants, however, failed to furnish such particulars though the case had to be postponed from time to time at the request of the learned Advocate for the respondents to enable them to furnish such particulars.

The next question is whether the rent is liable to be enhanced. The learned Additional District Judge has dismissed the claim for enhancement on the ground that it is barred under s. 109, Bengal Tenancy Act. It appears that in the year 1905 the plaintiffs applied in the Settlement Court under s. 105, Bengal Tenancy Act, for a settlement of rent of the three holdings which are the subject-matter of the present appeal. The applications, however, were subsequently withdrawn. The learned District Judge has relying upon the decision of the Judicial Committee of the Privy Council in *Reshee Case Law* v. *Satis Chandra Pal* (2), and the decision of a Full Bench of the Calcutta High Court in *Purna Chandra* v. *Narendra Nath* (3), held that the present suit is barred under s. 109, Bengal Tenancy Act. In my opinion the learned Additional District Judge has misunderstood the effect and scope of these decisions. Section 109, Bengal Tenancy Act, provides that subject to the provisions of s. 109-A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject-matter of an application made, suit instituted or proceedings taken under ss. 105 to 108. All that the Judicial Committee of the Privy Council decided in *Reshee Case Law* v. *Satis Chandra Pal* (2), was that where an application was made under s. 105, Bengal Tenancy Act, and subsequently withdrawn whether with or without permission to bring a fresh suit, and even if the withdrawal was before the evidence had been heard, the same subject was barred by the provisions of s. 109 of the Act. The question therefore is whether the subject-matters of the present suit and the application made in the year 1905 are the same.

A reference may be made here to s. 113, Bengal Tenancy Act, which provides that, when the rent of a tenure of holding is settled under Chapter X, it shall not except on the ground of a landlord's improvement or of a subsequent alteration in the area of the tenure or holding be enhanced, in the case of a tenure or an occupancy holding or the holding of an under-*raiyat* having occupancy rights for fifteen years, and, in the case of a non-occupancy holding or the holding of an under *raiyat* not having occupancy rights, for five years; and no such rent shall be reduced within the period aforesaid save on the ground of alteration in the area of the holding or on the ground specified in s. 38, cl. (*a*). It is clear that under this section the rent of an occupancy holding may be enhanced after a period of 15 years from the date on which its rent is settled under Chap. X. It is conceded on behalf of the respondents that if the application made by the plaintiffs in the year 1905 before the Settlement Officer had been disposed of on its merits, that is to say, if the Settlement Officer had either enhanced the rent or declined to enhance it, the plaintiffs, would not have lost the benefit of the section and could have claimed enhancement after a period of 15 years; but it is also contended that merely because they withdrew their petition, they have been barred for all time to come from exercising their right to claim an enhancement of rent under s. 130-B, Bengal Tenancy Act. To this latter proposition I am unable to assent. In my opinion the subject-matter of the present suit is entirely different from the subject-matter of the application made before the Settlement Officer in the year 1905.

The subject-matter of that application was whether the plaintiffs were entitled to claim enhancement under s. 130-B in that particular year, whereas the subject-matter of the present suit is whether in view of the rise in the average local prices of the staple food crops during the currency of the present term (1918—1927) the rent is liable to be enhanced. It has been held in *Abdul Sattar* v. *Rajkishore Sah* (4), that s. 109 will not bar the maintainability of a suit under s. 7 merely because the defence taken by the defendant in the suit is the same as the objection taken by him to a previous application under s. 105, and that where in an application under s. 105, Bengal Tenancy Act, for enhancement of rent, the defendant contended that the rent of the tenure was fixed and was not liable to enhancement, and the application was withdrawn,

(2) 116 Ind. Cas. 396; A I R 1929 P C 134; 56 I A 179; 57 C 118; 33 C W N 705; 57 M L J 43; 30 L W 279. 10 P L T 871 (P C.)

(3) 88 Ind. Cas. 637; A I R 1925 Cal. 845; 52 C 894; 41 C L J 456; 29 C W N 755.

(4) 127 Ind. Cas. 570; A I R 1930 Pat. 161; Ind. Rul. (1930) Pat. 714.

and more than 15 years afterwards the landlord sued for enhancement under s. 107, Bengal Tenancy Act, and the defendants raised the same objection, the suit could not be held to have become barred under s. 109, Bengal Tenancy Act. In that case the decisions of the Full Bench of the Calcutta High Court and of the Judicial Committee of the Privy Council were explained and it was pointed out that the question which was material to be considered was whether the subject-matter of the suit was the same as the subject-matter of the application. In my opinion, therefore, the plaintiff is entitled to enhancement; and, the only question is at what rate the enhancement should be allowed. The learned Munsif allowed enhancement at the rate of 4 annas 6 pies in the rupee, but having regard to the present conditions and particularly to the serious economic depression, we think that it would not be fair to allow enhancement at that rate. In course of the hearing of this appeal the plaintiffs expressed their willingness to accept enhancement at the rate of half an anna in the rupee upon the existing rent and we think that in the circumstances of the case, enhancement should be allowed at that rate.

Only one material point remains to be dealt with and they may be disposed of at once. The learned Additional District Judge states in his judgment that the plaintiffs have not impleaded the other co-sharer landlords and, therefore, their suits cannot be entertained as rent suits. The learned District Judge, however, in an earlier portion of his judgment, while he was reciting the facts of the case, has stated that the plaintiffs were landlords of a separate *patti* formed by the Collectorate *batwara* and allotted to them; and, as the learned Munsif has pointed out Register D which has been filed in the present suit shows that the plaintiffs are the exclusive landlords of the estate which has been formed as a result of the partition. Thus they are fully competent to sue for rent as well as for the enhancement of the rent in the present suit and there is no question of non-joinder of parties.

I would, therefore, allow the appeals with costs and set aside the decree of the learned District Judge. So far as the claim for rent is concerned, I would restore the decree of the Munsif and so far as the claim for enhancement is concerned, I would vary the decree passed by the Munsif by allowing enhancement at the rate of half an anna in the rupee.

James, J.—I agree entirely.

It appears to be clear that there was never any actual division of this *raiyati* holding. The learned Munsif perceived this from the fact that the defendant who gave evidence in the case was unable to specify the plots which had been allotted to him in the so-called division. The learned Additional District Judge discussing this point did not deal with the evidence of the defendants, but based his decision on statements made by the plaintiff's witnesses, taken out of their context, which read as a whole supported the view of the learned Munsif, and explained how it happened that before the Collectorate partition these landlords granted receipts which appeared to indicate that a division of the holding had taken place. It appears that the defendants quarrelled among themselves and set about dividing up their holding, obtaining the landlords' consent to this proposed partition, on condition that an *ekrarnama* was to be executed by the tenant. No such *ekrarnama* was executed; and when the landlords' estate was partitioned by the Collector, and it became necessary for the preparation of the Record of Rights for that partition, to specify the plots in possession of the *raiyats*, notice was issued to the defendants; but the holding was surveyed as one holding with their tacit acquiescence. It is impossible in the circumstances to say that there has been a sub-division of this holding; or that the landlords' willingness to recognize such a sub-division when it was originally proposed amounts to a recognition under s. 88, Bengal Tenancy Act, of a sub-division which did not in fact take place.

In *Reshee Case Law Satis* v. *Chandra Pal* (2), the Judicial Committee of the Privy Council accepted the decision of the Full Bench of the Calcutta High Court in *Purna Chandra* v. *Narendra Nath* (3), as authority for the proposition that the provisions of s. 109, Bengal Tenancy Act, barred a subsequent civil suit in a case in which the earlier claim under s. 105 was based on an alleged excess of area. A person presenting a petition under s. 105 states under sub-s. (4) of that section, what particular rule laid down in the Act for

guidance of Civil Courts he desires to have applied for the settlement of fair and equitable rent of the holding in question. In the case before the Privy Council it appears that s. 52 (1) (*a*), Bengal Tenancy Act, was thus called in aid; and the subject-matter of the subsequent suit was precisely the same as the subject-matter of the application under s. 105. In case where s. 32, Bengal Tenancy Act, is thus called in aid, a subsequent civil suit cannot deal exactly with the same subject-matter. In the present suit for enhancement the Court had to determine under s. 32, Bengal Tenancy Act, the effect of the rise in prices during the decennial period of 1918 to 1927. The effect of the rise in prices between 1918 and 1927 could not possibly have been the subject-matter of an application made under s. 105 in the year 1905; and consequently, although that application in 1905 may have been withdrawn with or without permission to institute a fresh suit, the effect of the provisions of s. 109 could not be in such circumstances a bar to a suit based on a rise in prices in subsequent years.

N. *Appeals allowed.*

ALLAHABAD HIGH COURT

Civil Miscellaneous Case No. 436 of 1934

September 26, 1934

THOM AND HARRIES, JJ.

RAM MOHAN LAL AGARWALA,

In the matter of

Contempt—Contempt of Court—Writer believing what he states to be true—Whether justification—Evidence to establish truth of allegations—Whether can be led—Election manifesto slandering judiciary—Contempt is punishable—Printer and publisher acting on Advocate's words—Absence of intention—Unqualified apology—Punishment, if called for.

There can be no justification of contempt of Court even assuming that the writer of an election manifesto believed all he stated therein to be true. If anything in the manifesto amounts to contempt of Court, he is not permitted to lead evidence to establish the truth of his allegations. Contempt of Court is saying or writing anything about the Court which may lower the prestige of the Court or bring it into contempt.

It is not uncommon to attack abuses and to attack persons in an election manifesto whether the abuses be existent or not, or whether the persons deserve the vituperation which is often showered upon them in these productions, but to slander the whole Judiciary of a Province in an attempt to secure votes at a Bar Council election, is not only contemptible but almost criminal in its purpose.

The passage in respect of which notice was issued was as follows: "I believe you must have seen my name prominently in the press in connection with a contempt of Court case and again under the Legal Practitioners Act last year. I was conducting my private case. It was not a case of a client and was not a case of moral turpitude but even then I was punished twice over for the same alleged offence. We are helpless. Being a fighter and having suffered for the strength of my convictions I can assure you that I will fight for your rights as well."

Held, that the passage was a clear reflection upon the High Court and that it could not be regarded merely as a technical contempt but the casting of the aspersion amounted to serious contempt of Court.

On the proprietor and printers of the press in which the manifestoes containing the above passage were printed, stating that they had no intention to make any aspersion either against the High Court or the Subordinate Judiciary and that they were unaware that what they were printing contained a contempt of Court and further that if they had unwittingly committed contempt of Court they offer an unconditional apology:

Held, that although no doubt they relied entirely upon the Advocate who gave instructions that nothing was being printed that was contempt of Court, it was not unreasonable that they should have relied upon the fact that they had been instructed to do the printing by an Advocate and though undoubtedly guilty of contempt, in view of the unqualified apology tendered by them, no punishment was necessary.

Messrs. *S. M. Hussain*, *Mushtaq Ahmad* and *T. A. Bradley*, for the Applicant,

The Government Advocate, for the Crown.

Order.—Mr. Ram Mohan Lal Agarwala, an Advocate practising in the High Court at Allahabad, has been directed to show cause why he should not be convicted for contempt of Court in respect of certain passages in election manifestoes which were issued by him in furtherance of his candidature for membership of the Bar Council of Allahabad at the recent Bar Council election. In five of these manifestoes the Advocate made certain statements in respect of which the Court issued these notices. For the sake of convenience the arguments of the Counsel for the Advocate will be dealt within one judgment. In the manifesto which is the subject of case No. 436 Mr. Ram Mohan Lal stated:

"The favoured few get tons and tons of money every month and also command respect because they are on the top already. They are above board. The Judge cannot snub them."

Coming from a member of the Bar this statement is undoubtedly highly objectionable. It is a statement to which we would have thought no respectable member of the Bar would have committed himself either in public or in private. We are not of the opinion, however, that it constitues a serious contempt of Court, although it does imply a certain criticism of the Court. It amounts to no more, in

our opinion, than a technical contempt and in the circumstances, therefore, so far as the particular statement is concerned, we discharge the notice which was issued against Mr. Ram Mohan Lal. In the manifesto which is the subject of Miscellaneous Case No. 437 Mr. Ram Mohan Lal stated as follows: A Judicial Officer, however impertinent, arrogant and conceited, is protected while a poor Advocate is:

"at the mercy of a Judicial Officer at every turn. The Bar Council is entitled to be as jealous about the interest of an Advocate as the High Court is about a Judicial Officer. A report whether correct or incorrect by a Munsif may be attended with direct consequences against an Advocate while the poor Advocate is helpless. The Court snubs an Advocate and treats him with contempt while a mild retort from him is often met with direct result."

The Advocate through his Counsel has stated that by the words used he did not intend to convey any criticism either of the Subordinate Courts or of the High Court. Learned Counsel has argued that interpreting the words in their ordinary meaning they do not imply any reflection upon the judiciary. We have considered all that learned Counsel has urged in this respect and we are of opinion, that we cannot accept his contention. The particular statement must be read along with the rest of the manifesto of which it forms part, and it is apparent to us that what Mr. Ram Mohan Lal intended to convey by this passage was that whilst the Judicial Officer could always look to the High Court or to the law for protection—it may be against an Advocate practising before him—when a report made by a Judicial Officer in regard to the conduct of an Advocate came before the High Court for disposal, the Advocate against whom the report was made did not get a square deal. In other words that the High Court before whom the reports about the conduct of Advocates came did not deal with these reports in an even-handed and impartial manner. That, in our view, is the plain meaning of this passage and we are confirmed in our view upon a consideration of the terms of the manifesto as a whole.

Such reflections upon the conduct of the Court undoubtedly amounts to contempt of Court. We hold, therefore, that in uttering and publishing the passage complained of Mr. Ram Mohan Lal has been guilty of contempt of Court. We convict him of contempt of Court and impose upon him a fine of Rs. 50. Further, he will pay the Government's costs in connection with this case. The statement in respect of which notice was issued in Case No. 438 is as follows:—

"The writer objects to the procedure adopted by the Leaders of the Bar in our High Court in certain contempt cases and cases of professional misconduct. They invariably, without going into the merits of the case, throw him at mercy of the Court. I respectfully submit, abject apologies are harmful to the dignity of the profession....."

We have carefully considered this passage and the manifesto of which it forms part and we are of opinion, that it does not amount to contempt of Court, although the statement is highly objectionable and one which we are surprised to see in a manifesto issued by an Advocate. We accordingly discharge the notice in Case No. 438. The passage in respect of which notice was issued in case No. 439 is as follows:—

"Ministerial Officers under the connivance of the presiding officers almost everywhere with some honourable exceptions accept bribes openly in the Courts.....No proceedings against me can desist me from exposing them who are in the wrong."

There can be no doubt whatever what was the intention of the writer of this passage. He clearly meant to convey to those to whom the pamphlet in which the passage appears was addressed that, with one or two exceptions, the subordinate judiciary in this Province was corrupt, that they allowed bribes to be taken in the Courts and that they indeed connived at this conduct. This, of course, is clear contempt of Court. Mr. Ram Mohan Lal was under the impression that he was entitled to make the statement referred to and further that in these proceedings he was entitled in his defence to prove that the statement was true. He, therefore, intimated to the Court by a written application that he proposed to call more than 1,600 witnesses to prove his allegation. Later he reduced the number of the witnesses which he asked this Court to summon to give evidence to-day. He was required by the Court to furnish an affidavit stating upon what grounds he alleged that any of these witnesses would admit the truth contained in the passage referred to. From his affidavit it was perfectly clear that he had no ground whatever for alleging that the witnesses whom he named would support him in the sweeping allegations he had made against the Subordinate Judiciary. In these circumstances, had the leading of evidence in these proceedings been open to Mr. Ram Mohan Lal, we should have refused to summon the witnesses whose names he

mentioned in his application to the Court. Clearly there can be no justification of contempt of Court, even assuming that the writer of the manifesto believed all he stated therein to be true. If anything in the manifesto amounts to contempt of Court he is not permitted to lead evidence to establish the truth of his allegations. Contempt of Court is saying or writing anything about the Court which may lower the prestige of the Court or bring it into contempt. Learned Counsel was unable to cite any case in which evidence had been permitted in justification of an offence in a case for contempt. Not only, therefore, was the Advocate not entitled to lead evidence in support of his allegations, but from his affidavit it was abundantly plain that he had no reason for believing that the witnesses he named would support him in the very grave and sweeping allegations he had made against the Subordinate Judiciary.

Learned Counsel has contended that we ought to take a lenient view of the offence of his client in respect that the manifesto was written in an excess of zeal for the public interest. The passage is in a manifesto which the Advocate issued for the purpose of securing votes from members of the Bar at the recent Bar Council election. It is not uncommon to attack abuses and to attack persons in an election manifesto whether the abuses be existent or not, or whether the persons deserve the vituperation which is often showered upon them in these productions, but to slander the whole Judiciary of a Province in an attempt to secure votes at a Bar Council election, is not only contemptible but almost criminal in its purpose. Nothing that learned Counsel for the Advocate has been able to say has in any way lessened the heinousness of the offence which Mr. Ram Mohan Lal has undoubtedly committed. If he had been of the opinion that abuses existed in the Subordinate Courts there were other methods which he could have adopted if he had been truely concerned with the removal of these abuses. It is apparent to us, however, that the main consideration present in Mr. Ram Mohan Lal's mind when he wrote this manifesto was to secure sufficient number of votes to return him as a member of the Bar Council.

We accordingly convict Mr. Ram Mohan Lal of contempt of Court in respect of the passage referred to in Case No. 439 and we sentence him to a fine of Rs. 200. Further he will pay the Government's costs in connection with these proceedings. The passage in respect of which notice was issued in Miscellaneous Case No. 440 is as follows :—

"I believe you must have seen my name prominently in the press in connection with a contempt of Court case and again under the Legal Practitioners Act last year. I was conducting my private case. It was not a case of a client and was not a case of moral turpitude but even then I was punished twice over for the same alleged offence. We are helpless. Being a fighter and having suffered for the strength of my convictions, I can assure you that I will fight for your rights as well."

In our view this is a clear reflection upon the High Court. The writer alleges that he was punished twice for the same offence and anyone reading the passage would understand that the High Court was responsible for imposing double punishment upon the accused for the same offence. Further, the writer infers in the passage that he was unjustly convicted, that he had suffered for his convictions and he assures his audience that he would continue to fight as he had fought in the past for their rights as well. In our view this is a flagrant contempt of Court. We have listened to all that has been urged on behalf of the Advocate by his Counsel. We cannot, however, giving due consideration to all, that he has stated, regard this merely as a technical contempt. The passage clearly shows that no matter what the decision of the High Court is, he is going to repeat the conduct for which he has already been punished and that he has really in effect suffered serious injustice. There can be no doubt that such an aspersion upon the Court amounts to serious contempt of Court. We convict Mr. Ram Mohan Lal of contempt of Court in respect of the passage mentioned in Miscellaneous Case No. 440. We sentence him to a fine of Rs. 50 and we direct that he do pay the Government's costs of these proceedings. Mr. Ram Mohan Lal is ordered to pay all the fines and the costs within two months from this date. Failing to pay the costs and the fine of Rs. 50 imposed in Case No. 437, Mr. Ram Mohan Lal is sentenced to simple imprisonment of one month. In default of the payment of the costs and the fine of Rs. 200 imposed in Case No. 439 Mr. Ram Mohan Lal is sentenced to a period of simple imprisonment of two months. In default of payment of the costs and Rs. 50 fine imposed in Case No. 440, Mr. Ram Mohan Lal is sentenced to undergo a period of simple imprisonment of one month. The

costs of the Government Advocate in each case will be Rs. 80.

In Miscellaneous Cases Nos. 436, 437, 438 and 440 notices to show cause were also issued to Mr. Muhammad Shafi, the proprietor of the "Imperial Press", printers of the manfestoes referred to in these cases. In Case No. 440 notice was also issued to a co-proprietor, Mr. Muhammad Azimuddin. These persons have appeared before us to-day and through their Counsel they have filed statements in Court. In these statements they say definitely that they had no intention to make any aspersion either against the High Court or against the Subordinate Judiciary, that they were unaware that what they were printing contained a contempt of Court and further that if they have unwittingly committed contempt of Court, they offer an unconditional apology.

We take into consideration the fact that the pamphlets in question were printed upon the instructions of a member of the Bar and, therefore, there is some excuse for Mr. Muhammad Shafi and Mr. Muhammad Azimuddin and the fact of their explanation that they were unaware that what they were printing contained anything amounting to a contempt of Court. No doubt it is true that they relied entirely upon the Advocate who gave instructions that nothing was being printed that was contempt of Court. It is not unreasonable that they should have relied upon the fact that they had been instructed to do the printing by an Advocate.

They have undoubtedly in law been guilty of contempt of Court in respect of all the statements except one referred to in Miscellaneous Case No. 438. In view of the unqualified apology which they have tendered and of the other circumstances which we have referred to above, we do not think that in justice the Court should impose any punishment upon them in respect of the offence for which they are guilty. We think, in the circumstances, that a warning is sufficient in their case. In their case the notices will be discharged.

Mr. Ghulam Azhar, proprietor of the City Press, Allahabad, was ordered to show cause in connection with the passage referred to in Case No. 439. He also has tendered an unqualified apology and through his Counsel and his written statement assured the Court that it was not his intention to cast any aspersion upon the Court. In his case also, therefore, we accept the apology and we think that it is unnecessary of impose any punishment on him in respect of the offence of which he has been guilty. We consider that in his case also a warning will be sufficient. We discharge the notice in his case.

N. *Order accordingly.*

PATNA HIGH COURT

Criminal Reference No. 14 of 1934

April 12, 1934

SAUNDERS, J.

GAYA PRASAD SINGH AND OTHERS—PETITIONERS

versus

RAM SAROBER SARAN SINGH AND OTHERS—OPPOSITE PARTIES

Criminal Procedure Code (Act V of 1898), ss. 145, 107—Previous order of Court in land registration case—Weight to be attached to it—Discretion of Magistrate—Interference with, if proper — Keeping case pending till revision against previous order is decided—Propriety of—Duty of Magistrate to receive evidence.

The likelihood of the breach of the peace is sufficient to give the Magistrate jurisdiction. The weight to be attached to a previous order of a Civil or Criminal Court is a question for the consideration of the Magistrate. Where therefore the Magistrate has jurisdiction to proceed under s. 145, Criminal Procedure Code, there can be no interference with his discretion even if the matter might have been more suitably dealt with under s. 107. In such circumstances, however, the case ought not to be kept pending for the decision of the application for revision against the previous orders in a land registration case relating to the land in dispute. The Magistrate should proceed with the case and decide it without avoidable delay so that the property may be restored as soon as possible to the party which was in possession of it. He is bound to receive all such evidence as may be produced. *Parmeshwar Singh* v. *Kailas Pati* (2), applied.

Cr. Ref. from an order of the Sessions Judge, Monghyr, dated March 23, 1934.

Messrs. *S. N. Roy* and *B. N. Rai*, for the Reference.

Messrs. *Baldeo Sahay*, *B. C. De* and *K. Dayal*, against the Reference.

Order.—This is a reference made by the Sessions Judge of Monghyr with regard to proceedings under s. 145, Criminal Procedure Code. between persons to whom a Hindu widow surrendered her late husband's estate and other persons who claimed to be in possession of the property. The proceedings relate to the *baskast* land appertaining to the estate. After the case was started the Magistrate found that the question of the possession of the entire estate had been decided by a Deputy Collector in a land

registration case whose decision had been upheld by the Collector on appeal. As evidence had been taken in that case, the Magistrate did not consider it necessary to hear evidence in his own Court and he proposed to dicide the case in accordance with the Deputy Collector's decision. But as an application for revision of the order of the Deputy Collector was pending, the Magistrate adjourned the case for orders until after the date fixed for the disposal of the application by the Commissioner. I should mention that the property which is the subject of the proceedings had been attached under the second proviso to sub-s. (4) of s. 145.

The learned Sessions Judge recommends that as there are concurrent findings of the Deputy Collector and the Collector in the land registration case in favour of one of the parties, the proceedings under s. 145 should be quashed, and that if there remains any apprehension of a breach of the peace, it may be left to the Magistrate to take action against the other party under s. 107 of the Code. The learned Sessions Judge takes the view that now that the question has been decided by the revenue authorities, it cannot be said that the dispute as to possession is *bona fide*. The decisions of the Calcutta High Court, however, in which this view was taken, were overruled by a Full Bench of that High Court in *Agani Kumar Das* v. *Momtazuddin* (1). In this case the question whether the word dispute in sub-s. (2), of s. 145 refers only to a "*bona fide*" dispute as distinct from a dispute that has already been decided *inter partes* by a competent Court was considered and it was held by Rankin, C. J., that the words "dispute likely to cause a breach of the peace" do not refer only to *bona fide* disputes or only to reasonable dispute. The decision of the Full Bench was that the words "dispute" means actual disagreement existing between the parties at the time of the proceedings under s. 145 even though the question as to the right of possession has already been decided by a Civil Court. A Full Bench of the Patna High Court also held in *Parmeshwar Singh* v. *Kailas Pati* (2), that the likelihood of the breach of the peace was sufficient to give the Magistrate jurisdiction, that the weight to be attached to a previous order of a Civil or Criminal Court was a question for the consideration of the Magistrate. In the present case, therefore, the Magistrate had jurisdiction to proceed under s. 145 and there can be no interference with his discretion even if, as the learned Sessions Judge supposes, the matter might have been more suitably dealt with under s. 107.

I agree, however, with the learned Sessions Judge that the case ought not to be kept pending for the decision of the application for revision by the Commissioner. The Magistrate should proceed with the case and decide it without avoidable delay so that the property may be restored as soon as possible to the party which was in possession of it. But as the Magistrate apparently does not intend to take any evidence and as the Advocate appearing for the party against which the land registration case has been decided state that it is proposed to adduce evidence on the question of the possession of the land to which the proceedings before the Magistrate relate, it becomes necessary for me to observe that, however, great may be the weight which he will eventually attach to the decision of the land registration case, the Magistrate is nevertheless under a legal obligation in the terms of the section:

"to receive all such evidence as may be produced by the parties, respectively, and consider the effect of such evidence."

With these observations the reference made by the Sessions Judge is discharged.

N. *Reference discharged.*

(1) 113 Ind. Cas. 181; A I R 1928 Cal. 610; 48 C L J 193; 32 C W N 1173; 30 Cr. L J 69; 56 C 290.

(2) 35 Ind. Cas. 801; A I R 1916 Pat. 292; 17 Cr. L J 369; 1 P L J 336; 1 P L W 95; (1917) Pat. 1.

ALLAHABAD HIGH COURT

Miscellaneous Case No. 349 of 1934

October 1, 1934

NIAMAT-ULLAH AND ALLSOP, JJ.

JUMNA DAS AND ANOTHER—PLAINTIFFS —APPLICANTS

versus

MISRI LAL AND OTHERS—DEFENDANTS —RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 9—Claim for profits by one co-sharer of an occupancy holding against another—Whether a suit of a civil nature—Co-sharers—Possession of one is possession of all—Agra Tenancy Act (III of 1926), s. 238.

Where one of several co-sharers in an occupancy holding or other tenure is solely in possession, he cannot be considered to be in wrongful possession; nor can the co-sharers suing for profits be said to have been wrongfully dispossessed from the holding or tenure. Possession of one co-sharer is possession of all who should be deemed to be in constructive

possession through the co-sharer who is in actual possession by cultivating the land or by receipt of rents from sub-tenants. A claim for profits by one co-sharer of an occupancy holding against another is a suit of a civil nature and hence under s. 9, Civil Procedure Code, the suit lies in the Civil Court.

Mis. Case from an order of the Collector, Agra, dated July 3, 1934.

Mr. *N. P. Asthana*, for the Applicants.

Judgment.—This is a reference under s. 267, Agra Tenancy Act, by the Collector of Agra. It appears that a suit was instituted by one of several co-sharers of certain occupancy holdings for profits in the Court of the Munsif, Agra, who returned the plaint for presentation to the Revenue Court on the ground that the suit is one which is within the exclusive jurisdiction of the Revenue Court. The learned Munsif made a reference to s. 99, Agra Tenancy Act, (III of 1926), besides s. 230 of the same Act the defendant is not represented in this Court and it is not clear, whether it was on his objection that the learned Munsif returned the plaint for presentation to the proper Court. We do not find anything in s. 99 which may be applicable to the circumstances of this case. Perhaps the learned Munsif thought that the suit was one by a co-sharer in an occupancy holding for compensation for wrongful dispossession by another co-sharer who is holding under the same landlord as the plaintiff. If the learned Munsif was influenced by this consideration, we think that he proceeded on a far-fetched ground. Where one of several co-sharers in an occupancy holding or other tenure is solely in possession, he cannot be considered to be in wrongful possession; nor can the co-sharers suing for profits be said to have been wrongfully dispossessed from the holding or tenure. Possession of one co sharer is possession of all who should be deemed to be in constructive possession through the co-sharer who is in actual possession by cultivating the land or by receipt of rents from sub-tenants.

In our opinion s. 230, Agra Tenancy Act, (III of 1926), is decisive on the point. That section declares that suits and application of the nature specified in the fourth schedule shall be heard and determined by the Revenue Courts, and no Courts other than a Revenue Court shall, except by way of appeal or revision as provided in this Act, take cognizance of any such suit or application or of any suit or application based on a cause of action in respect of which adequate relief could be obtained by means of any such suit or application. We are thus thrown back on Sch. IV, which does not make any mention of a suit by a co-sharer of an occupancy holding against another co-sharer for profits as one which the jurisdiction of the Revenue Court. It follows that the jurisdiction is not ousted by anything in s. 230, or Sch. IV, Tenancy Act. As to whether the civil Court has jurisdiction, there can be no doubt that under s. 9, Civil Procedure Code, it has jurisdiction to try all suits of a civil nature. It cannot be denied that a claim for profits by one co-sharer of an occupancy holding against another is a suit of a civil nature. This being so, the suit was, in our opinion, rightly instituted in the Court of the Munsif.

It appears that the plaint was subsequently filed in a Revenue Court which expressed the opinion that the suit was not cognizable by it. Accordingly the Collector made the present reference under s. 257. We take it that the plaint is still in the Revenue Court which shall return it to the plaintiff for presentation to the civil Court competent to try it. The reference is accordingly answered as above.

N. *Reference answered.*

ALLAHABAD HIGH COURT

Miscellaneous Case No. 512 of 1934

January 9, 1935

NIAMAT-ULLAH AND ALLSOP, JJ.

Musammat QUDSIA JAN—PLAINTIFF—APPELLANT

versus

ZAHID HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS

Agra Tenancy Act (III of 1926), ss. 99, 230, 267—Co-sharer—Suit by co-sharer of ex-proprietary tenure against other co-sharers for share of profits—Suit, if cognizable by Civil Court—Bench sitting in exercise of special jurisdiction conferred by s 267—Conflicting opinions expressed by single Judge of High Court sitting in appeal from Civil Court order, and by Revenue Court—Doubt as to jurisdiction—Reference under s. 267—Competency of—Previous opinion of single Judge—Whether operates as bar.

A suit by a co-sharer of an ex-proprietary tenure against other co-sharers, for his share of the profits, is within the jurisdiction of the Civil Court. *Jumna Das* v. *Misri Lal* (1), followed.

A single Judge of the High Court sitting in appeal or revision from the order of a subordinate Civil Court is a Civil Court within the meaning of s. 267, Agra Tenancy Act For the purposes of s. 267, Agra Tenancy Act, it does not matter that doubt as to jurisdiction arises from conflicting opinions expressed by a Court of Appeal in the exercise of its jurisdiction as a Civil Court, and by the

Revenue Court. Once there is a doubt created by conflicting orders of Civil and Revenue Courts the special jurisdiction of the High Court conferred by s. 267 of the Agra Tenancy Act can be invoked and can be exercised with the result stated in sub-s. (5), s 267. Where a Bench is sitting in the exercise of a special jurisdiction conferred by s. 267, a reference to that Court is competent and the previous order of a single Judge of the High Court on the question of jurisdiction will not be a bar to the exercise of the special jurisdiction by the Bench when the doubt as to jurisdiction has arisen from conflicting opinions expressed by the Single Judge sitting in appeal from the order of a Subordinate Civil Court, and by a Revenue Court.

Order on reference submitted by the Commissioner of Allahabad Division, United Provinces, as per his letter No. 1292, P. O. II, dated September 24, 1934.

Mr. *Hyder Mehdi*, for the Applicant.

Mr. *A. P. Dube*, for the Opposite Party.

Judgment.—This is a reference under s. 267, Agra Tenancy Act, by the Commissioner, Allahabad. The plaintiff instituted a suit against his co-sharers in an ex-proprietary tenure, in the Court of the Munsif, Allahabed, for his share of the profits. The Munsif returned the plaint for presentation to the Revenue Court, holding that the suit was within the exclusive jurisdiction of the latter Court. The plaintiff appealed to the District Judge who took a contrary view and held that the suit had been rightly instituted in the Civil Court. A second appeal was preferred to this Court and came up for hearing before a learned single Judge who treated the appeal as revision on the ground that no appeal lay to this Court. That learned Judge held that the suit was cognizable by the Revenue Court as held by the Munsif. Accordingly he set aside the District Judge's order and restored that of the Munsif. The plaintiff then presented his plaint in the Revenue Court. The Assitant Collector before whom the suit came on for hearing, dismissed it on the ground that the Revenue Court had no jurisdiction. The plaintiff went in appeal to the Court of the Commissioner who has made the present reference under s. 267, Agra Tenancy Act. We are of opinion that the learned Commissioner had adopted the proper procedure in view of the opinion expressed by a learned single Judge of this Court.

It is argued by the learned Advocate for the defendants that the order of the learned single Judge of this Court already referred to is a bar to this Bench taking a contrary view and that whatever may be the correct law on the subject, it must be held for the purposes of this case that the Revenue Court has jurisdiction. We are unable to accede to this contention. Section 267, Agra Tenancy Act, has been enacted to meet the requirements of cases in which conflicting opinions are entertained by Civil and Revenue Courts as regards the proper *forum*. The opening words of that section make it perfectly clear that :

"Where either a Civil or a Revenue Court is in doubt whether it is competent to entertain any suit, application, or appeal, or whether it should direct the plaintiff, applicant or appellant, to file the same in a Court of the other description, the Court may submit the record, with a statement of the reasons for its doubt, to the High Court."

The Commissioner did entertain a doubt and has submitted the case with his own opinion to the effect that the suit is cognizable by the Civil Court. Sub-section (4) of s. 267 further provides that :

"On any such reference being made, the High Court may order the Court either to proceed with the case or, to return the plaint, application or appeal for presentation to such other Court as it may declare to be competent to try the same."

Sub-section (5) contains the mandatory provision that :

"The order of the High Court shall be final and binding on all Courts Subordinate to it."

That a single Judge of this Court sitting in appeal or revision from the order of a subordinate Civil Court is a Civil Court within the meaning of s. 267, Agra Tenancy Act can admit of no doubt. We are sitting not in the exercise of our jurisdiction as a Court of first or second appeal but in the exercise of a special jurisdiction conferred by s. 267, Agra Tenancy Act, which as already stated, clearly declares that such order of this Court is final and binding on all Courts Subordinate to the High Court. For the purposes of s. 267, Agra Tenancy Act, it does not matter that doubt as to jurisdiction arises from conflicting opinions expressed by a Court of Appeal, even this Court in the exercise of its jurisdiction as a Civil Court and by the Revenue Court. Once there is a doubt created by conflicting orders of Civil and Revenue Courts, the special jurisdiction of this Court conferred by s. 267 of the Agra Tenancy Act can be invoked and can be exercised with the result stated in sub-s. (5), s. 267. We are clearly of opinion that the defendants' contention that the order of the learned single Judge of this Court is a bar, has no force.

On the merits of the case much need not be said as this Bench has already

held in a similar case, *viz.*, *Jumna Das* v. *Misri Lal* (1) that the jurisdiction in such cases lies with the Civil Courts. The argument put forward by the learned Advocate for the appellant in reference to s. 99 of the Tenancy Act has been disposed of by our judgment in that case. We need not repeat the grounds on which our decision in that case proceeds.

The result is that we hold that the plaintiff's suit is cognizable by a Civil Court. Accordingly we direct that the plaint be returned to the plaintiff for presentation to the Court of the Munsif East Allahabad, who has jurisdiction to entertain it.

N. *Order accordingly.*

(1) 155 Ind. Cas. 37; A I R 1935 All. 271; (1935) A L J 112.

OUDH CHIEF COURT

Second Civil Appeal No. 146 of 1933
February 21, 1935
NANAVUTIY, J.
Chaudhri AKBAR HUSAIN—
APPELLANT
versus
Musammat HUSAIN JAHAN BEGUM—
PLAINTIFF AND ANOTHER—DEFENDANTS
—RESPONDENTS

Oudh Rent Act (XXII of 1886), s. 7-A—U. P. Land Revenue Act (III of 1901), s. 36—Sir land, gift of, subject to charge of payment of profits as maintenance allowance—Sale—Ex-proprietary rights accruing in favour of donee—Liability of purchaser to pay maintenance allowance—Amount payable—Charge—Holder of property, if personally liable—Transfer of Property Act (IV of 1882), s. 100—Rent—Remission of rent—Whether automatically follows from remission of revenue.

The benefit which the ex-proprietary tenant gets by having ex-proprietary rights created in his once *sir* plots is a benefit which cannot be filched from him by any arrangement or device entered into by him or by any other person. *Raja Moti Chand* v. *Ikram Ullah* (2), applied. [p. 43, col. 1.]

Where *sir* land is gifted subject to the charge that the donee should pay the profits thereof to another as maintenance allowance and the land is subsequently sold giving rise to ex-proprietary rights in favour of the donee, his liability to pay maintenance ceases. After the sale, the purchaser is the only person whom the charge-holder can look to for payment of maintenance allowance and the amount payable is the rent which the purchaser receives from the ex-proprietary tenant and not the rent which the latter receives from his sub-tenants.

When an agreement, in the nature of a family settlement, makes provision for certain maintenance allowances, which should be paid out of the *taluqa*, that agreement does not create any personal liability on the holder of the estate, but creates a charge upon the income of the estate. *Har Narain Das* v. *Rup Kuer* (3), relied on. [p. 43, col. 2.]

Remission of rent automatically follows the remission of revenue. [p. 44, col. 1.]

S. C. A. against an order of the Sub-Judge, Malihabad, Lucknow, dated February 9, 1933, reversing that of the Munsif, Lucknow, dated February 12, 1932.

Messrs. *H. Husain* and *Iqbal Ali*, for the Appellant.

Messrs. *Nazaruddin* and *Abid Husain*, for the Respondents.

Judgment.—These are two connected appeals against an appellate judgment of the learned Subordinate Judge of Malihabad, in the District of Lucknow, partially allowing the plaintiff's appeal and modifying the judgment and decree of the Court of the Munsif of Lucknow, decreeing the plaintiff's suit for recovery of Rs. 318-9-0 with proportionate costs against the defendant No. 2 alone.

The facts out of which these appeals arise are briefly as follows.—One *Musammat* Saidunnissa was *Talukdar* of village Ghazipur in the District of Lucknow. Her name was entered at No. 2 in list I and at No. 2 in List III of the Lists prepared under s. 8 of the Oudh Estates Act, (Act I of 1869). On her death the estate devolved on Chaudhuri Muhammad Husain. On January 18, 1913 Chaudhuri Muhammad Husain executed a will by which he gifted this village to one Ahmad Raza subject to the maintenance allowances granted to the plaintiff Husain Jehan Begam and others. On December 20, 1917 Chaudhuri Muhammad Husain died leaving his grandson Chaudhuri Akbar Husain as his heir. On February 2, 1918 a compromise was arrived at between Chaudhuri Akbar Husain and the heirs of Ahmad Raza, including his father Muhammad Raza, under which village Ghazipur was given to Chaudhuri Akbar Husain, subject to payment of debts and subject also to the payment of the maintenance allowance granted to the plaintiff Husain Jehan Begam, under the will of Chaudhuri Muhammad Husain. On February 20, 1929, in execution of a decree, Nawab Shenshah Begam, defendant No. 2, purchased village Ghazipur at an auction sale, subject to the payment of the maintenance allowance granted to the plaintiff Husain Jehan Begam under the will of Muhammad Husain. The facts connected with this auction sale have been given at length in a Bench decision of the late Court of the Judicial Commissioner of Oudh reported in *Akbar Husain* v. *Shenshah Begam* (1). On December 20,

(1) 83 Ind. Cas. 854; 27 O C 56; 11 O L J 82; A I R 1924 Oudh 302.

1930, the Deputy Commissioner of Lucknow, in virtue of the provisions of s. 36 of the land Revenue Act, fixed the ex-proprietary rent to be paid by Chaudhuri Akbar Husain in respect of the 43 *bighas* 14 *biswas* of his *quondam sir* land in village Ghazipur at Rs. 264-10-2. On December 3, 1931, Husain Jehan Begam brought the present suit on the basis of the will of Chaudhuri Muhammad Husain, dated January 18, 1913, for recovery of Rs. 930 alleging that both defendants, namely, Chaudhuri Akbar Husain and Nawab Shenshah Begam, were liable to her for the profits of the *sir* land of 21 *bighas* 9 *biswas* in village Ghazipur as also for the arrears of maintenance allowance for two months, at the rate of Rs. 15 per mensem. The plaintiff claimed three years profits of the *sir* land extending from September 20, 1928, to September 20, 1931. The defence of Chaudhuri Akbar Husain, defendant No. 1, was, that he was no longer the proprietor of village Ghazipur or any portion thereof during the years in suit, that he was merely an ex-proprietary tenant under the Oudh Rent Act, and that, therefore, no liability attached to him for payment of the plaintiff's maintenance allowance or for payment of any profits from his once *sir* plots. He further pleaded that no decree for personal liability could be passed against him, as the maintenance granted to the plaintiff by his grand-father created a charge on village Ghazipur and as such, was to be paid by the proprietor of the village during the years in suit. The learned Munsif of Lucknow, who tried the suit, accepted the contention of defendant No. 1, and decreed the plaintiff's suit only against the auction-purchaser, Nawab Shenshah Begam defendant No. 2, in respect of a sum of Rs. 318-9-0 and dismissed the plaintiff's suit as against defendant No. 1, Chaudhuri Akbar Husain. The plaintiff went up in appeal, and the learned Subordinate Judge of Malihabad, in the District of Lucknow, gave the plaintiff a decree against both defendants, holding that defendant No. 1, Chaudhuri Akbar Husain, was liable to pay one-third of the sum decreed against defendant No. 2, Shenshah Begam, on the ground that the 4 annas in the rupee deduction allowed to defendant No. 1 in respect of his ex-proprietary holding should, in its entirety, be handed over to the plaintiff. The lower Appellate Court also made defendant No. 1 personally liable in respect of the amount decreed against him in favour of the plaintiff. Defendant No. 1, Chaudhuri Akbar Husain, has come up in second appeal against this finding of the learned Subordinate Judge. His appeal is No. 146 of 1933. The plaintiff Husain Jehan Begam has also appealed, and her appeal is No. 160 of 1933. Her prayer in her appeal is that the entire amount of rent realised from the sub-tenants of the once *sir* plots should be decreed to her.

I have heard the learned Counsel of all three parties at some length, and have examined the evidence on the record. I will first take up the appeal of defendant No. 1 (No. 146 of 1933). In the first place it was strenuously argued on behalf of Chaudhuri Akbar Husain that the lower Appellate Court acted contrary to law in holding that a decree for profits of *sir* land could be passed against an ex-proprietary tenant when that ex-proprietary tenant had lost all proprietary rights in the land in dispute. I have examined the will of Chaudhuri Mohammad Husain. It is marked Ex. I. This will is the foundation of the plaintiff's title. The last two lines of para. 1 of this will run as follows:

"*Aur har shaks mazur ki rakam go zara mukarara bar jumla jaedad mundarje dafa* 13 *wasiat name haza wa amdani jumla jaedad mundarje dafa* 13 *mazkur par jo Ahmad Razakur ko basaria vasiyatnama haza zer bar gozara hai mazur di gai hai, rahe*"

This clause obviously creates charge on village Ghazipur in respect of the payment of the maintenance allowance granted in favour of the plaintiff Husain Jehan Begam. In another portion of the will occurs the following passage in respect of the maintenance allowance granted to the plaintiff Hussin Jehan Begam:—

"*Mublig* 15 *rupya mahwar jo mublig* 180 *rupya salana hota hai, main munafa* 21 *bigha* 9 *biswas arazi jaribi sir bandobast* 1212 *Fsli,, bila lagan jo mundarje dafa* 13 *vasiyat haza hai yeh rakam va arazi mazkur ki amadani hin hayati mukarar ki gai hai*".

This clause in the will shows that the plaintiff Husain Jehan Begam is not only to receive a cash allowance of Rs. 180 per annum, but also the profits of the 21 *bighas* 9 *biswas* of *sir* land in village Ghazipur. The plaintiff claimed Rs. 300 a year as the rents actually realised from the sub-tenants by the proprietor in respect of this *sir* land. It is admitted in para 5 of the plaint that the 21 *bighas* 9 *biswas* of *sir* land mentioned in the will of Chaudhari Mohammed Husain has now been found on measurement to be only 20 *bighas* 10 *biswas*, and that the plaintiff only claims profits in respect of this area of *sir* land. Exhibit B-1 is the copy of the judgment of the Assistant Collector *Sheikh* Mohamad Husain dated

December 20, 1930, fixing Rs. 264-10-2 as the ex-proprietary rent of the entire *sir* area of 43 *bighas* 14 *biswas* in village Ghazi pur, and declaring Chaudhari Akbar Husain defendant No. 1, as the ex-proprietary tenant of these 43 *bighas* 14 *biswas*. The trial Court has held that the proportionate ex-proprietary rent from the 21 *bighas* 9 *biswas* or 20 *bighas* 10 *biswas* in suit comes to Rs. 134-8-5. Section 7-A of the Oudh Rent Act lays down that every proprietor or under-proprietor whose proprietary or under proprietary rights as the case may be, in a *mahal* or any portion thereof, whether in any share thereion or in any specific area thereof, are transferred, on or after the first day of January 1902, either by foreclosure or sale in execution of a decree or order of a Civil or Revenue Court, or by voluntary alienation, otherwise than by gift or by exchange between co-sharers in the *mahal*, shall become a tenant with a right of occupancy in his *sir* land, and in the land which he has cultivated continuously for 12 years at the date of the transfer, and shall be entitled to hold the same at a rent which shall be four annas in the rupee less than the fair and equitable rate payable by statutory tenants for land of the same class or classes of soil; and s. 36 of the Land Revenue Act, (Act III of 1901), lays down that when a right of occupancy has been created under the provisions of s. 10 of the North Western Provinces Tenancy Act, II of 1901, or s. 7-A of the Oudh Rent Act XXII of 1886, as the case may be, in favour of an ex-proprietary tenant, the Collector shall in the course of the mutation proceedings under s. 35, or, if more convenient in a separate, proceeding pass an order specifying the land in which such occupancy right has been created and fixing the rent payable, therefore, in accordance with the provisions of those sections.

It is thus clear that defendant No. 1 Chaudhari Akbar Husain has not in any way attempted to defraud the plaintiff, but has by statutory law, acquired ex-proprietary rights in his once *sir* plots, and is not liable to pay any portion of the benefit conferred upon him by statute to the plaintiff, who has been granted a maintenance allowance under the will of Chaudhari Muhammad Husain. In *Raja Moti Chand* v. *Ikram Ullah* (2), their Lordships of the Privy Council discussing the policy of Act II of 1901, delivered themselves as follows:—

"It appears to their Lordships that it cannot be doubted that the policy of III of 1901 is to secure and preserve to a proprietor whose proprietary rights in a *mahal* or any portion of it are transferred otherwise than by gift or by exchange between co-sharers in the *mahal* a right of occupancy in his *sir* lands and in the land which he has cultivated continuously for twelve years at the date of the transfer, and that such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee. The policy of the Act is not to be defeated by any ingenious devices, arrangments or agreements between a vendor and a vendee for the relinquishment by the vendor or his *sir* land or land which he has cultivated continuously for twelve years at the date of the transfer, for a reduction of purchase money on the vendor's failing or refusing to relinquish such lands or for the vendor being liable to a suit for breach of contract on his failing or refusing to linquish such lands. All such devices arrangements, and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any Civil Court or in any Court of Revenue."

It is thus clear that Chaudhari Akbar Husain could not, even if he whished, have given up his ex-proprietary rights in favour of the plaintiff Husain Jehan Begam.

The learned Counsel for the plaintiff-respondent has argued that whatever may be the changed position of Chaudhary Akbar Husain, he is still in possession of his once *sir* plots, and as such, he is legally liable to pay the plaintiff the profits that accrue to him from the cultivation of his once *sir* land. There is no force in this contention. The benefit which Chaudhari Akbar Husain as an ex-proprietary tenant of his once *sir* plots in village Ghazipur, derives by having his ex-proprietary rent fixed at a favourable rate cannot be legally taken away from him. In my opinion the contention of the defendant appellant Chaudhari Akbar Husain that as he is no longer the proprietor of village Ghazipur, he is not liable to pay anything towards the maintenance allowance of the plaintiff Husain Jehan Begam, is sound. The liability to pay the plaintiff's allowance arose in virtue of Chaudhari Akbar Husain being at that time the proprietor of village Ghazipur. The ownerships of Chaudhari Akbar Husain has now been extinguished by the auction sale in favour of Nawab Shenshah Begam, and the plaintiff can now only look to the defendant No. 2, Nawab Shenshah Begam, for the payment of the maintenance allowance granted to her by the will of Chaudhuri Muhammad Husain. With the extinction of the title of Chaudhuri Akbar Husain

(2) 39 Ind. Cas. 454; 44 I A 54 at p. 58; 15 A L J 150; 5 L W 388; 21 M L T 267; 32 M L J 383; 21 C W N 616; 19 Bom. L R 433; 39 A 173; 26 C L J 24; (1917) M W N 453 (P C).

as properitors of village Ghazipur his liability to pay the maintenance allowance of Husain Jehan Begam also ceased.

The learned Counsel for the plaintiff-respondent finding that he was on very insecure ground in his contention that defendant No. 1 should be made liable to pay the plaintiff her maintenance allowance, has argued that at any rate defendant No. 2, Nawab Shenshah Begam should be made to pay to the plaintiff the entire sum which the sub-tenants of the once *sir* plots paid to the landlord. There is no force in this contention either. The new proprietor Nawab Shenshah Begam is only liable to pay the entire ex-proprietary rent which she realises from new ex-proprietary tenant, namely, Chaudhuri Akbar Husain. The rent which the sub-tenants pay to the ex-proprietary tenant does not go into the pockets of the new *zemindar*. The difference between the rents paid by the sub-tenants to the ex-proprietary tenant and that paid by the ex-proprietary tenant to the *zamindar* is no doubt very great, but the plaintiff cannot under the terms of the will of Chaudhuri Muhammad Husain, get any share out of that amount. According to the terms of the will of Chaudhuri Muhammad Husain, only the profits accruing to the *zamindar* of village Ghazipur from these once *sir* plots are to be paid to her. Under the altered state of things the profits accuring to the new *zamindar* Nawab Shenshah Begam in respect of these plots are far less than what the former *zamindar* realised from these plots. This is, however, not due to any fault of Nawab Shenshah Begam, but is due to the creation of ex-proprietary rights in the once *sir* plots by operation of law, and the benefit which the ex-proprietary tenant gets by having ex-proprietary rights created in his once *sir* plots is a benefit which as pointed out by their Lordships of the Privy Council in the ruling cited above, cannot be filched from him by any arrangement or device entered into by him or by any other person. No doubt, the plaintiff has a grievence that through no fault of hers her income from the profits of these once *sir* plots has been reduced from Rs. 300 a year to a little more than Rs. 130 a year, but that result has been brought about through no fault of the defendants, and the plaintiff Husain Jehan Begam, like the new proprietor, Nawab Shenshah Begam, must submit to the creation of ex-proprietary rights in these *sir* plots by statute law.

I am, therefore, clearly of opinion that the plaintiff's suit against defendant No. 1 Chaudhuri Akbar Husain ought to have been dismissed as was done by the learned Munsif of Lucknow. I entirely fail to understand the reasoning of the lower Appellate Court by which it has sought to make the ex-proprietary tenant liable for the maintenance allowance which under the will of Chaudhuri Muhammad Husain was only recoverable from the proprietor of village Ghazipur, and which, under the same will, was made a charge on that village.

I come next to discuss the appeal of the plaintiff Husain Jehan Begam (No. 160 of 1933). The first contention urged on behalf of the plaintiff-appellant, Husain Jehan Begam, is that she is entitled to the entire profits derived by defendant No. 1 from his once *sir* lands. This is an entirely mistaken view of the plaintiff. What she is entitled to recover is what the new *zamindar* Nawab Shenshah Begam realises from these once *sir* plots. The new *zamindar*, N. Shenshah Begam, only receives Rs. 134-8-5 a year from the new ex-proprietary tenant Chaudhuri Akbar Husain, and that amount the defendant No. 2 is quite willing to hand over to the plaintiff. Whatever profits are realised by defendant No. 1 from his sub-tenant cannot be touched by the plaintiff, because there is no privity of contract between Chaudhuri Akbar Husain, the ex-proprietary tenant, and the plaintiff.

The learned Counsel for the plaintiff-appellant has also argued that a personal decree should have been passed against Nawab. Shenshah Begam in respect of the amount decreed against her, and in support of this contention the learned Counsel for the plaintiff-appellant has cited a ruling reported in *Har Narain Das* v. *Rup Kuar* (3). In my opinion that ruling does not support the contention of the learned Counsel for the plaintiff-appellant. In fact it clearly holds that when an agreement, in the nature of a family settlement, makes provision for certain maintenance allowances, which should be paid out of the *taluqa*, that agreement does not create any personal liability on the holder of the estate, but create a charge upon the income of the estate. The plaintiff having got a decree against defendant No. 2 can, in execution of her decree attach and sell

(3) 138 Ind. Cas. 128; 9 O W N 291; A I R 1932 Oudh 168; Ind. Rul. (1932) Oudh 299.

village Ghazipur for the realization of the amount.

The plaintiff has also in her memorandum of appeal urged that the lower Appellate Court ought to have allowed interest by way of damages to her. This plea was not seriously pressed before me, and in my opinion, there is no force in it. It was not even claimed in the lower Appellate Court.

As regards the contention that the lower Appellate Court erred in law in granting remission of rent in favour of the defendants, I find from the judgment of the lower Appellate Court that no evidence was produced by the plaintiff to support her contention that any such remission of rent was granted to the ex-proprietary tenant. Remission of rent automatically follows the remission of revenue. This plea also was not seriously argued before me.

As regards the last plea taken in the memorandum of appeal, namely, that the lower Court ought to have held that the amount claimed was a charge on the entire village of Ghazipur, I am of opinion that this contention is correct. The will Ex. 1, itself clearly states that the maintenance allowance granted to the plaintiff Husain Jehan Begam will be a charge upon the entire village of Ghazipur, and I therefore, modify the order of the lower Appellate Court, and declare that if defendant No. 2, Nawab Shenshah Begam, fails to pay the amount decreed against her within three months from the date of the order of this Court, the plaintiff will be entitled to realise the sum by attachment and sale of the entire village of Ghazipur.

The result is that, with the slight modification noted above, I dismiss the appeal of the plaintiff with costs, and order that her suit against defendant No. 1 stand dismissed. The appeal of defendant No. 1 (Second Civil Appeal No. 146 of 1933) is allowed with costs, against plaintiff-respondent alone.

N. *Appeal dismissed.*

ALLAHABAD HIGH COURT

First Civil Appeal No. 13 of 1934

September 27, 1934

SULAIMAN, C. J. AND BAJPAI, J.

FIRM PUTTU LAL KUNJI LAL—PLAINTIFFS—APPELLANTS

versus

FIRM B. JAGANNATH—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 85—Open account, nature of—Mutual account, essentials of—Balance never standing in favour of defendant—Account, if mutual—Art. 85, if applies

An open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise consisting of a series of transactions. An account current is an open or running account between two or more parties or an account which contains items between the parties from which the balance due to one of them is, or can be, ascertained. Such an account comes under the term of an open account, in so far as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having items on one side only, though made up of debits and credits. *Ram Pershad* v. *Harbans Singh* (1) and *Hirada* v. *Gadigi* (2), relied on.

Where the account between the parties was open and current, but there was no occasion when the balance stood in favour of the defendant, and it was clear from the nature of the dealings between the parties that there was no possibility of the balance standing in favour of the defendant:

Held, that although it was an open and current account, inasmuch as it had not been closed, it could not be said to be mutual and hence Art. 85, Limitation Act, did not apply.

Mr. *P. M. L. Verma*, for the Appellants.

Mr. *Panna Lal*, for the Respondents.

Judgment.—This is an appeal from an order of remand and the appeal is directed to the decision by the Court below that the plaintiffs' claim with the exception of a small sum of Rs. 49-13-3 is barred by time. The plaintiff alleged in his plaint that he had a firm of commission agents dealing in betel leaves at Mohoba in the District of Hamirpur, and that the defendant was a firm dealing in betel leaves in the city of Aligarh. The plaint went on to say that the defendant purchased betel leaves from the plaintiff's firm between November 17, 1926, to November 17, 1928, of the value of Rs. 10,095-1-9 and paid Rs. 9,426-7-6 up to November 16, 1928, and as such a balance of Rs. 668-10-3 was due to the plaintiff from the defendant under account. This sum together with interest was claimed in the plaint.

The lower Appellate Court has held that as the suit was instituted on August

10, 1931, the claim for the price of articles supplied before August 10, 1928, was barred by time. There were two other dates which were considered - one was November 16, 1928, when the defendant sent Rs. 50— to the plaintiff and the other was November 17, 1928, when the plaintiff sent betel leaves of the value of Rs. 49-13-3 to the defendant. The Court below held that the plaintiff :

"had the option to credit the sum of Rs. 50 the entire balance due on November 16, 1928"

and, therefore, the sum of Rs. 49-13-3 the price of the goods supplied on November 17, 1928, was within time on the date of the institution of the suit. In the appeal before us it is contended that the plaintiffs' suit is not barred by time for any amount. The first submission is that this is a suit for the balance due on a mutual open and current account under Art. 85, Limitation Act, and, therefore, the time from which the period begins to run is the close of the year in which the last item admitted or proved is entered in the account. We have come to the conclusion that the account between the parties was neither, on the pleadings nor on the evidence produced by the plaintiff a mutual, open and current account. The facts are that the plaintiff supplied betel leaves to the defendant from time to time and the defendant paid the price thereof from time to time and this went on up till November 1928. Before November 1928 there were transactions up till May 1928, and, therefore, if the account was not mutual, open and current, the transactions that took place up till May, 1928, could not be considered in the present suit because they would be barred by time. In *Ram Pershad* v. *Harbans Singh* (1), Mukerji, J., says:

"Now it is well settled that an open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise consisting of a series of transactions. An account current is an open or running account between two or more parties or an account which contains items between the parties from which the balance due to one of them is or, can be ascertained from which it follows that such an account comes under the term of an open account, in so far as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having items on one side only, though made up of debits and credits."

In support of these propositions the learned Judge referred to the judgment of Holloway, J., in *Hirada* v. *Gadigi* (2), where that learned Judge observed that:

"in order that accounts might be mutual, there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

We agree with the above observations. Applying the test laid down therein we have got to see whether the accounts between the parties can be said to be a mutual, open and current account. It may be conceded that it was an open and current account inasmuch as it had not been closed, but it cannot be said to be mutual. The plaintiff in his statement before the Court said that there never was an occasion when the balance stood in favour of the defendant and from the nature of the dealings it is clear that there never was a possibility of the balance standing in favour of the defendant. For all practical purposes the plaintiff purchased betel leaves on behalf of the defendant and sent them to the defendant. The defendant used to pay the price thereof from time to time to the plaintiff, and as mentioned before, the accounts never revealed that the defendant paid more than what was due to the plaintiff. Reliance was placed by the learned Counsel for the appellant on the case of *Din Dayal* v. *Pearey Lal* (3). The facts of that case were entirely different. The plaintiffs there were commission agents and they after having obtained some margin money purchased and sold grain on behalf of the defendants with the result that on occasions the balance stood in favour of the defendants when the transaction resulted in a profit, and at others it stood against the defendants when the transaction resulted in a loss. At the time of the institution of the suit there was a great deal of loss and the plaintiffs, therefore, brought the suit for the recovery of that amount. It was held that the parties stood to each other in a dual relationship and there was a mutuality of dealings and that the suit was within time under Art. 85, Limitation Act. This case, therefore, does not help the plaintiff and we have no hesitation in holding that Art. 85, Limitation Act, does not apply to the present case.

It was then contended that Art. 83 was applicable but that relates to a

(1) 6 O L J 158.
(2) 6 M H C R 142.
(3) 108 Ind. Cas. 694; A I R 1928 All. 236; 50 A 645; 26 A L J 353.

contract to indemnify, and in the present case, there was no such contract between the parties nor can Art. 115 apply, for the present suit cannot be said to be a suit for compensation for the breach of any contract. It is a suit for the recovery of a certain sum of money due for articles supplied to the defendant. A lukewarm argument was advanced before us to the effect that Art. 52 would be applicable to the facts of this case, but it is clear that there was no fixed period of credit in the present case and that article has no application.

The main contention of the plaintiff was that the dealing between the parties was a continuous dealing and, therefore, there was only one cause of action which cannot be divided. Reliance in this connection was placed upon the case of *Kedar Nath* v. *Dinabandhu Saha* (4). The basis of the decision in this case was that the claim was not barred by limitation because of the application of the proviso to s. 20, Limitation Act. It was held that where a cheque is signed by the debtor and paid in part payment of the principal of a debt, the cheque being subsequently signed, the proviso to s. 20, Limitation Act, was complied with and the suit was within limitation. It was not necessary to decide anything further but their Lordships towards the end of their judgment relied upon the case of *Bonsey* v. *Wordsworth* (5), at p. 334* and they quoted the following passage from that judgment:

"Where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided."

The English case is not an authority for the proposition that for purposes of limitation, in the case of a continuous demand, the whole forms but one cause of action. The question there, was a question of jurisdiction, and it was held that in a case like this although a part of the cause of action might arise in a different place, for purposes of jurisdiction, the entire cause of action must be deemed to be one. We are not prepared to extend the principle contained therein to a question of limitation more especially when we find that we have got to decide the case on the basis of a legislation which was enacted in the year 1877 long after 1856. For the same reasons we are not prepared to follow the case of *Najan Ahmed* v. *Salemahomed* (6).

The case which is very similar to the acts of the present case is *Abdul Aziz* v. *Muna Lal* (7). It was held there that in the case of a tradesman's account for goods sold and delivered to the customer from time to time, in respect of each item, the liability to pay and the period of limitation commences on the date of the delivery of that particular item. In a suit by a tradesman for the price of goods sold and delivered from time to time, the customer having from time to time made payments without specifying any particular item for which the payments were made, the limitation was governed by Art. 51 in respect of each item as delivered. The plaintiff in a case like this is, of course entitled to appropriate the payments to the earlier items in the account but not to credit them to the entire balance due up to date in the sense of saving limitation for each and every item. This is what has been done by the lower Appellate Court in the present case. The item of Rs. 50 has been allowed to be credited towards earlier liabilities but the suit for the remaining balance has been held to be beyond time on the ground of limitation. There is no force in this appeal and is dismissed with costs.

The defendant has filed cross-objections regarding the sum of Rs. 50. We have held already that the Court below was right in allowing the plaintiff to appropriate this sum towards the earlier purchases. There was no specification by the defendant when he made this payment that it should be applied towards any particular debt and the plaintiff was therefore justified in appropriating it towards an earlier account. The mere fact that there is some similarity between the figure of Rs. 50, the amount paid by the defendant, and the figure of Rs. 49-13 3 the price of the goods supplied does not show in the absence of any other evidence that this sum had to be credited towards the purchase of November 17, 1928, and could not be appropriated towards

(4) 31 Ind. Cas. 626; A I R 1916 Cal. 580; 42 C 1043; 19 C W N 724.

(5) (1856) 18 C B 525; 25 L J C P 205; 2 Jur (N. S.) 494; 4 W R 566; 107 R R 318.

*Page of (1856) 18 C. B.—[*Ed.*]

(6) 77 Ind. Cas. 943; A I R 1923 Bom. 113; 24 Bom. L R 998.

(7) 63 Ind. Cas. 435; A I R 1921 All. 325; 19 A L J 555.

an earlier liability at the option of the plaintiff.

There is no force in the cross-objections and we dismiss them also with costs.

Appeal and Cross-objections dismissed.

N.

PATNA HIGH COURT

Second Civil Appeal No. 852 of 1931
March 7, 1934
WORT AND DHAVLE, JJ.
ABDUL LATIF MIAN—PLAINTIFF —APPELLANT
versus
DEBI MAHTON—DEFENDANT —RESPONDENT.

Registration Act (XVI of 1908), ss. 49, 17—Transfer of Property Act (IV of 1882), s. 55—Unregistered agreement of sale—Deed not operating as transfer of any interest in immovable property—Suit for specific performance—Document, admissibility of.

An unregistered agreement for sale of immovable property of value of more than one hundred rupees but not operating as a transfer of any interest in the property, can be used in evidence in an action for obtaining specific performance of the contract. *Vyravan Chetti* v. *Subramanian Chetti* (1), *Dayal Singh* v. *Indar Singh* (2), *R. R Skinner* v. *Robert Hercules Skinner* (3), *Ramling Parvattya Samble* v. *Bhagvant Sambhvappa Kathale* (4) discussed.

S. C. A. against a decision of the District Judge, Saran, dated January 27, 1931.

Messrs. *Khurshaid Husnain*, *Syed Ali Khan* and *J. C. Sinha*, for the Appellants.

Mr. *Hareshwar Prasad Sinha*, for the Respondent.

Wort, J.—This case has been referred to a Division Bench for decision. The question which arises is whether an unregistered agreement for sale is admissible in evidence in an action for specific performance. The learned Judge in the Court below reversing the decision of the trial Court came to the conclusion that it was inadmissible in the plaintiff's suit.

In dealing with the matter two principal questions will have to be considered, one is the construction of the agreement itself and the other the provisions of the Registration Act, ss. 17 and 49. Under s. 17, Registration Act, certain documents are required to be registered amongst which will be the agreement before us if it is to be construed as a conveyance in contradistinction to a mere agreement for sale of the property concerned. One of the exceptions to the requirements, which I have mentioned is found in sub-s. (2), cl. (*v*) which provides:

"Any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest, etc., but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title, or interest."

Section 49 as is well-known provides that a document which is required to be registered under s. 17 shall not:

"affect any immovable property and shall not be received in evidence if it is unregistered."

By the proviso enacted by Act XXI of 1929 an unregistered document affecting immovable property required by the Act or the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance. One of the questions which might have arisen in this case, had the view which I hold not been different, would have been whether the proviso which I have just read is to be considered as retrospective. The agreement which was dated February 15, 1928, after certain recitals states:

'And also with the advice of and in consultation with my well-wishers fixed the price for the absolute sale of 11 *kathas* and 16 *dhurs* of *bakasht* land as per details given below lying in *Mauza* Musahri, etc."

It then states the price and adds:

"On receipt of Rs. 300 in cash in one instalment in one lump sum from the hand and asset of Abdul Latif Mian, etc. I do execute this deed of contract and make a trustworthy declaration that I shall, within three months, execute and get registered a deed of sale in respect of the land entered in this deed of contract."

There is nothing in the agreement which would in any way modify or affect the provision which I have just read, namely, that the vendor undertook that within three months he should get registered a deed of sale, and it is not seriously disputed that the agreement comes within the exception provided by sub-s. (2), cl. (5), s. 17, Registration Act. But it is by reason of some of the final clauses in the agreement that it is argued that the agreement requir-ed registration as "effecting" immovable property. The provision referred to is to this effect:

"I, the declarant, mortgaged, hypothecated and pledged the land entered in this deed of contract, so that should I execute any deed of any kind whatsoever, deed of sale, *rehan*, etc, in respect of the land entered in the deed of contract, the same shall be treated as null and void and inoperative. I therefore give these few words in writing, etc"

It is contended by the respondent that these clauses affect the immovable property either as a charge or mortgage. The learned Judge in the trial Court treated this clause as collateral and in fact redundant, to use his words. It seems to me quite clear, although the construction of that

clause is not without considerable difficulty, that it can be treated as a charge in respect of the earnest money which was paid on account by the purchaser, as is contended by the learned Advocate on behalf of the respondent. It clearly does not come within the definition of "charge" given in s. 100, Transfer of Property Act, and it seems to be very clear that it cannot be construed as a mortgage although that word is used in one of the clauses to which I have referred. It is a matter of considerable difficulty to place a grammatical construction upon the clauses, but, after careful consideration it seems to me to be reasonably clear that what the vendor intended was to enter into a covenant similar to a covenant which is usually found in deeds of this kind against incumbering or selling the land, after having once sold it to the purchaser under the agreement.

Mr. Khurshaid Husnain, who appears on behalf of the appellant, relied upon a decision of the Judicial Committee of the Privy Council in *Vyravan Chetti* v. *Subramanian Chetti*, (1). Reliance has been placed upon this authority on the assumption that the argument of the learned Advocate who appears on behalf of the respondent is well founded that the clauses to which I have just referred in fact in law "affect" immovable property. The matter under consideration in the case before their Lordships of the Judicial Committee: *Vyravan Chetti* v. *Subramanian Chetti* (1), was an agreement by a mortgagee of a certain property. One clause in particular had to be construed and Lord Bukmaster in delivering the opinion of the Judicial Committee made these observations:

"The clause is open to two interpretations. It may be that the provision that the rights, both prior and subsequent, should stand on the footing of equality, is explained and limited by the following words, which state that the amounts of realization shall be divided and appropriated in equal halves, or it may mean that two separate and distinct results are effected by the clause first, that the rights should stand on a footing of equality; and, secondly, that the proceeds should be equally divided. Whichever interpretation is taken there is no objection to the lack of registration in such proceedings as those out of which this appeal has arisen, for, if the whole effect of the agreement is to provide merely that the realized money is to be divided in equal shares then there is nothing in this agreement which requires to be registered, and if, on the other hand, there are two distinct provisions, the one relating to rights of property and the other with regard to the division of the realization of moneys then, as these proceedings relate merely to the question of the realized money, it need not be registered for the purpose of being given in evidence in this suit:"

in other words, their Lordships construed the separate clauses assuming that they were separate clauses dealing with separate rights, and that in enforcing the one to which the Registration Act did not apply, the document by which these rights were affected was admissible in evidence.

It is said, therefore, that that part of the contract which was merely an agreement for sale of the property was an undertaking to execute and register a deed of sale and consequently that part is admissible in evidence in this suit for specific performance. The respondent, however, relies on the case of *Dayal Singh* v. *Indar Singh* (2). In that case the appeal arose out of an action for specific performance. An agreement for sale of the property was before their Lordships for consideration and the question which was raised, was, whether the agreement was in effect a conveyance of property or whether it was a mere contract coming within the exception in s. 17, Registration Act, sub-s. (2), cl. (5) and their Lordships expressed their opinion in these words:

"They will assume without deciding that taking the terms of the Act of 1877 alone the judgments of the Courts below were right in holding that the present agreement was an agreement to sell and not a sale, and was consequently exempted under s. 17, sub-s. (2), cl. (*v*) which corresponds with s. 17 (*h*) of 1877."

But they went on to say that a point had escaped the attention of the Courts below. They referred to s. 55, Transfer of Property Act, and went on to hold that by reason of that section the lien which was created affected immovable property and therefore did not allow of the application of s. 17, sub-s. (2), cl. (5). It is difficult to understand the decision of their Lordships after a consideration of s. 55, Transfer of Property Act, which on its very words apply only to those cases in which the ownership of the property had passed to the purchaser, and if, as their Lordships assumed, the agreement came within the exception in s. 17, Registration Act, then it was an agreement under which the ownership of the property had not passed to the purchaser and therefore could not come under s. 55, Transfer of Property Act. The effect of this decision, however, has been dealt with by s. 2, Registration

(1) 56 Ind. Cas. 642; A I R 1920 P C 33: 47 I A 188; 43 M 660; (1920) M W N 368; 18 A L J 726. 39 M L J 37; 12 L W 143; 24 C W N 1053; 22 Bom L R 1357 (P C).

(2) 98 Ind. Cas. 508; A I R 1926 P C 94; 53 I A 214; 24 A L J 807; (1926) M W N 602; 3 O W N 631: 24 L W 396; 44 C L J 97; 7 P L T 661; 28 Bom. L R 1372; 51 M L J 788; 31 C W N 125; 28 P L R 10 (P C).

(Amendment) Act, II of 1927, which is to the effect that:

"A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money."

It was by reason of the fact that a part of the purchase money had been paid in *Dayal Singh* v. *Indar Singh* (2), that their Lordships held that the lien arose by the operation of s. 55, Transfer of Property Act. The explanation which has been added is clearly retrospective, but equally clearly does not deal with those contracts in which a lien has been specially created as the words of the explanation are:

"by reason only of the fact that such document contains a recital of the payment of any earnest money."

Dayal Singh v. *Indar Singh* (2), therefore, will still be an authority for the contention that a specific charge created would affect immovable property within the meaning of s. 49, Registration Act. But as I have said the answer to the appellant to this is the case of *Vyravan Chetti* v. *Subramanian Chetti* (1).

There is a further decision of their Lordships of the Judicial Committee in the case of *R. R. Skinner* v. *Robert Hercular Skinner* (3). Reliance was placed upon this case by the respondent. There again it was an action for specific performance and in construing the agreement their Lordships came to the conclusion that it was an instrument which affected immovable property and, therefore, was registrable and could not be received in evidence. Particular reliance has been placed upon the observations made towards the end of the judgment which was delivered by Sir George Lowndes, the words are these:

"In the present case the document under consideration in addition to creating an interest in the immovable property concerned provides as one of the terms and, therefore, as an integral part of the transfer, that the vendor should, if the vendee so requires, execute a registered sale deed, and it is contended for respondent No. 1, that, notwithstanding the non-registration he can sue upon this agreement putting the document in evidence as proof of it. Their Lordships are clearly of opinion that this is within the prohibition of the section. They think that an agreement for the sale of immovable property is a transaction "affecting" the property within the meaning of the section inasmuch as if carried out it will bring about a change of ownership."

Then reference is made to the exception in s. 17, Registration Act and then is added.

"In the face of this provision to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appears to their Lordships to be little more than an evasion of the Act."

The words which are particularly relied upon as I have said are:

"They think that an agreement for the sale of immovable property is a transaction affecting the property within the meaning of the section."

In my judgment it cannot be supposed that their Lordships meant that any contract or any agreement for sale of immovable property whether another document which was to be executed or not and which would convey the property to the purchaser was intended. The statement of Sir George Lowndes has to be read in conjunction with the reference made a moment later to the exception under s. 17 and in any event as their Lordships came to the conclusion that the contract was in fact a conveyance to transfer the ownership of the property to the purchaser, the case could not have come within cl. (5), sub-s. (2), s. 17. In my opinion the case of *R. R. Skinner* v. *Robert Hercules Skinner* (3) does not stand in the way of the plaintiff-appellant in this case.

There does appear to be some conflict if I may say so with respect to their Lordships of the Judicial Committee of the Privy Council between *Dayal Singh* v. *Indar Singh* (2), and the case in *Vyravan Chetti* v. *Subramanian Chetti* (1). But the matter before us can be disposed of on the consideration which I have already expressed that is to say that the agreement before us is an agreement coming within the exception to s. 17, Registration Act, and the clause at the end of the agreement which I have construed as a covenant not to incumber the property in no way modifies that decision.

In my judgment, therefore, this document coming as it does within the exception to s. 17 was admissible in evidence and the decision of the learned District Judge on this point was, therefore, wrong. I would allow the appeal, set aside the judgment of the learned District Judge, and restore the judgment of the trial Court. The appellant is entitled to his costs throughout. The cross-objection is dismissed.

Dhavle, J.—I agree. If upon a true construction of the deed upon which specific performance is sought we find that it does

(3) 119 Ind. Cas. 633: A I R 1926 P C 269; 6 O W N 835; 30 L W 451; (1929) A L J 1060; Ind. Rul. (1929) P C 337; 57 M L J 765; 50 O L J 487; (1929) M W N 937; 56 I A 363; 51 A 771: 32 Bom. L R 1; 11 P L T 1 (P C).

not operate as a transfer of any interest in the property there is nothing in the law to prevent its being used in evidence for obtaining specific performance. The deed purports to be an argeement for sale. It recites the receipt of some part of the consideration but the Explanation added to s. 17, Registration Act shows that such recital does not affect the non-liability to registration of a mere agreement for sale within s. 17, sub-s. (2), cl. (5), Registration Act. The view of the learned District Judge that the document also created a mortgage of immovable property for the sum paid as earnest money seems entirely untenable. The clause which makes the property "*makful wo mahbub wo mustagarak*" (words importing hypothecation of almost every conceivable kind) not only does not show what was taken or intended to be put into the deed as the debt secured but shows its true character by the concluding portion:

"so that should I execute any deed of any kind whatsoever, deed of sale, *rehan*, etc., the same shall be treated as null and void and inoperative"

The clause that immediately precedes this clause does not refer to the earnest money but it does refer to the recovery of the costs that the intending purchaser might be put to in the event of the agreement for sale not being carried out and yet it is not the case of the respondent that the document was intended to be used as a mortgage deed in respect of this possible liability. Why then the mortgage should be taken to refer to the earnest money, the receipt of which is recited several sentences earlier, the learned Advocate for the respondent has not been able to explain. In my opinion, the clause was neither intended to operate nor does it actually operate as a mortgage at all: the document is really no more than what it professes to be—a *moahdanama* or deed of agreement for sale—and the clause was merely intended to operate as a covenant against encumbering or selling the property to another. As regards the observation in *R. R. Skinner* v. *Robert Hercules Skinner* (3), that:

"as agreement for the sale of immovable property is a transaction 'affecting' the property within the meaning of the section inasmuch as if carried out, will bring about a change of ownership."

the deed in the case before their Lordships was found by them to purport to transfer George Skinner's interest in the immovable properties, and the observation in question must be read consistently with their Lordships' later observation that

"they have the satisfaction of knowing that the principls which has been enunciated above is in accordance with recent decisions in most of the High Courts"

among which they mention *Ramling Parvattya Samble* v. *Bhagvant Sambhvappa Kathale* (4). This was a case in which it was held that a document which was an agreement to convey and created no interest in the property agreed to be sold was not compulsorily registrable under s. 17, sub-s. (2), cl. (5), Registration Act.

The document in question, therefore, did not require registration at all. Assuming, however, that on another construction of the clause which creates a mortgage or charge, the document did require registration, there is the further contention of Mr. Khurshaid Husnain that in the present suit the deed was not put in to enforce any charge or mortgage and that there was nothing to prevent the plaintiff from using the other part of the document which purports to be a mere agreement for sale. In support of this contention he has cited definite authority in the decision of *Vyravan Chetti* v. *Subramanian Chetti* (1). The view of the learned District Judge, that the document was inadmissible in evidence and that, therefore, no specific performance could be decreed must, therefore, be overruled.

N. *Appeal allowed.*

(4) 96 Ind. Cas. 334; 50 B 334; A I R 1926 Bom 375; 28 Bom. L R 591,

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BOMBAY HIGH COURT

First Civil Appeal No. 130 of 1929

February 23, 1934

MURPHY AND DIVATIA, JJ.

YESHVANT RAMCHANDRA BHIDE AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOVIND CHINTAMAN BHIDE AND OTHERS—PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 11—A bringing suit for possession of his share against some members—B and C made co-defendants—B and C supporting A's claim—A's claim dismissed as time-barred—Subsequent suit by B and C against same members for partition of same property—Held, res judicata applied—Appeal — High Court whether can base its decision upon ground different from that given by trial Court—Hindu Law—Joint family —Parties are tenants-in-common—No adverse possession unless there is ouster.

A suit was brought by *A* in 1913 against his three step-brothers for a share in a house which was in their possession. *A's* two nephews, *B* and *C* were made co-defendants. The plaint averred that there was a separation of the joint family by virtue of an agreement in 1878, though not by metes and bounds and since then the step-brothers were in exclusive

possession of the property. *A*'s case was supported by *B* and *C* who also asked the Court to ascertain their respective shares in the house. The High Court, on appeal, against the dismissal of the claim by the trial Court on the ground that it was time-barred and that the step-brothers were in adverse possession, found on evidence that there was aseparation of the family members in 1878, and dismissed the claim as time-barred. In 1925 *B* and *C* brought a suit against their step-uncles for a share by partition in the same house alleging that it was joint ancestral property:

Held, that *B* and *C* were bound by the decision in the former suit and consequently the second suit was barred by *res judicata*.

[Case-law referred to.]

It is open to the High Court in appeal to base its decision upon a ground different from that given by the trial Court, provided there is sufficient evidence on the record from which a finding could be arrived at. [p. 54, col. 2.]

Where the family is joint and there is no division the parties are tenants-in-common and there is no adverse possession of one co-tenant against another unless there is a clear ouster, in other words, demand and refusal. [p. 56, col. 1.]

Messrs. *M. R. Jayakar* and *J. R. Gharpure*, for the Appellants.

Messrs. *D. N. Bahadurji*, *V. D. Limaye* and *G. M. Joshi*, for the Respondents.

Divatia, J.—This appeal is filed by the original defendants Nos. 1 to 3 in a suit by the plaintiffs to recover by partition possession of their one-fifth share in a house at Poona. The plaintiffs are the sons of one Chintaman who died in 1907, and defendants Nos. 1 to 3 are the step-brothers of Chintaman. One Bhikaji was also a brother of Chintaman, and both Bhikaji and Chintaman were the sons by the first wife of Ramchandra while defendants Nos. 1 to 3 were the sons by his second wife. Ramchandra died in 1902 and Bhikaji is also dead. The plaintiffs' case was that all the sons of Ramchandra were members of a joint Hindu family, and the suit house along with the other property situated at Sangli formed the joint family property, that after Ramchandra's death, the plaintiff's father lived at Miraj and that he used to come off and on to Poona where Ramchandra lived with his sons. The faimly property at Sangli being in a Native State was not included by the plaintiffs in the suit here. The case of defendants Nos. 1 to 3 was that there was a separation of the members of the family in 1878 and that since then different members of the family were separately enjoying different properties; that Bhikaji and Chintaman got for their share a certain cash allowance and a house at Sangli, while Ramchandra and defendant No. 1 (defendants No. 2 and 3 being born later) were in possession of the suit house at Poona and certain shops and fields at Sangli. These defendants further contended that the suit was barred by *res judicata* inasmuch as the plaintiffs' uncle Bhikaji had filed a partition suit in 1913 in which the present defendants Nos. 1 to 3 were defendants Nos. 1 to 3 and the present plaintiffs were defendants Nos. 4 and 5 and that in that litigation it was held ultimately by the High Court that there was separation of the family members in 1878, and that the branch represented by defendants Nos. 1 to 3 was in exclusive possession of the suit house since then. The defendants contended that the present suit was therefore barred by *res judicata* as the present plaintiffs were parties to that suit. On the merits it was contended that the plaintiffs were not in possession of the suit house at any time after 1878 and that they had lost their right to possession.

The lower Court has held that the present suit is not barred by *res judicata*, and that the present plaintiffs were not excluded from the enjoyment of the suit house inasmuch as the plaintiffs' father and after his death the plaintiffs were in receipt of a part of the income of the suit house. It therefore held that the plaintiffs were entitled to get their share in the property, and passed a decree in their favour for partition. The defendants have appealed against the decree, and two questions arise for decision in this appeal, firstly, whether the present suit is barred by *res judicata* by the decree in the former suit of 1913 and secondly, whether the defendants are in exclusive and adverse possession of the suit property as against the plaintiffs.

Taking the question of *res judicata* first, the suit of 1913 was filed by Bhikaji on the allegation that Bhikaji and the present plaintiffs' father Chintaman lived separate from the rest of the family, but that the estate was joint, that the deceased Ramchandra had made a will disposing of the suit house in favour of defendants Nos. 1 to 3, but that the said will was invalid as the property was ancestral and not the self-acquired property of Ramchandra, and that therefore he was entitled to a partition of his one-fourth share in the property. The case for defendants Nos. 1 to 3 in that suit was that neither Bhikaji nor defendants Nos. 4 and 5, *i. e.*, the present plaintiffs, had any connection with the suit property which was the same as the present

suit property, that both Bhikaji and Chintaman had become separate, that the branch of defendants Nos. 1 to 3 was in exclusive possession of the suit house; and that the suit was barred by limitation. With regard to the will their case was that the house was the self-acquired property of Ramchandra, and that therefore he had full power to make the will. The present plaintiffs also had put in their written statements in that suit and they had therein supported the case of Bhikaji and had stated that their father Chintaman along with Bhikaji began to live separately from the deceased Ramchandra about 30 years ago, but that the property was joint and that the same should be divided and their share also should be handed over to them on their paying the court-fee stamp. They had further contended that they had received Rs. 25 per month from defendants Nos. 1 to 3 out of the income of the suit house. With regard to the will their case was the same as that of Bhikaji, namely that the property being ancestral and not self-acquired, Ramchandra had no power to make a will in respect of it.

Several issues were framed in the case of which the material issues were whether the plaint property was the self-acquired property of Ramchandra, whether the will was binding on the then plaintiff Bhikaji, and whether he as well as defendants Nos. 4 5, *i. e.*, the present plaintiffs, were entitled to a share by partition in that suit. Two further issues were added subsequently, namely, under what circumstances did Bhikaji begin to live separately in 1878, and was there a division of the family then? The trial Court had disposed of the suit on the ground of limitation only, and having held that the then plaintiffs' suit was barred by limitation, it did not consider any of the other issues. The reasons given by the trial Court were that Bhikaji's case as stated in the plaint was that he was a divided member of the family since 1878, and that any idea of the continuance of the joint family was wholly negatived by his own pleading, and that although if the plaintiff had framed an ordinary suit for partition, defendants Nos. 1 to 3 would have practically no defence, still as the plaintiff himself had admitted that he had become separate from 1878, he had lost his share in the property by the adverse possession of defendants Nos. 1 to 3.

Against that decree dismissing Bhikaji's suit, defendants Nos. 1 to 3 had filed an appeal to this Court, being First Appeal No. 313 of 1916. To that appeal the present plaintiffs were also parties and were separately represented by their Advocate. In the course of arguments in that appeal it was admitted on behalf of defendants Nos. 1 to 3 that the suit house was not the self-acquired property of Ramchandra as recited in the will but that it became their property by partition upon the separation of the two branches of Ramchandra's family, and that defendants Nos. 1 to 3 were in exclusive possession thereof ever since 1878. After hearing the arguments of all the parties this Court made a finding on the evidence that there was a partition upon the separation of the two branches of Ramchandra's family in 1878, and that defendants Nos. 1 to 3 and Ramchandra were together in exclusive possession of the suit house and shops and fields at Sangli thereafter for nearly thirty-six years, while Bhikaji and the present plaintiffs' father were admittedly in exclusive possession of the family house at Sangli. As stated above, the trial Court had made no finding on the issue as to whether there was a partition in 1878. This Court, however, based its decision not so much on the finding of exclusion as on the finding that there was a partition in the family in 1878. It appears that Bhikaji had filed an application for review of this decision and also an application for leave to appeal to the Privy Council against the dismissal of his appeal. The review application was dismissed and so also was the application for leave, and while disposing of the latter application this Court remarked as follows;

"The conclusion reached by this Court is based upon the statement made by the plaintiff in the plaint and the evidence in the case; and the conclusion reached is one of fact based upon evidence. Though in form it may appear to be a question of law as it is a point of limitation, it really depends upon the facts found by this Court on the evidence."

Now, the lower Court is of opinion that this decision in the previous suit does not operate as *res judicata* in the present suit inasmuch as the present plaintiffs and defendants No. 1 to 3 were co-defendants in that suit, and the former being only *pro forma* defendants, there was no matter directly and substantially in issue between them and defendants Nos. 1 to 3, and in the adjudication upon the dispute in that suit between Bhikaji and the present defendants Nos. 1 to 3, it was not necessary

to determine the dispute beween the present plaintiffs and defendants Nos. 1 to 3. It was further stated that the present plaintiffs, as defendants Nos. 4 and 5, could not have appealed against the decree dismissing Bhikaji's suit as well as the appeal in the High Court, and that therefore they would not be barred by *res judicata*. This view has been challenged in appeal before us and it is contended on behalf of the appellants that the present plaintiffs were not simply *pro forma* defendants in the previous suit, but that they had actively taken part in that suit by siding with the then plaintiff and also by demanding their share in the suit property which defendants Nos. 1 to 3 had denied, and an express issue was also framed as to whether they were entitled to any partition. It is conceded on behalf of the appellants that the trial Court in the former suit did not make any finding adverse to the present plaintiffs, but the High Court based its conclusion on the evidence in the case and held that there was a previous partition and that finding was binding on all the parties in that suit including the present plaintiffs, and although the appeal could have been disposed of on the ground of the then plaintiff being excluded from the enjoyment of the family property, as this Court did enter into the other evidence and did make a finding adverse to Bhikaji as well as the present plaintiffs, it was a decision binding against both, although the decree of the lower Court was confirmed on grounds which were different from those given by the trial Court. For the plaintiffs-respondents it has been contended that there was no conflict between the defendants *inter se* in that suit, that in order to decide the dispute between the then plaintiff and defendants Nos. 1 to 3 in that suit it was not necessary to decide the conflict between the defendants *inter se* even if a conflict existed, and that, thirdly, the alleged conflict is also not decided in the former suit.

Now, the principles governing the operation of *res judicata* between co-defendants have been recently laid down by the Privy Council in three cases *Munni Bibi* v. *Tirloki Nath* (1), *Kishun Prasad Pandey* v. *Durga Prasad Thakur* (2) and *Maung Sein Done* v. *Ma Pan Nyun* (3). A number of authorities have been referred to by the learned Counsel on both sides. It is not necessary to refer to all of them as the decision of the Privy Council in the latest case of *Maung Sein Done* v. *Ma Pan Nyun* (3) lays down the real test that has to be applied to this case. In that case the question between the parties was whether sons alone inherited the suit property under the Chinese Customary Law, or whether the daughters were also entitled to a share under the Burmese Buddhist Law. One of the daughters had filed a suit against her two brothers and her sister was made a co-defendant with them. The sons disputed the plaintiff's claim relying upon the Chinese Customary Law, and the plaintiff's sister, as defendant, did not file any written statement but gave evidence supporting the plaintiff's case. The trial Court held that the inheritance was governed by the Chinese Customary Law, and therefore dismissed the plaintiff's suit. On appeal, the High Court at Rangoon confirmed that decree on the same grounds. Subsequently the daughter of the plaintiff's sister, who was a defendant in that suit and had supported the plaintiff's claim which had failed, filed a suit against the two sons, who were defendants in the former case, as well as the plaintiff in the former suit, and the plaint in the second suit was substantially the same as the plaint in the former suit. The sons pleaded *res judicata* and the trial Court negatived that contention. On appeal, the High Court also held that there was no bar of *res judicata* as there was no active contest as to the rights and no decision thereon as between the mother of the plaintiff in the second suit and her co-defendants in the former suit. On appeal, the Privy Council held that the bar of *res judicata* did apply inasmuch as the three tests which were laid down in the earlier case of *Munni Bibi* v. *Tiloki Nath* (1) for the operation of *res judicata* between co-defendants were fulfilled in that case. The reasons were that there was in the former suit a conflict of interest between co-defendants, *i. e.*, between the

(1) 132 Ind. Cas. 598; A I R 1931 P C 114; 58 I A 158; 53 A 103; (1931) A L J 453; 35 C W N 661; 53 C L J 552; 33 Bom. L R 979; Ind. Rul (1931) P C 182; (1931) M W N 742; 61 M L J 196; 34 L W 459 (P C).

(2) 133 Ind. Cas. 721; A I R 1931 P C 231; 8 O W N 973; Ind. Rul. (1931) P C 257; 61 M L J 415; 34 L W 439; 35 C W N 1217 (P C.)

(3) 137 Ind. Cas. 328; A I R 1932 P C 161; 59 I 247; 10 R 322. Ind. Rul. (1932) P C 184; 36 C W N 726; 55 C L J 403; 34 Bom. L R 1040; 63 M L J 64; 9 O W N 617; (1932) A L J 736; 36 L W 1 (P C.)

mother of the plaintiff in the second case and her brothers, that that conflict would necessarily have to be decided in order to give the plaintiff in the first case the relief which she claimed and that the question between the defendants *inter se* in the first suit, namely, as to whether the mother of the plaintiff in the second suit was entitled to any share in the estate, was finally decided. It was contended there on behalf of the respondents that as no relief had been given to the plaintiff in the first suit, the doctrine of *res judicata* did not apply as between the co-defendants. But that contention was not accepted and it was held that in the first suit, which was an administration suit, the mother of the plaintiff in the second suit was a necessary party, and there had necessarily to be an adjudication upon the issues involved before the suit could have been dismissed, and that it was none the less an adjudication because its consequence was the dismissal of the suit. On these grounds it was held that the second suit was barred by *res judicata* and the decision of the Rangoon High Court was reversed and the plaintiff's suit was dismissed.

There is a certain amount of similarity between the facts of the present case and the facts of the Rangoon case. Here also it was a suit for partition of the family estate and the present plaintiffs were necessary parties to the first suit. Not only that, but they also asked for their share being divided and handed over to them. There also the plaintiff's suit was dismissed as here. The respondents contend, however, that there is one important distinction between the present case and that case, *viz.*, that while in the latter case the actual point of conflict between the co-defendants, namely, as to whether the parties were governed by the Chinese Law or the Buddhist Law, was decided, here the trial Court did not decide the point of conflict between the parties, namely, the existence of the partition in 1878, and that although the High Court in appeal made a finding on this point, that finding was not necessary for the disposal of the then appellant's appeal, because if that appeal could be disposed of on the ground of limitation as was done by the trial Court, it was not necessary for the High Court to go into the question as to whether there was a partition in 1878 or not, and that therefore any remarks about partition were obiter and would not be binding against the present plaintiffs who were respondents in the appeal.

Now, as to the decision in the former proceedings it is clear that where there has been an appeal against the original decree, it is the decision in the appeal and not the decision in the trial Court that operates as *res judicata*. The decision of the High Court here, as I have said, was that there was a partition, and that also there was exclusion presumably because of partition. It cannot be said that the decision in the appeal as to the existence of a partition in 1878 was merely an expression of opinion and not a decision. It is expressly stated as a decision arrived at on the evidence in the case and the appeal is decided on this finding itself. It is no doubt stated there that both the branches were in exclusive possession of the property which they got in 1878, but the decision does not turn on the point of limitation but on the fact of the partition, and the exclusive possession was such because of the partition and not because of family convenience. It was open to the High Court in appeal to base its decision upon a ground different from that given by the trial Court, provided there was sufficient evidence on the record from which a finding could be arrived at: Not only was there an issue on the point, but in the opinion of this Court there was sufficient evidence to justify a finding based upon it. That being so, the finding of the High Court on the issue as to whether there was a partition or not cannot be regarded as a mere *obiter* or a mere expression of opinion, but it was made the very ground of the decision.

That such a finding based on evidence on a different ground from that given by the lower Court would operate as *res judicata* derives support from a decision of the Privy Council in *Risal Singh* v. *Balwant Singh* (4). What happend there was that a Hindu widow brought a suit to set aside an adoption of a son by her on the ground that she had no authority from her husband to adopt. It was held by the trial Court and the High Court, the decision of which is reported in *Dharam Kunwar* v. *Balwant Singh* (5), that the widow was estopped from disputing the adoption and that, therefore, her suit failed on that ground. She appealed to the

(4) 48 Ind. Cas 553; A I R 1918 P C 87; 45 I A 168; 40 A 593; 28 C L J 519; 24 M L T 361; 9 L W 52; 23 C W N 326; (1919) M W N 155; 36 M L J 597; 21 Bom. L R 541 (P C.)

(5) 30 A 549; 5 A L J 568; A W N 1908, 231

Privy Council, and in appeal the decision of which is reported in *Dharam Kunwar* v. *Balwant Singh* (6), their Lordships of the Privy Council, though agreeing with the lower Court that the mother was estopped from alleging want of authority, proceeded to state that the question could well be decided as one of fact on the mother's own statement without recourse to the doctrine of estoppel, and it was held that although the estoppel was purely personal to the mother, the evidence showed that she had authority from her husband to adopt the son, and that on that ground also her suit failed. Subsequently, after the death of the widow, a suit was brought by a person as the next reversioner of her husband against the son for possession of the estate on the ground that the adoption was invalid as the widow had no authority to adopt. One of the defences raised to that suit was that it was barred by *res judicata* on account of the decision in the previous suit decided against the widow which would bind the revisioner also.

The trial Court held that the suit was so barred, and on appeal to the High Court, which was heard by three Judges the majority confirmed that decision: *Risal Singh* v. *Balwant Singh* (7). The majority decision was that in the first suit their Lordships of the Privy Council preferred to decide the question of the authority of the mother and the validity of the adoption as one of fact even without regard to the doctrine of estoppel and that that decision was a final decision of the dispute between the parties disposing of that litigation both on the point of estoppel as well as on the merits. Against this decision there was again an appeal to the Privy Council, and the decision of that appeal is reported in *Risal Singh* v. *Balwant Singh* (4). Their Lordships confirmed the majority decision of the High Court and held that in the previous suit the Board did intend to decide the question of authority to adopt as a question of fact and in fact decided that point as there was ample material on the evidence upon which that point could be dicided and that decision did operate as *res judicata* against the reversioners also.

The principle of this decision, to my mind, applies to the facts of the present case. Here also the High Court in the previous litigation heard arguments as to the question of the alleged partition in 1878, and from the evidence on the record did arrive at the finding. The fact that in the present case the doctrine of *res judicata* is sought to be applied to co-defendants, whereas in the case of *Risal Singh* v. *Balwant Singh* (4) the contention was not between co-defendants, does not, in my opinion, affect the principle, because this is a partition suit and the present plaintiffs themselves as defendants had asked for their share in the partition, and they had also put in issue the question as to whether they were entitled to a specific share in the property. Their case also along with the case of the then plaintiff was that there was no partition in 1878. Therefore, they were in the High Court appeal in the same position as was the appellant so far as the claim against defendants Nos. 1 to 3 was concerned. The learned Counsel for the respondents has relied upon the case of *Ashidbai* v. *Abdulla* (8) but that case would not apply here as the former case was decided by the High Court not on any preliminary ground but on the merits. Similarly, the case of *Habibbhoy* v. *Dinshaw M. Petit* 3 Ind. Cas. 124 (9) would not also apply as in that case the finding that was sought to be used as *res judicata* was a clear *obiter* and not necessary for the purpose of the decision of that case. For these reasons I am of opinion that the present suit is barred by *res judicata* on account of the decision in the previous suit.

That being so, the other question in the case, namely as to whether the plaintiffs were excluded from the enjoyment of the suit property or its income and that, therefore, defendants Nos 1 to 3 were in adverse possession as against them, would not arise for decision. However, I may state that, in my opinion, the decision of the lower Court on that point is correct. On the evidence it clearly appears that defendants Nos. 1 to 3 made payments out of the income of the suit property to the present plaintiffs' family from 1904 to 1919. Defendants Nos. 1 to 3 say that this payment was made because of the directions in the will and it was made under the erroneous belief that the plaintiffs were entitled to it. But no such

(6) 15 Ind. Cas. 673; 38 A 398; 39 I A 142; 16 C W N 675; 9 A L J 730; 14 Bom. L R 485; 12 M L T 95; 16 C L J 60; 23 M L J 200 (P C)

(7) 30 Ind Cas. 657; A I R 1915 All. 360; 37 A 496; 13 A L J 594.

(8) 31 B 271; 8 Bom. L R 758.

(9) 3 Ind. Cas. 124.

provision in the will is pointed out, and if the payment is made whether under an erroneous or a correct belief that the plaintiffs were entitled to it, it would not affect the question of adverse possession. The learned Counsel for the appellants has contended that in any case no such payment has been proved from 1878 to 1904, and that therefore, before 1904 the adverse possession of defendants Nos. 1 to 3 had already been complete and so could not be affected by the payment made after 1904. But that, to my mind, is not the correct position. If the family is joint and there was no division in 1878, the parties are tenants-in-common, and there is no adverse possession of one co-tenant against another unless there is a clear ouster in other words, demand and refusal. There is nothing to show on the evidence that between 1878 and 1904 there was any demand made by the plaintiffs' branch and refusal by the appellant's branch, and, therefore, unless there has been an express refusal of the plaintiff's rights, adverse possession would not begin to run. On the contrary, far from any denial of the plaintiffs' rights, there have been regular payments from 1904 to 1919. Therefore, if there was no partition, the plaintiffs would be entitled to succeed. In fact, even with regard to Bhikaji, the trial Court had in the previous suit remarked that if Bhikaji had framed an ordinary suit for partition of a Hindu family, the defendants, *i. e.*, the present defendants Nos. 1 to 3, would have had practically no defence to offer. The plaintiffs are in a still better position than Bhikaji because while there was no payment made to Bhikaji, the plaintiffs have received the income at least from 1904. But as the appellants succeed on the point of *res judicata*, the result of this appeal is that the decree of the lower Court is reversed and the suit is dismissed with costs throughout.

Murphy, J.—One Ramchandra Narhar Bhide, who died in Poona in 1902, left him surviving five sons, named Bhikaji, Chintaman, Yeshvant, Narhar and Narayan. The first two were by his first wife, and the other three by his second wife. Ramchandra himself had been adopted into the Bhide family, and was employed at Sangli. He inherited a house in Poona, an hereditary office in Sangli State, a share in a *jagir* village and a house and some land in Sangli. The Poona house was heavily encumbered; Ramchandra served the Sangli State for some years and retired to Poona in 1878 with his wife and her eldest son, the two younger being born later. Bhikaji and Chintaman, the two eldest sons, sought service, Bhikaji taking the hereditary office in Sangli and rising to a high place while Chintaman got an appointment in Miraj. After Ramchandra's death in 1902 and Chintaman's in 1907, Bhikaji brought a suit in the Poona Court against his surviving half-brothers, defendants Nos. 1, 2, 3 and his nephews, the sons of Chintaman (defendants No. 4 and 5), now plaintiffs, praying for partition of the Poona property. The plaint and the theory on which it proceeded were ingenious. His case was that there had been a family arrangement in 1878 when he and Chintaman had gone to Sangli and Miraj, respectively, for a separation or partition though not by metes and bounds. He claimed a share in the Poona house on the basis of the state of the family in 1878, thus excluding defendants Nos. 2 and 3 who had not then been born. The learned Subordinate Judge who tried the case did not come to findings on any issue except that of limitation holding that on the pleadings the suit must be time-barred. The present plaintiffs then defendants Nos. 4 and 5 supported the then plaintiff Bhikaji, and asked that their share (one-fourth) should be given to them. There was an appeal to the High Court which also dismissed Bhikaji's suit. Attempts to carry the litigation further failed.

The principal question now is whether, plaintiffs, then defendants Nos. 4 and 5 can be suffered again to raise the claim made by Bhikaji in 1913. The High Court's judgment of 1919 was delivered by Hayward, J. As I read it the learned Judges were somewhat embarrassed by the learned First Class Subordinate Judge's judgment which dealt only with the inconsistency of the claim then made involving a partition in 1878 and a still subsisting right to partition in the ancestral property in 1913 which could hardly be. The judgment said that it was necessary to state the facts as this had not been done in the learned First Class Subordinate Judge's judgment and did so. It then said that on these facts it looked as though there was a family understanding in 1878 by which Ramchandra with defendant No. 1 of his younger family had seperated and taken as their share the family house in Poona and the shops and

fields at Sangli, while plaintiff and defendants Nos. 4 and 5 got the Sangli office and house. In then discussed plaintiff's own attitude as disclosed in his pleadings, the abandonment of the position stated in Ramchandra's will and ended with the following statement.

"It, therefore, seems to me that the finding on the facts ought to be that there was a partition on separation of the two families of Ramchandra in 1878 and that defendants Nos 1, 2 and 3 and Ramchandra were together in exclusive possession thereafter for 36 years of the family house at Poona, while the plaintiff and defendants Nos. 4 and 5 were admittedly in exclusive possession of the family house at Sangli. If that is so then a correct conclusion was arrived at by the First Class Subordinate Judge and this appeal ought to be dismissed with costs."

As I read the judgment their Lordships thought that there should have been a finding on the question of fact and so, as they were entitled to do they went into the evidence and found on it as the basis of their conclusion on the point of limitation. On these facts the learned Subordinate Judge has decided that the question between the present plaintiffs and defendants is not *res judicata* his chief reasons being that plaintiffs had been no more than *pro forma* defendants in the first suit that they had not fought the matter out that there was no issue between them and the then as now, defendants Nos. 1, 2 and 3, that they could not have appealed and that the former decision did not decide their rights. There is no doubt that had the present plaintiffs been ranged with the plaintiff in the former suit, they could not now be heard on this claim and the point of law arises because they were then ranged on the other side, although their interests were the same as the then plaintiffs.

Appellant's learned Counsel has relied on a series of cases to show that in law their former position makes no difference since the point decided in the former suit between the then plaintiff and the then defendants No. 1, 2 and 3 was also really decided between the then two groups of defendants *inter se* and cannot, therefore, again be agitated between them. The main argument has been that the first suit having been a general one for partition although the first Court held only on the pleadings that it was time-barred, the High Court went into the evidence and held on the facts that there had already been a family partition and that there could not, therefore, be a fresh one. The further argument has been that being ranged as defendants-plaintiffs need not then have brought this question in issue but in fact did so and that they could have appealed from the decree as being aggrieved by it, but did not though they were parties to the appeal. It has been suggested that the learned trial Judge missed the fact that the former suit had been one for a general partition and applied the general law whereas in a partition suit each party is a claiming party. To support his contentions Mr. Jayakar has relied on the following cases.

Assan v. *Pathumma* (10). The pertinent remarks in this case are that the reciprocal character of the parties in a partition suit makes the cause of action the same from either side: *Natwarlal* v. *Sassoon & Co.* (11). It was held that in a partition suit the plaintiff cannot withdraw without the consent of the defendants and these can apply to be traversed to the other side: *Nalini Kanta Lahiri* v. *Surnamoyi Debya* (12). The decision was that where in a partition suit partition has been allowed, and one of the parties afterwards alleges that there has been a mistake, his remedy lies in that and not in a separate suit. *Shivmurtappa* v. *Virappa* (13) deciding that a suit for a partial partition does not lie *Ejaz Ahmad* v. *Saghir Bano* (14). The *ratio decidendi* was that where it is necessary for giving relief to decide between two co-defendants such a decision is binding on the co-defendants—the relevance in this case being that before the point of limitation could be decided, it was necessary to find whether a partition had already taken place or not: *Munni Bibi* v. *Tirloki Nath* (1). The case lays down that s. 11, Civil Procedure Code, is not exhaustive and that when *(i)* there is a conflict between co-defendants, and *(ii)* it was necessary to decide it to give the plaintiff relief and *(iii)* the question was finally decided, the decision operates as *res judicata* between co-defendants. He next cited three cases to show that a Court has to look to the judgment as well as the decree to determine a question of *res judicata*. These cases are: *Magniram*

(10) 22 M 494

(11) 103 Ind. Cas. 256; A I R 1927 Bom. 447; 51 B 794; 29 Bom L R 921.

(12) 24 Ind. Cas. 294; A I R 1914 P C 31; 41 I A 247; 27 M L J 76; 1 L W 607; 16 M L T 544; (1914) M W N 948; 21 C. L J 23; 17 Bom. L R 1; 19 C W N 531 (P C.)

(13) 24 B 128; 1 Bom. L R 620.

(14) 118 Ind. Cas. 175; A I R 1930 All. 287; 51 A 850; (1929) A L J 883; Ind. Rul. (1929) All. 783.

v. *Mehdi Hossein Khan* (15), *Abdul Ghani* v. *Nabendrakishore Ray* (16), and *Krishna Chandra* v. *Challa Ramanna* (17). On the question of whether a defendant can appeal or not, the cases relied on were: *Krisha Chandra* v. *Mohish Chandra* (18), *Jamna Das* v. *Udey Ram* (19). *Kandiyil Cheriya Chandu* v. *Zamorin of Calicut* (20), *Yusuf Sahib* v. *Durgi* (21), and *Venkateswarin* v. *Lingayya* (22).

The present plaintiff's written statement in the former suit is Ex. 47 and may be summarized as follows: (1). That they had never been in possession of the Poona house and were not liable to account: (2) That they had never obstructed plaintiff and so were not liable for his costs: (3) That the father of defendants No. 4 and 5 deceased Chintaman was a full brother of the plaintiff and had lived separate from the deceased Ramchandra with the plaintiff. That was about 30 or 31 years earlier. That at that time there were four sharers in the plaint property, namely, the plaintiff, defendant Nos. 1[0] Ramchandra and Chintaman deceasad. The quarter share of deceased Chintaman fell to the share of his sons and heirs, defendants Nos. 4 and 5, after him. The same should be divided and given to defendants Nos. 4 and 5 along with the share of the plaintiff. Defendants Nos. 4 and 5 were willing to pay the court-fee stamp for the same (4). That the income due on their share should be awarded to defendants Nos. 4 and 5 (5) That defendants Nos. 4 and 5, since 1907 had been paid Rs. 25 per mensem by defendant No. 1 and that this being allowed for, account should be taken.

The last paragraph deals with Ramchandra's will which both sides now admit was invalid the statement made in it that the property was self-acquired being untrue, as it is ancestral. "Therefore the Court should declare that will as void." On the plaintiff's then written statement, I think it is plain that they had sided with the plaintiff and adopted his case, and the issue decided by the High Court was the one of fact as between the then and present plaintiffs against the then and now defendants Nos. 1, 2 and 3. If my view is correct then on the authority of the rulings cited before us, I think that plaintiff's present claim is barred by the decision in the former suit. The original Court's decree must be reversed and the plaintiff's claim and suit must be dismissed with costs.

D. *Appeal allowed.*

(15) 31 C 95; 8 C W N 30.
(16) 124 Ind. Cas. 161; A I R 1930 Cal. 47; 57 C 258; 33 C W N 876; Ind. Rul. (1930) Cal. 401.
(17) 136 Ind. Cas. 412; A I R 1932 P C 50; 35 L W 222; 62 M L J 221; 36 C W N 365; (1932) M W N 284; 34 Bom. L R 508; Ind. Rul. (1932) P C 108; 55 C L J 411 (P C)
(18) 9 C W N 584.
(19) 21 A 117; A W N 1898, 201.
(20) 29 M 515.
(21) 30 M 447; 17 M L J 260.
(22) 83 Ind. Cas. 960; A I R 1924 Mad. 689; 47 M 633; 20 L W 63; (1924) M W N 491.

PATNA HIGH COURT

Criminal Revision No. 605 of 1933
April 18, 1934
JAMES AND VARMA, JJ.
MATHURA SINGH AND OTHERS —PETITIONERS
versus
EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 190, 192—Cognizance is taken of offence and not of individual offenders—Transfer of case—Sub-Divisional Magistrate transferring case to another Magistrate—Explanation as to intention of transferring Magistrate—(Held, on facts, that whole case was transferred).

Under s. 190, Criminal Procedure Code, cognizance is taken of the offence and not necessarily of the individual offenders whose names transpire in the course of the investigation. *Sourindra Mohan* v. *Emperor* (1) and *Deonarain Singh* v. *Emperor* (2), relied on.

A Rule was issued in respect of five out of nineteen persons who were convicted under s. 147, Penal Code. The case was remanded to the District Magistrate calling for an explanation as to whether the Sub-Divisional Officer, who transferred the case to the Magistrate who tried and convicted the accused, intended to transfer the whole case or the case only of those persons against whom the Police recommended that the case should be started. The explanation stated that cognizance was taken only in respect of those persons sent up by the Police and that the intention of the Sub-Divisional Officer was that investigation should proceed only with regard to the persons sent up by the Police:

Held, (on facts) that the explanation of the Sub-Divisional Magistrate that "he took cognizance only in respect of the persons sent up by the Police", meant only that he took cognizance of the offence and his action in transferring the case without excluding any of the accused, showed that he transferred the whole case for disposal.

Cr. R. from an order of the Additional Sessions Judge, Patna, dated November 14, 1933.

Messrs. *Baldeo Sahay* and *C. P. Sinha*, for the Petitioners.

Mr. *S. Jaffar Imam*, for the Crown.

Varma, J.—A Rule was issued in this case, in respect of 5 out of 19 petitioners who were in the first instance, tried and convicted

by Mr. Rahman, a First Class Magistrate of Bihar, in the District of Patna, under s. 147, Penal Code, and sentenced to nine months' rigorous imprisonment each, but on appeal their sentences were reduced to six months' imprisonment by the Additional Sessions Judge of Patna.

The prosecution case is that one Mathura Prasad. Singh of village Gorewan is the purchaser of two and half annas *milkiat* in *touzi* Nos. 11029, 10874 and 10775 of village Nerut. He purchased it from one, *Musammat* Premdei Kuer in the month of *Phagun* 1339 *F. S.* There was a mutation case between him and one Naurangi Singh, a co-sharer of the deceased husband of Premdei Kuer, and the case was decided in favour of Mathura Prasad. The property purchased by Mathura Prasad includes 34 *bighas* of *khudkasht* lands of which two plots bearing Survey Nos. 348 and 429 are those with which we are concerned in this case. On plot No. 348 there was sugarcane grown and plot No. 429 happens to be an orchard. In January 1933, Mathura Singh sent an elephant to the village to feed on the sugarcane crop on the *khudkasht* land while some of his men staying in the orchard. For some days there was no obstruction but on February 5, at about 10 A. M., a mob including the petitioners came and assaulted Mathura Prasad's men and also inflicted injuries on the elephant. The defence was that the purchase by Mathura Prasad was a colourable transaction and that he never got possession of any of the properties said to have been purchased by him, that on the day of occurrence his men had gone to take forcible possession of the *kaudkasht* land, and that when opposition was offered, a fight took place in which some persons were injured. Some of the accused pleaded that they were falsely implicated in the case on account of enmity. It was also alleged that the sugarcane crop standing on plot No. 348 was not grown by the men of Mathura Prasad but that it was grown by one Karu. The present petitioners were sent up for trial along with the other accused persons and they have been convicted and sentenced as stated above.

The case came up for hearing on March 6, 1934, when Macpherson and Agarwalla, JJ., called for an explanation in the case from the District Magistrate as to whether the Sub-Divisional Officer, when he transferred the case on February 28, 1933, to the file of the Magistrate who tried and convicted the petitioners along with the other accused, intended to transfer the whole case including the case against the present petitioners, or the case only of those persons against whom the Police recommended that the case should be started. That explanation has now been received, and the Sub-Divisional Officer says:

"It was never my intention to take a cognizance of the whole case including the case regarding the 8 accused when the Police desired to be released from *Hajat* or bail. I took cognizance only in respect of the persons sent up by the Police and it was certainly my intention that the investigation should proceed only with regard to the persons who were sent up by the Police."

Relying on this explanation, it is argued on behalf of the petitioners that the Sub-Divisional Officer never took cognizance of the case against the present petitioners and therefore Mr. Rahman to whom the case was transferred by the Sub-Divisional Officer had no jurisdiction to try the petitioners. It is necessary to look into the order sheet of the case to find out the manner in which the learned Magistrate had been dealing with the case against the petitioners when he came to transfer it to the Court of Mr. Rahman. As I have already stated, the case was transferred on February 28. On February 21, 1933, the Sub-Divisional Officer passed the following order:

"I have perused the diary of the case and the supervision note of the Deputy Superintendent of Police. There are 29 accused in *Hajat* for whom bail petition has been moved and the 30th man, *viz.*, Reasat Khan surrenders to-day. The diary shows that there is no conclusive evidence under s. 436, Indian Penal Code. The other sections are all bailable and I think that bail should be granted in the case. Accordingly I direct that all the 22 accused be enlarged on a bail of Rs 500 each. The accused surrendering to-day will also give bail of the like amount. The O. S. I. prays for test identification. The Sub-Deputy Magistrate will please hold the test identification. Put up now on March 3, 1933, by which date Police should submit its report."

It will be seen that on February 21, in the opinion of the learned Sub-Divisional Magistrate, all the accused persons who were in custody were eligible for bail and he did grant them bail, and he was also of opinion that there was no opinion so far as the offence alleged under s. 436 was concerned, which was a non-bailable offence. On February 24, 1933, two of the accused, Dhirik and Janki, were remanded to *Hajat* for March 3, 1933. On February 28, 1933, the order runs as follows:

"Charge-sheet received against 23 accused with a prayer that two of the accused in *Hajat* should be released from *Hajat* and 6 of the accused be released from bail. The charge-sheet is for March 3, 1933, but there is no Court available on that date

This case is transferred to the file of M. Shah Wali-ur-Rahman to be taken up by him on March 15, 1933, when his diary shows he is free Inform the S. I. take P. R. of the P. Wa. for that date for appearance before the Second Officer. Put up on March 3, 1933, also before the Second Officer for passing a remand order on the accused and for taking fresh bail."

On March 3, 1933, Mr. Rahman to whose Court the case was transferred passed the following order:

"The case has been transferred for 15th. The accused are present to-day. They may be released on bail of Rs. 500 each for 15th."

At present we are not concerned with what his intentions were when he transferred the case from his file, but we have to see whether what he did on February 28, amounted to taking cognizance of the offence or not. For this purpose we have to refer to some of the earlier orders and that is why I have quoted them *in extenso*. When the charge sheet was received at least two of the accused were in custody and the others were on bail. The learned Sub-Divisional Magistrate while transferring the case to the file of Mr. Rahman ordered personal cognizance to be taken of the prosecution witnesses for March 15, 1933. He also ordered that these things should be placed before the Second Officer on March 3, 1933, for passing a remand order on the accused and for taking fresh bail. There is nothing in this order to indicate that he was excluding the petitioners from the operation of his order simply because the Police did not want to proceed against them. Therefore the order of February 28, 1933, read with the earlier orders, in my view, amounts to taking cognizance of the offence by the Sub-Divisional Magistrate. Under s. 190, Criminal Procedure Code cognizance is taken of the offence and not necessarily of the individual offenders whose names transpire in the course of the investigation. In the case of *Sourindra Mohan* v. *Emperor* (1), it was laid down that:

"taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence."

In this case if the Sub-Divisional Magistrate acted at all, the order for transfer was evidently made under s. 192 of the Code, and unless he had taken cognizance of the case he could not have transferred it to a Subordinate Magistrate. The real confusion seems to have arisen by losing sight of the fact that cognizance is taken of as offence and not of individual offenders

(1) 6 Ind. Cas. 8; 37 C 412; 11 Cr. L J 217; 14 C W N 512.

The case of *Deonarain Singh* v. *Emperor* (2) clearly points out that the expression "case of which he has taken cognizance" in s. 192 (1) Criminal Procedure Code, means nothing more than the judicial investigation into any offence of which he has taken cognizance. The explanation of the Sub-Divisional Magistrate that "he took cognizance only in respect of the persons sent up by the Police" in the light of above observations means only this that he took cognizance of the offence. And his action in transferring the case without excluding any of the petitioners shows that he transferred the whole case for disposal. I am, therefore, of opinion that the argument that the petitioners were tried without jurisdiction cannot succeed.

The other point was that there was a petition filed on behalf of the accused praying that Parthu Singh should be summoned for further cross-examination on questions which were left out inadvertently. The learned Magistrate issued summons through a special messenger for Sunday May 28, 1933. There were some other witnesses also summoned by the accused; but the order recorded on May 28, 1933, runs as follows:

"Accused did not examine any witness in defence. Parthu Singh who was summoned is absent and S. R. shows that process was not served on him. I can't drag on the case for this witness, heard argument, written statement filed, put up on May 31, 1933, for orders."

Thereafter the Magistrate proceeded to deliver his judgment which he did on May 31, 1933. From the order of May 22, 1933, it appears that the Magistrate summoned Parthu Singh for May 28, but the witness did not turn up, and the Magistrate was anxious to dispose of the case by May 31, 1933. The order of May 22, was in effect a conditional order, that Parthu Singh would be examined if his attendance could be secured on May 28. Objection might fairly have been taken to such an order if the accused had been entitled as a matter of right to re-summon Parthu Singh for cross-examination; but he had already been re-summoned and cross-examined after the framing of charges. This application for a second re-call might have been properly refused outright, on the ground that the witness should not be further harassed, or on the ground that the accused, having exercised their right of re-calling the witness,

(2) 147 Ind. Cas. 913; A I R 1933 Pat. 244; (1933) Cr. Cas. 716; 12 Pat. 341; 14 P L T 176; 6 R P 384; 35 Cr. L J 533.

should not be permitted to drag out the case by re-calling him again. In the circumstances, it cannot be said that the learned Magistrate, making his conditional order re-calling the witness, committed himself to keeping the case pending until all available means for securing the attendance of the witness had been exhausted. No prejudice can be said to have been caused to the petitioners, since Parthu Singh had already been cross examined, especially when no defence witnesses were examined by them on May 28, 1933. Moreover, this point does not seem to have been taken in the Court below, and if there was any merit in it, one would expect it to have been urged prominently before the lower Appellate Court. So this point also does not help the petitioners. In the result the Rule is discharged; the petitioners must surrender to their bail to serve out the remaining portion of their sentence.

James, J.—I agree.

N. *Rule discharged.*

PRIVY COUNCIL

Appeal from The Supreme Court of Hong Kong (Appellate Jurisdiction)

December 4, 1934

LORD ATKIN, LORD MACMILLAN AND LORD WRIGHT.

Nautical Assessors:

CAPTAIN A. H. RYLEY, CAPTAIN W. E. CRUMPLIN.

NIPPON YUSEN KAISHA—APPELLANT

versus

THE CHINA NAVIGATION COMPANY, LTD.—RESPONDENTS

Shipping — Collusion — Regulation for preventing collusions at Sea, Art. 16—Position of vessel, how to be ascertained by another vessel, within the meaning of the Regulation—Importance of implicit obedience to Regulations pointed out.

In order that the position of a vessel may be ascertained by another vessel within the meaning of the Regulation for preventing collusions at sea she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collusion. The *data* on which an inference is founded may be so collusive as to raise the inference to the level of a certainty. But where such inference is taken, the vessel so taking it, takes the chance of her inference being right. [p. 63, col. 2.]

It is important that there should be implicit obedience to the Regulations on whose observance navigators are entitled at all times to rely. If a vessel unjustifiably takes the risk of disregarding one of their injunctions, she must suffer the consequences

Messrs. *Lewis Noad, K. C.* and *R. F. Hayward*, for the Appellant.

Messrs. *A. R. Miller, K. C.* and *K. T. Corkmael*, for the Respondents.

Lord Macmillan.—On March 22, 1931, a collision occurred in the harbour of Hong Kong between the appellants' steamship "Toyooka Maru" and the respondents' steamship "Kiangsu." Each vessel blamed the other and cross-actions of damages, subsequently consolidated, were instituted by their respective owners against each other in the Supreme Court of Hong Kong. The trial Judge, Sir Joseph Kemp, C.J., found the "Toyooka Maru" solely to blame and his decision was affirmed by the Full Court on appeal. There were, however, considerable divergencies of view among the learned Judges below (and also apparently among the nautical assessors who assisted them) on certain aspects of the case. The learned Chief Justice, who sat as a member of the Appellate Court, altered the opinion which he had reached at the trial and was ultimately in favour of holding both vessels to blame.

The material facts are not complicated and are, to a large extent, common ground, It appears that the "Toyooka Maru" on the morning of the day in question left Kowloon Wharf outward bound shortly after seven o'clock. When she had proceeded some distance but was still within the harbour waters her master observed a bank of fog approaching from the N.E. She was then on the starboard or south side of the channel, being the proper side for an outgoing vessel. Her master, judging it unsafe to proceed in the fog, resolved to anchor and as the local Ordinances forbade vessels to anchor in the fairway, he decided to make his way to the anchorage for foreign men of war, shown on the chart to the north of the fairway. To reach this he had to direct his course to the N.E. across the fairway and at 7-43 A. M. he altered his course accordingly. No incoming vessel had been seen by him. He gave the usual fog-signals by sounding prolonged blasts at short intervals. At 7-44 he heard an answering fog-signal apparently from a vessel at some distance on his starboard bow, and immediately stopped his engines. Several more fog-signals were interchanged between the vessels and at 7-48 the the master of the "Toyooka Maru" which still had some way on, hearing a blast from the other vessel close on his starboard bow ordered his engines full speed astern. At 7-49 the "Toyooka Maru" for the first time sighted the other vessel, which proved to be the "Kiangsu," proceeding on a west

north-westerly course at a distance of about 600 feet. A collision was then inevitable and at 7-50 the port side of the "Kiangsu" about amidships struck and buckled over the stem of the "Toyooka Maru." At the time of the collision the "Toyooka Maru" had reached the area marked as the anchorage for foreign men of war and the collision occurred within the anchorage.

The "Kiangsu" was inward bound. She had entered the harbour waters through the Lyemun Pass at 7-35. At 7-44, as she was proceeding on the northern side of channel, which was her proper side, she heard a fog-signal some points on her port bow, from a vessel which was invisible in the fog, and which subsequently proved to be the "Toyooka Maru." She assumed that the vessel from which the signal came was outward bound and would be keeping to her own, the southern side of the channel so that the vessels would pass port to port. The "Kiangsu" did not stop her engines but put them to slow and after altering her course a point to starboard she proceeded on her way, sounding fog-signals at short intervals. The fog-signals from the other vessel were heard increasingly near and fine on the "Kiangsu's" port bow and at 7-49 the vessels, as already stated, became visible to each other for the first time. The "Kiangsu" put her engines full steam ahead and first ported and then immediately starboarded her helm so as to lessen the impact of the then inevitable collision. (The helm orders are in the old form throughout.)

The faults attributed to the "Toyooka Maru" are (1) that she adopted a negligent and dangerous course in crossing the fairway in fog; (2) that she failed, on hearing the "Kiangsu's" first fog-signal, to port her helm and resume the proper course for outgoing vessels on the south side of the channel; and (3) that she failed to drop her anchors when she sighted the "Kiangsu' at 7-49. The faults attributed to the "Kiangsu" are (1) that she acted in breach of Art. 16 of the Regulations for Preventing Collsions at Sea by not stopping her engines on hearing the fog-singal from the "Toyooka Maru"; and (2) that she proceeded at a dangerously high speed through the fog.

The learned Chief Justice at the trial found that the "Toyooka Maru" was to blame for having directed her course across the fairway in fog and also in not having dropped her anchors on sighting the "Kiangsu." He further found that the "Kiangsu" in not stopping her engines at latest at 7-47 had acted in breach of Regulation XVI and he held (erroneously, in view of s. 4 (1) of the Maritime Conventions Act, 1911) that the onus of showing that this breach did not contribute to the collision was thereby imposed on her. In his opinion "she obviously failed to discharge that onus". He nevertheless held the "Toyooka Maru" solely responsible for the collision. on the ground that she mainly contributed to the accident by crossing the fairway in fog and that by dropping her anchors she could have avoided the collision at the last moment, whereas the default of the "Kiangsu" was minor in degree and was due merely to an error of judgment in the "ambiguous position created by the "Toyooka Maru." He absolved the "Kiangsu" from the charge of excessive speed. As already indicated, the learned Chief Justice when sitting in the Full Court on appeal modified his original view and was in favour of holding both vessels to blame. Sir Peter Grain in the Full Court was of opinion that the "Toyooka Maru" was wholly to blame on account of her having crossed the fairway in fog and also on account of her not having altered her course to starboard when she heard the "Kiangsu's" second blast and knew that the "Kiangsu" was an incoming ship. He futher held that the "Kiangsu" was not in breach of Regulation XVI. Wood, J., took the same view, while also holding that the "Toyooka Maru" was not to blame for not dropping her anchors when she first saw the "Kiangsu."

The "Toyooka Maru" having been found by concurrent judgments in the Courts below to have been at fault in crossing the fairway in fog, their Lordships accept this finding, from which they see no reason to differ, and they therefore find that the "Toyooka Maru" was to blame for the collision. But there remains the question whether she was solely to blame or whether the "Kiangsu" was also to blame. This question their Lordships now proceed to consider.

The critical point for determination is whether the "Kiangsu" was or was not in breach of Regulation XVI. That Regulation provides in its second paragraph that

"A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The "Kiangsu" admittedly heard ap-

parently forward of her beam the first fog-signal of the "Toyooka Maru" at 7-44 and also the subsequent fog-signals and admittedly she did not stop her engines either at 7·43 or at any time before the collision. Her argument is that the Regulation did not apply because the fog-signals which she heard were those of a vessel the position of which was " ascertained," inasmuch as when she heard the first fog-signal she judged the vessel from which it emanated to be an outward bound vessel and thus "ascertained" her position to be on the south side of the channel, the proper side for an outgoing vessel. Sir Peter Grain states that Counsel for the appellants admitted, and that it was in fact admitted by all, that as far as the captain of the "Kiangsu" was concerned, the "Toyooka Maru" was an "ascertained" vessel up to 7-47 when her signals became nearer and finer on the "Kiangsu's" port bow.

Their Lordships doubt the justification of this admission but accepting it they have still to consider whether during the three minutes from 7-47 to 7-50, when the collision took place, the "Toyooka Maru" was a vessel whose position had been ascertained by the "Kiangsu." The learned Chief Justice at the trial and when sitting in the Full Court on appeal was of opinion that from 7-47 "at latest" the position of the "Toyooka Maru" was not ascertained by the "Kiangsu." Sir Peter Grain and Wood, J., were both of opinion that the "Toyooka Maru's" position was throughout "ascertained" on the ground that the "Kiangsu" was entitled to assume that she was an outward bound vessel whose position was necessarily on the southern side of the channel. Their Lordships do not agree with the view taken by the majority of the Full Court. The position of the "Toyooka Maru" was not, in their Lordships' opinion "ascertained" within the meaning of the Regulation. It was inferred, not ascertained, and as it turned out, the inference was wrong. The data on which an inference is founded may be so conclusive as to raise the inference to the level of a certainty, but in the present case the only data were that the fog-signals were heard on the "Kiagsu's" port bow, that outward bound vessels keep to the south side of the channel and that it was improbable that a vessel would be crossing the fairway in a fog. An inference based on these data was not in their Lordships' opinion an ascertainment on which it was justifiable to disregard the precaution enjoined by Regulation XVI. In order that the position of a vessel may be ascertained by another vessel within the meaning of the Regulation, she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision. See, *e. g.* per Sir Gorell Barnes, P., in "The Aras" [1907] P. 28 at p. 34.) The "Kiangsu" did not know the position of the "Toyooka Maru" in this sense; she inferred it and took the chance of her inference being right.

Then it was pointed out that the Regulation is further qualified by the words "so far as the circumstances of the case admit" and it was suggested that the "Kiangsu," inward bound with the tide behind her, could not safely have stopped her engines in the fairway and lost steerage way. Their Lordships are satisfied that the "Kiangsu" entirely failed to establish that the circumstances did not admit of her stopping her engines.

The result is that their Lordships are of opinion that the "Kiangsu" was in breach of Regulation XVI by reason of her failure to stop her engines, if not when she first heard the "Toyooka Maru's" fog-sigal at 7-44, at any rate from and after 7-47 when she heard the "Toyooka Maru's" further fog-signals. This is also the view of the nautical assessors who assisted their Lordships at the hearing, and who advised that the "Kiangsu" ought to have stopped her engines when she heard the first fog-signal of the "Toyooka Maru " at 7-44.

In view of this grave breach of the Regulation on the part of the "Kiangsu" she cannot be absolved from a share in the blame for the collision. Their Lordships cannot too emphatically express their sense of the importance of implicit obedience to the Regulations on whose observance, navigators are entitled at all times to rely. If a vessel unjustifiably takes the risk of disregarding one of their injunctions, as the "Kiangsu" did on this occasion, she must suffer the consequences. In the whole circumstances their Lordships are of opinion that both vessels should be held equally to blame.

Their Lordships will humbly advise His Majesty that the appeal be allowed, the judgments of the Chief Justice of the February 19, 1932 and of the Full Court of the August 15, 1932, be reversed and the case be remitted to the Supreme Court of Hong Kong with a direction to find the "Toyooka Maru" and the "Kiangsu" both equally to blame for the collision and to

dispose of the consolidated actions, including the costs in the Courts below, in accordance with this finding.

The appellants having been in part successful and in part unsuccessful before their Lordships, will have one-half of their costs of the appeal.

N. *Appeal allowed.*

Solicitors for the Appellants.—Messrs. *Waltons & Co.*

Solicitors for the Respondants.—Messrs. *Butterell & Roche.*

CALCUTTA HIGH COURT

Civil Appeal No. 477 of 1932
June 13, 1934
NASIM ALI AND KHUNDKAR, JJ.

PRABHATNATH DAS—APPELLANT
versus
RAMENDRA KUMAR SHAHA—
RESPONDENT

Executor—Probate, grant of—If a condition precedent to file suit.

The grant of a probate is not a condition precedent to the institution of the suit by the executor. He has a right to institute the suit as executor before he obtains the probate. Whether as executor he would be entitled to recover the decree or to maintain the same passed by the Court without producing the probate is an entirely different matter, he will be entitled to get a decree, if he produces the probate before the passing of the final decree. *Chandra Kishore Roy* v. *Prasanna Kumari Dasi* (1) and *Manahim Yusef* v. *Islam Aman* (2), relied on.

C. A. against an order of the District Judge, Noakhali, dated May 26, 1932.

Messrs. *Jitendrakumar Sen Gupta* and *Pareshchandra Sen*, for the Appellants.

Messrs. *Bhagirathchandra Das*, for the Respondent.

Judgment.—The facts which gave rise to these two appeals are as follows:

One Ramsundar executed a mortgage bond in favour of Udaychandra Das borrowing Rs. 250 with interest at the rate of 2½ per cent per month. There was also a stipulation for compound interest. On November 15, 1928, Uday's son, Mahendra, the sole appellant in S. A. No. 184 of 1933 and one of the appellants in M. A. No. 477 of 1932, instituted a suit on the mortgage-bond against the heirs of Ramsundar for recovery of Rs. 1,200 as executor to the will left by his father Uday after the death of Uday. At the time of the institution of the suit Mahendra did not institute any proceeding for getting a probate of the will of his father.

During the pendency of the suit, however, he applied for probate and was appointed administrator *pendente lite* under s. 247, Succession Act. Thereafter he prosecuted the mortgage suit as administrator *pendente lite* and obtained a mortgage decree on January 9, 1931. The plaintiff's claim for a personal decree for realization of the balance, if any, that may remain unrealized from the sale proceeds, was, however, dismissed. Thereupon, the defendants filed an appeal to the lower Appellate Court on March 23, 1931, impleading the appellant, Mahendra, as the sole respondent in the appeal. The application for probate, however, was dimissed on April 2, 1932, only on the ground that the appellant could not pay the probate duty. On May 10, 1932, an application was filed by the heirs of Uday for being substituted as respondents in place of Mahendra, on the ground that the probate of the will left by Uday was not taken out. This application was rejected by the lower Appellate Court on May 21, 1932. On May 27, 1932, the heirs of Uday filed an application for staying the hearing of the appeal to enable them to file an appeal against the said order to this Court and to get an order for staying the hearing of the appeal from this Court. This application was, however, refused. The appeal was thereafter heard by the learned Judge and the suit was dismissed. M. A. No. 477 of 1932 is by the heirs of Uday against the order dated May 21, 1922, and S. A. No. 184 of 1933 is by Mahendra as executor, who has now ceased to be the administrator *pendente lite*, against the order dismissing the suit.

M. A. No. 477 of 1932.—From the facts stated above, it is clear that the interest in the subject-matter of the suit, that is the interest in the mortgage security, did not come to or devolve upon the heirs of Uday during the pendency of the appeal in the lower Appellate Court. Consequently, the learned Judge was right in dismissing the application for substitution and addition of the heirs under O. XXII, r. 10, Civil Procedure Code. This appeal is accordingly dismissed.

S. A. No. 184 of 1933.—It appears from the judgment of the lower Appellate Court that the only point, which it decided was whether the decree could be maintained by the appellant after he had ceased to be the administrator *pendente lite*. The learned Judge has observed:

"Under s. 213, Succession Act, the plaintiff's right, as executor, could not be established till he was granted probate or letters of administration with a copy of the will annexed and, if he

succeeded in obtaining a decree on the basis of a grant of letters of administration *pendente lite*, that decree must be regarded as conditional on the plaintiff finally obtaining probate of the will. When, therefore, his application for probate was allowed to be dismissed, the whole decree was liable to be set aside on that ground alone."

From the facts stated above, it is clear that the appellant is the executor to the will of his father. There is no dispute about the genuineness of the will. The appellant failed to get the probate, because he could not pay the probate duty in time. He, however, obtained the decree in the trial Court as administrator *pendente lite*, as the application for probate was then pending. During the pendency of the appeal in the lower Appellate Court, the appellant ceased to be the administrator *pendente lite*. But this fact cannot take away his right to proceed with the proceeding or to maintain the decree as an executor. The grant of a probate is not a condition precedent to the institution of the suit by the executor: see *Chandra Kishore Roy* v. *Prasanna Kumari Dasi* (1). There cannot be any doubt that the appellant had the right to institute the present suit as executor before he obtained the probate. Whether as executor he would be entitled to recover the decree or to maintain the same passed by the trial Court without producing the probate is an entirely different matter. It is well established on authorities that he will be entitled to get a decree, if he produces the probate before the passing of the final decree. In *Manahim Yousef* v. *Islam Aman* (2), Beaumont, C. J., observed as follows:

"If the deceased mortgagee left a will..... the defect can be cured by plaintiffs Nos. 3 to 6 (who are allowed to be and who sued as heirs and legal representatives of the deceased mortgagee) taking out probate and then proceeding with their action seeing that their title arises under the will and the only necessity for obtaining probate is to enable them to prove the will in the only manner which the Court recognizes."

The learned Advocate for the appellant prayed before us for remanding this case to the lower Appellate Court in order to enable his client to cure the defect by producing the probate before the matter is finally disposed of by the said Court. From what has been stated above it is clear that the learned Judge has not come to any decision on the merits of the case. He dismissed the suit only on the ground that the appellant before us could not maintain the decree as he had already ceased to be the administrator *pendente lite*. It has been already pointed out that the appellant is still entitled to prosecute the suit as executor and will be entitled to get a decree, if the lower Appellate Court comes to a decision on the merits in his favour and if he produces the probate before the lower Appellate Court at the time of the hearing of the appeal. We accordingly set aside the decree of the lower Appellate Court and remand the case to that Court. If the plaintiff-appellant produces the probate before the lower Appellate Court within five months from this date, it will, thereafter, proceed to hear the appeal as well as the cross-objection on the merits and, if the findings of the said Court be in favour of the plaintiff, the suit will be decreed. If however the plaintiff fails to produce the probate within the time aforesaid, then the plaintiff's suit will stand dismissed with costs in the lower Courts. There will be no order for costs of both the appeals in this Court.

D. *Case remanded.*

(1) 9 Ind Cas. 122; 38 C 327; 38 I A 7; 15 C W N 121; 9 M L T 71; (1911) 2 M W N 30; 13 C L J 58; 8 A L J 93; 13 Bom. L R 67; 21 M L J 116; 4 Bur. L T 65 (P. C.)

(2) 131 Ind. Cas. 1167; A I R 1931 Bom. 547; 33 Bom. L R 1222; Ind. Rul. (1932) Bom. 47.

CALCUTTA HIGH COURT

Civil Appeals Nos. 432 and 469 of 1930

June 29, 1934

MUKERJI AND S. K. GHOSE, JJ.

MIR ABI MAHAMMAD AHASAN AND ANOTHER —APPELLANTS

versus

ABU NASAR MOHAMMAD EUSUFALI AND OTHERS —RESPONDENTS

Guardians and Wards Act (VIII of 1890), ss. 47 (1), 7 (1)—Interlocutory order—Held, that order was interlocutory order and that no appeal lay.

Where the Court refused an application by a person for being appointed a guardian, but the proceedings were kept pending for further orders after consulting the Collector for the appointment of the Court of Wards or some other person as guardian:

Held, that the order dismissing the application was an interlocutory order and not final according to s. 47 (1) or s. 7 (1), Guardians and Wards Act and as such no appeal could be filed till a final order was passed.

C. A. against an order of the District Judge, Bakargunj, dated June 26, 1930.

Messrs. *S C. Basak*, *Diptendra Mohan Ghose*, *Fazlal Huq* and *Radhikaranjan Guha*, for the Appellants.

Messrs. *Fazlal Huq*, *Radhikaranjan Guha*, *S. C. Basak* and *Diptendra Mohan Ghose*, for the Respondents.

Judgment.—Two gentlemen of whom the appellant is one applied to be appointed guardian of the properties of a certain minor each to the exclusion of the other. The District Judge on taking evidence came to the conclusion that neither of these two gentlemen was fit to be so appointed and he accordingly refused their applications to be appointed as such guardian. He further observed thus:

"I intend first of all to consult the Collector as to whether the personal properties of the minor can be taken over by the Court of Wards. If this cannot be done, I shall endeavour to appoint a third party acceptable to all contestants."

From the order refusing his own application to be appointed guardian, the appellant has preferred this appeal. A preliminary objection has been taken to the competency of this appeal. Section 47, Guardians and Wards Act, lays down in cl. (*a*);

"An appeal shall lie to the High Court from an order made by the Court under s. 7 appointing or declaring or refusing to appoint or declare, a guardian,"

The other clauses of this section are not relevant for the present purpose.

The only sub-section of s. 7 which is relevant here is sub-s. (1). It runs thus:

"Where the Court is satisfied that it is for the welfare of a minor that an order should be made (*a*) appointing a guardian of his person or property or both, or (*b*) declaring a person to be such a guardian, the Court may make an order accordingly."

The order to which we have referred is not an order coming within the purview of sub-s. (1), s. 7 of the Act. By that order, no guardian has been appointed of the person or property of the minor, nor has a person been declared as such guardian. Nor have the proceedings relating to guardianship in respect of the minor that were started in the Court of the learned District Judge come to an end by any order appointing or declaring or refusing to appoint or declare a guardian of the minor. All that has been done by the learned Judge is that the proceedings have been kept pending and the applications of the appellant and of another gentleman have been refused because they have been found incompetent. The order from which the appeal has been taken is, in our opinion, an interlocutory order passed at an intermediate stage of the proceedings and we are of opinion that no final orders coming within the purview of s. 7, sub-s. (1) or s. 47, cl. (*a*) have yet been passed. We are of opinion therefore that the present appeal is incompetent. It appears that after this appeal was preferred to this Court there was certain correspondence between the District Judge and the Collector of the District, and from certain letters which appear to have been received by the District Judge from the Collector it would appear that the properties of the minor should be taken by the Court of Wards subject, of course, to the sanction of the Board of Revenue. It appears further that certain terms as regards the moneys which would be paid to the minor during the time that the estate remains under the management of the Court of Wards have also been proposed in one of these letters.

It has been stated on behalf of the appellant that there is some misapprehension as regards the amount which the minor has been drawing from the *waqf* properties; the said amount is stated in one of the letters to be Rs. 300, but the appellant says that the amount is much less. These are matters of detail which may very well be considered by the learned District Judge and will certainly be taken into consideration by the Collector when the proposal for taking over the management by the Court of Wards proceeds further and on a proper application being made before the learned District Judge in that behalf. They are not matters which we are called upon to deal with at the present moment.

We therefore think that we must dismiss this appeal and send the case back to the Court of the learned District Judge in order that the proposal to make over the properties to the Court of Wards may be proceeded with. In the event of this proposal falling through, and of the learned District Judge being required to proceed with the guardianship proceedings any further and in the event of his appointing or refusing guardian in respect of the minor as the final result of such proceedings, it will be open of course to any party aggrieved, to prefer an appeal to this Court from such final order.

D. *Appeal dismissed.*

RANGOON HIGH COURT

Criminal Appeals Nos. 1823 of 1933 and 74 of 1934

April 6, 1934

MYA BU AND DUNKLEY, JJ.

NGA U KHINE AND OTHERS — APPELLANTS

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 162,

537—*Statement made to Police in course of investigation, if can be used without request of accused—Scope of s.* 162—*Accused, if can apply for copy of statement any time after witness has been called—Second proviso to s.* 162—*Part of statement, when excluded—Part of statement when used for contradiction must be proved—Infringement of mandatory provision of Criminal Procedure Code, if sufficient to hold that Court failed to administer justice—Accused in appeal, if can complain that trial Court refused to refer to statement and at the same time say that Appellate Court is not entitled to refer to them.*

Under s. 162, Criminal Procedure Code, a statement made by a person to a Police Officer in the course of an investigation, whether oral or reduced to writing, cannot be used for any purpose, save on the request of the accused (or, his pleader). The Judge (or Magistrate) has no authority to look at the police papers unless requested to do so by the accused. On the request of the accused, the Judge (or Magistrate) must refer to the statement of a witness to the police, if it has been reduced to writing, whether that statement is separately, recorded or recorded in a police diary. The purpose for which the Judge (or Magistrate) refers to the statement is in order to see whether any part of the statement ought to be excluded under the second proviso to the section, and not for the purpose of deciding whether there is in the statement material for cross-examination of the witness in the manner provided by s. 145, Evidence Act. Subject to any part being excluded under the second proviso to the section, the accused is entitled to a copy of the whole of the statement to the Police. It is not for the Court to decide whether there is any variation between the statement in examination-in-chief and the statement recorded by the Police. Subject to the power of the Judge (or Magistrate) to disallow any question which, in his opinion, does not fall within the scope of s. 145, Evidence Act, it is for the accused or his pleader to decide in what manner and to what extent he will use the statement for the purpose of cross-examination; but the cross-examination on the statement must be confined to alleged contradictions between the statement and the evidence-in-chief of the witness, and must be carried out in the manner provided by the latter part of s. 145, Evidence Act, *i. e.*, by calling his attention to the parts of the statement which it is intended to use for the purpose of contradicting him. *Nga Lu* v. *Emperor* (1) and *Bana Singh* v. *Emperor* (10), dissented from. [p. 69, col. 1.]

[Case-law reviewed.]

The accused may apply for a copy of the statement of a witness to the police at any time after he has been called, that is, at any time after the witness has entered the witness-box and while he is giving evidence. The cross-examination of the witness must be adjourned until the necessary copy has been given.

[Case-law referred to.]

Under the second proviso to s. 162, Criminal Procedure Code, the Judge (or Magistrate) should exclude from the copy supplied any part of the statement which in his opinion satisfies one or other of two conditions, *viz*, (1) that it is irrelevant or (2) that its disclosure to the accused is both unessential in the interests of justice and inexpedient in the public interest. There are only two separate and distinct conditions under which a part of the statement can be excluded. To justify exclusion under the second of the above conditions the two circumstances mentioned therein must exist together in conjunction. If he excludes any part of the statement the Judge (or Magistrate) must record the opinion on which he bases such exclusion, but not his reasons for that opinion. *Nga Po Chen* v. *Emperor* (13), dissented from.

Those parts of the statement to the police which are used in cross examination to contradict the witness must be proved and brought on to the record. This can ordinarily be done by the admission of the witness that he made the statement, or by examination of the Police Officer who recorded it. If the latter course is necessary, in order to avoid delay, there can be no objection to allowing cross-examination subject to subsequent proof of the statement.

If a mandatory provision of the Code of Criminal Procedure is infringed, that does not of itself make it necessary to hold that the Court must have failed in administering justice to the accused. In order that an infringement of the provisions of the Criminal Procedure Code should be of a such a nature that it does not come within the purview of s. 537 of the Code, it must go to the root of the trial and must in effect vitiate the proceedings. It must in effect amount to an assumption by the Court of a jurisdiction which it does not possess, or a failure to exercise a jurisdiction which is does possess. [p. 70, col. 2.]

[Case-law referred to.]

The appellant cannot complain that the trial Court refused to refer to the statements, although requested by the appellant to do so, and then say that the Appellate Court is not entitled to refer to them because the appellant has not requested it so to refer. He cannot be permitted to approbate and reprobate at the same time.

Cr. A. from judgment and sentences of the Additional Sessions Judge, Arakan, in Sessions Trial No. 49 of 1933.

Mr. *Mc Donnell*, for the Appellants.

Mr. *A. Eggar*, for the Crown.

Dunkley, J.—(His Lordship narrated the facts and proceeded.) As regards the third point, this raises the construction of that much-debated section s. 162, Criminal Procedure Code. Pleader Mahmood says in his affidavit that he asked the Judge to refer to the statements to the Police, recorded during the investigation of the case, of six prosecution witnesses and to supply him with copies thereof, that copies of extracts, of the statements of three of these witnesses only were supplied, and that while these copies were being prepared he was compelled to proceed with his cross-examination of these witnesses, and the copies were only ready after the examination of the witnesses had been concluded. The learned Additional Sessions Judge says that he was asked to refer to the statements of only three witnesses, that he did so and marked those parts which were, according to the Pleader Mahmood, contradictory and had copies of these parts made at once, that Mahmood appeared to have a complete knowledge of the Police papers, and proceeded at once on his own initiative

with his cross examination of the witnesses and did not wait until the copies were prepared, and that the copies were shown to him as soon as they had been prepared and were then filed on the record. The learned Judge's statement in regard to this matter is supported by the affidavits of the other pleaders in the case and of his clerks. It is further clear from the record of the evidence of the prosecution witnesses that Mahmood had, by some means or other, obtained knowledge of their statements to the Police and was able to cross-examine the witnesses thereon. I, therefore, unreservedly accept the explanation of the learned Judge on this point. I am quite sure that the statements of only three witnesses were asked to be referred to, and that Mahmood voluntarily continued his cross-examination of these witnesses while the necessary copies of their statements were being prepared. Learned Counsel for the appellant U Khine criticizes the procedure of the Additional Sessions Judge on three grounds, *viz.*, (1) that his client was entitled to copies of the whole statements of the witnesses to the Police; (2) that cross-examination of each of these witnesses should have been postponed until the necessary copy of his statement had been prepared and given to the defence pleader and (3) that the statements of these witnesses to the Police, so far as they were used under the provisions of s. 145, of the Evidence Act, were not proved. He has referred to a number of authorities of this Court and other High Courts regarding the interpretation of s. 162, Criminal Procedure Code, and in order to dispose of these appeals it is necessary that we should come to definite conclusions as to the procedure which ought to be adopted in applying its provisions. Section 162, sub-s. (1), is in the following terms:

"No statement made by any person to a Police Officer in the course of an investigation under this chapter shall, if reduced to writing be signed by the person making it nor shall any such statement or any record thereof, whether in a Police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accued be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by s. 145, Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination: Provided, further that if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused."

The plain meaning of the language of the section is that a statement made by a person to a Police Officer in the course of an investigation, whether oral or reduced to writing, cannot be used for any purpose, save on the request of the accused (or, of course, his pleader). In *Nga Lu* v. *Emperor* (1), there occurs the dictum of a learned Judge that "the Judge would be well-advised to refer to Police papers privately. From this dictum I must, with the utmost respect, dissent. It seems to me to be clear, from the provisions of the section, that the Judge (or Magistrate) has no authority to look at the Police papers unless requested to do so by the accused. It is not for me to speculate as to the intention of the legislature in enacting this unhappily worded section; but it is certain that its effect is frequently to defeat the ends of justice rather than to further those ends.

On the request of the accused, the Judge (or Magistrate) must refer to the statement of a witness to the Police, if it has been reduced to writing, whether that statement is separately recorded or recorded in a Police diary: *Sulaiman Mohamed* v. *Emperor* (2). The purpose for which the Judge (or Magistrate) refers to the statement is in order to see whether any part of the statement ought to be excluded under the second proviso to the section, and not for the purpose of deciding whether there is in the statement material for cross-examination of the witness in the manner provided by s. 145, Evidence Act. Subject to any part being excluded under the second proviso to the section, the accused is entitled to a copy of the whole of the statement to the Police: *Madari Sikdar* v. *Emperor* (3),

(1) 148 Ind. Cas. 810; A I R 1933 Rang. 373; (1933) Cr. Cas. 1486; 35 Cr. L J 792; 6 R Rang. 251.

(2) 115 Ind. Cas. 899; A I R 1929 Rang. 87; 30 Cr. L J 538; 6 R 672.

(3) 102 Ind. Cas. 550; A I R 1927 Cal. 514; 28 Cr. L J 582; 54 C 307.

Emperor v. *Bansidhar* (4), *Ramgulam Teli* v. *Emperor* (5), *Jhari Gope* v. *Emperor* (6), *Chedi Prasad Singh* v. *Emperor* (7), and *Nekram* v. *Emperor* (8). It is not for the Court to decide whether there is any variation between the statement in examination-in-chief and the statement recorded by the Police. On this point the case of *Saadat Khan* v. *Emperor* (9), has been dissented from in *Ramgulam Teli* v. *Emperor* (5). Subject to the power of the Judge (or Magistrate) to disallow any question which, in his opinion, does not fall within the scope of s. 145, Evidence Act, it is for the accused or his pleader to decide in what manner and to what extent he will use the statement for the purpose of cross-examination; but the cross examination on the statement must be confined to alleged contradictions between the statement and the evidence-in-chief of the witness, and must be carried out in the manner provided by the latter part of s. 145, Evidence Act, *i. e.*, by calling his attention to the parts of the statement which it is intended to use for the purpose of contradicting him. To this extent, I must, with all due respect, dissent from the ruling of this Court in *Bana Singh* v. *Emperor* (10).

The accused may apply for a copy of the statement of a witness to the Police at any time after he has been called, that is, at any time after the witness has entered the witness-box and while he is giving evidence: *Bakarali Sardar* v. *Emperor* (11), dissenting from *Madari Sikdar* v. *Emperor* (3), on this point, *Emperor* v. *Tahal Saithwar* (12), and *Ramgulam Teli* v. *Emperor* (5)

The cross-examination of the witness must be adjourned until the necessary copy has been given: *Saadat Khan* v. *Emperor* (9). This is essential, for it would defeat the object of granting a copy of the statement to the accused if he were to be provided with a copy only when cross-examination of the witness had been completed, or almost completed. It will rarely be necessary to exclude any part of the witness's statement to the Police under the second proviso to s. 162, and, therefore, the difficulty that such postponement of cross-examination might cause delay in the trial can usually be obviated by having copies of the Police statements in readiness at the commencement of the trial, or it would be a sufficient compliance with the law to allow the defence Pleader to see the original statement of the witness to the Police and to cross-examine thereon while the copy is being prepared.

Under the second proviso to the section, the Judge (or Magistrate) should exclude from the copy supplied any part of the statement which in his opinion satisfies one or other of two conditions, *viz.*, (1) that it is irrelevant, or (2) that its disclosure to the accused is both unessential in the interests of justice and inexpedient in the public interest. It should be noticed that there are only two separate and distinct conditions under which a part of the statement can be excluded, and not three, as, with all due respect, has been wrongly stated in *Nga Po Chen* v. *Emperor* (13), where the word "or" occurring between the word "inexpedient" and the words "not essential," should be "and." To justify exclusion under the second condition mentioned above, the two circumstances mentioned therein must exist together in conjunction. If he excludes any part of the statement, the Judge (or Magistrate) must record the opinion on which he bases such exclusion, but not his reasons for that opinion.

Those parts of the statement to the Police which are used in cross-examination to contradict the witness must be proved and brought on to the record: *Madari Sikdar* v. *Emperor* (3). This can ordinarily be done by the admission of the witness that he made the statement, or by examination of the Police Officer who recorded it. If the latter course is necessary, in order to avoid delay, there can be no objection to allowing cross-examination subject to subsequent proof of the statements.

Hence the irregularities which the learned Additional Sessions Judge committed

(4) 130 Ind. Cas. 625: A I R 1931 All. 262; (1931) Cr. Cas. 422; 32 Cr. L J 562; 53 A 453; (1931) A L J 157: Ind. Rul. (1931) All. 289.

(5) 107 Ind. Cas. 817; A I R 1928 Pat. 215; 29 Cr. L J 297; 7 Pat. 205.

(6) 118 Ind. Cas. 130; A I R 1929 Pat 268; (1929) Cr. Cas. 21; 30 Cr. L J 858; 8 Pat. 279; 10 P L T 460; Ind. Rul. (1929) Pat. 482.

(7) 102 Ind. Cas. 773; A I R 1927 Pat. 325; 28 Cr. L J 597; 8 P L T 613; 8 A I Cr. R 271.

(8) 129 Ind. Cas. 267; A I R 1931 All. 273; 32 Cr. L J 370; Ind. Rul. (1931) All. 139; L R 12 A 36 Cr.

(9) 103 Ind. Cas. 597: A I R 1927 Pat 243; 28 Cr. L J 709; 6 Pat. 329.

(10) 110 Ind. Cas. 333; A I R 1928 Rang. 150; 29 Cr. L J 701; 6 R 137.

(11) 116 Ind. Cas. 167; A I R 1929 Cal. 182; 30 Cr. L J 580; 56 C 840; 49 C L J 197.

(12) 130 Ind. Cas. 696; A I R 1931 All. 34; (1931) Cr. Cas. 207; 32 Cr. L J 578; 53 A 94; (1931) A L J 10; L R 12 A 40 Cr.; Ind. Rul. (1931) All. 312.

(13) 98 Ind. Cas. 491; A I R 1927 Rang. 80; 27 Cr. L J 1371; 4 R 356.

in this case are that he did not provide the copies of the whole of the statements of the witnesses which were desired by the accused's Pleader, and that he did not record his opinion for excluding parts of those statements, and furthermore, that he did not postpone the cross-examination of the witness until the copies had been supplied. It is further objected that the parts of the statements put on record were not proved, but it is the duty of the defence to prove the statements of which they have made use in cross-examination, and, consequently, it is not open to the defence to raise an objection because such statements have been brought on the record without proof.

Learned Counsel for the appellant, U Khine, urges that the provisions of s. 162, Criminal Procedure Code, are mandatory and, therefore, as the Court has failed to comply with them, we must presume that a failure of justice has occurred, and we have no option but to set aside the convictions and sentences and order a re-trial of the appellants. This is a contention with which I cannot agree, and there is ample authority for the proposition that if a mandatory provision of the Code of Criminal Procedure is infringed, that does not of itself make it necessary to hold that the Court must have failed in administering justice to the accused: *Abdul Rahman* v. *Emperor* (14), *In re K. Ramaraja Tevan* (15), *Emperor* v. *Barmha Singh* (16), *Emperor* v. *Nur Mahomed Abdul Kadar* (17) and *Devi Das* v. *Emperor* (18).

In order that an infringement of the provisions of the Criminal Procedure Code should be of such a nature that it does not come within the purview of s. 537 of the Code, it must go to the root of the trial and must in effect vitiate the proceedings. It must in effect amount to an assumption by the Court of a jurisdiction which it does not possess, or a failure to exercise a jurisdiction which it does possess: *Subramania Ayyar* v. *Emperor* (19) and *Emperor* v. *Bechu Chaube* (20). That the errors committed by the learned Judge in this trial are not of this nature is perfectly plain. Learned Counsel for the appellant, U Khine, has urged that the present case is exactly similar to the case of a Court refusing to allow any cross-examination at all of the prosecution witnesses, and he urges that in latter case a re-trial would undoubtedly be necessary. On this last point I am in agreement with him, but there is a great difference between the present case and a case where all cross-examination has been disallowed. In the latter case there would be no materials from which an Appellate Court could judge whether the action of the trying Court had occasioned a failure of justice or not; whereas in the present case all possible materials for deciding this point are available. I am clearly of opinion, that the errors committed in this trial are at the most irregularities falling within the purview of s. 537, Criminal Procedure Code, and that, therefore, it is for the appellants to satisfy us that these errors have, in fact, occasioned a failure of justice. Moreover, s. 167, Evidence Act, would appear to be applicable in the present case and to lead to the same result.

We announced our decision on this point at the end of the first day's hearing of these appeals, and provided learned Counsel with complete copies of the statements to the Police, not only of those three witnesses, parts of whose statements have been admitted to the record, but also of the other three witnesses whose statements, it is alleged, were applied for by the defence, and we invited learned Counsel for the appellants to point out to us how the appellants had been prejudiced in their defence by the failure to provide them at the trial with copies of these statements. Learned Counsel for the appellant, U Khine, declined to look at them and made the astonishing assertion that we ourselves could not refer to them for any purpose without his request to do so, which he would not make. He cannot be permitted to approbate and

(14) 100 Ind. Cas. 227; A I R 1927 P C 44; 54 I A 96; 5 R 53; 31 C W N 271; 25 A L J 117; (1927) M W N 103; 38 M L T 64; 8 P L T 155; 4 O W N 283; 28 Cr. L J 259; 6 Bur. L J 65; 52 M L J 585; 29 Bom. L R 813; 45 C. L J 441 (P C.)

(15) 127 Ind. Cas. 654; A I R 1930 Mad. 857; 52 Cr. L J 30; 53 M 937; (1930) M W N 377; (1930) Cr. Cas 1033; 32 L W 894; 59 M L J 945; Ind. Rul. (1930) Mad, 1038.

(16) 142 Ind. Cas. 532; A I R 1932 All. 681; (1932) Cr. Cas. 936; 34 Cr. L J 425; 54 A 1002; (1932) A L J 865; L R 13 A 154 Cr; Ind. Rul. (1933) All. 131.

(17) 129 Ind. Cas. 156; A I R 1930 Bom. 595; 54 B 934; 32 Bom. L R 1279; 32 Cr. L J 139; Ind. Rul. (1931) Bom. 140; (1930) Cr. Cas. 1182.

(18) 122 Ind. Cas. 93; A I R 1930 Lah. 318; 31 Cr. L J 343; 10 L 794; Ind. Rul. (1930) Lah. 285; 31 P L R 742.

(19) 25 M 61; 28 I A 237; 8 Sar. 160; 3 Bom. L R 540; 5 C W N 866; 11 M L J 233; 2 Weir 271 (P C.)

(20) 71 Ind. Cas. 115; A I R 1923 All. 81; 24 Cr. L J 67; 45 A 124; 20 A L J 874.

reprobate at the same time in this manner. He cannot complain that the trial Court refused to refer to these statements, although requested by the appellants to do so, and then say that the Appellate Court is not entitled to refer to them because the appellants have not requested it so to refer. I have studied these statements with care and compared them with the evidence given by the witnesses at the trial. In regard to the three witnesses, parts of whose statements to the Police have been admitted to the record, they were cross-examined on their statements and all possible contradictions were brought out in their cross-examination. In regard to one of the other three witnesses, whose statements to the Police are said to have been applied for, the appellants had this witnes's first information report to the Police as the basis of their cross-examination and full use was made of it; and in regard to the other two, nothing exists in the statements which can possibly be considered as contradictory to the evidence given by them at the trial. I have already shown that in respect of the other two minor points raised by the defence the appellants suffered no prejudice, and the only possible conclusion is that the errors committed by the learned Additional Sessions Judge have not, in fact, occasioned a failure of justice. (The remaining portion of his Lordship's judgment is not material for the purpose of this report.)

Mya Bu, J.—The only matter put forward in support of the appeal of Maung U Khine relates to alleged irregularities in the conduct of the trial by the learned Additional Sessions Judge. As regards two of them, namely, (1) the refusal by the learned Additional Sessions Judge to call the Civil Surgeon, Akyab, as a witness for the defence and (2) his failure to put on record until the conclusion of the trial an extract from the general diary of the Akyab Police Station, I have nothing to add to the reasons given by my brother Dunkley in whose conclusions I fully agree.

The third of the alleged irregularities is concerning the provisions of s. 162, Criminal Procedure Code. Upon the affidavits of the Pleader who defended Maung U Khine at the trial and other affidavits in support of the Pleader's allegations on the one hand, and the explanation tendered by the learned trial Judge and the affidavits of his clerks and of other Pleaders who appeared in the trial on the other hand, the only conclusion we can properly come to is that the learned trial Judge was asked to refer to statements of only three and not six witnesses as alleged by the Pleader, that the learned Judge having referred to the statements marked parts which the Pleader pointed out to be contradictory and ordered copies to be made of such parts, that while the copies were being made, the Pleader who appeared to have a complete knowledge of the contents of the Police papers was not compelled or required to proceed but voluntarily proceeded with or continued the cross-examination of the witnesses, and that when the copies had been made, they were shown to the Pleader and in the absence of anything done by the Pleader in that regard, they were filed on the record.

The first question for determination is whether, and if so, to what extent, the learned trial Judge contravened the provisions of s. 162 (1), Criminal Procedure Code. According to the plain meaning of the section no statement made by a person to a Police Officer in the course of an investigation or any record thereof or any part of such statement or record may be used for any purpose at any enquiry or trial except as provided in the first proviso to the sub-section. The sub-section as it stood before the amendment of the Criminal Procedure Code in 1923, merely provided against the use of the record of such statement or any part thereof as evidence but by the amendment the use for any purpose whatever of such statement or record or any part of such statement or record at an enquiry or trial of the offence under investigation at the time when such statement was made is entirely prohibited except as provided by the first proviso to the sub-section, under which an imperative duty is cast upon the Court, on the request of the accused (or, of course, his Pleader), to refer to the record of such statement. Therefore unless and until the accused or his Pleader makes the request, the duty of the Court to refer to such record does not arise and the prohibition contained in the main sub-section remains unqualified. For these reasons I join, with the utmost respect to the learned Judge concerned, in the note of dissent struck by my learned brother Dunkley with reference to the dictum that "the Judge would be well advised to refer to Police papers privately" appearing in Criminal Appeal No. 1080 of 1933 of this Court.

Under the proviso an imperative duty

is cast upon the Court, on the request of the accused or his Pleader, not only to refer to such record but also to direct the accused to be furnished with a copy thereof, although under the second proviso not only does the Court have the right but also it is its bounden duty to exclude from the copy to be furnished to the accused any part of such statement, if the Court is of opinion that such part is not relevant to the subject-matter of the enquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests. Where the Court excludes such part from the copy of the statement furnished to the accused the Court must record its opinion (but not the reasons therefor) by which it justifies the exclusion. The plain meaning of the two provisos then is that the Court on the request of the accused is bound to refer to the record of the statement of a witness called for the prosecution for the purpose of forming an opinion: (1) whether any part of such statement is not relevant to the subject-matter of the enquiry or trial or (2) whether its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests; and when no part of the statement is found not to be relevant to the subject-matter of the enquiry or trial or is found to be such that its disclosure to the accused is not essential in the interests of justice and is inexpendent in the public interests, the Court must direct that the accused be furnished with a copy of the record of the statement; but if the Court is of opinion that any part of such statement is not relevant to the subject-matter of the enquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, the Court must record such opinion, but not the reasons therefor, and must exclude such part from the copy of the statement furnished to the accused and then direct that the accused be furnished with a copy of such statement, less such part as the Court excludes. There is nothing in the language of these two provisos to suggest that it is the duty of the Court to decide whether there is any variation between the statement of the witness in Court and the statement recorded by the Police before directing that the accused be furnished with a copy of the statement. It must be borne in mind that the exclusion of any part of the statement of a witness to the Police on the ground of irrelevancy under the second proviso is not irrelevancy based on want of contradiction, inconsistency or discrepancy between the witness's statement in Court, and his statement to the Police, but irrelevancy with reference to the subject-matter of the enquiry or trial. Therefore it does not appear to be a necessary ground for requiring the Court to direct that the accused be furnished with a copy of the statement of a witness to the Police that there should be any variation between the witness's statement in Court and his statement to the Police. In so far as the ruling in *Bana Singh* v. *Emperor* (10), indicates that there should be such variation in order that the accused be entitled to a copy of the record of the statement made to the Police, I am at one with my learned brother Dunkley in respectfully dissenting from it.

Upon other points relating to the interpretation of the provisions of s. 162, the views expressed by my learned brother in his lucid judgment are supported not only by the plain meaning of the section but also by judicial pronouncements quoted by him, and I have nothing to add to his observations but state that I entirely agree with his views. I also agree that such irregularities, as we have found the learned trial Judge has committed, are at most irregularities falling within the purview of s. 537, Criminal Procedure Code, and that they have not in fact occasioned any failure of justice. Upon the facts of the case I agree that there is no substance in the appeal of any of the three appellants. I agree in the order proposed by him.

D. *Order accordingly.*

CALCUTTA HIGH COURT

Civil Appeal No. 281 of 1932
August 17, 1934
MITTER, J.

NISHI CHANDRA SEN—PLAINTIFF—APPELLANT

versus

ROMESH CHANDRA MAJUMDAR AND ANOTHER—DEFENDANTS—RESPONDENTS

Grant—Noabad land—Government, if can settle it with anyone—Government coming to wrong conclusion on question of possession—Settlement, if confers title only on grantee.

The Government had the right to make settlement of Noabad lands with anybody it pleased. Although in making the settlment, the fact of previous possession is taken into account, yet if the Sub-Deputy Collector had come to the wrong conculsion on the question of possession, still the settlement made would confer a right on the grantee alone in the land.

C. A. from Appellate Decree of the Additional Sub-Judge, First Court, Chittagong, dated July 17, 1931.

Mr. *Chandra Sekhar Sen*, for the Appellant.

Mr. *Narendra Kumar Das*, for the Respondents.

Judgment.—This appeal is on behalf of the plaintiff for declaration of his alleged 8-annas share in a certain holding and for confirmation of possession. The subject-matter of the suit is the watery portion of a tank recorded in Dag No. 1609 of the settlement map. The plaintiff's case is that the said tank was recorded as Dag No. 328 of the Chitta of 1200 M. E. in the possession of Srimanta and Kalidas. The plaintiff's further case is that on the death of Srimanta, the property was inherited by Srimanta's son Radhakrishna on whose death the same passed to Brajeswari. The plaintiff is the daughter's son of Radha Krishna. The plaintiff's further case is that Kalidas' rights devolved ultimately upon Harapriya who is defendant No. 1. The other defendants are sons of Harapriya. It appears that in the 1871 Biswambar purchased at an execution sale Brajeswari's alleged right whereupon Brajeswari instituted a suit to recover possession of her alleged share challenging the decree and the execution sale. In that suit Biswambhar, Harapriya and Harapriya's husband were parties defendants. The said suit ended in a compromise in the year 1872. By the terms of the compromise decree, to which Harapriya and Biswambhar were parties, the right of Brajeswari to a moiety share was recognised and the said share was leased out in Temami right for six years by Brajeswari to Lakhshmi Kanta, the husband of Harapriya. The plaintiff's further case is that although Brajeswari was in possession jointly with Harapriya. Harapriya's husband Lakshmikanta who looked after the affairs fraudulently caused the name of Harapriya to be entered in the records of Fasson's survey which took place in the year 1878. It is on the basis of this record, he says, that the Government granted in the year 1881 a *jote* settlement to Harapriya. In the year 1895, there was a Cadastral Survey. Brajeswari was recorded as an under-*raiyat* under Harapriya, but she having repudiated through Rasik the said position, her name was removed from the Record of Rights and Harapriya's name alone continued to be on the record. It appears that in the year 1914, a tank was re-excavated by defendant No. 1 with the help of the District Board. She herself contributed a substantial sum of money. From the year 1914 to 1917 there were proceedings under s. 9, Specific Relief Act between the plaintiff and the defendants in respect of the banks of the tank and in respect of some of the proceedings the plaintiff was successful. In the year 1928 the Khas Tahsildar recorded the name of the plaintiff along with the name of Harapriya in the Government Register. It is on these facts that the plaintiff says that he has a moiety share in the *jote* which was created in the name of Harapriya in the year 1881. The plaintiff also based his claim to a moiety share on title by adverse possession.

The Court of first instance gave effect to some of the contentions of the plaintiff and decreed the suit. The lower Appellate Court has, however, dismissed the same. It is admited by both the parties that the tank in question appertained to a Noabad *taluk* belonging to the Government and that the Government had the right to make any settlement it liked. It is the finding of the learned Subordinate Judge that the banks of the tank in respect of which proceedings were taken under s. 9, Specific Relief Act, do not appertain to the Noabad *taluk*, but they appertained to Taraf Mehals and were held under different titles. The learned Subordinate Judge points out that in the Mughi Chitta the possession of Srimanta and Kalidas was simply recorded but they had in fact at the time or thereafter no rights to the land. They assumed they had rights and on that footing dealt with the property by the transactions as mentioned above. In the year 1877, Mr. Fasson started his survey and in the course of the same it was found that Maghi Survey plot No. 328 together with some other plots was lying unsettled. The Sub-Deputy Collector Pran Krishna Das enquired into the fact of possession and came to the conclusion that Harapriya was the only person in possession and was entitled to a settlement from the Government. Accordingly, in the year 1881, the land in suit was settled with Harapriya. That settlement for the first time created a right in the lands in suit. He accordingly held that so far as title is concerned, Harapriya is alone entitled to it. On the question of possession the learned Subordinate Judge in more places than one after reviewing the evidence came to the conclusion that the plaintiff was not in

possession of the land in suit for a considerable period, much more than 12 years before the suit, and, therefore, held that the plaintiff's claim based on a title by adverse possession was also not substantial. In my opinion, both these findings of the learned Subordinate Judge dispose of the matter. The right to the property was first created in the year 1881. The Government had the right to make settlement of Noabad lands with anybody it pleased. No doubt, in making the settlement the fact of previous possession is taken into account, but if the Sub-Deputy Collector had come to the wrong conclusion on the question of possession still the settlement which was made with Harapriya would confer a right on her alone in the land. In this view of the matter the plaintiff cannot claim any interest in the *jote* so created. The mere fact that for some time, the husband of Harapriya looked after the properties of the plaintiff would not make him a trustee so as to give to the plaintiff on equitable principles a right to the settlement made by the Government in favour of Harapriya. The plaintiff's claim based on adverse possession must also fail on the findings that he had no possession at least after the Cadastral Settlement which was finally published in the year 1898. For these reasons, I affirm the judgment and decree passed by the learned Subordinate Judge. The appeal is accordingly dismissed with costs.

D. *Appeal dismissed.*

MADRAS HIGH COURT

Criminal Appeals Nos. 265 and 266 and Criminal Revision No. 659 of 1934 and Taken up No. 6 of 1934

August 20, 1934

PAKENHAM WALSH, J.

MAVUTHALAYAN AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 109—Accomplice—Person knowingly aiding in disposal of stolen property—Whether an accomplice—Criminal trial—Charge solely under ss. 457 and 380, Penal Code—No alternative charge under s. 411, Penal Code—No mention of s. 411 even in charge to jury—If an omission prejudicing accused.

A person who knowingly aids in the disposal of stolen property falls under the third definition under s 107, Penal Code, and is an accomplice.

No direct evidence existed to show that the accused committed the house-breaking and theft. Yet the charge against them was framed solely under ss. 457 and 380, Penal Code, with no alternative charge under s 411, Penal Code In his charge to the jury the Judge did not mention s. 411, Penal Code, nor inform the jury that it was open to them either to find on the facts that the accused committed the house-breaking and theft or that they were guilty under s. 411, Penal Code, or tell them that they might convict them in the alternative He left them no choice between a conviction under ss 457 and 380, Penal Code, and an acquittal:

Held, that the offence under s. 411 being punishable with a lesser sentence than offences under the two former sections, this was an omission which prejudiced the accused.

Cr. A, against an order of the Sessions Court, North Arcot, in C. C. No. 21 of 1934.

The Public Prosecutor, for the Crown.

Judgment.—In this case the accused have been convicted of house-breaking and theft, offences under ss. 457 and 380, Indian Penal Code. There is no direct evidence that any of them were seen at the place of house-breaking and the conviction rests on the subsequent recovery of certain of the stolen articles. The learned Sessions Judge says in his charge to the jury:

"there is hardly little or no evidence on record that these accused were arrested with these articles in their possession."

So the evidence against them is that of third person to whom they handed over the property. One of these is P. W. No. 6 to whom 6 brass vessels, M. O. s. 2 to 7 and a silk saree, M. O. 10 were sold. As regards this witness the learned Judge instructed the jury as follows:

"What P. W. No. 6, Abdul Rahim Sahib, says is that accused Nos. 1, 2 and 4 who are all brothers brought to him these brass vessels and one silk saree, M. O. s 2 to 7 and 10, and wanted him to give them Rs. 2. As he had no money then he gave them six annas. You have seen this witness in the box. These three accused were living in his land. He knew them very well. He was compelled to say that these brass articles could not have been owned by these accused. He was also forced to answer that the silk saree, M. O. 10, is one which the womenfolk of accused Nos. 1, 2 and 4 could not have owned. This may show that he might have known at the time when he received these articles that they were stolen. But he is not at present in the dock. If it is an offence, it is for the authorities to proceed against him. What you are now concerned with is whether his testimony is true or not. That these articles were recovered from his possession is proved by P. W. No. 5 as well as by the Village Munsif of Desur. A *Mahazar*, too, was prepared at the time which has been filed as Ex. C. Desure is not far away from the place of occurrence Salai Arugavur; it is only three miles from it. So then, it comes to this: that if you believe the testimony of P. W. No 6, it follows that very soon after the theft most of the articles that had been stolen were sold or pledged with him by accused Nos. 1, 2 and 4."

Curgenven, J., admitted this appeal with

the note that the Sessions Judge omitted to point out the need for caution in accepting the evidence of a receiver of stolen property as that of an accomplice. Mr. Bewes, for the Crown, raised the point whether a person who receives stolen property knowing it to be stolen is an accomplice. Woodroffe in his Evidence Act says the term "accomplices" may include all "*partcipes criminis*" and there is a note below that in English Law it includes both principals of the first and second degree and accessories before and after the fact, but that in India it was held that an accessory after the fact (under the law prior to the Penal Code) stood on a very different footing from an accomplice. Mayne says (p. 756, 2nd Edition),

"abettors of crime are accomplices and must be looked at as such if they are produced as witnesses against the principal offenders."

Section 107, Indian Penal Code, says:

"A person abets the doing of anything, who first instigates any person to do that thing; or secondly engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission the doing of that thing."

It appears to me that a person who knowingly aids in the disposal of stolen property falls under the third definition and is an accomplice, and that whatever may have been the case in India before the Penal Code, he is an accomplice under that Code. If so, the Judge was, I think, bound to tell the jury this that P. W. No. 6 being, on the evidence, a receiver of property which he must have known to be stolen was a tainted witness whose evidence must be received with great caution. I therefore hold that there has been a failure to direct the jury on a material point and that the accused have been thereby prejudiced. On looking through the records I found another matter, which, in my opinion also vitiates the charge and which I pointed out to Mr. Bewes. As stated above, there was no direct evidence that the accused committed the house-breaking and theft. Yet the charge against them was framed solely under ss. 457 and 380, Indian Penal Code, with no alternative charge under s. 411, Indian Penal Code. In his charge to the jury the learned Judge did not mention s. 411, Indian Penal Code, nor inform the jury that it was open to them either to find on the facts that the accused committed the house-breaking and theft or that they were guilty under s. 411, Indian Penal Code, or tell them that they might convict them in the alternative. He left them no choice between a conviction under ss. 457 and 380, Indian Penal Code, and an acquittal. The offence under s. 411 being punishable with a lesser sentence than offences under the two former sections, this was an omission which prejudiced the accused. For both these reasons the conviction and sentence must be set aside and a re-trial ordered. The case will be transferred to the Sessions Judge, Chittoor, for disposal according to law. The convictions and sentences passed on accused Nos. 2 and 4 who have not appealed and whose cases are indistinguishable are also set aside under ss. 423 (*d*) and 439 (1) Criminal Procedure Code, for the reasons given in the judgment above and their re-trial is ordered.

A/D. *Re-trial ordered.*

CALCUTTA HIGH COURT

Civil Appeal No. 1777 of 1930

May 11, 1934

PATTERSON, J.

APTABUDDIN KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JOHAR ALI KAZI AND OTHERS—RESPONDENTS

Customary Rights—Villagers having certain legal rights—Court's duty to defend and enforce them—Equity—Applicability to question of legal rights.

Where it has been found that the villagers have certain legal rights in the land in suit, and that they have never surrendered those rights, it is the duty of the Courts to defend and enforce those rights.

Where it is a question of legal rights, there is no scope for the application of equitable principles.

A. from appellate decree of the Sub-Judge, Second Court, Tippera, dated March 31, 1930.

Mr. *Rashindra Nath Sarkar* and Syed *Forhat Ali*, for the Appellants.

Mr. *Upendra Kumar Roy*, for Respondents.

Mr. *Bireswar Chatterji*, for the Deputy Registrar.

Judgment.—This is an appeal by two of the defendants, and arises out of a suit brought by the plaintiffs on their own behalf and on behalf of the other inhabitants of a village called Piparia, for a declaration that a certain strip of land forms part

of the village Gopat, for an order on the defendants to fill up a tank that they have excavated in such a way as to block the Gopat, and for certain other reliefs. The strip of land in suit lies to the west and north of the defendant's *charabari*, and according to the defendants' case, it forms part of their *charabari*, while according to the plaintiffs' it is the *zemindar's khas* land and forms part of a village Gopat that has existed and has been used by them from time immemorial.

It is undisputed that a village Gopat runs from south to north through the part of the village to the south of the defendants' *charabari*, and also that a similar Gopat runs from south to north through the part of the village to the north thereof. The plaintiffs' contention was and is that these two Gopats were really one and the same Gopat, and that the land in suit was the portion of the Gopat connecting the northern and southern portions. The defendants' case was, *inter alia*, that the people of the village had at most a customary right to pass across the defendants' *charabari*, but not by any defined path, from its south-western corner where the southern Gopat ended, to its north-eastern corner where the northern Gopat began and that the tank had been dug and the path diverted with the consent of all the villagers concerned, including the plaintiffs themselves.

The trial Court dismissed the suit, but the lower Appellate Court decreed it, and one of the principal grounds of appeal that has been urged before this Court is that the lower Appellate Court did not reverse some of the findings on the strength of which the trial Court had dismissed the suit, and in some cases did not even refer to the points to which those findings related. There is, in my opinion, no substance in this contention, for the findings of the lower Appellate Court appear to me to be conclusive, and are such as to render the consideration of those of the trial Court's findings to which no reference has been made quite necessary. The lower Appellate Court has found, on a consideration of all the evidence that has been adduced on both sides, including the Settlement Records and the records of the *butwara* proceedings: (1) That the land in suit is a village Gopat and not part of the defendants' *raiyati*; (2) that for a long time—(by which is evidently meant 'from time immemorial,' to use the legal phrase),—there had been a village Gopat over the land in suit connecting the northern and the southern Gopats; (3) that the defendants gradually encroached on and finally appropriated the land in suit; and (4) that the villagers never gave their consent to the old Gopat over the land in suit being closed, and a new path opened up. These are findings of fact which cannot be questioned on second appeal and they are, as has already been stated, conclusive.

It has been contended that the lower Appellate Court ought to have considered the evidence with regard to an earlier diversion of the path that is said to have taken place some 14 or 15 years ago, and especially with reference to the question of limitation; but it has been held that limitation does not apply in a case of this sort, obstruction to a right of way being a continuing nuisance: *Nazem* v. *Wazedulla* (1). It has further been contended that customary rights, such as the right now under consideration, must be exercised in a reasonable manner, and attention has been drawn to the finding of the trial Court to the effect that the new path provided by the defendants is quite convenient, and is in fact being used by the majority of the villagers without complaint. This contention would have had great force, if the lower Appellate Court had merely found that the villagers had some sort of right of way over the defendants' land, but it becomes entirely irrelevant in view of the finding of that Court to the effect that the land in suit is a village Gopat that has existed from time immemorial and that it does not form part of the defendants' *raiyati* at all.

As the matter now stands, it is a question of legal rights, and there is, therefore, no scope for the application of equitable principles. It has been found that the villagers have certain legal rights in the land in suit, and that they have never surrendered those rights, and this being so, it is the duty of the Courts to defend and enforce those rights. The result is that the appeal is dismissed with costs to the appearing respondents, and the judgment and decree of the lower Appellate Court are affirmed. Leave to appeal under s. 15, Letters Patent, is refused.

D. *Appeal dismissed.*

(1) 29 Ind. Cas. 385; A I R 1916 Cal. 733; 21 C L J 640.

LAHORE HIGH COURT

Criminal Appeal No. 1080 of 1933
February 20, 1934
SHADI LAL, C. J. AND HILTON, J.
GURCHARAN SINGH—CONVICT—APPELLANT
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 300, 302, 304, Part. II—Sudden quarrel—Single dang blow on head—Death—Offence.

Where in a sudden quarrel, the accused deals a single blow with a *dang* on the head of his antagonist, an old man whose weakness and enlarged spleen might have hastened his death which ensues, the accused is guilty not of murder but of culpable homicide not amounting to murder.

Mr. *Ram Lal Anand*, for the Appellant.

Mr. *Des Raj Sawhney*, for the Crown.

Shadi Lal, C. J.—The appellant Gurcharan Singh *alias* Mahna Singh, has been convicted of the murder of one Jamal, a blacksmith of Chak No. 549, G. B. in the District of Lyallpur, and has been sentenced under s. 302, Indian Penal Code, to suffer the penalty of death. The convict has preferred an appeal to this Court, and the record has also been submitted to us for confirmation of the capital sentence.

The prisoner, who has read up to the Intermediate Examination of the Punjab University, was residing in the month of April 1933, with his brother Pritam Singh in Chak No. 549, G. B. where the latter was working as a *Patwari*. On the evening of April 21, the prisoner went to the shop where the deceased Jamal worked as a blacksmith, and asked him to repair his bicycle. Jamal expressed his inability to undertake the repair, and an altercation then ensued between them, which led to an exchange of abuse between Jamal's son Ahmad on the one side and the accused on the other side.

The evidence for the prosecution shows that on the morning of April 22, Jamal was assaulted by the prisoner when the former was going to a field in order to collect heaves of wheat. The accused inflicted a blow on the head of the victim with his *dang* with the result that the wounded man fell down on the ground and became unconscious. In the afternoon he was being taken to the hospital.

The medical witness, who conducted the *post mortem* examination, deposes that the deceased sustained, besides two abrasions, a contused wound on the head which caused a fracture of the parietal bone and resulted in his death. The abrasions could, in the opinion of the medical witness, be caused by a fall. The witness also deposes that a moderate blow on the head would have caused the fracture of the parietal bone, because the deceased was an old man of 60 years of age; and that

"his weakness and emaciated condition and enlarged spleen might have hastened his death."

The learned Counsel for the appellant contends that only one blow was struck on the deceased and that the evidence of the prosecution witness Shah Ahmad to the effect that three or four blows were struck is contradicted by the statement made by him to the Police, in which he attributed only one *dang* blow to the assailant. This contention also receives support from the testimony of the medical witness, who found only one wound on the head of the deceased. It appears that the assault was preceded by a quarrel between the accused and Jamal, and this is the opinion which was expressed by three assessors. The learned Counsel for the Crown admits that the the prisoner struck one blow upon a sudden quarrel, and that he had no intention such as is contemplated by the definition of murder contained in s. 300, Indian Penal Code. The offender must, however, be deemed to possess the knowledge that the blow inflicted by him was likely to cause death.

The circumstances of the case show that the offence committed by the prisoner was one of culpable homicide not amounting to murder, as contemplated by s. 304, Part 2, Indian Penal Code. I would, accordingly, accept the appeal so far as to alter the conviction to one under s. 304, Part 2, Indian Penal Code, and to reduce the sentence to rigorous imprisonment for five years.

Hilton J.—I agree.

N. *Conviction altered.*

CALCUTTA HIGH COURT

Civil Appeal No. 500 of 1933
July 19, 1934
MUKERJI, ACTG. C. J. AND S. K. GHOSE, J.
MATHURESH CHAKRAVARTY—APPELLANT
versus
S. R. MILLS CO., LTD. AND ANOTHER—RESPONDENTS

Provincial Insolvency Act (V of 1920), s. 52—Attachment of properties of debtor in execution of decree—Subsequent appointment by insolvency Court, of interim Receiver — Order of stay of execution and order under s. 52 by insolvency Court—Legality—Remedy—Proper procedure.

Where after the attachment of property of a debtor in execution of a decree against him, the insolvency Court admits a petition for insolvency by the debtor and appoints an *interim* Receiver, it is only the Executing Court that can pass an order under s. 52, Provincial Insolvency Act, on an application made to it and not the insolvency Court and where, on an application by a petitioning creditor the execution proceedings are already stayed by the insolvency Court and also an order passed under s. 52 of the Act, on an application by the decree-holder, directing the Receiver to sell the property for realising the costs of the suit and of the execution, there are two alternatives either of which may be adopted. One of these alternatives is for the insolvency Court to direct the Receiver to make a proper application to the Executing Court in order to obtain the necessary order under s. 52, Provincial Insolvency Act ; and the other alternative is for the decree-holders to apply to the Executing Court for the sale of the properties under attachment in order that their dues may be realized, in which case the insolvency Court has to vacate the stay order which he had already made.

A. from original order of the District Judge, Hooghly, dated August 23, 1933.

Messrs. *Narendra Nath Choudhury* and *Fanindra Mohan Sanyal*, for the Appellant.

Mr. *Chandra Sekhar Sen*, for the Respondents.

Judgment.—This is an appeal by a debtor against whom insolvency proceedings are pending in the Court of the District Judge of Hooghly. The facts necessary to be stated for the purpose of this appeal are quite simple. The debtor was a surety against whom a certain money decree was being executed in the Miscellaneous Execution Case No. 101 of 1930 of the Second Subordinate Judge's Court, Hooghly. In the course of the said execution proceedings, certain properties of the debtor were attached. Long after the attachment a petitioning creditor, namely, Pramatha Nath Chatterjee, started proceedings in insolvency as against the debtor alleging that the latter was indebted to him for a certain amount. The petitioning creditor, after his application was registered, filed a petition praying for restraining the decree-holders Sovaram Ramprasad Mills, Ltd., from selling the properties of the debtor in the said execution case until the disposal of the insolvency proceedings and for the appointment of a Receiver. The learned Judge appointed an *interim* Receiver and also issued an order staying the sale. Thereafter certain proceedings followed but with them we are not concerned in the present appeal.

The result of those proceedings was that it was ordered by this Court that the said Sovaram Ramprasad Mills, Ltd., could not be brought in in the schedule of creditors because they were alleging that there was collusion between the debtor and the petitioning creditor and also because no order of adjudication had yet been passed but that they would be entitled to show that the insolvency application should not be granted, or in other words, that the acts of insolvency alleged in the petition of the petitioning creditor have not been established. Thereafter an application appears to have been made by the said Sovaram Ramprasad Mills, Ltd., to the learned District Judge before whom the insolvency proceedings are pending that the Receiver might be directed to sell the property for satisfying the costs of the suit and of the execution under s. 52, Provincial Insolvency Act. Upon this petition the learned District Judge has made this order which is complained of in this appeal. The order in effect was that the Receiver should sell the properties involved in the execution proceedings which had been stayed by the previous order of the learned District Judge to which reference has already been made and should deposit the sale proceeds in Court. It appears, therefore, that the *interim* Receiver was appointed by the insolvency Court long after the attachment order had been issued from the Court in which the execution proceedings were taking place, and the order complained of in the appeal was made by the insolvency Court upon the view that s. 52, Provincial Insolvency Act, would entitle the Court to make such an order. On reading s. 52, Provincial Insolvency Act, it seems to us to be perfectly clear that an application under that section has got to be made to this Court which was executing the decree and it is that Court which on such an application being made can direct the property to be delivered to the Receiver in order that a sale may be held. The learned District Judge had no jurisdiction to make the order for sale under the provisions of the said section. The order complained of in the appeal, therefore, must necessarily be set aside.

The question then is what direction should be given by us in order that the respondents who are executing the decree may proceed to realize their costs of the suit and of the execution. We have considered the matter carefully and we think that there are two alternatives either of which may be adopted. One of these alternatives is for the learned District Judge to direct the Receiver to make a prope

application to the executing Court in order to obtain the necessary order under s. 52, Provincial Insolvency Act; and the other alternative is for the said respondents to apply to the executing Court for the sale of his properties under attachment in order that their dues may be realized. In case it be necessary for the said respondents to adopt that course, it will be necessary for the learned District Judge to vacate the stay order which he had already made because so long as that order stands, it will not be open to the said respondents to make any application to the Executing Court for the sale of his properties attached. We, therefore, direct that on receipt of the record from this Court the learned District Judge will either direct the Receiver to apply to the executing Court for an order under s. 52 for the sale of the properties or he will vacate the *interim* order of stay which he made at the time when the application was made by the petitioning creditor for restraining the respondents from selling the properties so that the said respondents may have an opportunity to apply to the Executing Court for the sale of the properties attached. We make no order as to costs of this appeal.

D. *Order accordingly.*

MADRAS HIGH COURT

Letters Patent Appeal No. 10 of 1930

February 14, 1934

JACKSON AND BUTLER, JJ.

YELLAMRAJU VENKATASUBBA RAO —DEFENDANT—APPELLANT

versus

LAKKARAJU ANANDA RAO AND OTHERS—PLAINTIFF AND DEFENDANT —RESPONDENTS

Hindu Law—Widow—Alienation—Alienation of part of estate for religious ceremonies of daughter's son—Acts done for spiritual welfare of deceased husband—Alienation, if binding on daughter's son as reversioner.

It is very difficult under the Hindu Law, to distinguish positively between sincere religious feeling and idle sentiment. All that can safely be said is that where the point is doubtful and where there is not the slightest suspicion of ulterior motive or fraud, the benefit of the doubt should be given to religious feeling. It is not for a Court of law to disparage the pious acts of devout people.

Under Hindu Law, a daughter's son who offers the funeral oblation is particularly worthy of honour. Consequently, where a widow who is in possession of her deceased husband's estate alienates a part of the estate, to defray debts contracted for family expenses and thread and marriage ceremonies of her daughter's son, the latter act being done as an act conducive to the spiritual welfare of her deceased husband, and not through any compelling necessity, and there was no suggestion of undue extravagence or of fraud: the alienation is binding on the daughter's son as a reversioner In such cases the test is whether the expenditure was reasonable according to the common notions of Hindus. *Sardar Singh* v. *Kunj Behari Lal* (2) relied on.

L. P. A. against the decree of Anantakrishna Ayyar, J., dated October 7, 1929.

Mr. *P. Satayanarayana Rao*, for the Appellant.

Mr. *G. Lakshmanna*, for the Respondents.

Judgment.- One Lakshmayya died leaving a widow (defendant No. 2) and daughter Subbamma, mother of two sons defendant No. 3 and plaintiff, who are the nearest reversioners to Lakshmayya's estate. On November 20, 1918, with the assent of defendant No. 3, the widow, defendant No. 2, sold a parcel of the estate for Rs. 1,500 for debts contracted for family expenses and the thread and marriage ceremonies of the plaintiff. Four years later the plaintiff with more sense of humour than of decency sued to invalidate this sale on the ground that the estate had been dissipated for improper purposes. The District Munsif decreed, the Subordinate Judge dismissed, and this Court decreed the suit; and it now comes up for final decision with the vendee as appellant. The facts as stated above are not in dispute. The elder brother's participation in the transaction has precluded any question of fraud, and there is the plain first issue:

"Whether the suit alienation in favour of defendant No. 1 was made for legal necessity and for purposes binding on defendant No. 3 and plaintiff;" ?

Defendant No. 3 and plaintiff were not so indigent as to be dependent upon their grandmother, and it cannot be said that her giving them this help was an act of compelling necessity. The question is whether the act was conducive to the spiritual welfare of Lakshmayya when admittedly it would be justifiable. That this is a question which admits of no simple answer is clear not only from the conflict of decisions in the reported cases, but from this case itself; for it so happens that we have on this very case the opinion of two learned Judges of this Court, either of whom we should have been prepared unhesitatingly to follow in a matter of Hindu Law, *cf.*, the judgment

under appeal and the comment upon it in *Mallayya* v. *Bapi Reddi* (1). An ancient text of Brihaspathi runs:

"A widow inheriting her husband's estate should honour with food and presents . . . . a daughter's son."

As pointed out in *Mallayya* v. *Bapi Reddi* (1) at p. 44* it is the daughter's son who offers the funeral oblation, and who therefore is particularly worthy of honour. Mr. Lakshmanna argues that this is mere sentiment, but it is just here that the line of cleavage appears. Who is to distinguish positively between sincere religious feeling and idle sentiment? All that can safely be said is that where the point is doubtful and where there is not the slightest suspicion of ulterior motive or fraud, the benefit of the doubt should be given to religious feeling. It is not for a Court of law to disparage the pious acts of devout people. And this principle has been followed by the Judicial Committee. In *Sardar Singh* v. *Kunj Bihari Lal* (2), an alienation by a widow was being considered where its avowed object was to offer food to an idol and the following passage from *Vuppuluri Tatayya* v *Ramakrishnamma* (3) at p. 291† was quoted with approval:

"We think we are warranted in holding that if the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited, and the occasion of the (disposition or) expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioner."

And the Judicial Committee proceeds:

"In the present case the purpose for which the alienation was made was undoubtedly not for the performance . . . . of any such duty as might be regarded as obligatory under the Hindu Law. But at the same time there can be no question that it was a pious act."

And accordingly the alienation was allowed. The quantitative ratio approved in this judgment is not, at first sight, easy to understand. If a small gift to an idol is conducive to the husband's spiritual bliss, would not a larger gift be still more conducive? Probably human nature being what it is, Courts are not prepared to sanction transactions which offend ordinary common sense and good husbandry. If a widow devotes the whole of her estate to an idol, there may be suspicion of fraud or undue influence. In our present case there is no suggestion of undue extravagance, and it must be remembered that the quantitative ratio works in both directions. Her pious duty for her husband's satisfaction is to honour the daughter's son, and some meagre gift for his ceremonies which would only make him ridiculous in the eyes of the neighbours would not fulfil this obligation. It may be taken then that the quantum of this alienation is reasonable, and one need not embark on an argument as to whether feeding an idol is or is not more meritorious than honouring a daughter's son. Both involve an expenditure "reasonable according to the common notions of Hindus," and that is sufficient justificatian for the impugned sale.

In the judgment under appeal, it is stated "we have here no purpose connected with the husband's spiritual welfare" a proposition which we should not think of questioning as an authoritative statement of Hindu doctrine, but we are not so much concerned with what is the correct doctrine as with "the common notions of the Hindus." The pious endeavour of this widow to promote her husband's spiritual bliss by honouring his daughter's son may, for aught we know, in its result, fall short of her intention; but so long as she acted with piety and in consonance with prevalent notions, we do not think it incumbent upon us to interfere any more than the Judicial Committee interfered with the gift to the idol. No doubt there is much conflict in the authorities as observed by our late Chief Justice in *Srinivasa Raghavachariar* v *Rajagopalachariar* (4) and little will be gained by attempting to piece them together into coherent pattern, for instance, discussing whether if a daughter's daughter may be honoured at marriage, the same does or does not apply to a son and so on. We prefer to base our judgment simply upon *Sardar Singh* v *Kunj Bihari Lal* (2) with the satisfaction that substantial justice has been done, and the result is not, as is candidly admitted in the judgment under review, one which a Court of law would like to avoid. The appeal is allowed with costs throughout.

A/D. *Appeal allowed.*

(1) 135 Ind. Cas. 715; A I R 1932 Mad. 26; 62 M L J 39; (1931) M W N 808; 35 L W 131; Ind. Rul. (1932) Mad. 203.

(2) 69 Ind. Cas. 33; A I R 1923 P C 231; 49 I A 383; 44 A 503; 16 L W 871; 31 M L T 253; 37 C L J 383; 44 M L J 766; 27 C W N 653; 25 Bom. L R 648; 2 P W R 1923 (P C).

(3) 6 Ind. Cas. 240; 34 M 288; (1910) M W N 222; 8 M L T 74; 20 M L J 798.

(4) 109 Ind. Cas. 525; A I R 1927 Mad. 438; (1927) M W N 231; 54 M L J 418; 27 L W 838.

*Page of 62 M L J—[*Ed.*]

†Page of 34 M—[*Ed.*]

PATNA HIGH COURT

First Civil Appeals Nos. 265 of 1930 and 33 of 1931 and Civil Revision No. 536 of 1930

November 28, 1934

COURTNEY-TERRELL, C. J. AND FAZL ALI, J

Pandit RAJBALLABH MISIR AND OTHERS —APPELLANTS

versus

BISHUN PRASAD SINGH AND OTHERS— RESPONDENTS

Minor—Persons dealing with property of minor—Law applicable—Bona fide *lender—Certificate from District Judge—When can be got and relied on—Guardian acting under authority from District Judge—Stranger purchasing minor's property from guardian—When entitled to protection—Alienation setting aside of—Burden of proof—Fraud—Sale, when can be impugned on ground of fraud—Appeal—Findings of trial Court should not be disturbed unless manifestly incorrect.*

The ordinary law applicable to those who deal with the property of a person under disability is that he must make a proper inquiry to satisfy himself (*a*) that there is legal necessity for the money and (*b*) that there is a necessity for the loan or sale to produce that money. A *bona fide* lender or purchaser may satisfy this obligation to inquire by demanding from the borrower or vendor a certificate from the District Judge that the money is required for a legitimate purpose and sanctioning the loan or sale to supply the need certified. But if he is already aware or has materials in his possession which reasonably put him on inquiry, he is not entitled to substitute the opinion of the Judge in place of his own opinion. *Gangapershad Sahu* v. *Maharani Bibi* (1), followed. [p. 83, col. 1.]

A stranger purchasing from a guardian acting under authority from the District Judge, would be entitled to every protection from Courts so long as it is not shown that he acted in a fraudulent or collusive manner, knowing that the debts for the liquidation of which the purchase-money would be applied were not debts lawfully binding on the minor. The burden of proof would, in such a case, lie heavily on any one seeking to set aside such an alienation. But where the purchasers were themselves the creditors of the family whose debts it was the object of the alienations to liquidate, inasmuch as they have the means of satisfying a Court as to the origin and nature of those debts and how they are binding on the minor, the burden of proof is shifted on their shoulders as soon as the plaintiff has established a *prima facie* case. *Sikher Chand* v. *Dulputty Singh* (2), followed. [p. 83, cols. 1 & 2.]

In order that a sale may be impugned on the ground of fraud, knowledge on the part of the purchaser or reasonable notice to him, should be established as a fact. *Gangapershad Sahu* v. *Maharani Bibi* (1), followed. [p. 86, cols. 1 & 2.]

An appeal is not in the nature of a re-hearing. Where the Judge has heard the evidence and come to his own conclusion, that finding should not be disturbed in appeal unless it is manifestly incorrect. [p. 84, col. 1.]

F. C. A. against the decision of the Sub-Judge, First Court, Gaya, dated May 24, 1930.

Messrs. *S. M. Mullick, Rai Guru Saran Prasad, L. K. Jha, B. K. Prasad, K. N. Varma, Sarjoo Prasad, Ramnandan Prasad* and *Rameshwar Prasad*, for the Appellants.

Messrs. *Khurshaid Husnain, N. K. Prasad II, H. R. Kazimi* and *Rajani K. Sinha*, for the Respondents.

Courtney-Terrell, C. J.—These appeals arise out of a suit by the plaintiffs who, at the time of the transactions in question, were minors to set aside alienations by the mother of the plaintiffs who was their certificated guardian acting under the directions of the District Judge. Appeal No. 265 is by a group of defendants (Nos. 8 to 11), Appeal No. 33 is by defendants Nos. 1, 2 and 3. These defendants also stand in the place of defendant No. 4 who has transferred her rights to them. Defendants Nos. 5 and 6 have not appealed against the decree setting aside the alienations in their favour and defendant No. 7 is in a similar position. Defendant No. 12 is a relative of the plaintiffs. The Subordinate Judge found, and there has been no appeal from his finding, that this defendant colluded with or controlled the mother of the plaintiffs, and that with a single exception, the alienations in question were for the purpose of satisfying his debts for which the estate of the plaintiff was in no way liable.

We have to deal with two separate appeals, and I approach first the case of defendants Nos. 1, 2 and 3 which is the subject-matter of First Appeal No. 33 of 1931. Certain points, however, in common with both cases must first be related. The family to which the plaintiffs and defendant No. 12 belonged are the descendants of Babu Dayal Narain Singh. This man had two sons, the elder Parmeshwar Nath Singh, who in turn was the father of Babu Basdeo Prasad Singh. Basdeo died in the year 1910 leaving a widow *Musammat* Deolochan Kuar and two sons who are the plaintiffs, Babu Bishun Prasad Singh, plaintiff No. 1 and Babu Paraspat Prasad Singh, plaintiff No. 2 who is still a minor. The younger son of Dayal Narain Singh was named Keshonath Singh and he was the father of Jagdeo Prasad Singh, who is defendant No. 12. The widow of Babu Basdeo Prasad was appointed by the District Judge guardian of the two minor plaintiffs, Jagdeo Prasad, defendant No. 12, was the sole adult member of the family. It has been decided by the Subordinate Judge, and the finding is accepted by these defendants, that in point of fact Jagdeo was separate from Besdeo and his

branch of the family. It is true that they lived in the same house and that Jagdeo seems to have transacted the family business both on account of his own share and that of the minors and his conduct was such that outsiders might well have believed that he was in fact joint with the minors and the *karta* of the family.

In the case of defendant Nos. 1, 2 and 3 two sale-deeds in their favour are impeached by the plaintiffs. The first (Ex. SS) is dated August 1, 1918. The transferors are defendant No. 12 and the widow as mother and Court guardian of the minor plaintiffs. It recites that Jagdeo and the minors are members of a joint family governed by the Mitakshara Law; it recites that certain debts are due by the family to the defendants (these will be dealt with later) and it recites that the permission of the District Judge had been obtained to raise money to pay off these debts and for the sale, for a consideration of Rs. 10,000—of, a 4 annas share in a village named Simra and a 4 annas share in another village named Lerua. In point of fact the deceased Basdeo and Jagdeo had between them owned the entire proprietary interest in these villages each having 8 annas. It is noteworthy that on the same date the same defendants took *zarpeshgi* (Ex. M) from Jagdeo. This *zarpeshgi* is executed by Jagdeo alone; he purports to execute the deed as *karta* of the joint family of which he states that he and the minor were members. He recites that he and the minors were in urgent need of money for paying certain debts which are specified and will also be referred to and mortgaged 7 annas out of the entire 16 annas in *Mauza* Lerua which is recited as the *milkiat* interest in possession of Jagdeo and the minors of the joint family, so that, whereas under the deed impeached the share of the minors is recited as separate from the share of Jagdeo and the guardian is, therefore, brought in as a necessary party on their behalf, in this deed on the very same date the same transferees treat the property as undivided and treat Jagdeo as the *karta* of the family and entitled to deal with it. These two methods of treating Jagdeo are entirely inconsistent. The defendants seek shelter under the order of the District Judge by which the sale was sanctioned and certain debts were allowed to be paid out of the purchase money as binding upon the minors.

Now, the Subordinate Judge has found, and it is not denied by the defendants, that some of the debts were owned to the defendants who are, therefore, creditor-purchasers. It is also clear that the directions of the District Judge with regard to the sale were not strictly followed. Furthermore, many of the debts were clearly incurred by Jagdeo not only after the death of Basdeo but after the appointment of the guardian and could not possibly, therefore, have been binding on the estate of the minors. These defendants do not attempt to disturb the finding of the Subordinate Judge that Jagdeo acted fraudulently towards the minors by saddling the minors' estate with his personal debts and further they admit that the order of the District Judge appointing the mother as guardian and sanctioning the sale in question was obtained at their instigation. Not only are these facts found, but all the debts recited in the deed (with the exception of the first) towards the satisfaction of which the purchase money was devoted do not appear in the schedule of debts upon which the petition for sanction was obtained.

The argument on behalf of the defendants is that they were entitled to rest upon the sanction of the District Judge. One of the debts which was discharged by the defendants out of the purchase money was a mortgage by Jagdeo, dated May 9, 1915, to the defendants themselves to secure a loan of Rs. 4,500 on the security of his separate 8 annas share in *Mauza* Simra and his 8 annas share in *Mauza* Lerua, and it is argued that the *bona fide* of the defendants in taking a sale of the minor's interest is evidenced by their abandonment of their undoubted right to enforce this mortgage against the separate share of Jagdeo in favour of a sale of the minors' interest and a weakening of their position and by the fact that in certain litigation in the year 1929, to which all the parties were then parties, it had been held that Jagdeo and the minors were joint. It is contended that defendants were justified in assuming their jointness. In my opinion, in view of the fact that the defendants were old creditors of Jagdeo and in view of the fact that they themselves insisted on the appointment of the guardian, they were, if not parties to the frauds by Jagdeo on the minors, certainly possessed of information which should have put them on their guard. It is true that the sanction of the District Judge gives a certain measure of

protection to the lendor of money or the purchaser of a property of a minor. The ordinary law applicable to those who deal with the property of a person under disability is that he must make a proper inquiry to satisfy himself (*a*) that there is legal necessity for the money, and (*b*) that there is a necessity for the loan or sale to produce that money. A *bona fide* lender or purchaser may satisfy this obligation to inquire by demanding from the borrower or vendor a certificate from the District Judge that the money is required for a legitimate purpose and sanctioning the loan or sale to supply the need certified. But if he is already aware or has materials in his possession which reasonably put him on inquiry, he is not entitled to substitute the opinion of the Judge in place of his own opinion. This was made clear by the judgment of the Judicial Committee in *Gangapershad Sahu* v. *Maharani Bibi* (1):

"Their Lordships think that when an order of the Court has been authorizing the guardian of an infant to raise a loan on the security of the infant's estate, the lendor of the money is entitled to trust to that order and that he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him, that would be a different matter, but apart from any charge of that kind, their Lordships think that he is entitled to rest upon the order."

In that case the Court had sanctioned a loan of a certain amount but had omitted to state the rate of interest. The plaintiff had lent money at 18 per cent. The Court held that the order could not be construed at extending further than a permission to borrow money at a reasonable rate of interest and having held that 12 per cent. was a reasonable rate, they decided that the plaintiff was entitled to recover interest at that rate only. In *Sikher Chand* v. *Dulputty Singh* (2), at p. 371*. the plaintiffs were a firm of money lenders (as in the case before us) who were sued by the minors to set aside sales by a certificated guardian acting under the orders of the Court of the District Judge. The learned Judge said:

"It cannot be denied that a stranger purchasing from a guardian acting under authority from the District Judge under s. 18, Act XL of 1858, would be entitled to every protection from our Courts so long as it is not shown that he acted in a fraudulent or collusive manner, knowing that the debts for the liquidation of which the purchase-money would be applied were not debts lawfully binding on the minor. The burden of proof would, in such a case, lie heavily on any one seeking to set aside such an alienation. But where as in the present case, the purchasers were themselves the creditors of the family whose debts it was the object of these alienations to liquidate, it appears to me that inasmuch as they have the means of satisfying a Court as to the origin and nature of those debts and how they are binding on the minor the burden of proof is shifted on their shoulders as soon as the plaintiff has established a *prima facie* case.

We should not in such a case exact from a plaintiff the same amount of proof as in the case first put. In every one of the cases now before us, the defendants are either the actual purchasers or their heirs. In some of these cases the defendants are men of business, money-lenders or bankers who may not unreasonably be considered to have at hand evidence of the nature just stated. They may have paid some money in these transactions, but the question before us is whether they made sufficient and proper inquiry or had means of knowing whether the money was to be applied in payment of debts for which the minor's estate was liable."

To my mind this case is directly in point and the principle enunciated is clearly applicable. It was argued on behalf of the defendants that equity demanded that if we should be disposed to set aside the sale, we should restore the position of the defendants as mortgagees in respect of the debt which the sale was intended to discharge and it was contended that as the mortgagors had sold a portion of the security, such equitable condition was no longer possible. To this contention the answer in my opinion; is that it is only a *bona fide* purchaser who is entitled to equitable consideration. The defendants abandoned their security under circumstances which entitled them to no protection. If they should have any remedy in respect of the mortgage money they may pursue it in such manner as they may be advised but we cannot restore their position as mortgagees, nor are they entitled to any equitable condition upon an order which we must make setting aside this transaction.

These defendants are also concerned with a second deed (Ex. II (*e*), dated May 14, 1934, which also was executed with the sanction of the District Judge. This was a sale by the mother-guardian of the minors of a 1 anna share out of the 4 annas belonging to the minors in *Mauza* Simra to one *Musammat* Sahodra Kuer (defendant No. 4) for a consideration of Rs. 1,575. The interest of this defendant had been bought up by defendants Nos. 1 to 3 and she is no longer before the Court. The matter to be investigated is the title of *Musammat* Sahodra Kuer as a purchaser. The position of defendants Nos. 1 to 3

(1) 11 C 379; 12 I A 47; 4 Sar. 621; 9 Ind. Jur. 158 (P C).

(2) 5 C 363; 5 C L R 374.

*Page of 5 Cal.—[*Ed.*]

with regard to this deed is no better and no worse than that of defendant No. 4, had she still been contesting the case. It was contended on the evidence that this was really a *benami* transaction behind which stood the present defendants. Even if that were the case, it would be necessary to consider the tansaction on its own merits. The sale to *Musammat* Sahodra Kuer, which was sanctioned by the District Judge was to raise money and to pay off a debt due to one Raja Lal and this money had been required to finance the marriage of a daughter of Basdeo, a sister of the minors. It is clear that if there was such a daughter and if the marriage in fact took place, it was a debt for which the estate of the minors could be made liable, the marriage of a daughter being a matter of family necessity. As to the marriage, it took place if at all in the year 1922. The plaintiffs contend that in fact they only had one sister who was married before the death of her father. We have little doubt on the evidence that there was in fact a daughter who was in fact married about the year 1910 and the conflict upon the evidence has turned upon the question of whether there was a second daughter who was married in 1922. The learned Judge came to the conclusion, on the evidence that the plaintiffs' story was true that there never had been a second daughter and that of any marriage did take place in the year 1922, it was of the daughter of Jagdeo and that Jagdeo raised the money for that purpose and appropriated it to his own use.

I am well aware that an appeal is not in the nature of a rehearing. The Judge heard the evidence and came to his own conclusion and we should not disturb that finding unless it is manifestly incorrect. The impression on my own mind is that his finding was mistaken and that in fact there was a marriage in the year 1922 and that notwithstanding the denial of the widow of Basdeo she had in fact two daughters, the marriage of the second of whom was the subject of this loan. But whatever be the correct view of the facts and whether or not Jagdeo was a party to a fraud upon the minors, the question still remains as to whether the knowledge of the fraud or information sufficient to put them on their guard has been brought home to the defendants. To this part of the question the learned Judge has devoted very little attention. They could hardly be expected to know of the precise number of the female relatives of the minors. It is clear that Jagdeo, notwithstanding the separate nature of his interest had been behaving in a manner which might reasonably lead outsider to believe that he was at any rate the man of affairs employed by the widow who lived within the *pardah*. Even if the whole story of Jagdeo was untrue as to the identity of the girl who was to be married, the knowledge of the false identity cannot be imputed to the defendants and the position is not altered even if we held as the plaintiffs contended that the defendants had actually paid off the debt of Raja Lal and had bought up the interest of the purchaser *Musammat* Sahodra Kuer. In my opinion the case against these defendants in respect of (Ex. 11 (*e*) fails and the order of the Subordinate Judge setting it aside must be discharged. The consideration of these two matters concludes the case of defendants Nos. 1, 2 and 3. Their appeal is allowed as to Ex. 11 (*e*) and is dismissed with regard to Ex. SS. Exhibit SS is the most serious part of the case and on this part of the case t ey have lost. To my mind the fairest way of dealing with the costs is that the order for costs awarded by the Subordinate Judge as against these defendants will stand, but there will be no order for costs of this appeal.

Appeal No. 265 is by defendants Nos. 8 to 11. The plaintiffs seek to set aside a sale-deed (Ex. R), dated March 11, 1927, by which Jagdeo sold to these defendants 7 annas of *Mauza* Bhagli Khurd bearing *tauzi* Nos. 2779 and 2803. In this case the defendants were creditors either of Jagdeo or of the minors. They actually advanced cash and discharged with the purchase money liabilities which are undoubtedly the liabilities which were contemplated by the District Judge when he sanctioned the sale. The appointment of the mother as guardian long preceded the execution of the sale-deed and there was no evidence of earlier transactions between Jagdeo and these defendants which would give reasonable cause to the defendants to doubt the validity of the sanction given by the District Judge. The 16 annas in the *tauzis* was as to annas 8 owned by Jagdeo and annas 8 belonged to the plaintiffs. The scheme originally sanctioned was subsequently slightly modified. It is true that the Subordinate Judge has found and there is no appeal against that finding that certain of the debts which were sanctioned by the Judge

and were discharged with the purchase money were debts which were not binding on the estate of the minors, and it may well be that Jagdeo perpetrated a fraud upon the minors.

The sanction was obtained as a result of an application for permission which was numbered as permission case No. 80 of 1916 in the file of the District Judge and a number of debts were scheduled to the application dated August 25, 1914, amounting in all to about Rs. 24,000.

The particular sale, however, with which we are concerned, realized only a portion of the amount required to satisfy the total indebtedness. It is, therefore, clear that the whole of the debts could not be paid off out of the purchase money. The third item on the list was undoubtedly a debt of Jagdeo's due to Gobind Lal and this debt was discharged out of the purchase money and accounted for Rs. 6,952 out of the total purchase money. It was a mortgage on the very property which the purchaser was acquiring and by its payment the minor's estate was relieved of the interest. Item Nos. 15, 16 and 17 were handnotes. The creditor had taken a mortgage bond in place of these handnotes, so that the debts instead of being secured by the handnotes were secured by the mortgage bond, and the property mortgaged was the very property which the purchaser was about to acquire, that is to say village Bhagli. The defendants applied part of the purchase money towards the payment of this mortgage bond. That the debt secured by the mortgage bond is identical with that secured by the handnotes is clear and in fact the defendants received the handnotes as one of the terms of the discharge of the mortgage. Similarly, Item No. 14, a debt to one Banwari Lal secured by a handnote, has been substituted by a mortgage of village Bhagli executed by Jagdeo and this was also paid off by the defendants. They can hardly be blamed for selecting such of the debts as were burdens upon the property they were about to pay purchase for payment. They also paid a sum of Rs. 534 in cash. This sum seems to have been paid to Jagdeo, but it is hardly fair to demand that the defendants should pay this directly into the hands of a *pardah-nashin* woman, and having regard to Jagdeo's conduct and the way in which he was allowed to manage the lady's affairs, it was not unreasonable for the defendants to accept him as her man of business even if he were not the *karta* of the family The balance of the purchase money. Rs. 1,070 was employed by the purchasers in the discharge of a mortgage by Jagdeo in favour of *Musammat* Sahodra Kuer of 2 annas in *Mauza* Bhagli, the subject of the sale-deed to the defendants.

It is true that another piece of property, the precise nature of which was not clear, was also mortgaged. This mortgage is not part of the scheduled debts, but I do not think that the defendants can be blamed for discharging it, nor can it be inferred from the payment of this particular mortgage that the defendants had any reasonable warning of fraud which Jagdeo was perpetrating upon the minors. Moreover, the accounts had to be filed as a term of the Judge's sanction and there is no evidence that the devotion of this part of the purchase money was made the subject of comment. Upon the evidence, it is perfectly clear that before this transaction there had been no business of any kind between these defendants and the plaintiff, nor were any questions put to the principal defendant as to any participation by him in Jagdeo's fraud. Whatever be the position of the mother under the Judge's direction, Jagdeo was the *de facto* guardian of the minors. Jagdeo has all along been looking after her affairs, and although there was no evidence as to his present activities, there is no indication that the plaintiffs have repudiated him or that he is not still in the closest relation with them. It is true that only Item No. 3 in the petition is a genuine debt binding on the minors: it is true also that the names of the executants of the deeds creating the other debts are not given in the petition, but the defendants cannot be held to blame for this. The burden of showing that the defendants have acted dishonestly has not been discharged, and in the absence of evidence to that effect, it is of no avail to the plaintiffs to show that they were defrauded by Jagdeo.

The plaintiffs also seek to avoid a sale (Ex. Q) to these defendants of a 1 anna share in *Mauza* Bhagli effected on November 22, 1922, for a consideration of Rs. 1,503. There had been an original proposal to raise a sum of Rs. 5,000—Rs. 2,500 by sale and Rs. 2,500 by loan. The Judge had sanctioned the sale but the amount of the loan had been drastically reduced. The sale-deed in question is executed by the widow in favour of the principal defendant She recites the authority of the District.

Judge and recites the previous sale of March 11, 1917, by herself jointly with Jagdeo of 7 annas in *Mauza* Bhagli as joint property and further recites her need of Rs. 1,500 for the marriage of her daughter, and the sale of the 1 anna share in Bhagli is said to be effected for that purpose. She acknowledges receipt of the Rs. 1,500 at the time of the marriage of her daughter. Her explanation of this transaction is that she knew nothing of it and signed whatever Jagdeo put before her and that she never received the purchase money. It is clear that the money was paid to Jagdeo, who in fact gave receipts; but here again the defendant could hardly be expected to force his way into the presence of the lady and there was nothing dishonest in paying it into the hands of Jagdeo, whether or not there was a daughter and whether or not a fraud was played by Jagdeo on the minors, there is no evidence whatever of any complicity by these defendants or any of them in that fraud. Nor in spite of his ultimate conclusion does the judgment of the learned Judge contain an indication of the evidence upon which he holds the defendant responsible. The judgment extends to about 70 printed pages and is certainly a monument of conscientious industry, but the case would have been much shortened and the labours of the Judge much lightened if he had held clearly in his mind the burden of proof which rested on the shoulders of the plaintiffs. Had he done this, he might have dealt with the case in a comparatively brief manner.

In discussing the preliminary point whether, even assuming that Jagdeo was a fraudulent person, either of the two sets of defendants could reasonably be expected to have knowledge or notice of his conduct. An attempt was made on behalf of the plaintiffs to argue that even in the event of the defendants being held to be entirely innocent, the sale must be set aside because the consent of the District Judge, had been obtained by fraud, although it was conceded that in such case the defendants might be entitled to an order in their favour imposing equitable conditions. But I have been unable to find any authority which would justify this argument and indeed the judgment of the Privy Council in *Gangapershad Sahu* v. *Maharani Bibi* (1), above referred to, indicates clearly that for a sale to be impugned knowledge on the part of, or reasonable notice to the purchaser, must be established as a fact.

In my opinion, the appeal of defendants Nos. 8 to 11 must be allowed with costs throughout. There was an application in Civil Revision No. 506 of 1930 by the plaintiffs relating to the matter of costs. It has no merit and is of no importance in view of the decision in the appeals. But it was not made a matter of argument and will be dismissed, but without costs.

Fazl Ali, J.—I entirely agree.

N. *Order accordingly.*

ALLAHABAD HIGH COURT

Letters Patent Appeal No. 61 of 1934.

April 19, 1934.

SULAIMAN, C. J. AND KING, J.

PURAN MAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHIVA LAL AND ANOTHER—DEFENDANTS—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 41—Whether applies to auction-purchasers.

The transfer referred to in s. 41, Transfer of Property Act, must be a voluntary transfer which is effected by an act of the ostensible owner. It is not, therefore, applicable to an auction-purchaser. *Mangat Lal* v. *Ghasi Khan* (1), followed.

L. P. A. from an order of Niamatullah, J. dated July 26, 1932.

Mr. *S. N. Seth*, for the Appellants.

Mr. *Panna Lal*, for the Respondents.

Judgment.—This is a plaintiffs appeal under the Letters Patent from a judgment of a learned Judge of this Court reversing the decree of the lower Appellate Court.

It appears that one Inayat Khan and his three brothers were entitled to 5-6th share in a village, the remaining 1-6th belonged to a lady. Instead of mortgaging his 1-4th out of the 5-6th, Inayat Khan made a mortgage of 1-4th share in the village to the present plaintiffs. This came to about 17 *bighas* odd and the remaining 1-4th of 1-6th came to about 2 *bighas*. Subsequently a sale-deed was taken from the lady in the names of the sons of Inayat Khan and their wives whose names were entered in the revenue papers. The defendants, in execution of a money decree against the sons and their wives, got 1-4th of 1-6th share belonging to the lady attached and put up for sale, and they purchased it themselves. Now, the plaintiffs have brought this suit for sale on the basis of their mortgage-deed and wish to enforce the security against the extra share, namely,

1-4th of 1-6th which had been included in the mortgage, but which at that time did not belong to Inayat Khan. In the plaint there was no reference to s. 43, Transfer of Property Act, and accordingly there was no issue on this point, but the point appears to have been pressed before the trial Court which went into the question. The point was again considered by the lower Appellate Court and the lower Appellate Court came to the conclusion that the plaintiffs were entitled to enforce their equitable right under s. 43 against the defendants auction-purchasers. On appeal a learned Judge of this Court felt that the question of s. 43 being a mixed question of law and fact ought to be investigated. He accordingly sent down two issues to the Court below for determination with liberty to the parties to produce fresh evidence. The findings returned by the lower Appellate Court were to the effect that Inayat Khan was the real owner and that his sons and their wives were mere *benamidars* and that the plaintiffs were entitled to enforce their rights against the defendants.

The learned Judge of this Court, on the basis of these findings, came to the conclusion that in spite of them the suit should fail as regards this extra share. The basis of this decision is that the word "transferee" in the proviso to s. 43 is wide enough to cover an auction-purchaser and that therefore the present defendants who purchased the property for consideration and in good faith and without notice of this equitable charge are protected. He further expressed the opinion that the defendants, having purchased the supposed interests of the *benamidars* who were the ostensible owners of the property with the implied consent of Inayat Khan, are entitled to protection on account of Inayat Khan's conduct. In appeal it is urged before us that neither s. 41 nor the proviso to s. 43 can apply to an auction-purchaser.

It is significant to point out that the preamble to the Transfer of Property Act, suggests that it was to define and amend certain parts of the law relating to transfer of property by act of parties that the Transfer of Property Act was passed. Section 2 (*d*) also indicates that nothing in the Act is to affect any transfer by operation of law, or by or in execution of, a decree or order of a Court of competent jurisdiction save as provided by s. 57 and Chap. IV of the Act. Both ss. 41 and 43 are based on the principle of estoppel where, on a representation made by one party and acted upon by another, the rights of the latter are prejudiced so as to enable him to the benefit of the principle of estoppel as against the other. It may therefore be very doubtful whether the word "transferees" in the proviso to s. 43 would expressly cover an auction-purchaser. But we think that in this particular case it is not necessary to express any final opinion on this point.

The defendants are auction-purchasers of the right, title and interest of Inayat Khan's sons and their wives. They are not people who have taken a voluntary transfer from the ostensible owners. Indeed they made the purchase without the consent, and it may well be, against the will of their judgment-debtors. Inayat Khan no doubt had put his sons and their wives in possession and was holding them out to be ostensible owers to the world. But the defendants have not acquired rights by virtue of any act directly done by these ostensible owners, but have acquired the property under an involuntary or compulsory sale and therefore *prima facie* against the will or at any rate without the consent of these ostensible owners.

Section 41, Transfer of Property Act, applies to a case where the true owner allows his *benamidar* to remain in possession of the property as an ostensible owner and to deal with it as full owner. Where such ostensible owner "transfers" property to a person who takes it in good faith after having taken reasonable care to ascertain that the transferor had power to make the transfer, the transaction binds the true owner. But obviously the transfer spoken of in s. 41 must be a voluntary transfer which is affected by an act of the ostensible owner. On this point there is a direct authority of this Court, namely, *Mangat Lal* v. *Ghasi Khan* (1), which does not appear to have been brought to the notice of the learned Judge of this Court. The learned Judges were of opinion that in view of the language of s. 41 it would not be applicable to auction-purchasers.

It is also equally clear that the Bench did not think that any general principle underlying s. 41 would be applicable to auction-purchasers. Indeed it is difficult to see how such a principle would be applicable, because auction-purchasers are not

(1) 118 Ind. Cas. 718; A. I. R. 1929 All. 800; Ind. Rul. (1929) All. 926.

expected to take any reasonable care to ascertain that the judgment-debtor has any power to make the transfer. They merely purchase the right, title and interest if any, of the judgment-debtor which are put up for sale and take a certain amount of risk in bidding for the property.

We are, therefore, of opinion that even if either the proviso to s. 43 or any principle underlying that section were applicable to an auction-purchaser like the defendants-respondents, that principle is of no avail to them because they have not taken the property from Inayat Khan himself, but purchased at auction the rights and interest of his sons and wives, who were his *benamidars* and who are now found to have no title. They are not entitled to the protection afforded by s. 41, Transfer of Property Act, nor by any principle on which that section is based. We must, therefore, allow this appeal and setting aside the decree of the learned Judge of this Court restore that of the lower Appellate Court. In view of the fact that the plea of s. 43 was not raised in the plaint, but relied upon by the plaintiffs, and an issue had to be remanded and fresh evidence recorded, we direct that the parties do bear their own costs of both the hearings in this Court.

N. *Appeal allowed.*

PATNA HIGH COURT

Criminal Revision No. 11 of 1935
January 31, 1935
VARMA, J.

PURAN SINGH—PETITIONER
versus
Musammat RAMJHARI KOER—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 144, 145—Period of sixty days—When begins to run—Dispute as to possession of immovable property—Proceeding under s 145 should be preferred to that under s. 144.

The period of sixty days referred to in s. 144, Criminal Procedure Code begins to run from the date on which the notices are issued. *Thomson* v. *Emperor* (1), referred to.

Held, that on the materials before the Court that it would not interfere after the order had spent itself.

Where the dispute is with regard to possession of immovable property, a proceeding under s. 144 of the Code of Criminal Procedure is a poor substitute for a proceeding under s. 145 which settles once for all so far as the Criminal Courts are concerned, the question of possession with regard to a particular piece of immovable property. Such cases should be decided under s. 145.

Cr. R. from an order of the Sub-Divisional Officer of Jehanabad, dated December 6, 1934.

Mr. *Raj Kishore Prasad*, for the Petitioner.

Mr. *Janak Kishore*, for the Opposite Party.

Judgment.—This petition is against an order under s. 144 of the Code of Criminal Procedure made against the present petitioner who was the first party before the Sub-Divisional Magistrate of Jehanabad. On November 24, 1934, notices were issued against both the parties restraining them from going into the disputed plot and to show cause, if any, by December 6, 1934. The parties shewed cause on December 6, but the Magistrate passed the order against which the present petitioner has moved this Court.

It would be clear on the authority of the case reported in *Thomson* v. *Emperor* (1) that the period of sixty days begins to run from the date on which the notices are issued. Therefore by to-day the sixty days have expired. Although in certain cases where the High Courts found that the party against whom the order was passed was seriously prejudiced, they interfered with the order under s. 144 of the Code of Criminal Procedure even after the expiry of the period of sixty days. But in this case on the materials before me I am not in a position to hold that the case is such as to call for the interference of this Court after the expiry of sixty days. Reading the judgment of the Sub-Divisional Magistrate of Jehanabad it seems that the dispute is with regard to the possession of a plot of land No. 2776 in village Kamta. Both the parties have filed documents and were content to make their submissions through their Pleaders. In a case of this kind where the dispute is with regard to possession of immovable property a proceeding under s. 144 of the Code of Criminal Procedure is a poor substitute for a proceeding under s. 144 which settles once for all so far as the Criminal Courts are concerned, the question of possession with regard to a particular piece of immovable property. Although I am not prepared to interfere or set aside the order under s. 144 as it has spent itself, I am clearly of opinion that in case any future dispute arises, this case should be decided under s. 145.

The application is dismissed.

N. *Application dismissed.*

(1) 4 Ind. Cas. 590; 13 C W N 195; 11 Cr. L J 12.

ALLAHABAD HIGH COURT

First Civil Appeal No. 421 of 1932
September 27, 1934

NIAMAT-ULLAH AND COLLISTER, JJ.

Mirza HUSAIN YAR BEG—APPLICANT

versus

Sahu RADHA KISHAN AND OTHERS—OPPOSITE PARTIES

Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Cross-objection—Whether can be taken against a co-respondent—Case of co-respondent having nothing in common with that of appellant—Maintainability of cross-objection against such co-respondent.

The expression "cross-objection" is clearly indicative of the fact that it should be directed against the appellant, but it may be taken against a co-respondent also, if there is a community of interest between the latter and the appellant. When the cross-objection is directed solely against a co-respondent, whose case has nothing in common with that of the appellant but proceeds on the same grounds on which the appeal does, it is not maintainable. *Co-operative Hindustan Bank* v. *Surendra Nath De* (1), *Nursey Virji* v. *Alfred H. Harrison* (2), *Official Trustee of Bengal* v. *Charles Joseph Smith* (3) and *Abdul Ghani* v. *Muhammad Fasih* (4), referred to [p. 90, col. 2; p. 91, col. 1.]

Mr. *Mushtaq Ahmed*, for the Applicant.

Messrs. *A. M. Khwaja*, *G. S. Pathak* and *Krishna Murari Lal*, for the Opposite Parties.

Mr. *S. N. Seth*, for the Objection.

Judgment.—This is a cross-objection filed by one of the defendants-respondents in an appeal which has been compromised between the appellant and the plaintiff-respondents. A preliminary objection has been taken by the plaintiffs-respondents that the cross-objections which are directed solely against them are not maintainable under O. XLI, r. 22, Civil Procedure Code. To appreciate the arguments addressed to us, it is necessary to bear in mind the following facts. The property in dispute is village Tewar Khas. It belonged to one Muhammad Husain who had a son Ahmad Husain and three daughters, only two of whom need be mentioned, namely, Bashiruzzaman Bibi and Shaukatuzzaman Bibi. Muhammad Husain executed a deed of gift in favour of his son Ahmad Husain sometime in 1883. Not long afterwards he instituted a suit for the cancellation of that deed. The principal defendant was his son Ahmad Husain, the donee. The controversy was referred to an arbitration by a common friend whose award dated September 13, 1884, was made a rule of the Court by decree dated November 13, 1884. The award provided that Muhammad Husain would remain in possession of village Tiwar Khas, that after his death Ahmad Husain would become the owner thereof but would have no power of transfer and would be bound to allow the property to descend upon his own heirs unfettered by any encumbrances created by himself. Ahmad Husain was made liable to pay Rs. 30 a month to each of his two sisters Shaukatuzzaman Bibi and Bashiruzzaman Bibi. Muhammad Husain died in 1886. Ahmad Husain who entered into possession made default in payment of the monthly allowance which he was bound to pay under the award and the decree of 1884.

His sisters instituted suit for arrears of their allowance in 1892. The dispute between the brother and sisters was referred to arbitration. The award which was again made a rule of the Court directed that the village Tewar Khas be made over to one of the two sisters, namely, Bashiruzzaman Bibi who should pay herself the monthly allowance and thereafter the monthly allowance of her sister Shaukatuzzaman Bibi. If any surplus was left, the same was to be paid to Ahmad Husain. The award was given effect to and Bashiruzzaman Bibi was placed in possession of village Tewar Khas. In 1910 Shaukatuzzaman Bibi made a simple mortgage of her interest in village Tewar Khas to Asfandayar Beg who has since died and is now represented by his son Husain Yar Beg. In 1912 Asfandayar Beg enforced his mortgage and had the rights of Shaukatuzzaman Bibi sold. He himself became the auction-purchaser. The result of this was that he became entitled to Rs. 30 a month which his mortgagor Shaukatuzzaman Bibi was entitled to receive in terms of the award of 1884. An arrangement was arrived at between the auction-purchaser Asfandayar Beg and Bashiruzzaman Bibi who was in possession of the village Tewar Khas, under which part of that village was made over to Asfandayar Beg who was to recover Rs. 30 a month from its rents and profits. The arrangement appears to have been given effect to. In 1922 Bashiruzzaman Bibi executed a deed of *waqf*, the particulars to which need not be stated in detail. In 1924 she executed another deed of *waqf*. One related to her right in that portion of the village Tewar Khas which was in possession of Asfandayar Beg. The other related to the rest of her rights in that village. By one or both of these deeds she made her daughter's daughter *Musammat* Sabiri Begam the

present cross-objector a beneficiary entitled to receive Rs. 10 per month. Nazir Ahmad, the son of Shaukatuzzaman Bibi who had died in the meantime was made the *mutwalli* entitled to manage the *waqf* properties. Accordingly Nazir Ahmad obtained possession of that part of Tewar Khas which was not in possession of Asfandayar Beg. The plaintiffs Radha Kishan and his three brothers claim to be the auction-purchasers of the right and title and interest of Ahmad Husain. They instituted a suit against Nazir Ahmad the *mutwalli*, Hussain Yar Beg, the son of Asfandayar Beg, who has since died, *Musammat* Sabiri Begam, one of the beneficiaries under the *waqf* and two others. They claimed the relief of possession and mesne profits on the ground that Shaukatuzzaman Bibi and Bashiruzzaman Bibi were entitled to receive Rs. 30 a month only for life and both having died, their legal representatives by inheritance or by transfer are no longer entitled to that allowance and that the plaintiffs being the representatives in interest of Ahmad Husain, the paramount owner, are entitled to actual possession of the entire village Tewar Khas. It will appear that the plaintiffs repudiate the title of Husain Yar Beg and Sabiri Begam precisely on the same ground. Husain Yar Beg claims to derive his right partly from Shaukatuzzaman Bibi and partly from Bashiruzzaman Bibi. Sabiri Begam claims to derive title from Bashiruzzaman Bibi. The nature of the rights of Bashiruzzaman Bibi and Shaukatuzzaman Bibi as precisely identical. The suit was contested by Husain Yar Beg and Sabiri Begam on identical grounds. They pleaded that the plaintiffs acquired no interest by auction purchase because Ahmad Husain whose interest they purchased had no transferable rights. Sabiri Begam took the additional plea that she is entitled to Rs. 10 a month under the deeds of *waqf* of 1922 and 1924, but this plea is of no consequence as against the plaintiffs, as if the plaintiffs' rights prevail—and they can prevail only of Shaukatuzzaman Bibi and Bashiruzzaman Bibi had only life interest—the deeds of *waqf* lapsed on their deaths and Sabiri Begam ceased to be entitled to anything thereunder. If on the other hand the plaintiffs' rights do not prevail for the alleged reason that their predecessor-in title Ahmad Husain had no transferable right, their suit should be dismissed and it would not be necessary to adjudicate on *Musammat* Sabiri Begam's additional plea. The Subordinate Judge decreed the plaintiffs' suit in its entirety. The *mutwalli* Nazir Ahmad did not appeal nor did *Musammat* Sabiri. Husain Yar Beg preferred appeal which was numbered as F. A. No. 421 of 1932. On receipt of summons *Musammat* Sabiri Begam filed cross-objections which it is not disputed were filed after the expiry of the period of limitation for an appeal by her against the decree. Husain Yar Beg and the plaintiffs entered into a compromise, the effect of which was that the former's appeal was dismissed. There only remain the cross-objections of *Musammat* Sabiri Begam, which, if otherwise maintainable, remain unaffected by the fact that the appeal has been dismissed.

The plaintiffs-respondents have taken the preliminary objection that in the circumstance of the case *Musammat* Sabiri's cross-objections which are directed against them alone are not maintainable and should be dismissed without a hearing thereof on the merits. From the narrative of the facts given above, it is clear that *Musammat* Sabiri Begam's cross-objections proceeded on the same grounds as Husain Yar Beg's appeal which has been dismissed. They are not, to any extent, directed against the appellant Husain Yar Beg. The position of Sabiri Begam in the litigation was such that she could very well have joined Husain Yar Beg in the appeal filed by him. They both attack the plaintiffs-respondents on the same grounds. On the one hand it is contended on behalf of the plaintiffs-respondents that cross-objections can be directed only against the appellant and that it is not open to one of the respondents who has preferred an appeal to file cross-objections under O. XLI, r. 22, Civil Procedure Code against his co-respondents. On the other hand it is argued on behalf of *Musammat* Sabiri Begam that the language of O. XLI, r. 22, is general enough to allow cross-objections by a respondent, who could have appealed from a part of the decree but had not done so. It seems to us that the correct view lies mid-way between the extreme contentions which have been put forward before us on behalf of the plaintiffs-respondents and *Musammat* Sabiri Begam. The expression "cross-objection" is clearly indicative of the fact that it should be directed against the appellant, but it may be taken against a co-respondent also if there is a community of interest between the latter and the ap-

pellant. It is clear to us that where the cross-objection is directed solely against a co respondent, whose case has nothing in common with that of the appellant but proceeds on the same grounds on which the appeal does, it is not maintainable. The case-law on the point does not militate against this view. In *Co-operative Hindustan Bank* v. *Surendra Nath De* (1) it was held that:

"A cross-objection which seeks to raise a question as between two respondents *inter se* and is a purely lateral attack in which the appellant is not concerned or interested, cannot be entertained in view of the settled practice of the Calcutta High Court both under the old and under the present Code."

The facts of this case were different, but the view taken is that a cross-objection unless it is directed against the appellant also is not maintainable. In *Nursey Virji* v. *Alfred H. Harrison* (2), it was held that—

"The ordinary rule is that the cross-objections provided for by O. XLI, r. 22, Civil Procedure Code are cross-objections which are aimed against an appellant from a decree of a lower Court and are not cross-objections against a co-respondent. In any case such cross-objection will not be allowed as against a co-respondent where the respondent could have preferred them by way of appeal."

In the case before us *Musammat* Sabiri Begam could have have not only preferred an appeal of her own but as already stated could have joined with Husain Yar Beg as appellant in the appeal which the latter filed in *Official Trustee of Bengal* v. *Charles Joseph Smith* (3) the point has been considered at great length. It was held that:

"Order XLI, r. 22 (1) in so far as it relates to a cross-objection, was provided to meet the case where a respondent, although the decree is not entirely in his favour, is content to let matters rest provided his opponent does not appeal, but who may not be willing to run the risk of having the findings in his favour varied or reversed without an opportunity of appealing against the findings which are adverse to him. The rule should ordinarily be confined to cases of cross-objections urged against the appellant, but O. XLI, r. 33, gives the Court a wide discretion, where justice requires it, that cross-objections against a co-respondent should be heard. The rule should not be invoked to enable a litigant to avoid the provisions of other statutes such as the Limitation Act or the Court Fees Act."

In *Abdul Ghani* v. *Muhammad Fasih* (4), which was decided under the Code of 1882, it was held that:

"Where it is necessary for the proper decision of an appeal before it, it is competent to an appellate Court to take into consideration objections filed under s 56 (1), Civil Procedure Code, by one of the respondents, not only as against the appellant, but, it may be, as against the co-respondents with the objector also, and to modify the decree as against them accordingly."

In that case the appeal was filed by one of the defendants who impleaded the plaintiff and a defendant who had a common interest with the appellant. The plaintiff filed cross objection which was directed against the defendant-appellant and the defendant-respondent. The question was whether the plaintiff should be allowed to impugn the decree by his cross-objections so far as it affected his co-respondent. It was observed as follows:—

"The Court of first instance had decided the suit upon a ground common to all the defendants Consequently, under s. 544, Civil Procedure Code on the appeal of only one of the defendants, the appellate Court could modify or set aside in favour of all the defendants the decree of the lower Court. The whole case was thus opened out in appeal not only as between the plaintiff and the defendant who had appealed, but also as between the plaintiff and other defendants, who had been made respondents apparently because they had not joined in the appeal. Having regard to the nature of the suit, and of the decree passed by the Court of first instance, those defendants were necessary parties to the appeal and complete justice could not be done without having them before the Court. Under the circumstances of the case they were to all intents and purposes appellants in the lower appellate Court. The objections under s. 56 (1) were preferred not only against these other defendants, the co-respondents of the plaintiff, but also against the appellant .... .. As the Court on the appeal of one of the defendants could have varied or set aside the decree in favour of all the defendants, it seems to us to be just and equitable that it should also have the power upon objections taken by the plaintiff to vary the decree against all the defendants."

It will be seen that in this case the cross-objections were directed against the defendant-appellant to the same extent as against the defendant-respondent, the cross-objector being the plaintiff who had partly succeeded in the Court of first instance. None of these cases countenances the view that cross-objection can be permitted by one respondent against another where the effect of the cross-objection, if successful, cannot be adverse to the appellant to any extent. We hold that in the circumstances of the present case, the cross-objections filed by *Musammat* Sabiri Begam which are directed solely against the plaintiffs-respondents are not maintainable under O. XLI, r. 22, Civil Procedure Code. Accordingly we dismiss them with costs.

N. *Cross-objection dismissed.*

(1) 138 Ind. Cas. 852; A I R 1932 Cal. 524; 59 C 667; 36 C W N 263; Ind. Rul. (1932) Cal. 528

(2) 21 Ind. Cas. 7; 37 B 511; 15 Bom. L R 781.

(3) 56 Ind. Cas. 262; A I R 1920 Pat. 77; 5 P L J 328.

(4) 28 A 95; 2 A L J 667; A W N 1905, 200.

OUDH CHIEF COURT

Second Civil Appeal No. 291 of 1933
February 25, 1935
THOMAS, J.

KHUD MUKHTAR BANK, UTRAWAN—DEFENDANT—APPELLANT
versus
BHAGWAN DIN—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS

Jurisdiction—U. P. Land Revenue Act (III of 1901), s. 233 (m)—Suit for recovery of amounts realisable by the Collector from a person on a requisition to the Collector by the Registrar, Co-operative Societies—Whether entertainable by Civil Court—Civil Procedure Code (Act V of 1908), s. 100—New plea involving question of jurisdiction — Whether can be raised for first time in second appeal.

No suit can be brought into the Civil Court for recovery of an amount realisable by the Collector from a person on a requisition to the Collector by the Registrar Co-operative Societies, as that is a sum recoverable in the same manner as arrears of Land Revenue, for s. 233 (*m*) of the Land Revenue Act bars institution of such a suit. *Abdulla* v. *Secretary of State for India in Council* (2), relied on.

The Court of second appeal can, in the interests of justice allow to be raised for the first time a plea involving a question of jurisdiction *Official Liquidator of M. E. Moola Sons, Ltd.* v. *Perin R. Burjorjee* (1), relied on.

S. C. A. against an order of the Subordinate Judge, Lucknow, dated July 13, 1933.

Messrs. *Hakimuddin* and *Naziruddin*, for the Appellant.

Judgment.—This is an appeal on behalf of defendant No. 1 against the decree of the learned Subordinate Judge of Lucknow, dated July 13, 1933, upholding the decree of the learned Munsif of Havali, at Lucknow, dated November 28, 1932.

The appellant is represented through a Counsel. The respondents have been served but are absent, and no body has appeared for them.

The appellant Bank obtained a decree against Ram Charan, defendant-respondent No. 2 and others for a sum of Rs. 456-5-0 and in execution of the said decree, attached a house and a *gondah* alleging that they belonged to Ram Charan. Bhagwan Din, father of Ram Charan, judgment-debtor filed objections under O. XXI, r. 58 of the Code of Civil Procedure, but they were dismissed. He then filed a regular suit in the Court of the learned Munsif, Havali, Lucknow, for a declaration that the house and the *gondah* belonged to him. The suit was contested by the appellant-Bank. The trial Court decreed the suit of the plaintiff with respect to the house in dispute, but dismissed it in respect of the *gondah*.

The Bank then appealed to the Court of the learned District Judge of Lucknow, and the appeal was decided by the learned Subordinate Judge of Lucknow who dismissed it.

The appellant-Bank has now come up in appeal to this Court, and it is contended on behalf of the appellant that the Civil Court has no jurisdiction to try the suit.

This point was neither raised in the written statement nor in the grounds of appeal before the learned District Judge. It is for the first time raised in this Court, but as it involves a question of jurisdiction I have in the interest of justice allowed the learned Counsel to raise the plea.

In the case of *Official Liquidator of M. E. Moola Sons, Ltd.* v. *Perin R. Burjorjee* (1) their Lordships of the Privy Council laid down, that

"when a question of law raised for the first time in a Court of last report upon the construction of a document or upon the facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting the course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But the course ought not in any case to be followed unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts if fully investigated would have supported the new plea".

In the present case the point can be decided without entering into questions of fact.

The sole question for decisione in the appeal is whether the provisions of O. XXI, r. 58 of the Code of Civil Procedure are applicable in which case the remedy of the plaintiff would be by bringing such a suit as that from which this appeal arises, or whether such a remedy is barred to him by the provisions of s. 253 (*m*) of the Land Revenue Act.

It is proved that Ram Charan was a member of the Co-operative Society and used to borrow money from the said Society.

Under r. 20 (1) of the Rules of the Manual for Co-operative Societies, framed by the Local Government, any dispute touching the business of a registered Society between members or persons claiming through a member, should be

(1) 136 Ind. Cas. 737; A I R 1932 P C 118; 36 C W N 677; 55 C L J 362; 10 R 242; (1932) M W N 860; 34 Bom. L R 1021; (1932) A L J 706; 36 L W 75; 63 M L J 131; 59 I A 161; Ind. Rul. (1932) P C 151 (P C).

referred to, and decided by the Registrar, or by arbitration.

The learned Counsel for the appellant has filed with my permission, the original award accompained by an affidavit which clearly shown that the dispute was referred to the arbitration of one Pandit Gaya Prasad, who awarded against Ram Charan a sum of Rs. 456-5-0.

Under Government Notification No. 2633-1-343, dated December 4, 1919, r. 20 (13) of the Rules of the Manual for Co-operative Societies, awards of arbitrators and decision of the Registrar are enforced in the following manner;

"On a requisition to the Collector of the District made by the Registrar, all sums recoverable under the award or decision shall be recovered as if they were arrears of land revenue".

It is thus perfectly clear that the amount awarded against Ram Charan is recoverable as land revenue, under s 233 (*m*) of the Land Revenue Act (Act III of 1901) no person shall institute any suit or other proceedings in the Civil Court with respect to any claims connected with or arising out of, the collection of revenue, or any process enforced on account of an arrear of revenue, or on account of any sum which is by this, or any other act realisable as revenue.

It is clear that no suit can be brought into the Civil Court for recovery of an amount realisable by the Collector from a person on a requisition to the Collector by the Registrar, Co-operative Societies, as that is a sum recoverable in the same manner as arrears of Land Revenue, for s. 233 (*m*) of the land revenue Act bars the institution of such a suit.

The above view is supported by a decision of the Allahabad High Court reported in *Abdulla* v. *The Secretary of State for India in Council* (2).

I, therefore, hold that the Civil Court had no jurisdiction to entertain the suit.

I accordingly set aside the decree of the lower Court and allow the appeal but as this point was not raised in the pleadings, I do not award any costs to the appellant. He will bear his own costs right through.

N. *Appeal allowed.*

(2) 101 Ind. Cas. 626; 49 A 701; 25 A L J 521; L R 8 A 183 Rev; A I R 1927 All. 532.

PATNA HIGH COURT

Civil Revision Petition No. 27 of 1934

February 1, 1935

WORT, J.

DAROGA PRASAD SAHU AND OTHERS—DECREE-HOLDERS—PETITIONERS

versus

BHAGWATI PRASAD SINGH AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXI, rr. 100, 101 — Person not dispossessed—Whether can apply under r. 100—Decree against father—Sons, if can be said to be persons other than the judgment-debtors.

It is only when the person is dispossessed that he can apply under O. XXI, r. 100, Civil Procedure Code Where no possession has been given to the decree-holders, an order under O. XXI, r. 101, cannot be passed as the Court has no jurisdiction to determine the matter in the form of an anticipatory application. *Ibrahim Mullick* v. *Ramjadu Rakshit* (1), referred to.

Where a decree has been made against the father of the petitioners the petitioners will *prima facie* be bound by the decree and cannot therefore be said to be persons other than the judgment-debtors within the meaning of O. XXI, r. 100.

C. R. Ptn. from an order of the Subordinate Judge, 1st Court of Monghyr, dated December 1, 1933.

Messrs. *L. M. Ghosh* and *K. P. Sukul*, for the Petitioners.

Mr. *Girindra Nath Mukharji*, for the Opposite Party.

Judgment.—This rule is directed against the order of the Subordinate Judge dismissing the decree-holders' application for delivery of possession.

The question is whether the Court had jurisdiction to determine the matter in the form in which the matter came before it. It purported to be an application by persons other than the judgment-debtors under O. XXI, r. 100. In the first instance it is quite clear that if the application was properly maintainable under O. XXI, r. 100, the order which the Judge had jurisdiction to make was not an order dismissing the application by the decree-holders for possession but an order under O. XXI, r. 101, that is, putting the applicants into possession. In my judgment the very fact that it became necessary for the Judge to make the order in the form in which he has made it, shows that both the application and the order were entirely without jurisdiction because no such order as he has made is known to the Code of Civil Procedure, that is to say, in an application of the kind which was before him. Order XXI, rr. 97 to 99, deal with an application or a complaint by the decree-holder who is resisted or obstructed in

obtaining delivery of possession of a property sold in execution, and, when such an application is made, the Code provides for the determination of the dispute and eventually for making an order under O. XXI, r. 98 or r. 99 according to the facts proved in the case. Now the only application which is contemplated by the Code by a person in the position of the present petitioners is one under O. XXI, r. 100, in a case where a person in that position is dispossessed. There are a number of points raised in this case as to whether the petitioners come within the rules on the merits, that is to say, whether they are persons other than the judgment-debtors. But I should feel inclined to hold, if the matter came up for determination, that having regard to the fact that a decree was made against their father, the petitioners who are the sons of the judgment-debtor would be *prima facie* bound by that decree and could not therefore be said to be persons other than the judgment-debtors. Be that as it may, it seems to me that the objection to the jurisdiction of the Judge is based on the plain meaning of the words of O. XXI, r. 100, to which I have referred. The order provides that a person may make an application 'when he is dispossessed'. In the Calcutta High Court it has been held in *Ibrahim Mullick* v. *Ramjadu Rakshit* (1), that such a person is not dispossessed within the meaning of the order when symbolical possession is given, and I should feel inclined to come to the same conclusion if that was the point determining this case. But in this case the parties have not gone so far as they had in the Calcutta case referred to. Nothing more has been done in this case than an application by the decree-holders for possession. It cannot be said that persons other than the judgment-debtors have been dispossessed because there has been no possession given to the decree-holders, that yet remains to be done, and to put it shortly there is no jurisdiction in the Judge to determine in the form of an anticipatory application a matter of this kind. It is only when the person is dispossessed that an application of this kind can come before the Judge and he certainly could not make such an order as he has done under O. XXI, r. 10'.

In those circumstances I think the Rule must be made absolute and the order of the Subordinate Judge discharged with costs: hearing fee two gold *mohurs*.

N. *Rule made absolute.*

(1) 30 C 710.

OUDH CHIEF COURT

Second Civil Appeal No. 292 of 1933

March 5, 1935

SRIVASTAVA, J.

Musammat KABOOTRA—DEFENDANT—APPELLANT

versus

RAM PADARATH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS

Hindu Law of Inheritance (Amendment) Act (II of 1929), s. 2—'Sister', whether means only sister of the full blood.

The word 'sister' as used in s. 2, Hindu Law of Inheritance (Amendment) Act must be interpreted according to the plain meaning of the word in the English language, which ordinarily means a sister of the full blood *Ram Adhar* v. *Sudesra* (1), relied on.

S. C. A. against the order of the Subordinate Judge of Gonda, dated July 18, 1933.

Mr *Hyder Husain*, for the Appellant.

Messrs. *Radha Krishna* and *N. Banerji*, for the Respondent No. 1.

Judgment.—This is a defendant's appeal against the decree dated July 18, 1933, of the learned Subordinate Judge of Gonda, reversing the decree dated November 1, 1932, of the learned Munsif of Utraula in that District.

It arises out of a suit for possession. The plaintiff claimed to be entitled to half of the property of Mahabir deceased as one of his next reversioners. The suit was contested by the defendant-appellant who claimed to be the full sister of Mahabir. The learned Munsif held that the fact of the appellant being the full sister of Mahabir had been satisfactorily established and that she was entitled to succeed to the property of her brother Mahabir in preference to the plaintiff under the Hindu Law of Inheritance (Amendment) Act, 1929.

On appeal the learned Subordinate Judge did not agree with the finding of the learned Munsif and after a careful scrutiny of the evidence came to the conclusion that the defendant-appellant was a half-sister of Mahabir being born of his step-mother. Relying on the Full Bench ruling of the Allahabad High Court in *Ram Adhar* v. *Sudesra* (1), he held that being a step-sister she was no heir of Mahabir under Act II of 1929.

(1) 145 Ind. Cas. 529; 55 A 725; A I R 1933 All. 491; (1933) A L J 680; 6 R A 117 (F B.)

The learned Counsel for the defendant-appellant has not questioned the correctness of the lower Appellate Court's finding that the defendant-appellant is only a half sister and not the full sister of Mahabir deceased. The only contention urged by him is that the interpretation placed by the Full Bench of the Allahabad High Court on the meaning of the word "sister" as used in s. 2 of Act II of 1929 is not correct. He has conceded that as between a full sister and a half sister the full sister will be entitled to preference on the principle that a relation of the full blood excludes a relation of the half blood. If the word "sister" as used in s. 2 of the Act is to include a half sister, then it seems to me that on a proper interpretation of s. 2 of (the Act?) the full sister as well as the half-sister must take together. If the intention of the legislature had been to include a half sister and to give preference to the full sister over her, it was to be expected that instead of using the single word "sister" they should have used the words "full sister" and after her mentioned "half sister". In the absence of any indication to that effect, I am of opinion that the word "sister" as used in this section must be interpreted according to the plain meaning of the word in the English language which ordinarily means a sister of the full blood. I need not repeat the other reasons given by the Full Bench of the Allahabad High Court in support of this interpretation with which I am in full agreement. I am accordingly of opinion that the decision of the lower Appellate Court is correct.

The appeal, therefore, fails and is dismissed with costs.

N. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1201 of 1932

December 21, 1934

BAJPAI, J.

Nawab Syed SULAIMAN HUSAIN KHAN —PLAINTIFF—APPELLANT

versus

SITA—DEFENDANT—RESPONDENT

Civil Procedure Code (Act V of 1908), ss. 102, 24 —U. P. Honorary Munsifs Act (II of 1896), ss. 7, cl. (4), 9—Suit of value below Rs. 500—Institution of suit in Honorary Munsif's Court — Transfer by District Judge to Munsif's Court—Trial by Munsif—Second appeal from decision of Munsif to High Court — Competency of.

Where a suit for a sum of money below Rs. 500 was rightly filed in the Honorary Munsif's Court but on the Honorary Munsif writing to the District Judge that as he was related to one of the parties, he would not like to try the suit, the District Judge under s. 24, Civil Procedure Code transferred the suit from the Court of the Honorary Munsif to another Court which was not a Court of Small Causes, and the suit was heard by that Munsif:

Held, that it was not obligatory on the District Judge to transfer it to the Court of Small Causes but as the suit was of a nature cognizable by a Small Cause Court and was heard by a Munsif against whose decision an appeal did lie, the decision of the lower Appellate Court was not appealable by way of a second appeal to the High Court under s. 102, Civil Procedure Code.

S. C. A. from the decision of the Subordinate Judge of Farrukhabad, dated June 11, 1932.

Mr. *Shiva Prasad Sinha*, for the Appellant.

Mr. *R. C. Ghatak*, for the Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit brought by him for the recovery of a sum of money less than Rs. 500. The suit was decreed by the trial Court but was dismissed by the lower Appellate Court. There is, therefore, a preliminary objection that no second appeal lies because the suit was of a nature cognizable by a Court of Small Causes. The contention of the learned Advocate for the plaintiff-appellant, however, is that the suit ought to have lain in a Small Cause Court and the entire proceedings are vitiated and the proper order that I should pass in the present case is to return the plaint for presentation to the proper Court.

In order to appreciate the contention of the appellant and the preliminary objection of the respondent it is necessary to state a few facts. The suit was filed in the Court of the Honorary Munsif at Shamshabad which Court had jurisdiction to entertain the suit. It is contended by the plaintiff that although he filed this suit in the Court of the Honorary Munsif at Shamshabad he should have filed it in the Court of Small Causes at Farrukhabad. He has not been able to support his contention by a reference to any enactment or notification except s. 16 of the Provincial Small Cause Courts Act which says that save as expressly provided by this Act or by any other enactment for the time being in force a suit cognisable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable. I shall assume for the purposes of this appeal that there is a Court of

Small Causes at Farrukhabad which might have had territorial jurisdiction over the present suit, but s. 7, cl. 4 of the Honorary Munsif Act provides that nothing in s. 16 of the Provincial Small Cause Courts Act of 1887 shall be deemed to affect the jurisdiction of Honorary Munsifs or Benches under the Honorary Munsifs Act.

It would, therefore, appear that the suit was rightly instituted in the Court of the Honorary Munsif at Shamshabad and there was nothing to prevent that Court from proceeding to dispose of the suit. The learned Honorary Munsif, however, wrote to the learned District Judge that as he was related to one of the parties he would not like to try the suit. The learned District Judge then under s. 24, Civil Procedure Code, which is applicable to the Honorary Munsifs Act by reason of s. 9 of the said Act transferred the suit from the Court of the Honorary Munsif to the Court of the Munsif at Kaimganj. It is said that the learned Disrtict Judge ought to have transferred the suit to the Court of Small Causes at Farrukhabad but it was not obligatory for the learned District Judge to do so and he could transfer the suit to any Court subordinate to himself and competent to entertain the same. The suit was, therefore, of a nature cognizable by a Small Cause court, but it was heard by a Munsif against whose decision an appeal did lie, but the decision of the lower Appellate Court is not appealable by way of a second appeal to this Court under s. 102, Civil Procedure Code.

The result is that the preliminary objection is sound and there is no force in the contention advanced by learned Counsel for the appellant that the suit ought to have been instituted in the Small Cause Court and I should return the plaint for presentation to that Court. Moreover, the objection comes with a very bad grace from the mouth of the appellant who himself filed the suit in the wrong Court and invited that Court to give a decision in his favour. The finding of the learned Subordinate Judge is a finding of fact which is fatal to the appellant's claim, the finding being that the amount of the debt was paid up by the defendant. There is no force in this appeal and I dismiss it with costs.

N. *Appeal dismissed.*

PATNA HGH COURT

Appeal from Appellate Decree No. 246 of 1932

March 12, 1934

MUHAMMAD NOOR, J.

GOUR CHANDRA CHOUDHURI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Srimati SARAT KUMARI DEBI AND ANOTHER—DEFENDANTS—RESPONDENTS

Cess—Liability to pay cess — When can be contracted out—Absence of contract — Cess so far paid included in rent—No mention that further cess assessed would not be payable by tenure-holder —Liability to pay additional cess imposed on tenure

Although the liability to pay cess under the Cess Act can be contracted out, but in order to make the legal provisions for the responsibility to pay cess ineffective, the contract must be clear and expressive. Where there is no such contract and the plain meaning of the lease is that the cess so far paid has been included in the rent, and there is no mention that further cess assessed upon the tenure would not be payable by the tenure-holder by whom it must be paid under the provisions of law, increased cess for the period after the re-assessment should be allowed. *Mahanand Sahai* v. *Sayedunnissa Bibi* (1), relied on.

A. from a decision of the Judicial Commissioner of Chota Nagpur, dated June 12, 1931, reversing that of the Deputy Collector of Purulia, dated January 13, 1931.

Messrs. *K. B. Dutt* and *S. C. Mazumdar*, for the Appellants.

Messrs. *A. K. Roy* and *S. Biswas*, for the Respondents.

Judgment.—The simple question involved in this second appeal is whether the plaintiffs are entitled to get a decree for the cess which has increased since the tenure was created. The defendants held two tenures on one lump rental of Rs. 42 annually. This rent according to the lease was fixed inclusive of cesses. The plaintiffs brought the suit for realization of cess at half anna per rupee on this Rs. 42 up to *Chait* 1334 *Fasli* and, since then, for cess payable by the defendants under the revised assessment. Both the Courts below have disallowed cess for the period before the re-assessment. The learned Deputy Collector, however, allowed the increased cess for the period after the re-assessment. This has been disallowed by the learned Judicial Commissioner. The plaintiffs have appealed.

The learned Advocate for the appellants has in my opinion rightly, not pressed the claim for cess so far as the period prior to the re-valuation is concerned. The only question is whether under the terms of

the lease and under law the plaintiffs are entitled to get the increased cess. The *patta*, as I have said, makes the *jama* inclusive of cess. In my opinion, this case is on all fours with *Mahanand Sahai* v. *Sayedunnissa Bibi* (1). It is true, as the learned Judicial Commissioner has pointed out, that the liability to pay cess under the Cess Act can be contracted out. But in order to make the legal provisions for the responsibility to pay cess ineffective the contract must be clear and expressive. In this particular case there is no such contract and the plain meaning of the lease is that the cess so far paid has been included in the rent. There is no mention that further cess assessed upon the tenure would not be payable by the tenure-holder by whom it must be paid under the provisions of law. In my opinion the view taken by the learned Deputy Collector was right, and, had the Calcutta case referred to above been brought to the notice of the learned Judicial Commissioner, I am sure his decision would have been the same. I hold that the cess payable up to *Chait* 1334 *Fasli* is included in the sum of Rs. 42 which the defendants have to pay as rent and defendants are liable to pay the additional cess imposed upon the tenure. The learned Deputy Collector fixed this amount on calculation at Rs. 7-3-6. There is, however, one mistake in this calculation, namely, that the amount of cess included in the sum of Rs. 42 ought to have been deducted and the rent should have been calculated by deducting cess from Rs. 42. The correct calculation should be as follows:—

Rent inclusive of cess

	Rs.	A.	P.
Rent	40	11	3
Cess on the amount at 6 pies in the Rupee	1	4	9
	42	0	0
Value of tenure under the new assessment	136	11	0
Cess at one anna per rupee ...	8	8	6
Deduct landlord's share at 6 pies a rupee on Rs. 40-11-0	1	4	9
Cess after deduction ...	6	3	9
Deduct cess included in the... rent	1	4	9
Cess payable	5	15	0

The decree of the learned Judicial Commissioner is set aside and that of the Deputy Collector is restored with this modification that the plaintiffs will get a decree for cess allowed by him for the period after *Chait* 1334 *Fasli* at the rate of Rs. 5-15-0 per annum and not Rs. 7-3-6. The plaintiffs will get three-fourths of costs in this Court and also of the Court of Appeal below.

N. *Decree set aside.*

(1) 12 C W N 154.

155—13 & 14

ALLAHABAD HIGH COURT

Civil Revision Application No. 598 of 1934

February 25, 1935

KENDALL, J.

SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER—DEFENDANTS—APPLICANTS

versus

Firm NARAIN DAS SHYAM LAL—PLAINTIFFS—OPPOSITE PARTY

Railways Act (IX of 1890), s. 76 — Scope of—Damages not caused by misconduct and negligence of Railway servants—Consignor, if entitled to benefit of s. 76—Court relying on s. 76—Misdirection as to law—Interfernce in revision.

The provisions contained in s. 76, Railways Act were made for the protection of plaintiffs who had suffered loss but who were not in a position to prove in what manner the property had been damaged or destroyed after it had been consigned to the Railway, because in the ordinary course of events they are not in a position to know how the loss has been caused. But the Act has not anywhere provided that a plaintiff is absolved from the duty of proving that a Railway Administration is liable for causing the loss or deterioration of the goods. If it is clear that the damage has been caused by the misconduct of the Railway servants, it is not necessary for the plaintiff to prove how their misconduct had caused the loss. But where from the evidence it seems to be highly probable that the goods which were consigned in a damaged condition and remained in the train for over ten days had deteriorated for this reason and not through any misconduct and negligence on the part of the Railway Administration, and the Judge relies entirely on s. 76, the Judge in doing so misdirects himself as to the law on the point and his decision being a result of the misdirection, is liable to be interfered with.

C. R. App. against the order of the Judge of Small Cause Court, Aligrah, dated July 24, 1934.

Mr. *Muhammad Ismail* (Government Advocate), for the Applicant.

Judgment.—This is an application on behalf of the Secretary of State for India in Council through the Agent of the Eastern Bengal Railway and the East Indian Railway for the revision of an order of the Judge of the Small Cause Court, Aligarh, in which the suit of the Opposite Party for Rs. 32 damages was decreed. The circumstances are stated in the judgment of the trial Court. It appears that the plaintiff had consigned a number of

bags of rice for despatch to Aligarh, and that when the rice arrived at the station of destination, damage was found to have been caused to the extent of six maunds, and the plaintiff, therefore sued for compensation to the amount of Rs. 30, the value of the rice.

In decreeing the suit the Judge noticed the evidence brought by the Railway to prove that the wagon was water-tight, and he also noticed that in the Risk Form A which represented the contract between the parties, a note had been made when the goods were despatched that the bags in which the rice was consigned were in a damaged condition some were rescued, others showed signs of probing and damp storage, so that they were liable to deteriorate in transit. Risk Form A is a form that is used when goods are already damaged and it is one of those forms which are known as owners risk forms, but the Judge in giving the plaintiff a decree has relied entirely on s. 76 of the Indian Railways Act in which it is laid down that in a suit against a Railway Administration for compensation for..... deterioration of...goods delivered to a Railway Administration for carriage by Railway, it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused. This provision was made by the Legislature no doubt for the protection of plaintiffs who had suffered loss but who were not in a position to prove in what manner the property had been damaged or destroyed after it had been consigned to the Railway because in the ordinary course of events they are not in a position to know how the loss has been caused. But the Act has not anywhere provided that a plaintiff is absolved from the duty of proving that a Railway Administration is liable for causing the loss or deterioration of the goods, and from the terms of the contract it appears that the plaintiff knew of the fact that the goods tendered to the Railway were either in bad condition or defectively packed and understood to hold the Railway

"harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants."

In the present case the plaintiff did not prove that the loss or damage to the rice had arisen from misconduct on the part of the Railway Administration's servants, and the Judge apparently believed that he was relieved of the necessity of proving this by s. 76 of the Act. This, however, only shows that if it is clear that the damage has been caused by the misconduct of the Railway servants, it is not necessary for the plaintiff to prove how their misconduct had caused the loss. In this case, from the evidence that was before the Court, it seems to be highly probable that the goods which were consigned in a damaged condition and remained in the train for over ten days had deteriorated for this reason and not through any misconduct and negligence on the part of the Railway Administration. At any rate, it is quite clear that the learned Judge misdirected himself as to the law in a matter of this sort, and that his decision is a result of his misdirection. No one has appeared on behalf of the opposite party in this Court. I therefore allow the application, set aside the decree and order of the trial Court, and direct that the plaintiff's suit be dismissed with costs in both Courts.

N. *Application allowed.*

PATNA HIGH COURT

Appeal from Original Decree No. 39 of 1932

February 20, 1934

WORT AND AGARWALA, JJ.

MESSRS. VILLIERS, LTD., MANAGING AGENTS, THE JAINTY CENTRAL COLLIERY, LTD. AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAGDISH PRASAD SINGH—PLAINTIFF—RESPONDENT

Public Purposes Land Acquisition Act (VI of 1857)—Works of Public Utility Companies Act (XXII of 1863), s. 26—Scope of—Declaration made under Act VI of 1857—Courts, if can hold that it was not for a public purpose—Acquisition of land declared to be for public purpose—Effect of.

The Works of Public Utility Companies Act (XXII of 1863), is for works of public utility to be constructed by private persons or companies in contradistinction to the Public Purposes Land Acquisition Act (VI of 1857), which was for the acquisition of land for "public purposes". The earlier sections of the Act of 1863 make provision for the machinery by which the promoters, as they are called in the Act, are to satisfy the Government that the matter in hand is a matter of public utility and a matter for the purpose of which the land should be acquired under the Act, and, amongst other things, provision for the survey of the lands which are sought to be acquired. [p. 100, col. 1.]

What is contemplated by s. 26 is a definite declaration by the Government that they are proceed-

ing under the Act of 1863 and that the land is required for the said work; and that when once that declaration is made the declaration is conclusive for the authorities to exercise their powers under the Act to acquire land for purposes of public utility. The latter part of the section merely provides that after the declaration has been made under the earlier part of s 26 the Government proceeds to acquire the land by the use of the machinery provided in the earlier sections of the Act of 1857. [p. 100, col. 2.]

Having exercised powers under Act (VI of 1857), and made the declaration, it is not open to any Court to hold that it was not for a public purpose. The two Acts give powers of acquisition for different purposes. The declaration under the one Act that the acquisition was for a public purpose is conclusive as is the declaration under the other that "the land may be taken under the Act." Consequently where it has been declared that the land is acquired for a public purpose, it is not competent for any one to canvass the question whether the land was used for a public purpose or not. [p. 101, col 1.]

Appeal from a decision of the Subordinate Judge of Deoghor, dated April 25 1932.

Messrs. *P. R. Das* and *S. C. Majumdar*, for the Appellants.

Messrs. *S. M. Mullick* and *J. C. Sinha*, for the Respondent:

Wort, J.—This is an appeal from a decision of the learned Sudordinate Judge of Deoghor given on April 25, 1932, in which he allowed the plaintiff's claim which sought a declaration that the mineral rights in village Madankata between miles 173 and 174 now occupied by a line of the East Indian Railway Company were his property. That learned Judge also allowed an injunction against the defendants restraining them from working the coal mines under that land.

The question which we have to consider is what was the effect of a declaration made on February 7, 1886, by the Government purporting to be under Act VI of 1857 by which the Government for the purpose of constructing a railway line between Sitarampur and Luckiserai acquired the land in dispute together with other lands.

The defendants who are the appellants before us, are the Jainty Central Colliery Co., Ltd., who at a time which is not material to mention acquired the mining rights from the plaintiff on either side of the railway line in question abutting on what are called "B" lands are the lands immediately on either side of the railway lines between miles 173 and 174 as I have stated. One of the questions which came to be determined by the learned Subordinate Judge was whether the plaintiff being a *Ghatwal* of Birbhum was entitled to the mineral rights. That was decided in favour of the plaintiff and no question arises before us with regard to the matter.

Another question which was canvassed before the Judge was whether on a proper construction of an agreement made on January 13, 1927, between the Secretary of State for India in Council and the defendant Colliery Co. the right to work the coal under "B" lands passed to the defendants. But whatever view may be taken of this point the question is immaterial. If it is once established that the plaintiff is entitled to the mineral rights under the "B" lands no agreement entered into between the Secretary of State and the Colliery Co. could give the defendants those rights. The question, therefore, as I have said, is to be determined upon the exact effect of the declaration of February 7, 1866, which purported to be made under Act VI of 1857.

It was the view of the learned Judge that the Act of 1857 was amended by Act XXII of 1863 or so it appears and the rights of the parties depended upon the latter Act. If that view is correct, the case of the plaintiff would necessarily succeed by reason of s. 50 of Act XXII of 1863 which is as follows:—

"Whenever land shall be taken under this Act for the construction of any work, the taking thereof shall not be held to convey, or include, the right to any mine of coal, or other minerals, laying under such land; except only such part thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless compensation for the same shall have been expressly allowed in the award made in favour of the persons interested in the land."

It is admitted that if this section does not apply then by the acquisition of 1866 the land and the minerals passed to the Government. Had the declaration acquiring the land been made under the Act of 1863 and having regard to the fact that compensation was not allowed as provided by s. 50, it is admitted that the decision of the learned Subordinate Judge would be correct. But the question arises as, to the effect of Act VI of 1857 and Act XXII of 1863. It seems to me that a perusal of the two Acts will show that the conclusion of the learned Judge is clearly erroneous. Act VI of 1857 by its preamble provides:

"Whereas it is expedient to make better provision for the acquisition of land needed for public purposes within the territories in the possession and under the Government of the East India Co. and for the determination of the amount of compensa-

tion to be made for the same, it is enacted follows,"

and then the first section of importance which is to be noticed is s. 2 which provides :

"Whenever it appears to the Local Government that any land is required to be taken by Government at the public expense for a public purpose, a declaration shall be made to that effect under the signature of a Secretary to the Government or of some officer duly authorised to certify the orders of the Government and such declaration shall be conclusive evidence that the purposes for which the land is needed is a public purpose ; and after making such declaration the Government may take any such land in the manner hereinafter provided."

The subsequent provisions of the Act, the details of which it is unnecessary to state provide the machinery by which the Government may take land which is the subject-matter of the declaration which is made under s. 2.

The Act of 1857 contains no such provision as s. 50 of Act XXII of 1863. There was Act II of 1861 which repealed ss. 9 and 37 of the Act of 1857 but those sections it is necessary to consider.

We come to Act XXII of 1863 which I have stated, the learned Subordinate Judge in the Court below held amended the Act of 1857. It is the contention of Mr. Sushil Madhav Mullick who appears on behalf of the respondent, admitting that Act XXII of 1863 does not amend the Act of 1857 that the rights given to the Government under the latter Act are these only which are given to the Government under the Act of 1857 : in other words the two Acts are to be read together.

Now the scheme of Act XXII of 1863 must be noted. In the first place the preamble states :

"It is an act to provide for taking land for works of public utility to be constructed by private persons or companies, and for regulating the construction and use of works on land so taken."

The first thing to be noticed is this, that this Act is for works of public utility to be constructed by private persons or companies in contradistinction to the purpose of the Act of 1857 which was for the acquisition of land for "public purposes." The earlier sections of the Act of 1863 make provision for the machinery by which the promoters, as they are called in the Act, are to satisfy the Government that the matter in hand is a matter of public utility and a matter for the purpose of which the land should be acquired under the Act, and among other things, provision for the survey of the lands which are sought to be acquired. Section 26 of the Act provides :

"When the boundaries of the land acquired for the work shall have been settled as aforesaid and the promoters shall have caused the said land to be measured and suitable land plans to be prepared of the same, the Local Government shall cause a declaration to be made under the signature of a Secretary to such Government or some officer duly authorised to certify the orders of the Local Government that the land aforesaid is required for the said work and such declaration shall be conclusive that the land may be taken under this Act."

A distinction is sought to be drawn by Mr. Mullick in his favour between the words which I have just read in s. 26 and the words in s. 2 of the Act of 1857. The distinction is based on the provision in s. 26 of the Act of 1863 :

"After making such declaration the Local Government may proceed to take any such land, as though it had been required to be taken at the public expense and for a public purpose ; and as though a declaration had been made as required under Act VI of 1857 for the acquisition of land for public purposes."

Mr. Mullick's argument is that the declaration under s. 26 of Act XXII of 1863, is merely for the purpose of giving the acquisition of the land, the sanction of law and that the declaration contemplated by the section is always that provided for by s. 2 of the Act of 1857, whether the acquisition is under the Act of 1857 for a public purpose or for "public utility" under the Act of 1863, in other words the mere mention of Act VI of 1857 in the declaration is immaterial and that if the acquisition is for a work of public utility to be constructed by a private person or company, the acquisition is under the Act of 1863 whatever the declaration may state. In my judgment that argument cannot be supported. What is quite clearly contemplated by s. 26 is a definite declaration by the Government that they are proceeding under the Act of 1863 and that the land is required for the said work: and that when once that declaration is made, the declaration is conclusive for the authority to exercise their powers under the Act to acquire land for purposes of public utility. The latter part of the section is equally clear, and that merely provides that after the declaration has been made under the earlier part of s. 26, the Government proceeds to acquire the land by the use of the machinery provided in the earlier sections of the Act of 1857.

The argument to which I have referred is based on the contention that under the Act of 1857, the Government were not authorised to acquire land for a third party. Exactly what the position in this

case was, does not appear. We do know that the East Indian Railway Company was incorporated under a private Act of the Imperial Parliament (12 and 13 Vict. Chap. 93) but whether the Government having acquired the land under the declaration of 1866 handed the land over to the Railway Company or retained its rights over the land as I have said, does not appear but it does seem to be abundantly clear that whatever the Government may do with the land which it purported to acquire under the Act of 1857, when once it is declared that the land is for a public purpose, it is not competent for any one to canvas the question whether the land was used for a public purpose or not. This argument addressed to us on behalf of the respondent was partly based upon the wording upon the declaration itself which was to the effect that

"Whereas it appears to the Lieutenant-Governor of Bengal that land is required to be taken by Government at the public expense for a public purpose, namely, for a line of railway between Sitarapmpur and Luckhisrai, it is hereby declared, etc"

The mention of the purpose for which the land had been acquired, it is said, modified the declaration that the land was acquired for a public purpose and that, therefore, the Government was proceeding under Act XXII of 1863. This position is untenable. Having exercised powers under Act VI of 1857 and made the declaration, it is not open to any Court to hold that it was not for a public purpose. The two Acts give powers of acquisition for different purposes. The declaration under the one Act that the acquisition was for a public purpose is conclusive as is the declaration under the other that "the land may be taken under the Act." It is these words that are conclusive of the matter and as in this case it had been declared that the acquisition had been made for a public purpose, and as the acquisition was for a public purpose in contradistinction to the acquisition for public utility, it can be made only under the Act of 1857. Whether that Act was mentioned or not, it is equally conclusive that the act of acquisition was made under Act VI of 1857. On this view of the effect of the declaration the mines and minerals under the land so acquired did pass to the Government and consequently the plaintiff is not entitled to the relief which he claims in the action.

In my judgment, therefore, this appeal must succeed, the judgment of the Subordinate Judge will be set aside, and the action dismissed with costs throughout.

Agarwala, J.—I agree.

N. *Appeal allowed.*

BOMBAY HIGH COURT
Full Bench

Criminal Revision Application No. 302 of 1934

September 10, 1934

BEAUMONT, C. J., RANGNEKAR AND DIVATIA, JJ.

RAMCHANDRA BABAJI GORE— PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 209, 437—Discharge of accused by Magistrate—Order set aside by Sessions Judge and re-trial in Sessions Court ordered—Jurisdiction to set aside the order—"Improper", meaning of.

Under s. 437, Criminal Procedure Code, the Sessions Judge or the District Magistrate has jurisdiction to set aside the order of a Magistrate discharging the accused under s. 209, Criminal Procedure Code, if he is of opinion that the order is improper. It is not necessary that the order should be perverse or manifestly contrary to the evidence in the case. *Parasharam Bhika* v. *Emperor* (1), overruled.

Per *Beaumont, C. J.*—The order of discharge may be set aside on the ground that the Magistrate has, however competently, taken upon himself the discharge of a duty which under the Code is entrusted to the Sessions Court, that is to say, the duty of appreciation of evidence of doubtful credibility or in a proper case on the ground that he disagrees with the appreciation of evidence by the Magistrate *In re Narainan Venkatesh* (2), dissented from. [p. 101, col. 2.]

Per *Rangnekar, J.*—In a case triable exclusively by the Court of Session, the Sessions Judge can set aside the order of discharge and commit the accused for trial: (1) when he considers that the charge was not groundless, and (2) when he considers that there are sufficient grounds for commitment, both on facts and on legal grounds, or even when the proceedings before the inferior Court were not regular and that is the meaning of the expression "improperly discharged." [p. 107, col. 1.]

The result of a careful consideration of the sections and the cases is, as follows:—(1) That it is competent to the committing Magistrate at any stage of the preliminary inquiry to discharge the accused if he considers the charge to be groundless for reasons to be recorded by him. (2) The commiting Magistrate is entitled to weigh and appreciate the evidence led on behalf of the prosecution and on behalf of the defence, and if on a consideration of this evidence he is of opinion that there are not sufficient grounds of committing the accused for trial, in other words, there is no case which would fairly justify or sustain a conviction at the trial, or no evidence on which any reasonable person can hold the accused to be guilty, then it is his duty to discharge the accused. (3) If after a charge is framed and a list of further witnesses put in by the accused and the Magistrate after examining any such witnesses thinks that there are not sufficient grounds

for committing the accused for trial, it is his duty to cancel the charge and discharge the accused. (4) The expression "sufficient ground" means, when credible witnesses make statements which, if believed, would sustain a conviction. (5) The Sessions Judge has jurisdiction to interfere in revision but such jurisdiction should be exercised only if he thinks that the order is illegal or incorrect or otherwise improper. (6) The expression "improper" in this connection means that in the opinion of the Sessions Judge there were sufficient grounds before the Magistrate on which he ought to have made an order for committal. (7) The power in revision must not be used freely. (8) The Sessions Judge must give reasons for his interference, so that if the matter comes to the High Court, there may be materials before it for deciding whether the Sessions Judge acted properly in interfering with the order of discharge. [p. 107, col. 2; p. 108, col. 1]

Cr. R. App. from the order of the Session Judge, Ahmednagar.

Messrs. *C. H. Carden Noad, G. K. Chitale* and *J. G. Rele*, for the Petitioner.

Mr. *P. B. Shingne*, for the Crown.

Beaumont, C. J.—This is an application in revision which comes before the Court in the following circumstances. The present applicant was charged jointly with accused No. 2, who was his first wife and who has recently died, with the murder of a woman called Tulsa, who was the second wife of the applicant, accused No. 1, so that the charge was under s. 302, Indian Penal Code. The matter was inquired into by the City Magistrate, First Class, Ahmednagar, who discharged the accused. Against that order of discharge, the complainant, who was the uncle of the deceased woman, applied in revision to the Sessions Judge of Ahmednagar, and the Sessions Judge set aside the order of discharge and directed the accused to be tried in the Sessions Court. From that order this application is made. On the application for a Rule, it appeared to the Bench which heard the application that, whether or not the order of the Sessions Judge was right on the merits, the order was contrary to the ruling of this Court in *Parasharam Bhika* v. *Emperor* (1), and as the Bench felt some doubt as to whether the ruling in that case was correct, the Rule was made returnable before a Full Bench.

This being a charge under s. 302, Indian Penal Code, the case is one exclusively triable by a Court of Session, and therefore, the inquiry before the Magistrate had to be conducted under s. 206 and the sections following in Chap. XVIII, Criminal Procedure Code, s. 208 provides that in such a case the Magistrate shall hear the complainant and take all such evidence as may be produced in support of the prosecution or on behalf of the accused or as may be called for by the Magistrate. Then s. 209, provides that when the evidence referred to in s. 208, has been taken and he has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, the Magistrate shall, if he finds that there are not sufficient grounds for committing the accused for trial, record his reasons and discharge him. That was the section under which the Magistrate discharged the accused in this case. Then s. 436, enables the Sessions Judge to direct further inquiry to be made in a complaint which has been dismissed under s. 203 or s. 204, or in the case of any person accused of an offence who has been discharged. So that that section covers the discharge of an accused person in respect of an offence not exclusively triable by a Court of Session. Then s. 437 deals with the discharge of an accused exclusively triable by the Court of Session, and under that section the Sessions Judge or District Magistrate, if he considers that an accused person has been improperly discharged by the inquiring Court, may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been in the opinion of the Sessions Judge improperly discharged. In *Parasharam Bhika* v. *Emperor* (1), the Magistrate had discharged the accused person under s. 253, Criminal Procedure Code, which deals with inquiries before a Magistrate in warrant cases triable by a Magistrate. But the Court held that the discharge should really have been under s. 209, and that the principles governing discharges under the two sections, *viz.*, ss. 209 and 253, are the same. The gist of the decision is contained in the judgment of Broomfield, J. at p. 440*, where he says this:

"The view we take is that the Magistrate is both entitled and bound to value and weigh the evidence and that, if he disbelieves the evidence and makes an order of discharge, the question whether it ought to be set aside in revision depends on whether it is a reasonable order, the criterion being, not whether the revising Court agrees with it, but whether it is rational in the sense that it cannot be fairly described as perverse or manifestly contrary to the evidence."

If that ruling is right, it involves a considerable departure from the language of s. 437. Section 437 empowers the Sessions

(1) 143 Ind. Cas. 289; A I R 1933 Bom. 158; (1933) Cr. Cas. 470; 34 Cr. L J 564; 57 B 430; 35 Bom. L R 245; Ind. Rul. (1933) Bom. 266.

*Page of 57 B.—[Ed.]

Judge to set aside an order of discharge whenever he thinks that the order is improper. If the ruling of this Court is to be accepted, the power can only be exercised when the order is perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence before the Court. In considering the circumstances which may entitle a Sessions Judge to come to the conclusion that an order of discharge is improper, it is necessary, in the first instance, to notice, what the Magistrate is required to do in the inquiry before him, that is to say, to consider what would be a proper order. Now, it is quite clear, I think, that under s. 209, the Magistrate has got to consider the evidence. He has got to satisfy himself that there are sufficient grounds for committing the accused person for trial, and to do that he must consider the evidence, both its nature and credibility; but he has not got to satisfy himself that there is a proper case for convicting the accused; he is not to try the accused, that being a duty imposed by the Code on the Sessions Court. It is no doubt difficult and undesirable to attempt to define precisely the limits of the powers of Magistrates conducting preliminary inquiries. Experienced Magistrates do not in practice find any great difficulty in dealing with inquiries under s. 206, and the following sections. They have to be satisfied before committing the accused that there is a fit case to be tried. If the Magistrate comes to the conclusion that there is evidence to be weighed, he ought to commit the accused for trial and he ought not to discharge the accused merely because he thinks that if he were to try the case himself, he would not be prepared to convict the accused on the evidence before him. But if he comes to the conclusion that the evidence for the prosecution is such that no tribunal, whether a Judge or jury, could be expected to convict the accused, then he ought to discharge him. Sometimes cases arise which are near the line, and the Magistrate may feel legitimate doubt as to his proper course. If he commits a case where he ought to discharge, result is a waste of public time and money in conducting an unnecessary trial, and this result Magistrates should try to avoid. On the other hand, if he discharges an accused whom he ought to commit, then the Sessions Judge or District Magistrate has power either under s. 436 or s. 437, to take action in the matter. By these sections the legislature has imposed checks upon improper orders of discharge, and the powers conferred ought not to be frittered away by the Courts. Under s. 437, which applies in this case, all that the Sessions Judge has to do is to come to the conclusion that the order for discharge was improper. He may, as it seems to me, reach that conclusion not only on the grounds indicated in the judgment of Broomfield, J., in *Parasharam Bhika* v. *Emperor* (1), that is to say, that the order was perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence in the case; but also on the ground that the Magistrate has, however competently, taken upon himself the discharge of a duty which under the Code is entrusted to the Sessions Court, that is to say, the duty of appreciation of evidence of doubtful credibility. On that ground, I think, the Sessions Judge clearly can set aside an order of discharge, but I am prepared to go further and to hold that in a proper case he may do so on the ground that he disagrees with the appreciation of evidence by the Magistrate. In saying that, I am differing from the view expressed by this Court in *In re Narainan Venkatesh* (2).

In that case the District Magistrate had differed from the inquiring Magistrate in regard to the appreciation of the evidence. The Court held that the District Magistrate had jurisdiction to set aside the order of discharge, but they went on to say that in the exercise of his discretion the District Magistrate ought not to exercise that power merely because he disagreed with the appreciation of the evidence of the Magistrate conducting the inquiry. I quite agree that in such a case the District Magistrate or the Sessions Judge must bear in mind that the inquiring Magistrate has seen the witnesses, and the Court acting in revision has not done so, and for that reason the Sessions Judge or the District Magistrate should be slow to set aside an order of the Magistrate merely because he disagrees with the Magistrate's appreciation of the evidence. But I am not prepared to say that in a proper case such a power cannot be exercised.

In so far as the powers of the Magistrate under s. 209, are concerned, I think that the views I have expressed are in accordance with all the earlier authorities in this Court, particularly *Queen-Empress* v. *Namdev Satvaji* (3), *In re Bai Parvati* (4)

(2) 40 Ind Cas 494; A I R 1917 Bom. 227; 18 Cr. L J 646; 19 Bom. L R 350.
(3) 11 B 372.
(4) 8 Ind. Cas. 631; 35 B 163; 11 Cr. L J 692; 12 Bom. L R 923.

and *Emperor* v. *Varjivandas* (5), and in so far as the judgment of Broomfield, J., in *Parasharam Bhika* v. *Emperor* (1), restricts or enlarges the powers of the Magistrate under s. 209, beyond the extent to which they have been laid down in those cases, I think the decision cannot be supported. But the main criticism upon *Parasharam Bhika* v. *Emperor* (1), is in regard to the restriction which it places upon the jurisdiction of the Sessions Judge to interfere under s. 437. In my opinion the words of the Code are quite general, and enable the Sessions Judge or the District Magistrate to interfere whenever he thinks that the order of the Magistrate is improper, and there was no justification for restricting that power in the manner in which the case of *Parasharam Bhika* v. *Emperor* (1), seeks to restrict it. I think that that case was wrongly decided and should be overruled. With regard to the merits of the present case, there is no doubt that where the Sessions Judge does interfere with an order of discharge under s. 437 and directs the accused to be tried by the Court of Session, this Court has power to interfere in revision, but we should be slow to exercise that power. Generally speaking, if the Sessions Judge thinks that there is a case to be tried, it ought to be tried. But, in my opinion, this is one of those rare cases in which we ought to interfere.

The learned Magistrate gave a detailed judgment in which he discussed the prosecution evidence, and it is clear that in discharging the accused he so acted, not because in weighing the evidence of the prosecution and the evidence of the defence he thought that the prosecution failed ; he discharged the accused because he was satisfied that no tribunal could possibly convict on the evidence before him. He points out that, of the witnesses called by the prosecution only one man named Mukunda gave evidence which in any way supported the charge of murder. The evidence of that witness is that he saw the dead body of the woman alleged to have been murdered being brought out of the hut of the accused and thrown into a well. Even if that evidence be accepted, it would hardly lead to more than an inference that the evidence of a crime had been concealed which might support a charge under s. 201, Indian Penal Code, but would afford no evidence as to who committed the murder, if murder had been committed. But apart from that, the witness came forward with his story to the complainant at the late stage, and there is some reason for thinking that he was not on the scene of offence when he says he was, and all the witnesses that he relies upon to corroborate his story contradict him. I think, therefore, the Magistrate was right in the view he took that no Court could possibly convict the accused upon the uncorroborated evidence of that witness. The learned Sessions Judge in setting aside the order of the Magistrate says that there are suspicious circumstances about the case, and I am not disposed to differ from him as to that. But suspicious circumstances alone cannot lead to conviction. The Sessions Judge, apart from suspicious circumstances, says that he sees no reason for disbelieving Mukunda. It may be that Mukunda is telling the truth, but as I have said, it would be quite impossible for any Court to accept his evidence, contradicted as it is by other witnesses, and base a conviction solely upon it. That being so, it seems to me that, though the learned Sessions Judge had jurisdiction to set aside the order of the Magistrate, he was wrong in this case in doing so. I think, therefore, we must allow the application, set aside the order of the Sessions Judge, and direct the accused to be discharged and his bail bond cancelled.

Rangnekar, J.—On the merits of the case I desire to say nothing and I agree with the learned Chief Justice that the application must be allowed. The other question raised before us is, whether the decision in *Parasharam Bhika* v. *Emperor* (1) is correct, and if so, to what extent, the applicant's contention being that the ruling in that case was ignored by the Sessions Judge. There are four propositions which my brother Broomfield has laid down in that case, *viz.* (1) that there is no distinction between an order of discharge passed under s. 253 and under s. 209, Criminal Procedure Code; (2) that under s. 209 the Magistrate is both entitled and bound to weigh and value the evidence ; (3) that if the Magistrate disbelieves the evidence and makes an order of discharge, the Sessions Judge ought not to set aside the order merely because he disagrees with it and substitute his own opinion on the facts in place of that of the Magistrate ; and (4) that an order of discharge made by a Magistrate after hearing all the evidence

(5) 27 B 84; 4 Bom. L R 779.

for the prosecution and defence ought not to be set aside unless it can be said that the order is perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence before the Court. It is obvious that the real question is, first, what is the extent of the jurisdiction of the Magistrate in an inquiry into cases triable by the Court of Session under Chap. XVIII, Criminal Procedure Code and, secondly, the jurisdiction of the Sessions Judge or the District Magistrate to interfere with an order of discharge made by the Magistrate, and this depends upon the true construction of certain sections of the Criminal Procedure Code. I propose to deal with the questions raised in the light of the relevant sections, apart from any authority in the first instance.

Chapter XVIII deals with inquiry into cases triable by the Court of Session or the High Court. Section 207 provides that the procedure in the sections following in that Chapter shall be adopted in inquiries where the case is triable exclusively by a Court of Session or in the opinion of the Magistrate ought to be tried by such Court. The distinction between these two classes of cases is clear from the Code itself. Schedule II shows that there are certain offences which are exclusively triable by the Court of Session. It also shows that certain classes of Magistrates have concurrent jurisdiction with the Court of Session. As to these latter class of cases, the Magistrate may commit the accused for trial if in his opinion the case is one which ought to be committed to the Sessions Court. Section 208, provides that the Magistrate has to hear the complainant and take all evidence in support of the prosecution and also on behalf of the accused, or such evidence as may be called for by the Magistrate. Section 209 (1) provides that when the evidence referred to in s. 208, *i. e.*, the evidence on behalf of the prosecution as well as any led on behalf of the accused, has been taken and the accused has been examined, if necessary, if the Magistrate finds that there are not sufficient grounds for committing the accused person for trial, after recording his reason, he should discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate. This shows that the Magistrate has to consider the evidence which is led before him carefully, and where the offence disclosed is not exclusively triable by a Court of Session, it is open to him to try the accused or to transfer the case to some other Magistrate competent to try it. Sub-s. (2) of s. 209 provides that it is competent to a Magistrate at any stage in the course of the inquiry, for reasons to be recorded by him, to discharge the accused if he considers the charge to be groundless. Then comes s. 210, which says that if the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he should frame a charge, and under s. 211 require the accused to give in a list of witnesses whom, he wishes to summon at the trial. Section 212, however, allows the Magistrate to examine any such witnesses named in the list, and s. 213 says that after examining such witnesses if the Magistrate is satisfied that there are not sufficient grounds for committing the accused for trial, he is competent to cancel the charge and discharge the accused.

It will be seen from these sections that an order of discharge can be made at three distinct stages : (1) at any stage of the inquiry, if the Magistrate considers the charge to be groundless ; (2) upon a consideration of the evidence for the prosecution and for the accused and (3) even when he thinks that there are sufficient grounds for committing the accused and frames a charge, upon examination of further witnesses called by the accused after the charge is framed, if in the opinion of the Magistrate there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused. It seems to me to be impossible to hold upon the plain construction of these sections that the Magistrate is a recording machine—a view often pressed before the Courts. In my opinion, these sections show that a Magistrate holding an inquiry has wide powers, and for the proper and effective exercise of the same, he must weigh and appreciate the evidence before him. But, excepting the case where in his opinion, the charge is groundless, he can discharge the accused only when he considers that there are not sufficient grounds for committing the accused for trial. The question then arises, when it can be said that there are "sufficient grounds" for committing the accused for trial. The words in question were considered in *Queen-Empress* v. *Namdev Satvaji* (3) and the test there laid down was that when credible witnesses make statements which, if believed, would fairly

sustain or justify a conviction at the trial, the Magistrate must commit the accused for trial. The same view was taken and this case was approved in *Emperor* v. *Varjivandas* (5) in which the Court observed as follows (p. 88*) :

"The words in s. 209, [Criminal Procedure Code] 'sufficient ground for committing' have been explained to mean, not sufficient ground for convicting, but where the evidence is sufficient to put the accused on his trial, and such case arises when credible witnesses 'make statements' which, if believed, would sustain conviction. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out a *prima facie* case against the accused, and he exercises a wrong discretion if he takes upon himself to discharge an accused in the face of evidence which might justify a conviction."

In my opinion, the test laid down in this case is correct. To put it in simple language, all that the Magistrate has to see is whether there is a *prima facie* case on which the accused can be put on his trial. In most cases no difficulty arises, but cases do occur which are on the border line as to which no hard and fast rule can be laid down. But I do not see why a Magistrate cannot discharge the accused when on a consideration of the whole of the evidence before him he is of opinion that there is no credible evidence against the accused. I do not see why he cannot say so. There is no harm in taking this view as the Magistrate has to give his reasons, and if they do not appeal to the Sessions Judge, it is, as I shall presently show, open to him to set aside the order. In this respect, therefore, I agree with my brother Broomfield. There has been some discussion before us as to the distinction between an order of discharge under s. 209 and one under s. 253. I do not propose to examine the question, as it is not strictly necessary to do so on this application.

This brings me to the other opint in the case as regards the jurisdiction of the Sessions Judge. The relevant sections are ss. 435 to 438 in Chap. XXXII, which deals with reference and revision. Section 435 empowers the Courts mentioned therein including a Sessions Judge to call for and examine the record of any proceeding before any Criminal Court inferior to it or him. The object of the power which is thus conferred on the Courts mentioned therein is to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceeding of the inferior Court. It will be seen from the terms of this section that the revisional powers conferred upon the Courts named in this section are very wide. Then ss. 436, 437 and 438 provide for the action to be taken by the Sessions Judge in the exercise of his revisional jurisdiction. Section 436 empowers the Sessions Judge to order further inquiry into any complaint which has been dismissed under s. 203 or s. 204 (3) or into the case of any person accused of an offence who has been discharged. Section 437 provides that upon examining the record of any case under s. 435, or otherwise, the Sessions Judge considers that such case is triable exclusively by the Court of Session and that the accused person has been improperly discharged by the inferior Court, he may cause him to be arrested and may order him to be committed for trial. Section 438 enables the Sessions Judge to report for the orders of the High Court, the result of his examination of the record in all other cases. A careful examination of these sections shows that s. 436 explains the revisional jurisdiction of the Courts mentioned therein over inferior Courts and as to the true meaning of the section. I can do no better than to refer to the observations of Mr. Justice Wilson in *Hari Dass Sanyal* v. *Saritulla* (6).

This is what he stated (p. 618*):

"This I read as an express enactment that every finding, sentence or order is liable to review not only on the ground of *illegality or irregularity* but also on the ground of incorrectness, that is to say, on the ground that it is wrong on the merits. And an order of discharge is no exception to the general rule."

Then ss. 436, 437 and 438 state the action the Sessions Judge can take when he acts in the exercise of his revisional jurisdiction or in simple language, tell him what he can do. Now with reference to orders of discharges by the inferior Courts, it will be seen that under s. 436 the Sessions Judge can set aside the order of discharge and order further inquiry in any case except when the order of discharge is made in a case exclusively triable by a Court of Session, and when the order of discharge is in a case triable exclusively by the Court of Session, the Sessions Judge can only act under s. 437.

Now there is some distinction between these two sections and it is this. Section

*Page of 27 B—[*Ed.*].

(6) 15 C 608.

*Page of 15 C—[*Ed.*]

436 provides that the Sessions Judge can set aside an order of discharge and order further inquiry when he is acting in the exercise of his revisional jurisdiction, whereas s. 437 provides that he can make an order of commitment when the accused was improperly discharged. The question then arises whether there is any real distinction between the revisional jurisdiction of the Sessions Judge when he acts under s. 436 and when he acts under s. 437. One thing is clear and that is, the action to be taken under both the sections by the Sessions Judge when he considers that interference is necessary only in the exercise of his revisional jurisdiction. It is not easy to understand why the legislature has used the words "improperly discharged" in s. 437. The learned Government Pleader argues that in spite of the use of this expression, there is substantially no difference between ss. 436 and 437 as to the jurisdiction of the Sessions Judge in revision as to orders of discharge made by the Court holding an inquiry under Chap. XVIII, and I am inclined to agree with his contention. I think what is meant by this particular expression is nothing more than what Crowe, J., said in *Emperor* v. *Varjivandas* (5), to which I have referred, in these words (p. 88*):

"The next point which arises is whether the order of discharge was illegal or incorrect or otherwise improper, *i. e.*, was it wrong on the merits."

Confining myself to the order of discharge falling under s. 437, the position seems to me that in a case triable exclusively by the Court of Session the Sessions Judge can set aside the order and commit the accused for trial: (1) when he considers that the charge was not groundless, and (2) when he considers that there are sufficient grounds for commitment both on facts and on legal grounds or even when the proceedings before the inferior Court were not regular, and that is the meaning of the expression "improperly discharged." This then being the extent and scope of the revisional jurisdiction of the Sessions Judge, it is difficult to see how it can be said that an order of discharge made by a Magistrate after hearing all the evidence for the prosecution ought not to be set aside unless "the order is perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence by the Court." Nor is there with sincere respect for Broomfield, J., any warrant for the proposition the learned Judge laid down in *Parasharam Bhika* v. *Emperor* (1), in these words (p. 440*):

"... the question whether it ought to be set aside in revision depends on whether it is a reasonable order, the criterion being not whether the revising Court agrees with it but whether it is rational in the sense that it cannot be fairly described as perverse or manifestly contrary to the evidence."

Having said this there are some points to which I might usefully refer. The first is that this Court has always held that the power in revision has to be used not freely but sparingly, not as if the revising Court is sitttng in appeal from a judgment of the lower Court. That rule is good enough for the guidance of the High Court and *a fortiori* I think that rule is binding on all Subordinate Courts. The second point is that the Sessions Judge must remember first, that the Magistrate who discharged the accused had the advantage of seeing the witnesses for himself. Thirdly, the object of the legislature in requiring an inquiry before a trial in the Court of Session is to prevent commitment of cases in which there is no reasonable ground for conviction and to save people from the anxiety of undergoing prolonged and expensive trials and to save the time of the Sessions Court from being wasted. These considerations, I think, should be borne in mind by the Sessions Judge when he is acting in the exercise of his revisional jurisdiction and will make it obvious that the power to interfere in revision is not to be exercised freely. If these considerations are borne in mind, then I have no doubt that the powers under s. 437 would not be exercised as freely as one would think. When, however, the Sessions Judge interferes with an order of discharge, he must clearly indicate the reasons which would justify him for doing so, so that the order of the Sessions Judge may in turn be examined by this Court if, and when, it is challenged.

In this view it is not necessary to refer to the cases cited before us. The result of a careful consideration of the sections and the cases is in my opinion as follows: (1) That it is competent to the committing Magistrate at any stage of the preliminary inquiry to discharge the accused if he considers the charge to be groundless for reasons to be recorded by him. (2) The committing Magistrate is entitled to weigh and appreciate the evidence led on behalf of the prosecution and on behalf of the

*Page of 27 B.—[*Ed.*]

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defence, and if on a consideration of this evidence he is of opinion that there are not sufficient grounds for committing the accused for trial, in other words, there is no case which would fairly justify or sustain a conviction at the trial or no evidence on which any reasonable person can hold the accused to be guilty then it is his duty to discharge the accused. (3) If after a charge is framed and a list of further witnesses put in by the accused and the Magistrate after examining any such witnesses thinks that there are not sufficient grounds for committing the accused for trial, it is his duty to cancel the charge and discharge the accused. (4) The expression "sufficient grounds" means, when credible witnesses make statements which, if believed, would sustain a conviction. (5) The Sessions Judge has jurisdiction to interfere in revision but such jurisdiction should be exercised only if he thinks that the order is illegal or incorrect or otherwise improper. (6) The expression "improper" in this connection means that in the opinion of the Sessions Judge there were sufficient grounds before the Magistrate on which he ought to have made an order for committal. (7) The power in revision must not be used freely. (8) The Sessions Judge must give reasons for his interference so that if the matter comes to this Court, this Court may have materials before it for deciding whether the Sessions Judge acted properly in interfering with the order of discharge.

Divatia, J.—I agree and have nothing to add.

D. *Order set aside.*

PRIVY COUNCIL

Appeal from the Supreme Court of Cyprus

April 12, 1934

LORD BLANESBURGH, LORD MERRIVALE AND SIR SIDNEY ROWLATT.

OTTOMAN BANK, NICOSIA—

APPELLANT

versus

DASCALOPOULOS—RESPONDENT

Exchange—Plaintiff employed in Turkey—Salary in terms of Turkish pounds—Plaintiff transferred to Bank's branch in Cyprus—Salary paid in accordance with currency of Cyprus — Retirement—Pension, in what currency payable—Rate of exchange prevalent as each instalment falls due—Whether should be adopted.

The plaintiff was employed by the Ottoman Bank in 1905 and was taken on the pensionable staff thus being entitled on retirement to a pension on the basis of his salary in the year previous to his retirement. His salary was at the beginning expressed in terms which in the result made it payable in Turkish gold pounds. In 1915 paper currency was made legal tender in Turkey. The plaintiff was subsequently transferred to the Bank's branch, in Cyprus and he retired in 1931 while in service there. In Cyprus his salary was paid in Cyprus pounds at the exchange rate of 100 Cyprus pounds to 110 Turkish pounds. Subsequently the Cyprus currency depreciated in terms of gold. The question was whether on retirement, the plaintiff became entitled to a pension payable in Turkish gold pounds translated into Cyprus currency at the exchange of the day:

Held, that his pension was to be calculated on the basis of Turkish gold pounds and he was entitled to a monthly pension in Cyprus currency of a sum equivalent to the amount of Turkish gold pounds to which he would be entitled and that the Cyprus currency was to be calculated in accordance with the rate prevailing at the date when each instalment of pension became due. [p. 111, col 1.]

Messrs. *Govin Simonds*, *Ronald Smith* and *T. W. G. Barry*, for the Appellant.

Messrs. *William Jowitt* and *Kenelm Preedy*, for the Respondent.

Lord Blanesburgh.—This is an appeal from a judgment of the Supreme Court of Cyprus affirming the judgment of the District Court of Nicosia at the trial. The appellants, defendants in the action, are the Ottoman Bank of Nicosia, and the respondent, the plaintiff, is a former official of the Bank. Prior to his retirement on December 31, 1931, the respondent was serving in the Larnaca branch in Cyprus and the one question which survives for determination upon the present appeal is whether the pension to which, in accordance with the terms of his employment, he then became entitled is, as both Courts in Cyprus have held, a pension payable in Turkish gold pounds translated into Cyprus currency at the exchange of the day, or whether, as the appellant Bank contends, it is due only in pounds of Turkish currency or, whether so or not is in Cyprus payable only in the currency of the Island at the fixed rate of exchange of 100 Cyprus for 110 Turkish pounds and that whether the salary pounds be gold or not. The respondent's pension, in other words, according to the view of the Bank, so far from being based upon gold, is really in Cyprus a sum expressed in Cyprus currency fixed and invariable, whatever, either intrinsically or in exchange, the value of that currency may be or become. As the Cyprus pound is no longer on a gold basis, and bears in actual exchange to a Turkish gold pound a very much higher ratio than 100 to 110, the question at issue is even now one of substantial consequence to the respondent.

To the Bank the issue may also be of general importance as affecting the pension claims of others of its retired officials in a position similar or analogous to that of the respondent. In 1903 the respondent entered the service of the Imperial Ottoman Bank, with which, for all present purposes, the appellant Bank may be regarded as identical. In March 1905 he joined the permanent and pensionable staff, and he then signed a declaration by which he bound himself to adhere to the regulations governing the pensions and superannuation fund of the Bank, which, adopted by the Director General in December 1898, had been in force as from January 1, 1899. These regulations, as the respondent then further declared, formed an integral part of the conditions of his engagement with the Bank.

The regulations are voluminous. Only a few of the articles constituting them need however here be specifically referred to. By Art. 2, the general management of the Bank may at all times of the year discharge an employee, but (Art. 3) he receives an indemnity from the pension fund applicable to his case. Each employee (Art. 9) cedes to the Bank prescribed proportions of his fixed salary and increments. These sums are retained by the Bank each month, and lodged by it to the account of the fund. The Bank, for its part, is to lodge, every month, to the same account, 6 per cent. of the salaries of the *personnel* and undertakes to make good the deficiency, if the total of the fund, as so composed, is insufficient to meet pensions then already granted. By Art. 14, the amount of a retired employee's pension is fixed "on the basis of the salary which [he] received on December 31 of the year preceding that in which he is retired." The date applicable to the respondent's case accordingly is December 31, 1930. By Art. 15 the amount of pension is calculated for 10 full years' service at 30 per cent. of the employee's annual fixed salary, with 2 per cent. for each of the subsequent years. Article 30 is striking:

"The general management reserve unto themselves the right to modify these regulations every time they think it necessary, *and in so far as the rights and interests of the* personnel *will not be injured by these modifications.*"

It is complained that the general management have, on occasions, purported to exercise this power without due or any regard to the qualification imposed by the words above italicised. The powers of the Bank, in this behalf, are not, however, in the present case directly in question. But incidentally the article must again be referred to. There is in the regulations no direct statement as to the currency in which any salary is to be paid. There is, however, in Art. 16, expressed in Turkish pounds, a minimum as well as a maximum pension which employees of a particular type may claim. A similar provision in the case of a pension payable to the widow of a deceased employee is to be found in Art. 22. It may also be observed that at the date of the regulations the only Turkish pound either known, or (with the possible exception of pounds of equivalent intrinsic value issued in paper by the Bank itself), in circulation, were gold coins of a special gold content, and their Lordships can have no doubt that the reference in the regulations was a reference to these Turkish gold pounds. Nor is the salary to be paid to the respondent referred to in any document then signed by him. The amount was no doubt agreed, and increased from time to time. That it was *ab initio*, expressed in terms which in the result made it payable in Turkish gold pounds can hardly be doubted. It is indeed stated in evidence by the Bank that in Turkey prior to the war the employees' salaries were always paid in Turkish gold pounds.

And here it may be convenient to allude to the origin, with the meaning to be attached to it, of the conversion of Turkish into Cyprus pounds at the rate of 110 to 100. To this conversion, as has already been indicated, and as will later more clearly appear, final importance is attached by the Bank. Cyprus pounds were here the equivalent of the English sovereign and this particular ratio which as is explained was always followed in the books of the Bank in relation to English sovereigns represented a real ratio founded on the actual gold content of two gold coins—a Turkish pound and an English sovereign. In fixing it, the gold content of the Turkish pound was taken to be 7·216 grammes, and that of the English sovereign 7·988 grammes. It is further in evidence and it may here be conveniently added that during the term of the respondent's service in Cyprus—certainly at the critical date, December 31, 1930—the Cyprus £1 note and the sovereign were in practice interchangeable. In Cyprus, said Mr. Jones, a witness for the Bank, there was no difference between

gold and paper. Now the respondent, on the permanent staff of the Bank since March 1905, was, in 1923, serving temporarily in Constantinople. He had previously been employed in branches in other parts of Turkey. In 1923 he was transferred to Cyprus, and became Chief of the Larnaca office. In that post he remained until December 31, 1931, when he was retired. Thenceforth he was eligible for pension, and it is not now in question that in accordance with the pension regulations above summarised, and in view of his length of service, the respondent was entitled to a monthly pension of 64 per cent. of the fixed salary he was receiving on December 31, 1930. It is now further agreed that the fixed or pensionable salary of the respondent on that date was one which, expressed in terms of Turkish currency, was a salary of 45 Turkish pounds per month. The first, and it may the final question, for determination is whether these Turkish pounds were any other than Turkish gold pounds representing the pensionable portion of the salary to which, under the terms of his employment, the respondent was then entitled.

It is vital to remember in the consideration of this question that the respondent at the date of his retirement was being employed outside Turkey. Had he then been employed within Turkey – for example, in Constantinople, where the official in *Ottoman Bank* v. *Chakarian* (1) had been employed, different considerations as to his pension rights might have arisen. Here, however, their Lordships are concerned only with the case of an official of the Bank who had continuously for about eight years before his retirement been serving abroad – to wit in Cyprus. Now it is in evidence that on transfer for service abroad no fresh agreement was normally entered into as to the salary payable to the transferred employee by the Bank. In the particular case of the respondent, however, when in 1923 he was transferred to Cyprus, he was informed by the Director of the Bank, so he says, that his salary—then a salary of 45 Turkish pounds a month, would be as formerly, and that he would draw it in parity, that is he would draw salary at 110 Turkish gold pounds to 100 English. Objection was taken by the Bank to the admission of this evidence; but the fact that the Turkish pounds on which the translation into Cyprus or English currency depended were throughout the respondent's service Turkish gold pounds is, their Lordships think, clearly shown by what actually happened in Cyprus. First on May 21, 1926 the respondent was granted an increase in his emolument – a so-called indemnity—, expressed as 2 Turkish pounds to be added to the 45 Turkish pounds he was then receiving. He was granted a similar increase as from January 1, 1929. It is not open to doubt their Lordships think, that in each case there were and were intended to be, additions of two Turkish gold pounds to the fixed salary then described in the same currency. But the most conclusive evidence as to nature of the Turkish pounds in which the respondent's salary in Cyprus was expressed is supplied by the salary book of the Bank framed in terms, which, for the present purposes, are of great significance. Every month the respondent on receipt of his salary was required to sign and did sign the salary book. The details specified are always in the same form. For convenience, their Lordships take the entry of which those printed in the appendix is latest in date. It is the entry for January 1929.

There in the first column the name of the respondent appears at the head of the "Directing Staff." In col. 2 headed "Salary £tq" his salary is entered as 45 Column 3 is headed "Indemnity £tq." In this column the respondent's two increases are entered as £tq. 4. Passing over cols. 4 and 5 indicating deductions from the £tq. 49 shown in cols. 2 and 3, we find under col. 6 headed "Net salary in £tq," that the respondent's net salary is brought out at £tq. 46·75. Column 7, the most important perhaps of all in this connection, is headed "Equivalent in £ s cp" and the respondent's equivalent is entered at £42 10s. Then under col. 8 headed "Total in £ s cp," the same figure as in col. 7 is brought out, namely, £42 10s. The whole is signed by the respondent. This entry appears to be free from ambiguity. That the £tq. 45 and £tq. 4 are Turkish gold pounds is proved by the fact not really in dispute—that the so-called "equivalent" in col. 7 is the Cyprus equivalent for a Turkish gold pound and for nothing else. Equally clear is it, when the actual facts are remembered, that the real function of this column was to equiparate in the Cyprus currency, in which payment was actually being made and accepted, the respondent's contractual salary in Turkish gold pounds.

1 30 A. C. 277; 99 L J P. C. 97; 142 L T 465.

The Bank does not accept this view. Even if, contrary to its submission, based upon reasons later to be stated, the Turkish pounds referred to are held to be Turkish gold pounds, even so, it contends that the respondent is not entitled, in Cyprus at all events, to any payment other than one in Cyprus currency exchanged at the rate of 110 Turkish pounds for 100 Cyprus pounds. Their Lordships are unable to accept this contention. They are satified that the "equivalent" in Cyprus currency ascertained by that formula was, and intended to be, a real equivalent. It is merely exegetical of the basic contract. It was a formula applicable only where the result was to produce parity in terms of gold. To both parties it was a convenience that the salary of the respondent, stationed in Cyprus as he was, should be paid in Cyprus currency. But the salary remained a salary due in Turkish gold pounds, and if it had been tendered by the Bank in that form, it must have been accepted by the respondent. In short, these monthly entries express with clearness, as their Lordships think, the respondent's contractual rights in the matter of salary, and it being now agreed that his pensionable salary on December 31, 1930, was 45 Turkish pounds a month, they justify the declaration of the learned trial Judge that the respondent is entitled to a monthly pension of a sum equal to 28·80 Turkish gold pounds; with as a necessary corollary, now that Cyprus currency has so depreciated in terms of gold, that the "equivalent" in Cyprus currency must be calculated according to the rate of exchange, whatever it may be, prevailing at the date when each instalment of pension becomes due. Their Lordships have reached this conclusion without so far considering the possible effect upon it of the fact that whereas up to 1915 there was substantially no Turkish pound existing other than a Turkish gold pound, there was brought into being on April 15, 1915, as the result of an Ordinance of that date, an issue of Turkish paper pounds to which were attached the privileges specified in the Ordinance.

The Bank goes so far as to say, and it relies in support of its contention on a decision of this Board in the case already cited, that as one result of the issue of these paper pounds, the salaries of the Bank's employees, whatever may have been the case before, ceased to be payable in gold. So far, however, as the respondent's salary is concerned, it will be found, their Lordships think, that for so long as he was employed outside Turkey—and that is the only case with which their Lordships are concerned—his position was unaffected either by the Ordinance or by any pronouncement of the Bank following upon it. In order, however, to appreciate the true position in this respect and also to ascertain the bearing, if any, of the Chakarian decision upon the respondent's rights, it is necessary to go into some little detail.

By Art. 1 of the Ordinance in question the Ministry of Finance was authorized to issue £tqs. 6,583,094 of paper money against the deposit of effective gold for 150,000,000 francs. By Art. 2 the acceptance and circulation of this paper money exactly in the same way as cash was made obligatory in all the territory of the Empire in all transactions, either between private parties and the Government or between private parties themselves. By Art. 3 the counter-value of this paper money was to be reimbursed in gold at sight and to bearer, six months after the conculsion of peace at Constantinople. By Art. 4 such of the paper money as should not have been presented for reimbursement within the five years following the date fixed in Art. 3 was to be prescribed to the profit of the Treasury.

Now the effect of this Ordinance is of course a matter of Turkish Law with reference to which no evidence was tendered at the trial. But its somewhat remarkable provisions are alluded to in the Supreme Court. It is pointed out by Sertsios, J., that the notes were to be legal tender only up to a date of six months after peace, an event which the Chief Justice points out occurred on August 6, 1924. It may also be questioned whether these currency notes were ever made legal tender for any payment under a Turkish contract which by that contract had to be made outside of Turkey. These matters, however, have not been discussed in the Courts below and their Lordships in the absence of evidence as to Turkish Law, are not in a position to pronounce upon them now. They need not, however, do so. For it is clear to them that not even in Turkey did the Bank ever assert a right to meet the claims of its employees hitherto paid in Turkish gold pounds by tendering them Turkish paper pounds. So far as the employees of the Bank outside of Turkey were concerned, there is no indication that

any change at all was made in the manner of paying their salaries hitherto always paid on a gold basis. As for the employees in Turkey proper, the Bank did, from time to time purport to alter the salaries, but nearly always by way of increase.

In the present case, which is not concerned with an employee serving in Turkey at any relevant date, these variations are not important, and their Lordships are, for present purposes, content to accept the summary statement of the Chief Justice with reference to them that salaries in Turkey were being paid on a gold basis, each employee receiving in Turkish currency a sum, which had Turkish gold pounds been procurable, would have enabled him to obtain these to a number equal to the Bank's original figures of his month's salary. The Bank, however, in 1920 made the following notable pronouncement applicable to the staff of Constantinople and the agencies in Turkey:

"As from 1st January 1920 the gross monthly salary of each employee will be converted into pounds sterling at the rate of 110 Turkish pounds for 100 pounds sterling and the proceeds of conversion so obtained will be paid to each employee in Ottoman Treasury notes at the average selling price of the pound sterling registered at the head office during the three months immediately preceding the current month."

This method of payment was followed for nearly a year and a half. It was superseded by a decision of May 1921, of the Management Committee, arbitrarily fixing 451 *piastres*—a number far less than the proper number in exchange as the number to be taken as the equivalent of the pound sterling and finally, in 1923, after the respondent had gone to Cyprus, the Bank adopted a method of directly converting the Turkish gold pound, "the gross monthly salary," into paper by treating it as the equivalent to 410 *piastres*. Now the action of the bank in this matter has not passed unchallenged in the Cyprus Courts. It has in the case of *Esmerian* v. *The Ottoman Bank* been condemned, as an attempt by the Bank, under cover of Art. 30 of the pension regulations above set forth, to alter a fundamental term of their contracts in the case of its employees in Turkey. This may or may not be so. Upon such a question their Lordships in this case naturally express no opinion. But they draw attention to its existence in order that the meaning and effect of the judgment of the Board in *Ottoman Bank* v. *Chakarian* (1) may be made clear.

That case is claimed by the Bank as an authority for the proposition that the salaries of the Bank's employees are no longer payable in gold. This claim seems to rest upon a complete misapprehension of the decision. The plaintiff there was an employee of the Bank who, when employed at the Constantinople Office, had, as he alleged, been wrongfully dismissed. His action against the Bank brought in Cyprus was one for damages for such wrongful dismissal. For the purpose of assessing the damages, and only for that purpose, it was necessary to value the plaintiff's pension rights on the footing that he had been retired at the date when he was dismissed. He had, in fact, received on December 31 of the year preceding his dismissal, without protest or objection on his part, his salary calculated according to the above decision of May 1921. In these circumstances it was held by the Board that for the purpose of fixing his pension rights the plaintiff, was, under Art. 14 of the regulations, bound by and could not go behind that receipt which as a receipt of 451 *piastres* for every pound sterling, was an essential part of the decision of May 1921. The validity of the decision of May 1921, was not itself in question: it was assumed to be valid: the only question under discussion was what it meant, and upon that question practical agreement was reached during the argument.

In the judgment of the Board therefore delivered by Lord Thankerton, it was not necessary to do more than record the result. It follows that so far as any general question as to payment in gold is concerned, the decision is only relevant now as showing that by common consent the "gross monthly salary" of the pronouncement of January 1920—the exact counterpart of the respondent's £tq 45—was assumed to be even in Turkey, a salary in Turkish gold pounds. But the case has no further application to the present, which relates to an employee of the Bank serving out of Turkey: nor can it be any authority in any case, even of an employee serving in Turkey: where the validity of the decisions of May 1921 and 1923 is not admitted or, if questioned, is not established. In the view their Lordships take of the case it is unnecessary, they think, to deal with other questions canvassed during the argument. For the reasons given they are of opinion that the concurrent judgments of the Courts in Cyprus to the effect above stated were in the result right, and they

will accordingly humbly advise His Majesty to dismiss this appeal. Their Lordships understand that the costs have been arranged between the parties.

N. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *Bischoff Coxe-Bischoff & Thompson.*

Solicitors for the Respondent:—Messrs. *Gisborne & Co.*

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Revision Application No. 184 of 1933

September 16, 1933

FERRERS, J. C. AND RUPCHAND, A. J. C.

EMPEROR—PROSECUTOR

versus

MAHAMMED PANAH—OPPONENT

Criminal Procedure Code (Act V of 1898), s. 497 (1)—Granting of bail—Considerations to be taken into by Court.

The High Court's power to grant bail under s. 498 of the Criminal Procedure Code, is not limited by the restriction imposed by s 497 (1). The High Court will not, however, grant bail in non-bailable cases except in special circumstances and according to the exigencies of each particular case. *Emperor* v. *Wahidino* (1) and *Har Chand* v. *Emperor* (5), relied on.

Bail will not be withheld merely as a punishment But in granting or refusing bail the Courts will take into consideration, amongst other things, the question whether the accused, if released on bail, is likely to tamper with the prosecution evidence or get up false evidence in support of the defence.

Magistrates are bound to consider whether a prisoner, if released, will suborn evidence and they may well refuse to enlarge on bail a prisoner who is of such a character that his presence at large will intimidate witnesses. *Emperor* v. *Wahidino* (1) *Emperor* v. *Nga San Htwa* (2), *Krishna Chandra Jagati* v. *Emperor* (3) and *Har Chand* v. *Emperor* (5), relied on.

Cr. R. App. from an order of the Sessions Judge, Sukkur.

Mr. *C. M. Lobo*, for the Crown.

Mr. *Motiram Idanmal*, for the Opponent.

Judgment.—This is a criminal revisional application under ss. 439 and 561-A, Criminal Procedure Code. It is presented by the Public Prosecutor and we are informed that he is acting under instructions from Government. We are asked to vacate a bail order passed by the learned Sessions Judge of Sukkur on September 11, 1933. The allegations made by the Public Prosecutor are these: *Khan Bahadur* Muhammad Panah is a man of wealth, dignity and influence. Amongst other offices he is Chairman of the School Board. He was instrumental in securing the appointment as peon of a man named Imambux. On April 13, this Imambux was sent to the Treasury at Garhiyasin to collect a sum of Rs. 2,937 which was required for the payment of salaries. Imambux went to the Treasury and collected the money. He set out on his return journey. But the money was never delivered. Shortly after Imambux left the Treasury, startling news came to the ear of Muhammad Panah. It was reported that Imambux had been waylaid by four foot-pads who had knocked him on the head with their hatchets and robbed him of the money which he was carrying. Muhammad Panah was one of the first to reach the place where Imambux was lying. The man had upon his head certain marks which were alleged to be the wounds which the foot-pads had inflicted. He was carried to a medical officer who reported that the wounds were fictitious. Proceedings were taken against Imambux for giving false evidence and an action was also taken with a view to recover from his sureties the money which had disappeared. Imambux absconded and was for some time at large. He was eventually arrested and taken before the District Magistrate. There he made a remarkable statement. He said that the whole story of the attack by foot-pads was a falsehood and that the theft of the money was the result of a conspiracy in which *K. B.* Muhammad Panah and Rasulbux had also been involved. On August 28, Imambux was pardoned on condition that he gave a full and true account of all that he knew. On 31st of the same month Rasulbux was arrested. On the following day an application was made for bail not only on account of Rasulbux who was under arrest but also for Muhammad Panah, who had not yet been apprehended. The learned Judge on September 1, made an order in these terms.

"The applicant *K. B.* Muhammed Panah be released on bail of Rs. 10,000, if arrested, till final order is passed on his application."

Such an order as this is not warranted by law. Section 497, Criminal Procedure Code, begins with the words

"When any person is arrested or detained ..or is brought before a Court, he may be released on bail ....."

The first step which must be taken by any person who wishes to be admitted to bail is to appear before the Court and to surrender. We are not, however, at present concerned with the order of September 1. That order has been vacated by the learned Judge himself. The Public Prosecutor made an application in which he appears to have said that:

"*K. B.* Muhammad Panah will be formally arrested

and kept in private house at Sukkur and a guard would be kept over the house and that he will not be handcuffed and no man will be allowed to see him except his Pleaders without the permission of the Police He will have two private servants at his disposal"

Under the circumstances mentioned above, the learned Judge cancelled the order passed on September 1, about bail. This procedure was also wholly incorrect and unwarranted by law. The Public Prosecutor did wrong in proposing conditions such as those which are set forth by the learned Judge in his order and the learned Judge himself did wrong in accepting and acting upon them. In due course the opponent was sent up to the Court of the Sub-Divisional Magistrate, Rohri, under ss. 120-B, 409 and 109, Indian Penal Code. To this Magistrate an application for bail was made and by him it was rejected on the ground that the accused would take advantage of his freedom and intimidate witnesses. The opponent then applied once more to the learned Sessions Judge. That officer passed an order in these terms:

"I order that the applicant be released on bail on his passing a bond of Rs. 10,000 and agreeing not to go beyond the Municipal limits of the town of Sukkur without the permission of the lower Court, with two sureties of Rs. 5,000 each. The lower Court will be at liberty to remand the accused if a charge is framed against him."

The grounds upon which this order was made are thus worded:

"(i) We have no evidence on record to show that there are reasonable grounds for believing that the applicant is guilty of an offence punishable with transportation for life."

Now the learned Judge has here slightly gone beyond the language of the law. The question of bail arises at a time when the opportunity for recording of evidence has not yet occurred. Section 497 does not therefore speak of evidence. It speaks of reasonable grounds. Now the learned Magistrate who refused bail and the learned Judge who granted it had before them the charge sheet and the statement of Imambux and other witnesses, and these are the only indications which are usually available at this stage. If these could not be counted as reasonable grounds, then it would be necessary in every case whether a man be charged with murder or with any other offence, however heinous, to admit him on bail until some evidence against him could find its place on the record. This however is not the law. The second reason is given by the learned Judge in these terms:

"The only ground given by the learned Magistrate is that the applicant might take advantage of his freedom and intimidate the witnesses. But this is not a sufficient ground."

It is probable that the learned Judge's attention was not called to the rulings which have been recorded by this Court for the guidance of Magistrates upon this point. In *Emperor* v. *Wahidino* (1) at page 313* a case is reported in which Percival, J. C., quoted with approval the following words from the judgment of a Sessions Judge:

"The complaint made is that the evidence has been tampered with I am of opinion that the complaint of the learned A. P. P appears justified. To enlarge the accused on bail would be to encourage further tampering and consequent failure of justice."

Very recently the law has been re-stated upon this subject in these terms. Bail will not be withheld merely as a punishment. But in granting or refusing bail the Courts will take into consideration, amongst other things, the question whether the accused, if released on bail, is likely to tamper with the prosecution evidence or get up false evidence in support of the defence. The law has been laid down to the same purpose by other High Courts also. In *Emperor* v. *Nga San Htwa* (2), the High Court laid down for the guidance of Magistrates the lines on which they should exercise their discretion in this matter. Magistrates are bound to consider whether a prisoner, if released, will suborn evidence and they may well refuse to enlarge on bail a prisoner who is of such a character that his presence at large will intimidate witnesses. In *Krishna Chandra Jagati* v. *Emperor* (3), a similar rule is laid. The learned Judges say that, although other authorities are of the contrary opinion, in India any allegation that the accused is tampering or attempting to tamper with the witnesses would be a very cogent ground for refusing bail. To the like effect is the ruling in *Hikayat Singh* v. *Emperor* (4). The order made by the learned Judge cannot be sustained. It proceeds upon erroneous ground and it is in itself not in accordance with law. There is nothing to be found in the Code which would justify the conditions imposed upon the opponent by this order. Although

(1) 117 Ind. Cas. 773; 23 S L R 310 at p. 313; 30 Cr. L. J. 845; A I R 1929 Sind 137.

(2) 101 Ind. Cas. 101; 5 R 276 at p. 282; A I R 1927 Rang. 205; 28 Cr. L J 773.

(3) 102 Ind. Cas. 909; 6 Pat. 802; 8 P L T 557; 28 Cr L J 621; A I R 1927 Pat. 302; 8 A I Cr. R 303.

(4) 133 Ind. Cas. 27; 11 Pat. 280, 13 P L T 530 (1932) Cr. Cas. 522: 33 Cr L J 574; A I R 1932 Pat. 209; Ind. Rul. (1932) Pat. 162.

*Page of 23 S. L. R.—[*Ed.*]

he is released on bail yet he is required to agree not to go beyond the Municipal limits of the town of Sukkur without the permission of the lower Court. We must of necessity vacate this order. But we then find it necessary to apply our own minds to the question whether the accused in this particular case should or should not be released on bail. In *Harchand* v. *Emperor* (5) the conditions upon which this Court is accustomed to grant or refuse bail have been laid down in these terms:

"The High Court's power to grant bail under s. 498, Criminal Procedure Code, is not limited by the restriction imposed by s. 497 (1). The High Court will not, however, grant bail in non-bailable cases except in special circumstances, and according to the exigencies of each particular case."

Now the special circumstances of the present case to which our attention has been called are these. The accused is a man of very high standing in his community. He has been a member of the Legislative Council of Bombay and also the Legislative Assembly of all India. He is also a Magistrate of the Second Class. A second circumstance to be taken into consideration is that an important part of the evidence against him is the evidence of an accomplice who has been admitted to a pardon. This is tainted evidence which would require corroboration. The third circumstance which we cannot overlook is that the opponent has been much hampered by the unjustifiable condition imposed upon him by the order of the learned Judge. He is debarred from coming out of the limits of the town of Sukkur and it has therefore been impossible for him to come before us in person and to give his own instructions to the Advocate who appears for him. The proceedings in the Magistrate's Court are to begin to-morrow, and to avoid interposing an unnecessary delay, we have not called for the record and proceedings. This was a further obstacle in the way of the opponent. It was imposed for his advantage; but it has nevertheless to a certain extent hampered him in the presentation of his case. In the absence of the record we do not touch the question whether any attempt to tamper with the evidence has or has not been made. Taking all these circumstances into consideration, we pass the following order: The opponent is admitted to bail in the sum of ten thousand rupees (Rs. 10,000) with two sureties jointly and severally bound in the like amount. This bail will be effectual unless and until the learned Magistrate may find that a *prima facie* case has been made out either to commit for trial or to frame a charge. In that case should he think fit to remit the prisoner to custody, he need not wait to record any evidence which may be tendered for the defence. This order is passed on the condition that the case do begin to morrow and go forward from day to day without interruption. The order will be *ipso facto* vacated if any attempt is made on the part of the accused in any way to postpone or interrupt the continuous prosecution of the case. The order relating to Rasulbux will be in the same terms.

D. *Order accordingly.*

(5) 40 Ind. Cas. 290; 10 S L R 203; 18 Cr L J 642.

RANGOON HIGH COURT

Special Second Civil Appeal No. 137 of 1933

May 1, 1934

DUNKLEY, J.

SAN TUN U AND OTHERS—APPELLANTS

versus

MA NI MA—RESPONDENT

Lunatic—Co heirs refusing to maintain lunatic—Person who is not strictly a co-heir maintaining and supporting—Inheritance to property of lunatic after his death—Co-heirs, if excluded—Rule, if equitable—Burmese Law—Inheritance.

The share of a person who is insane and incapable of taking care of himself or his affairs should go on his death to the co-heir who maintained and looked after him during his life-time. The same principle applies to a person who is not strictly a co-heir of the lunatic if all the co-heirs of the lunatic refused to undertake his custody. In an extreme case, these rules are neither inequitable nor opposed to the present day ideas of the Burmans. *Mi Kan Yon* v. *Nga Pwe* (1), relied on, *Ma Miya* v. *Maung Kywet* (2), followed.

Sp. S. C. A. against the decree of the Assistant District Court of Akyab, dated April 25, 1933, in Civil Appeal No. 8 of 1933, arising out of the decree of the Additional Township Court of Pauktaw, in Civil Suit No. 49 of 1932, dated February 1, 1933.

Mr. *Sein Tun Aung*, for the Appellants.

Mr. *Tun Aung*, for the Respondent.

Judgment.—It is now admitted that the land in suit was the property of the lunatic, Ma Kra Nye Khine. During her life-time the lunatic was looked after by her brothers in succession, and during the time that she lived with each of them that one obtained the rents and profits of this land for the maintenance of the lunatic. Unfortunately, her occupation of the house of a brother was invariably followed, after a time, by the death of the brother, and consequently, about 10

years or more ago, after the death of one brother, Maung Zan, none of the lunatic's natural heirs was prepared to take her into his house, for, the whole family had concluded that her presence in the house brought ill-fortune. At that stage the plaintiff-respondent, Ma Ni Ma, who is the widow of one of the lunatic's deceased brothers, took over the custody of the lunatic, obtaining the rents and profits of this land for the lunatic's maintenance. It is admitted that for the last 10 years of the lunatic's life the respondent looked after her and that the lunatic died in her house. The respondent alone performed the funeral ceremonies and bore all the expenses of the funeral.

The respondent has set up that at the time that she took over the custody of the lunatic she was persuaded to do so because all the natural heirs of the lunatic agreed that on the lunatic's death she should inherit the latter's property to the exclusion of her natural heirs. But, although the respondent has succeeded in establishing that the defendants-appellants did enter into such an agreement with her, she has failed to establish that all the natural heirs of the lunatic agreed to this course, and, therefore, her case as based upon the agreement must fail.

Consequently, the sole point for consideration is whether, under the circumstances of this particular case, the respondent ought to be allowed to inherit the property of the lunatic to the exclusion of the latter's natural heirs. In my opinion, there is ample authority for holding that she should so inherit. In the case of *Mi Kan Yon* v. *Nga Pwe* (1), it was held that the share of a person who is insane and incapable of taking care of himself or his affairs should go on his death to the co-heir who maintained and looked after him during his life-time. This authority, if accepted, is really conclusive of the present case, for, although the respondent is strictly not a co-heir of the lunatic, nevertheless, in my opinion, the same principle applies, because all the co-heirs of the lunatic refused to undertake the custody of her. It was further held in the case of *Ma Mya* v. *Maung Kywet* (2), that persons naturally entitled to inherit can be excluded from inheritance by the person who supports the deceased and performs the funeral ceremonies, when desertion and intentional and deliberate neglect of the ordinary duties of affection and kindred are proved against them.

On behalf of the appellants it is argued that these authorities are now obsolete and are unsuited to the conditions of modern life, but this is a contention with which I am unable to agree in its entirety, for it seems to me that in an extreme case, such as I look upon the present to be, these rules are neither inequitable nor opposed to the present day ideas of the Burmans themselves. The respondent looked after the lunatic for a long period, when she had been abandoned by her co-heirs, and she attended to the lunatic in her last illness, and performed the funeral ceremony and bore the expenses thereon. The lunatic was deliberately and intentionally deserted by her own blood relations and they neglected the ordinary duties of affection and kindred to her. In these circumstances, I think that I shall be right in following the ruling in *Ma Mya* v. *Maung Kywet* (2), and holding that the lunatic's blood relations should be excluded from the inheritance.

Consequently, in my opinion, the decision of the Assistant District Court was correct, and this appeal fails and is dismissed with costs.

D. *Appeal dismissed.*

(1) 14 Ind. Cas. 843; 5 Bur. L T 61.
(2) 12 Bom. L R 228.

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1215 of 1932
February 1, 1935
GANGA NATH, J.

JAGAI KURMI AND OTHERS—DEFENDANTS—APPELLANTS
versus
HARAKH RAJ SINGH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS

Landlord and tenant—Trees planted by zemindar *and standing in holding of tenants—Right of* zemindar *to timber of trees—Fruits of trees—Right of tenants, in absence of contract to contrary.*

When a land is let out to a tenant by a *zemindar* it is to be presumed that it is let out with the trees. If there was any contract to the contrary reserving the right to appropriate the fruits of the trees standing on the land for the *zemindar*, it is for the *zemindar* to set up and prove that contract. Consequently in the absence of any contract to the contrary the tenants on whose land the tree is standing have a right to appropriate its fruits. But the timber of trees planted by the *zemindar* before land is let out to tenant and standing on the holdings of tenants, whether occupancy or ex-proprietary tenants, belongs to the *zemindar*.

[Case-law reviewed.]

S. C. A. from the decision of the Additional Subordinate Judge of Basti, dated June 16, 1932.

Mr. *Wali-ullah*, for the Appellants.

Mr. *Kanhaya Lal Misra*, for the Respondents.

Judgment.—This is a defendant's appeal and arises out of a suit brought against them by the plaintiff for possession over a *mahua* tree and to recover Rs. 10 as damages for fruits and branches of the tree alleged to have been wrongfully appropriated by the defendants. The plaintiff's case was that he was the *zamindar* and the tree in suit had been planted by him and he had been appropriating its fruits. The defendants contend that the tree was in their occupancy holding and that they and their predecessors-in-title had all along been appropriating its fruits. The trial Court found that the tree belonged to the plaintiff and gave a decree for possession but dismissed the suit for damages holding that the defendants were entitled to appropriate the fruits. In appeal the learned Additional Subordinate Judge found in favour of the plaintiff and held that the plaintiff had a right to appropriate the fruits and decreed the suit in full as the tree had been planted by the plaintiff.

As already stated, it is apparent from the findings of the Courts below that the tree was planted by the plaintiff himself before his land was let out to the defendants. It is a settled law that the timber of the trees standing on the holdings of tenants whether occupancy or ex-proprietary tenants belongs to the *zamindar*. In *Nazir Khan* v. *Faiz Muhammad Khan* (1), it was held that the timber of a tree belongs to the *zamindar* when the tree is growing on a tenant's land and that it makes no difference if the tenant happens to be an ex-proprietary tenant who himself has planted the tree. In *Khan Chand* v. *Chandan*, 24 Ind. Cas. 81 (2). It was observed by Justice Piggott :

"I take it to be established by a number of rulings of this Court, of which the cases of *Lachman Das* v. *Mohan Singh* (3) and of *Ganga Dei* v. *Badam* (4), may be taken as specimens, that the trees planted by tenants on their holdings will be the property of the *zamindar* and the tenants will have no transferable rights therein. This will be presumed in the absence of evidence to the contrary."

The defendants, therefore, had no right to appropriate the timber of the branches as the timber belonged to the plaintiff. The defendants are liable for damages for the branches of the tree appropriated by them. The plaintiff is, therefore, entitled to a decree for Rs 6 for the price of the branches appropriated by the defendants.

As regards the fruits, it is also an equally settled law that a tenant has a right to appropriate the fruits of the trees growing in his holding whether they were planted by him or not. In *Kamta Prasad* v. *Sheo Prasad* (5), it was held that in the absence of a custom or contract to the contrary, an occupancy tenant has a right as against his *zamindar* to the fruit of trees standing upon his holding, though the trees themselves may be the property of the *zamindar*. The same view was taken in *Imdad Khatun* v. *Bhagirath* (6) and *Ganga Dei* v. *Badam* (4). In the latter case it was laid down :

"The presumption of law, and the general rule in the absence of custom, is that the property in timber on a tenant's holding vests in the *zamindar*, and that the tenant has no right to cut and remove such timber. But it appears to us to be clear that in the absence of a custom or a contract to the contrary, a *zamindar* has no right to interfere with the enjoyment by his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists."

When a land is let out to a tenant by a *zamindar* it is to be presumed that it is let out with the trees. If there was any contract to the contrary reserving the right to appropriate the fruits of the trees standing on the land for the *zamindar*, it is for the *zamindar* to set up and prove that contract. No such contract was set up in this case by the plaintiff nor any has been proved. Consequently in the absence of any contract to the contrary the defendants on whose land the tree is standing have a right to appropriate its fruits. The plaintiff is, therefore, not entitled to a decree for possession or for damages for the fruits. It is, therefore, ordered that the appeal be partly allowed. The decree of the lower Court be modified inasmuch as the plaintiff's suit for Rs. 6 for the branches appropriated by the defendants shall be decreed and the rest of the case shall be dismissed. The parties shall get and pay costs in all Courts in proportion to their success and failure.

Appeal partly allowed.

N.

(1) 121 Ind. Cas. 826; A I R 1930 All 433; Ind. Rul. (1930) All. 202; 14 R D 308.
(2) 24 Ind. Cas. 81.
(3) 14 Ind. Cas. 582; 9 A L J 672.
(4) 30 A 131; 5 A L J 99; A W N 1908, 51.
(5) 71 Ind. Cas. 971; 45 A 351; 21 A L J 292; A I R 1923 All. 406.
(6) 10 A 159; A W N 1888, 32.

LAHORE HIGH COURT

Criminal Appeal No. 637 of 1933
April 5, 1934
ADDISON AND AGHA HAIDAR, JJ.
EMPEROR—APPELLANT
versus
KURA—ACCUSED—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 417—Acquittal, appeal against—Principles of interference.

In the case of appeals from acquittals, the decision of the Court below must be clearly wrong before the High Court will interfere, that is to say, a reasonable decision of a Court entitled to deal with the matter should not be set aside merely because the High Court took a different view.

Cr. A. from an order of the Additional Sessions Judge, Karnal, dated February 24, 1933.

Mr. *Norman Edmunds*, for the Appellant.

Mr. *Bhagat Ram Puri*, for the Respondent.

Addison, J.—Six persons were tried by the Additional District Magistrate, Karnal. One of them Kura was sentenced to one year's rigorous imprisonment, together with a fine of Rs. 200, for the offence of causing grievous hurt with a sharp-edged weapon to *Musammat* Lachhmi, under s. 326, Penal Code, and to one year's rigorous imprisonment, under s. 324, Penal Code, for causing simple hurt with a sharp-edged weapon to Chandgi, husband of *Musammat* Lachhmi. He was also sentenced to one year's rigorous imprisonment for committing house-trespass after preparation for causing hurt under ss. 452-149, Penal Code. These sentences were to run consecutively. The others who were tried with him, namely, Lakhi Ram, Badlu, Phula, Telu Ram, son of Chhajju Mal, and Telu, son of Shadi, were sentenced to one year's rigorous imprisonment each under ss. 324 and 326, Penal Code, and to one year's rigorous imprisonment each under ss. 452 and 149, Penal Code, the sentences to run consecutively. They were also sentenced to pay fines of Rs. 100 each under ss. 324 and 326, Penal Code.

On appeal, the Additional Sessions Judge gave Kura the benefit of the doubt and acquitted him. He also reduced the sentences of the others, *i. e.*, they were sentenced to three months' rigorous imprisonment together with a fine of Rs. 100 for the offence of causing simple and grievous hurt and also to three months' rigorous imprisonment each for the offence of house-trespass after preparation to cause hurt: the sentences to run concurrently. Against the acquittal of Kura, the Crown has preferred an appeal. It has also put in a revision petition, asking for the sentences of the five persons, whose convictions were maintained, to be enhanced, while the five convicts have put in a revision petition against their convictions and sentences. (His Lordship referred to the prosecution story, and defence story, and proceeded). As regards the appeal of the Crown, it has to be noted that the reasons given by the Additional Sessions Judge for acquitting Kura are as follows:

Chandgi had a motive to implicate him as he was the decree-holder while Juman, *chaukidar*, P. W. No. 3, must be held to be a friend of Chandgi seeing that he went with him to the Police Station to report the offence, while Badam is the brother of Juman and the two brothers had already given evidence in another case on behalf of Chandgi. Then Daulat was positive that he was not there while *Musammat* Lachhmi could not identify him. Similarly Lal Singh could not identify him in the parade. Thus only Chandgi, Juman and Badam, his brother, had identified Kura. For these reasons the learned Additional Sessions Judge thought it unsafe to uphold the conviction of Kura even though he did not believe Kura's defence, part of which consisted in getting a false entry made in a report by a Girdawar Kanungo.

It has been held in the case of appeals from acquittals that the decision of the Court below must be clearly wrong before this Court will interfere, that is to say, a reasonable decision of a Court, entitled to deal with the matter should not be set aside merely because this Court took a different view. It has been contended before us that *Musammat* Lachmi was wearing a veil, and thus might easily not have noted Kura's face with sufficient distinctness to remember it. This may be correct but the fact remains that Kura was not identified by her. It was next argued that Daulat (P. W. No. 4) had been won over because he was indebted to Amin Chand, father-in-law of Kura. Daulat admitted that he was once indebted to him but stated that the debt had been paid off. Another prosecution witness Sis Ram has said that Daulat is indebted to Amin Chand. At the same time Daulat is a Jat of the same caste as Chandgi. It may be that the Additional Sessions Judge has attached too much importance to Dau-

lat's statement that Kura was not there but here again, the fact remains that Daulat states that he was not there. It was further contended that Lal Singh may, in the first instance, have been unable to identify Kura and to pick him out of a large number of people but that he may have been able to do so later after seeing Kura in Court when his features had come back to his memory. This may be so but Lal Singh is not a witness of very high status and the fact that he did not identify Kura at the parade is, I think, important.

It was argued on behalf of the Crown that Chandgi should not be considered to be a witness who had enmity with Kura as, at the time he made the first information report to the Police he considered that Lakhi Ram was the decree-holder of his uncle, Udmi, though, as a matter of fact Lakhi Ram, was only an attorney of Kura and that in spite of this belief the principal part in the attack was given to Kura in the first information report. This again has some importance, while I agree that merely going to the Police Station with Chandgi should not have been made a ground for partially rejecting Juman's evidence because it was his duty as a *chaukidar* to accompany an injured person to the Police.

On the whole, however, I am unable to hold that the guilt of Kura is so clear that it was the duty of the Additional Sessions Judge to uphold his conviction. There are certain circumstances in his favour. Some of them may be accidental but they reduce the amount of evidence against him with the result that the offence against him was not so clearly proved as it was against the others. That being the case, I would not interfere in the appeal against his acquittal and would accordingly dismiss it.

As regards the petition of the Crown for enhancing these sentences of the other five, there is little to be said. They have been given substantial sentences and there is thus no occasion for interference by this Court. I would also dismiss the petition for enhancement of sentences presented by the Crown.

Agha Haidar, J.—I agree.

N. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Criminal Appeal No. 808 of 1934
December 20, 1934
BENNET, J.
RAM CHARAN AND OTHERS—ACCUSED
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860, s 394—Medical evidence not proving death from throttling—Confession not made to Magistrate—Ornaments recovered not connected with deceased—Conviction under s. 394, legality of—Criminal trial—Motive—One accused not getting his share in loot—Whether motive for making confession against himself—Evidence Act (I of 1872), s 25—Confession to village mukhia *—Admissibility.*

Where the medical evidence did not prove that the accused died from asphyxiation by throttling, some symptoms favouring that view and some not favouring it and the confession was not made before a Magistrate but was only stated to have been made in the village to three villagers whose evidence was of little weight to prove that a confession was made, and although the evidence of ornaments stolen being found in the houses of the accused might be correct, yet the prosecution failed to connect those ornaments with the deceased :

Held, that the prosecution had not proved the charge against the accused under s. 394, Penal Code, and they were entitled to an acquittal.

It is not very natural that an accused person should merely from the annoyance at not getting his proper share of the loot take an action which he must know will put himself in jail

A village *mukhia* is not a Police Officer for the purpose of s. 25 of the Evidence Act. *Nga Myin* v. *Emperor* (1), referred to.

Cr. A. from an order of the Sessions Judge, Mainpuri, dated August 23, 1934.

Messrs. *B. S. Darbari* and *N. C. Tewari*, for the Appellants.

The Government Pleader, for the Crown.

Judgment.—This is an appeal by four persons Ram Charan, Ram Dayal, Bhimma and Jodha who have been convicted by the learned Sessions Judge of Mainpuri under s. 394, Indian Penal Code, and sentenced to 7 years' rigorous imprisonment each. The accused were charged under s. 396, Indian Penal Code, by reason of having been participants in a dacoity in the house of Bahora Meghraj on the night of March 5 and 6, 1934, in which Bahora Meghraj was killed. The learned Sessions Judge found that the prosecution case was proved but because two other persons who are alleged to have taken part in the crime were not before him, the number of accused was less than five and, therefore, s. 396, Indian Penal Code, did not apply and he says that the accused committed robbery and voluntarily caused hurt to the deceased which was the least proved against them. He, therefore, did not find that the accused persons had caused death of the deceased

but only that they caused certain injuries to the deceased. These nine injuries noted in the *post mortem* report which he found had been caused were external abrasions and would amount only to simple hurt. The sentence, therefore, was very severe for a robbery in which simple hurt was caused and it appears to me that although he did not expressly state so, the learned Judge must have passed the sentences on the view that the accused had caused the death of the deceased. If that were his view, he should have convicted the accused of the offence under s. 302, Indian Penal Code, but he has not done so. The case for the prosecution rests on the alleged confession made in the village to three witnesses by one of the accused, Jodha, on March 28, 1934, and on the discovery of ornaments pointed out by the accused on March 30, 1934. When the accused Jodha was brought before a Magistrate, he refused to make a confession. The history of the affair is as follows:—The deceased died sometime during the night and no outcry was made and no one in the village became aware of a crime. At the time he was living alone in his house. Next morning attention was drawn by the fact that the cattle were unattended and that the door remained shut. Balwant Singh, the *zemindar*, went to the house accompanied by Ajudhia Prasad, the Mukhia, and Kesari. These persons stated that they found Bahora Meghraj lying dead on his bed covered with a cloth and as the witnesses were not of his caste, they sent for Khem Chand, who was a Bahora, of an adjoining village called Seonra. Meanwhile the body had remained covered with the cloth. When Khem Chand came, he removed the cloth preparatory to funeral preparations and he found that there were injuries on the body. He, therefore, said that matter must be reported at the *thana*. The *chaukidar* was sent to make a report. The *chaukidar* was a *dhanukh*, a low caste, and he was not taken inside the house or yard and he did not see the injuries on the corpse. He was told to go and make a report and he did so. This was not a first information report of a crime but a report made in order that an inquest might be held. The report was entered in the general diary at the *thana* at 7 P. M. and the report did not mention any injuries on the deceased. The report says that the deceased used to take intoxicating drugs that his eyes were dilated and it seemed that he had died on account of the effects of over-intoxication from opium and *bhang* The second officer and the mortuary box were sent for an inquiry into the cause of death which was not clear from the report of the *chaukidar*. The second officer held an inquest and noted some injuries in regard to which the medical witness observes in a letter on p. 7 that most of these injuries were probably due to *post mortem* staining. In the *post mortem* it was stated that no definite opinion could be given as to the cause and manner of death owing to the fairly advanced state of the decomposition of the body. There were nine places in which there were one or more abrasions. Of some of these marks the Medical Officer stated in evidence:

"The above-mentioned injuries could have been produced in struggle when the deceased was being throttled. Injury No. 4 could have been caused during the act of closing the nostrils by force. Injury No. 8 could have been caused by pressure on side of chest by knees, elbow or any other hard substance. The above-mentioned injuries could not cause death separately or jointly; in all probability, therefore it is possible that some other act might have caused the death of the man. Cynoses of the face, bluing of tongue and nails combined with the congestion of brain and meningies and redness of eyes may indicate that asphyxia may have been the cause of death. The above injuries cannot be caused by fall from a stair-case as they are on the different parts of the body."

There is one point in regard to which the Medical Officer was not cross-examined and that is the internal appearances of the throat. The alleged confession stated that death was due to throttling and the medical witness has stated that some of the points he observed point to death by asphyxiation. In Modi's Medical Jurisprudence, 1924, 3rd Edition, p. 142, I find it stated as follows:—

"Internal Appearances. There is extravasation of blood due to ecchymoses in the subcutaneous tissues under the ligature mark or finger marks, as well as in the adjacent muscles of the neck.. .. Both the larynx and trachea are congested, and contain frothy mucus. The larynx or the rings of the trachea may be fractured when considerable force is used"

In the *post mortem* report it is stated "Larynx trachea and bronchi. Empty." There is no injury noted in these organs. The opinion of Modi is that these organs should show signs of internal injury in asphyxiation. In the present case there is no injury shown and it was not suggested by the medical witness that they were so decomposed that examination from this point of view would be impossible. And there were no external injuries on the neck. This appears to me to be one weakness in the theory that the accused died from throttling as stated in the confession.

The next point is in regard to the confession. After the Sub-Inspector came to

the village and held his inquest and made an inquiry, nothing further happened until March 28. Balwant Singh states that at that date Jodha accused came to him of his own accord and said that he and five other persons, including the other three accused had committed this murder and had stolen a number of ornaments and that he was making a confession because he had not been given his share out of the proceeds of certain gold ornaments—Lar, Goph and two guineas - which were taken by Ram Charan and Jiwa Ram to Shikohabad and sold. This motive for making the confession is frequently put forward but it does not seem to be very natural that an accused person should merely from the annoyance at not getting his proper share of the loot take an action which he must know will put himself in jail. Balwant Singh states that when he heard the confession he took the accused Jodha before the *mukhia* Ajudhia Prasad, and Kesari, and Jodha repeated this confession to these persons. All the three persons give evidence as to what Jodha said to them. No attempt was made by them to take down this confession in writing although they must be literate. They did, however, send for the Sub-Inspector and after the production of various ornaments, the Sub-Inspector put Jodha and Ram Charan before a Magistrate and they refused to make a statement. It seems extraordinary that if Jodha had been willing to make a confession on the 28th and had been of the same opinion on the 30th when he pointed out various ornaments that he should have changed his mind when he was brought before the Magistrate and no reason is given for this change. This fact throws a doubt on the statement that Jodha did make a confession in the village on March 28. It was argued for defence that in any case a confession to a *mukhia* would be to a Police Officer and would be barred by s. 25 of the Indian Evidence Act. It has been held in *Mga Nyin* v. *Emperor* (1). that a village headman is not a Police Officer for the purpose of s. 25 of the Evidence Act. No ruling to the contrary has been shown.

Now in regard to the ornaments, three exhibits have been sent to this Court. The Sub-Inspector states that Bhimma accused handed over *hamel*, Ex. P. 3, from his house and that Ram Dayal accused handed over a *bera* Ex. P-4, from an earthen vessel inside his house. In regard to the two *karas*, Exs. P-2/1 and P-2/2, the Sub-Inspector stated that Ram Charan handed over one of them from under the threshold of his house and that Jodha handed over the other from under the floor of his house. This was confirmed by the two search witnesses, Ajudhia Prasad, *mukhia* and Balwant Singh As to the identity of these articles that property had belonged to the deceased, there was a statement of Balwant Singh that he knew that the *karas* Exs. P-2/1 and P-2/2 had been worn by *Musammat* Gaura. sister of the deceased and that the *bera*, Exhibit P-4 was worn by the deceased. There was also the evidence of *Musammat* Gaura that the *karas* were hers and the *bera* was worn by the deceased at times only and she said that the *hamel* Ex. P-3 belonged to Churna Lodh and she afterwards explains she meant Ram Charan accused and that her brother, Meghraj, told her that Ram Charan had pawned this *hamel* with him. She says that she had seen the *hamel* hanging on a peg in the house. Now as regards the identification of these articles, the gold ear-rings, Ex. P-4, are mere plain circles of gold which have no mark on them by which they could be identified and there are many such ornaments in villages. The silver *karas* are also of a very ordinary type with very little ornamentation. *Musammat* Gaura says that these were made for her by her brother-in-law, Kashi Ram, who died 12 years ago and, therefore, no *sonar* was called to prove that he made them. She says that she stayed occasionally from one to four months with her brother, Meghraj, and at other times she stays with her other relatives. At the time of the murder, she was staying with other relatives and did not come until the next morning when she was called. Her explanation of how she came to leave the *karas* in the house of the deceased is:

"I had kept my pair of *karas* with the deceased last year in the month of *Jeth*. I was then ill and felt rather uncomfortable with them so I put them with the deceased."

Her suggestion is that she allowed her *karas* to remain with the deceased from the hot weather of 1933 because they were rather uncomfortable. It seems unlikely. Further she admits:

"The second officer came to me and asked me to see if the things in the house were in order and I replied that they were. I was much grieved and I had not the strength to go upstairs myself."

She made no attempt to see whether her *karas* were missing or not and it was not till after the discovery of the *karas* that she

(1) 81 Ind. Cas. 540: A I R 1924 Rang. 245; 2 R 31; 2 Bur. L J 11; 25 Cr. L J 924 (F B.).

came forward apparently with a claim that they were hers. These facts render her evidence that these *karas* belonged to her extremely doubtful. The other article, the *hamel*, is one which is quite easily capable of identification as it has a number of coins and a large square of silver with various small ornaments on it and an elaborate pattern. This article, however, is stated by *Musammat* Gaura to have been pawned by the accused, Ram Charan, with the deceased Her only knowledge on the pawning is attributed to a statement of the deceased. No books are produced to show that there was such a transaction. The suggestion for the prosecution is that the deceased was a man of considerable property and he apparently traded in money-lending as he was a Bahora. Such persons usually keep books of account in which these transactions of pawning are entered. No witness for the prosecution has stated that there were no books of deceased, but no books are produced. Another point in regard to this *hamel* is that if the *hamel* had belonged to Ram Charan accused and Ram Charan had taken part in this robbery, he would naturally have asked that this *hamel* should be given back to him. But the prosecution case is, according to the confession, that it was given to the accused Bhimma and the evidence is that Bhimma handed this *hamel* up from his house. He is not the brother of Ram Charan as they have different fathers and the evidence of the Sub-Inspector indicates that they have different houses. The confession mentions only a few ornaments as having been found. It would be, in my opinion, quite impossible that at a distribution of the loot Ram Charan would not have recognised his *hamel* and ask for it but the confession makes no mention of any such demand by Ram Charan. I think, therefore, the prosecution altogether fails to show any connection between the *hamel* and the deceased. The *hamel* may no doubt have been found in the house of the accused person Bhimma but that does not prove that it was in any way connected with the alleged robbery. A lantern was stated to have been taken out from a pond. This was stated to have belonged to the deceased but lanterns are of a common type and cannot be identified as belonging to any particular person.

To sum up the case, the medical evidence does not prove that the accused died from asphyxiation by throttling. Some symptoms favour that view and some do not. The confession was not made before a Magistrate and it is only stated to have been made in the village to three villagers whose evidence is of little weight to prove that a confession was made.

The evidence of ornaments being found in the houses of the accused may be correct, but the prosecution fails to connect those ornaments with the deceased. For these reasons, I find that the prosecution has not proved the charge against these four appellants, I, therefore, acquit them of the offence of s. 394, Indian Penal Code, and direct that they be set at liberty.

N. *Accused acquitted.*

PATNA HIGH COURT

Appeals from Appellate Decrees Nos. 1355 and 1356 of 1930

February 6, 1935

FAZL ALI AND ROWLAND, JJ.

Musammat KRISHNA KUAR AND OTHERS—APPELLANTS

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—RESPONDENTS

Adverse possession—Actual possession, necessity of, to sustain claim to land by limitation—Land under water and unfit for occupation—Effect—Survey of land—Presumption of occupation by Government at one point of time—Whether arises.

In order to sustain a claim to land by limitation under the Indian Act, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him. In a suit for recovery of possession it is for the defendant to show that he had at sometime been in adverse possession of the land in suit continuously for a period of 12 years

A certain land was under water and unfit for occupation from 1911 to 1916 and there was no evidence as to possession before 1911. The most that could be said was that the disputed land having been surveyed as a part of a village in 1898 a presumption arose that in that year the lands were capable of occupation and were in fact occupied by or on behalf of the Secretary of State :

Held, that from that evidence regarding the state of things at one point of time, it could not be presumed that the Secretary of State (defendant) had adverse possession for a period of 12 years and hence the plaintiff should succeed in the suit on proof of his title. *Secretary of State for India* v. *Krishnamoni Gupta* (1), relied on.

A. from a decision of the District Judge of Saran, dated January 24, 1930, reversing that of the Additional Subordinate Judge of Saran, dated August 31, 1928.

Messrs. *S. M. Mullick* and *Phulan Prasad Varma*, for the Appellants.

The Government Pleader and Mr. *Jadubans Sahay*, for the Respondents.

Rowland, J.—These second appeals arise out of one suit brought by the

plaintiff-respondents claiming to recover possession of 18 *bighas* 15 *kathas* and 16 *dhurs* of land as part of their estate Domaigarh *Nezamat*. They had impleaded as defendant No. 1 the Secretary of State for India in Council as proprietor of the Government estate adjoining and the first defendant's lessee as defendant No. 2. The Subordinate Judge who tried the suit passed a modified decree in favour of the plaintiffs for possession of 17 *bighas* 17 *kathas* 4 *dhurs* out of the disputed land and gave a decree for mesne profits against the second defendant. Each of the two defendants appealed separately to the District Judge who has allowed the appeals and dismissed the suit. For this reason the plaintiffs present two appeals to this Court from the same judgment and decree.

Most of the facts are common ground. The plaintiffs have three *tauzis* in *Mauza* Domaigarh *Nezamat*, that is to say, the stable portion of village Domaigarh *Nezamat*. South of this some *diara* land has accreted which is Government estate of the name of Domaigarh Diara. In 1915 a dispute arose between the plaintiffs and the Collector of Saran representing the Secretary of State in which the plaintiffs claimed 141 *bighas* 2 *kathas* which had been demarcated by the *Kanungo* as part of the *khas mahal* alleging that this was wrong and the land belonged to their permanently settled estate. Negotiations for compromise falling through they brought Suit No. 58 of 1917 to recover this land from the Secretary of State and that dispute was adjusted by a compromise dated June 6, 1918, by which it was agreed that the revenue survey boundary between the two villages should be relaid by the Survey Department and the parties would abide by the boundary so relaid and their rights should accrue from the date of decree to be passed, the parties agreeing to accept the boundary between the two aforesaid estates that should be laid down. The boundary was accordingly relaid. The plaintiffs allege that under the compromise referred to their title to the land now in suit was declared and they obtained possession and the Courts have found that in fact the boundary as relaid by the survey department includes the bulk of the disputed land within the limits of *Nezamat* Domaigarh Estate. The contention for the defendants was that the dispute of 1916—18 related to the boundary as between Domaigarh *Nezamat* and Domaigarh *Diara* and had nothing to do with laying the boundary between Domaigarh Nezamat and any other village. To the south east of Domaigarh *Nezamat* is Bhabhauli, a Government estate of defendant No. 1 and the suit lands are in fact part of village Bhabhauli being shown as such in a cadastral survey map prepared in 1898. It is common ground that this map does not agree with the revenue survey map and that the disputed land falls according to the map of 1898 in the defendants' estate of Diara Bhabhauli and according to the revenue survey map of 1843-44 it falls within the plaintiffs' estate of Domaigarh *Nezamat*. It is not a part of the 141 *bighas* which were in dispute in 1915. The Subordinate Judge thought that the dispute of 1915 and 1917 covered the whole of the southern boundary of Domaigarh *Nezamat* and therefore, this decision should be decisive of the rights of the parties in the disputed land.

The District Judge on appeal pointed out that the compromise was for the adjustment of the disputed boundary between Domaigarh *Nezamat* and Domaigarh *Diara* and was of opinion that the compromise decree could not affect anything which was not at the time within one of those two villages. After giving his reasons for this conclusion, which he has done clearly and at length, he says "This disposes of the respondents' contention that they obtained title to the land in suit by virtue of the compromise decree". He then states that there being no evidence on which he could find that the plaintiff-respondents were definitely in possession of the land in suit prior to the compromise or at any time within 12 years previous to it, the plaintiff-respondents failed to establish their title to the land because they could not prove that they had a subsisting title to the land in suit at the time of the compromise. The District Judge in saying this seems to have somewhat lost sight of the fact that the decision of the first Court had been based not merely on the plaintiffs' claim to title based on the compromise, but their claim to title based on the revenue survey map of 1843. The revenue survey map is in a sense itself a document of title because it was in this map that the Government reduced to writing the statement of the areas settled with *zamindars*. It was accepted by both the Courts below that the revenue survey map had been correctly relaid by

the Survey Officer deputed from Ranchi in 1921 and that on the basis of that relaying the original title to the land in suit lay with the plaintiffs. Mr. Mullick's contention before us is that on those facts and that finding the plaintiffs ought to succeed unless the defendants can prove that by adverse possession the title of the plaintiffs was extinguished at some time between the revenue survey and the date of the proceeding in the present litigation. The Subordinate Judge has said in his judgment "the plaintiffs had title to the land from a long time before 1917" and says that "in *diara* lands possession should follow title". Perhaps the Subordinate Judge has expressed himself rather too broadly. The principles to which regard is to be had in dealing with suits for alluvial land are set out in *Secretary of State for India* v. *Krishnamoni Gupta* (1), where the principles governing limitation were discussed by their Lordships of the Privy Council and applied both to lands which had been continuously under cultivation for a long series of years and to lands in which the enjoyment of the land after a short period had been from time to time interrupted by the action of the river diluviating the lands. Their Lordships found that in respect of one part of the land in dispute before them, Government had acquired title by continuous adverse possession for over 12 years. Thereafter the land becoming submerged the title of the plaintiffs was not revived in respect of this land, but as regards the northern portion of the disputed lands their Lordships said other considerations applied.

"The Government have never had actual possession of the land through their *ijaradars* for a continuous period of 12 years because the land became submerged prior to the year 1869 and remained so (it is found by the High Court) until within ten years of the commencement of the suit. But it is urged on behalf of the Government that having been in possession through their tenants when the lands became submerged their possession must be deemed to have continued in law while the lands were under water and to have revived on their being reformed."

But their Lordships held that

"for the purpose of trying the question whether limitation applies, the Government must be regarded as a trespasser and dispossessor of the rightful owners, and it would be contrary both to principle and authority to imply such constructive possession in favour of a wrong doer, so as to enable him to obtain thereby a title by limitation. In order to sustain a claim to land by limitation under the Indian Act, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him".

(1) 29 C 518.

Their Lordships thought that on the dispossession of the Government by the *vis major* of the floods the constructive possession of the land was, if anywhere, in the true owners. Applying this observation to the case before us, I think, that it was in the circumstances of this case for the defendant to show that he had at sometime been in adverse possession of the land in suit continuously for a period of 12 years. Both sides are agreed in evidence that the land was under water and unfit for occupation from 1911 to 1916 and there is no evidence as to possession before 1911. The most that can be said is that the disputed land having been surveyed as part of village Bhabhauli *Diara* in 1898, a presumption arises that in year the lands were capable of occupation and were in fact occupied by or on behalf of the Secretary of State. From that evidence regarding the state of things at one point of time we cannot, I think, presume that the Secretary of State had adverse possession for a period of 12 years. Consequently the plaintiffs should have succeeded in the suit on proof of their title.

Accordingly I would allow the appeals, set aside the judgment and decree of the District Judge and restore those of the Subordinate Judge. The plaintiffs will get proportionate costs throughout. There will be only one set of Pleader's fee for the two appeals.

Fazl Ali, J.—I agree.

N. *Appeal allowed.*

ALLAHABAD HIGH COURT

Miscellaneous Case No. 677 of 1934
March 1, 1935

NIAMAT-ULLAH AND BENNET, JJ.

Pandit SHIVNATH PRASAD—ASSESSEE—APPLICANT

versus

THE COMMISSIONER OF INCOME TAX, CENTRAL AND UNITED PROVINCES, LUCKNOW—OPPOSITE PARTY

Income Tax Act (XI of 1922), ss. 66 (2), 30 (2), 31—Appeal to Assistant Commissioner filed beyond time—Refusal to admit appeal not being satisfied that appellant had sufficient cause for delay—Appeal, if has proceeded beyond stage referred to in s. 30 (2)—Action under s. 66 (2), if can be taken by High Court—'Order confirming assessment', in s. 31—Meaning of.

Action under s 66 (2), Income Tax Act, cannot be taken if the appeal has not proceeded beyond the stage referred to in s. 30 (2), and the High Court cannot direct the Commissioner to state a case. Where

an appeal is presented to the Assistant Commissioner beyond time and he refuses to admit the appeal on not being satisfied that the appellant had sufficient cause, no appeal can be registered and disposed of in the manner laid down by s. 31 and no order under s. 31 can be passed and hence action under s. 66 (2) cannot be taken. *Jot Ram Sher Singh* v. *Commissioner of Income-tax* (1), relied on.

An order confirming the assessment is an order which has reference to the assessment and which affirms it. Where the question of assessment is not even considered and the appeal is rejected as one barred by limitation, the order of dismissal cannot be considered to be one confirming the assessment

Mr. *Shabd Saran*, for the Applicant.

Order.—This is an application under s. 66 (3), Income Tax Act for an order of this Court requiring the Income Tax Commissioner to state a case under s. 66 (2) of the same Act. The applicant was assessed to tax by the Income Tax Officer. He preferred an appeal to the Assistant Commissioner after more than thirty days from the date of the notice of demand. The Assistant Commissioner fixed a date calling upon the assessee to show cause why the appeal should not be rejected as one filed beyond time. On the date so fixed and after hearing the assessee the appeal was rejected. The assessee applied to the Income Tax Commissioner for revision of the order of the Assistant Commissioner. His application was dismissed. He then applied to the Income Tax Commissioner for statement of case under s. 66 (1). This application was also rejected. Thereupon he filed the present application.

It has already been held by this Bench in *Jot Ram Sher Singh* v. *Commissioner of Income-tax* (1) that the High Court can require the Income Tax Commissioner to state a case only if the conditions required by s. 66 (2) are made out and that one of those conditions is that an order under s. 31 or s. 32 or s. 33 should have been passed in the case. It appears to us that no order under any of those sections was passed in the present instance. A reference to ss. 30 and 31 of the Income Tax Act shows that an appeal is filed under the former section, and if it is admitted as an appeal presented in time, the appeal is ripe for hearing and a date is fixed for its disposal on the merits. It is only after that stage that the Assistant Commissioner functions under s. 31 and can dispose of the appeal by confirming, reducing, enhancing or annulling the assessment or setting aside the assessment and directing the Income Tax Officer to make a fresh assessment, etc. s. 30 (2) prescribes the period of limitation for appeals which according to that sub-section should

"ordinarily be presented within thirty days of receipt of notice of the demand relating to the assessment or penalty objected to or of the date of the refusal to make a fresh assessment under s. 27, as the case may be."

The Assistant Commissioner is, however, authorised to admit an appeal after the expiration of that period, if he is satisfied that the appellant had sufficient cause for not presenting it within that period. If the Assistant Commissioner is satisfied, admits the appeal, the order is one under s. 30 (2). If he is not satisfied that the appellant had sufficient cause, he refuses to admit the appeal, in which case no appeal can be registered and disposed of in the manner laid down by s. 31 and no order under s. 31 can be passed. It follows that action under s. 66 (2) cannot be taken if the appeal has not proceeded beyond the stage referred to in s. 30 (2), and the High Court cannot direct the Commissioner to state a case.

The learned Advocate for the appellant contends that the Assistant Commissioner dismissed the appeal presented before him though it may be that it was dismissed on the ground that it was barred by limitation. Accordingly, he argues that the order is one confirming the assessment within the meaning of s. 31, Income Tax Act. We do not think that this contention is sound. An order confirming the assessment is an order which has reference to the assessment and which affirms it. Where the question of assessment is not even considered and the appeal is rejected as one barred by limitation, the order of dismissal cannot be considered to be one confirming the assessment. As already stated, the order of the Assistant Commissioner in this case properly described is not an order dismissing the appeal but is an order refusing to entertain the appeal.

For the reasons stated above we hold that s. 66 (2), Income Tax Act, does not apply, and the High Court cannot direct the Commissioner to state a case for the decision of the question of law said to arise from the order of the Assistant Commissioner. We express no opinion as to whether the question which the applicant desires to be considered by the High Court is a question of law.

The application is dismissed.

Application dismissed.

(1) 150 Ind. Cas. 197; (1934) A L J 274; A I R 1934 All. 559; 6 R|A 1045

PATNA HIGH COURT

Criminal Reference No. 45 of 1934
October 9, 1934
MOHAMMAD NOOR AND LUBY, JJ.
RAM SINGH—PETITIONER
versus
S. A. RIZWI—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 197, 436—S. 197, when operates—Offence must be so connected with official duty as to become inseparable from it—Order of Magistrate quashing proceedings—Whether amounts to discharge — Power of High Court to order further inquiry without reference to High Court.

In order to attract the provisions of s. 197, Criminal Procedure Code, the act must be so connected with the official duty as to become inseparable from it. It must be so connected with the official act as to form part of the same transaction. It will be perhaps quite a different thing if for the time being the public officer stops the official work, engages himself in private work and in that connection commits an offence. But it may be that a Judge or public servant may commit an offence as against a stranger while acting or purporting to act in the discharge of his official duty. [p. 130, col. 1.]

Where a Deputy Magistrate was engaged in realising taxes and he had threatened the defaulters and immediately he turned round and engaging himself with the complainant took him to task for being near him in a particular manner:

Held, that the offence alleged against him was so connected with the performance of his official duty that it was impossible to say that it was an independent act in no way connected with the realization of taxes, and that it did not matter that the Deputy Magistrate had no jurisdiction over the complainant. Consequently, sanction of the Local Government was necessary for prosecution.

The order of a Magistrate quashing the proceedings amounts to an order of discharge and it is open to the Sessions Judge, if he is of that opinion, to order further inquiry into the complaint without referring to High Court.

Cr. Ref. from an order of the Sessions Judge, Monghyr, in his letter No. 3127 X-1, dated August 14, 1934.

Mr. *Baldeo Sahay*, for the Petitioner.

Sir *Sultan Ahmad*, for the Opposite Party.

Mohammad Noor, J.—This is a reference by the Sessions Judge of Monghyr. He has recommended that an order of the Sub-Divisional Officer of that place quashing the proceedings of a criminal case against Mr. Rizwi, a Deputy Magistrate at Monghyr, be set aside. The facts are these:

Taxes were imposed upon the inhabitants of Barhiya village in the District of Monghyr for maintaining an additional Police force there. One Dhanukdhari Singh had defaulted in the payment of that tax, and on December 15, 1933, the the Deputy Magistrate, Mr. Rizwi, went to that village to execute the distress warrant issued against him. He was accompanied by clerks, constables, peons, *defadars* and *chaukidars*. It is alleged that one Ram Singh, an inhabitant of the village and Head Clerk in the Office of the Deputy Inspector of Schools in Kishunganj, who was then on leave, was standing amongst the spectators behind the Deputy Magistrate when the latter was engaged with the defaulters, pressing them for payment of the taxes. Ram Singh's case is that he was standing with his hand crossed on his chest. The Deputy Magistrate, after he had finished with the defaulters Kare Lal Singh, son of Dhanukdhari Singh, and Tooka Singh from whom the tax had to be realized, turned round and asked him (Ram Singh) angrily what the matter was. Ram Singh replied "nothing." On this the Deputy Magistrate asked him to lower down his hands and himself pulled them down. On this Ram Singh asked the Deputy Magistrate what the harm was in standing in the manner in which he was standing. This irritated the Deputy Magistrate, who used abusive language towards him and gave a hard blow on his cheek and under his orders constables charged him with *lathis* and one of them hit him on his right elbow. On the next day (December 16, 1933), Ram Singh filed a complaint before the Sub-Divisional Officer of Monghyr, accusing the Deputy Magistrate and the constable of offences under ss. 323 352 and 504, Penal Code. As it transpired that Ram Singh had also sent a telegram of the incident to the District Magistrate the passing of order was postponed and the telegram was sent for. Nothing seems to have been done till January 4, when the Sub-Divisional Magistrate having been apprised that a counter-case was started against Ram Singh by the Police ordered the complaint case of Ram Singh to wait till the counter-case was disposed of. In the counter-case Ram Singh was sent up for trial. He then moved this Court for the transfer of the two cases to another District on the ground that they could not be fairly tried at Monghyr, inasmuch as a Deputy Magistrate of that place was a party to both of them. His Lordship the Chief Justice rejected it, but referring to the order of January 4, in Ram Singh's complaint case, which I have referred to above said:

"There is no need for the complete disposal by judgment of the counter-case before the petitioner's (Ram Singh's) complaint is tried. The orders in

both cases should be postponed until both cases have been heard and this will enable both sides to put their versions of the incident before the Court to give evidence"

Further on His Lordship said:

"Both sides in this case should be heard on their respective complaints and a single judgment should be delivered disposing of the entire matter."

The Sub-Divisional Magistrate proceeded with the counter-case and having finished it directed on June 13, 1934, in compliance with the order of this Court, issue of summons against Mr. Rizwi so that he might complete the hearing of Ram Singh's complaint case also. Mr. Rizwi appeared on June 21, 1934, through the Court Inspector who took a preliminary objection that Mr. Rizwi could not be prosecuted without the sanction of the Local Government under s. 197, Criminal Procedure Code. On June 28, 1934, the Sub-Divisional Officer upheld the objection and quashed the proceedings against Mr. Rizwi and afterwards pronounced judgment in the Police case against Ram Singh and convicted him. Ram Singh has preferred an appeal which is pending before the Sessions Judge of Monghyr. He also moved the learned Sessions Judge against the order of the Sub-Divisional Officer upholding the contention of the Court Inspector that sanction of the Local Government was necessary for the prosecution of Mr. Rizwi. The learned Sessions Judge has referred it to this Court, recommending that the order quashing the proceedings against Mr. Rizwi be set aside. He is of opinion that the offence, if any, as disclosed by the complainant could be tried without the sanction of the Local Government.

I have to point out at the outest that it was not necessary for the learned Sessions Judge to refer the case to this Court. He himself was competent to deal with it. The order of the learned Sub-Divisional Officer, dated June 28, 1934, quashing the proceedings against Mr. Rizwi after he had been summoned amounted to an order of discharge, and it was open to the learned Session Judge, if he was of that opinion, to order further inquiry into that complaint. However as the matter has been referred to us and the question is of some public importance, we proceed to give our decision on the points raised. The only question is whether or not in the present case the prosecution can proceed without the sanction of the Local Government. Before I come to the facts disclosed by the complainant, it is necessary to examine the provisions of s. 197, Criminal Procedure Code, as it stood before its amendment in 1928 and the effect of the amendment made in that year. The section as it stood before the amendment ran thus:

"When any Judge or any public servant not removable from his office without the sanction of the Government of India or the Local Government is accused as such Judge or public servant of any offence, no Court shall take cognizance, etc., etc."

The words "as such Judge or public servant" were the subject-matter of judicial interpretation in more cases than one. It is unnecessary for me to refer to them in detail. It was held by the Calcutta High Court in *Baisnab Charan* v. *Sukhomoy Chowdhury* (1), that a Magistrate or a judicial officer who was holding a trial could not be said to be acting in a judicial capacity if he abuses or defames a witness or a legal practitioner appearing before him. A different view was taken by the Madras High Court in the case of *In re Ghulam Muhammad Sharif-ud-daulah* (2). The trend of the decisions, however, was that the offence for the trial of which sanction was necessary should be one which can be committed by a Judge or a public servant in his capacity as such Judge or public servant. In the section as it now stands the words

"is accused of any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty."

replaced the words "is accused as such Judge or public servant of any offence." The obvious effect of this amendment, in my opinion, is that the scope of the protection has been widened, and some of the earlier decisions are no longer good law. Sir John Woodroffe in his edition of the Criminal Procedure Code, remarks as follows and I endorse it:

"The amended section, however, substitutes for the words 'as such Judge or public servant of any offence' the following: of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties.' Thus defamatory language used by a Judge to a person out of Court when not sitting as a Judge would not be within the section; but the case would be different if the same words were used by the Judge in the trial of a suit as he would then be acting in the discharge of his official duties."

The nice question whether the Judge or public servant was accused as such will no longer arise. The only question will be—was he accused of committing

(1) 62 Ind. Cas. 825; A I R 1921 Cal. 388; 22 Cr. L J 585; 25 C W N 956.

(2) 9 M 439.

an offence while acting or purporting to act in the discharge of his official duty. The learned Sessions Judge has referred to several decisions, but, in my opinion, none of them is of any assistance to us in the disposal of this case. I propose to examine them in detail. The first is *Amanat Ali* v. *Emperor* (3). There a Sub-Deputy Collector had misappropriated a sum of money paid to him as *salami* for setting certain *khas mahal* lands. The learned Judges while construing the section as it stands now, observed as follows:

"The question is whether in the present case the offence is alleged to have been committed by the public servant, namely, the Sub-Deputy Collector while acting or purporting to act in the discharge of his official duty. That would seem to imply that something in the nature of an official character attached to the act itself, that act either being in fact done or purporting to be done as an official act in persuance of the public office held by the public servant."

It may on the one hand be said that when the Sub-Deputy Collector received the money, he was not acting or purporting to act in the discharge of his public duty; but on the other hand, it is clear that the money was entrusted to him as Sub-Deputy Collector and he received it as such. The misappropriation was no doubt committed by him in his private capacity, but that may be said of every criminal act done by a public servant in the course of discharging public duty. At the time of committing the offence the public servant cannot be said to be discharging a public duty. With all respect to the learned Judges I am unable to agree with the construction which they put upon the plain meaning of the section. As was pointed out by Waller, J., in the case of *Jujjavarapu Gangaraju* v. *Kandiboyina Venki* (4), the policy of the Legislature to afford a reasonable protection to public servants against vexatious charges arising out of the performance by them of their official functions, will become conspicuously unsuccessful. His Lordship said that:

"by a series of judicial decisions that protection has been refined down to the vanishing point,"

and referred to an observation of Seshagiri Ayyar, J., in *Sankaralinga Tevan* v. *Avudai Ammal* (5), which ran thus:

"If this argument is pushed to its logical conclusion, no public servant or Judge can have the safeguard of a sanction, as it is not within the powers of such an officer to commit an offence. Any offence committed by such a person must *prima facie* be beyond his official rights and duties."

However so far as the case of *Amanat Ali* v. *Emperor* (3), is concerned, it may be said in support of the decision that when the Sub-Deputy Collector received the money he was not acting as a public servant. The next case referred to by the learned Sessions Judge is *In re Narayan Janu Mahajan* (6). There intimidation and force was caused by officers of a village for the purpose of collecting subscription for an association which was encouraged by Government. It was held that it could not be said to be an act purporting to be or falling in the discharge of their official duties. The learned Sessions Judge thinks the case to be on all fours with the present one. I am not of that opinion. In the Bombay case the officers were engaged in collecting subscription which was encouraged by Government. It is no part of the official duty of a public servant to collect voluntary subscriptions. In the present case Mr. Rizwi was engaged, at any rate, a few seconds before the incident in realizing taxes. This was certainly a part of his public duty.

Two more cases have been referred to by the learned Sessions Judge *Gulabmiya Dadumiya* v. *Emperor* (7) and *Kamisetty Raja Rao* v. *T. Ramaswamy* (8). In the former an organizer of Co-operative Credit Societies was appointed Liquidator of a Society. He misappropriated certain sums of money. It was held that the money having come to his custody as liquidator, no sanction under s. 197, Criminal Procedure Code, was necessary. The decision rested upon the question whether the liquidator was a Judge. It was held that he was not. It was further contended that as an organizer he was not removable except by orders of the Local Gov-

(3) 122 Ind. Cas. 627; A I R 1929 Cal. 724; (1929) Cr. Cas. 360; 33 C W N 1058; Ind. Rul. (1930) Cal. 259; 31 Cr. L J 430.

(4) 118 Ind. Cas. 102; A I R 1929 Mad. 659; (1929) Cr. Cas. 440; 30 Cr L J 864; 52 M 602; 30 L W 116; 57 M L J 31; Ind. Rul. (1929) Mad. 742; (1929) M W N 387.

(5) 35 Ind. Cas. 826; A I R 1917 Mad. 657; 17 Cr. L J 394.

(6) 130 Ind. Cas. 530; 32 Cr. L J 575; (1931) Cr. Cas. 225; A I R 1931 Bom. 191; 32 Bom. L R 1493; Ind. Rul. (1931) Bom 260.

(7) 129 Ind. Cas. 344; A I R 1930 Bom. 487; 32 Bom. L R 1131; Ind. Rul. (1931) Bom. 152; (1930) Cr. Cas. 1023.

(8) 102 Ind. Cas. 347; A I R 1927 Mad. 566; 28 Cr. L J 539; 50 M 754; 25 L W 603; 52 M L J 647; (1927) M W N 423; 38 M L T 338; 8 A I Cr. R 170.

ernment. It was held that the two offices were distinct, and the misappropriation committed as Liquidator did not require sanction for prosecution in spite of the fact that the incumbent was also an organizer of Co-operative Credit Societies. In the second case the fact was that a President of the Municipal Council was charged of threatening a voter with injury to his property with intent to induce him to vote for a candidate or to abstain from voting. It was held that the offence did not require sanction of the Local Government. It is clear that in this case the offender while threatening the voter was in no way engaged in the performance of any public duty, nor was the canvassing for a vote in any way connected with the performance of public duty.

The learned Sessions Judge has also referred to B. B. Mitra's commentary on the Criminal Procedure Code, 8th Edition, pages 539 and 540. I have not been able to find anything there, which supports the view taken by the learned Sessions Judge. On the other hand, there is a passage which has been endorsed by Waller, J., in *Jujjavarapu Gangareju* v. *Kandiboyina Venki* (4), which I have referred to above. Referring to the cases decided under the old section, the learned commentator says:

"These cases, though correctly decided under the old Codes, would be of no authority now, as the language of the present section materially differs from the language of the old law. Under the present section it will not be necessary to decide whether the facts of the accused being a Judge or public servant was a necessary element in the offence or whether the offence was one which could not have been equally committed by a private person. These nice questions would not arise; if it is found that the Judge, Magistrate or public servant has committed an act at a time when he was doing (or purporting to do) an official duty, this will be sufficient to attract the provisions of this section. In other words, the legislature has now given a greater protection to the Officers concerned than it did under the old section."

The decided cases not being quite in point, we have to fall back upon the wording of the section itself and apply them to the facts of the present case. Ram Singh's petition of complaint places the assault and insult immediately after the Deputy Magistrate had threatened the defaulters. In his petition of complaint he says:

"They (meaning thereby the clerks, constables, etc.), were making demands from Karelal Singh and Tooka Singh of tarafshrikant and on their promising to pay in course of January and February and on their expressing inablity to pay then and there, the two persons were subjected to harsh treatment. A number of spectators were there. Out of curiosity I also stopped there and took my stand three or four cubits behind Mr. Rizwi. Having finished with them, Mr Rizwi turned back. Finding me standing there with my hands crossing each other on my chest he asked me what was the matter—"*keya hai.*"

In his statement on oath he says:

"The Deputy Magistrate after holding out threats to them (meaning the defaulters) looked back and inquired of me if I wanted anything"

The question is, when the Deputy Magistrate engaged himself with the complainant, was he acting or purporting to act in the discharge of his official duty? Mr. Baldeo Sahai, who appears on behalf of Ram Singh, contends that the performance of the official duty was finished as soon as the Deputy Magistrate turned round towards the complainant and engaged himself with him. I am, however unable to accept this contention, because as I have said and as was pointed out in the Madras case just referred to, as soon as a public servant engages himself in the commission of an offence he momentarily withdraws himself from the public function. I cannot conceive of any case in which a Judge or public servant can be said to be committing an offence and at the same time acting or purporting to act as Judge or public servant, because when he engages himself in the commission of an offence he is not acting or purporting to act as a public servant. If we accept this contention we will have to confine the sanction to cases in which the Judge or public servant commits the offence as such, that is offences peculiar to his office and that will nullify the effect of the amendment deliberately made by the legislature.

In *M. L. Sivaramakrishna Ayyar* v. *Seshappa Naidu* (9), Curgenven, J., said that:

"the offence contemplated must contain an element necessarily dependent upon the offender being a public servant."

Waller, J., said commenting upon this observation:

"We are of opinion that that is too limited a construction of the section. The question is not as to the nature of the offence, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official duty. We hold that, if the offence alleged was committed by the public servant, while he was actually engaged in or purported to be engaged in the discharge of his official duty, sanction is required. Assuming that *In re Ghulam Muhammad Sharif-ud-daulah* was wrongly decided, as the law then stood, the decision would certainly be correct—in our judgment as the law now stands."

In my opinion, each case must be decided on its own facts. The offences in order to

(9) 15 Ind. Cas. 248; A I R 1929 Mad. 172; 30 Cr. L J 396 52 M 347

attract s. 197, Criminal Procedure Code, must be so connected with the official act as to form part of the same transaction. It will be perhaps quite a different thing if for the time being the public officer stops the official work, engages himself in private work and in that connection commits an offence. But in the case before us it is not so. The Deputy Magistrate was engaged in realising the taxes. According to the complainant he had threatened the defaulters and at the next moment he turned round and engaged himself with the complainant and took him to task for being near him in a particular manner. The alleged offence was so connected with the performance of his official duty that it is impossible to say that it was an independant act in no way connected with the realisation of taxes. The learned Sessions Judge has stated that the Deputy Magistrate had absolutely no jurisdiction over the complainant. This is true. But it may be that a Judge or public servant may commit an offence as against a stranger while acting or purporting to act in the discharge of his official duty. For instance if a Magistrate is holding a Court in the open where there are number of sight-seers and by-standers. He thinks, though wrongly, that a certain by-stander is hindering or obstructing his work. He deals with that stranger roughly. I am clearly of opinion that this all will come within the words :

while acting or purporting to act in the discharge of his official duty."

Sir Sultan Ahmad argued that even an offence committed purely on private account unconcerned with the official act would come under s. 197, Criminal Procedure Code, if when the offence was committed, the Judge or public servant was engaged in the performance of official duty. I am, however, as at present, advised, not prepared to accept this contention: I think as I have said the act in order to bring it within s. 197, Criminal Procedure Code, must be so connected with the official duty as to become inseparable from it. In my opinion, therefore, this is a case in which sanction of the Local Government is necessary.

I cannot close this judgment without referring to a certain passage in the letter of reference of the learned Sessions Judge. In connection with the appeal pending before him he has referred to the order of this Court passed by His Lordship the Chief Justice and says as follows :

"The instructions given in the aforesaid order have not been followed by the lower Court on account of which the order of conviction of the petitioner appealed against cannot stand, if sanction in the petitioner's case is not necessary for this reason I propose to keep the appeal pending till the disposal of this reference."

Here the learned Sessions Judge is obviously in error. I am perfectly certain that the learned Chief Justice did not mean and could not have meant that both the cases must be carried to all the stages even if both or either of them collapsed on account of some legal or other defect. What his Lordship meant was this that the decision of both the cases on merits should be pronounced at one and the same time so that no question of pre-judging the one or the other may arise. If, however, the learned Sub-Divisional Magistrate thought that the case brought by Ram Singh could not proceed, he was perfectly justified in dropping it; and then he had no option left but to pronounce judgment in the other case. Even if the view taken by the learned Sub-Divisional Magistrate had been wrong and we would have come to a different conclusion, our decision would have had no effect whatsoever upon the decision in the counter case. The learned Sessions Judge should now dispose of the appeal on its own merits irrespective of what has happened in the complaint of Ram Singh.

With these remarks I would discharge the reference

Luby, J.—I agree.

N. *Reference discharged.*

LAHORE HIGH COURT

Miscellaneous First Civil Appeal No. 974 of 1933

March 8, 1934

HILTON, J

KESHO RAM—JUDGMENT-DEBTOR—APPELLANT

versus

BHAGWAN DAS AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 4, 7 (1)—Order granting review on ground of error apparent on the face of the record—Appealability of.

No appeal lies from an order granting review under O. XLVII, r. 4, Civil Procedure Code, except on grounds mentioned in O. XLVII, r. 7 (1). Where the ground for granting review is an error apparent on the face of the record, no appeal lies from the order.

Misc. F. A. from an order of the Senior

Sub-Judge, Ambala, dated February 16, 1933.

Messrs. *Qabul Chand* and *Shamair Chand*, for the Appellant.

Mr. *Chiranjiv Lal* for Mr. *Tek Chand*, for the Respondents.

Judgment.—It is objected that no appeal lies. The objection is correct. An order under r. 4, O. XLVII, Civil Procedure Code, granting an application for review can be appealed against but only on the grounds mentioned in O. XLVII, r. 7 (1). Those grounds do not exist here. It is contended that the order contravened the provisions of r. 4 (2) (*b*) of O. XLVII, but that is not correct.

The review was granted on account of an error apparent on the face of the record and not on account of new matter or evidence. The question of the knowledge of the applicant-respondent does not, therefore, arise. For these reasons the appeal cannot proceed and I dismiss it with costs.

N. *Appeal dismissed*

ALLAHABAD HIGH COURT
Full Bench

Second Civil Appeal No. 1149 of 1930
February 18, 1935

SULAIMAN, C. J., KENDALL AND RACHHPAL SINGH, JJ.

Pandit SHIAM LAL—PLAINTIFF—APPELLANT

versus

ABDUL RAOF—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 2—'In pursuance of an enactment', meaning of—Person honestly believing that he is acting under some enactment—Protection of—Police constable making report against plaintiff—Suit for damages—Proof that defendant acted honestly on some information received—Necessity of, for protection of Art. 2—Criminal Procedure Code (Act V of 1898), s. 44.

The words 'in pursuance of an enactment' in Art. 2, Limitation Act, must be interpreted as meaning acting in conformity with an enactment and not merely pretending to act or acting under colour of such an enactment. Where a person honestly believes that he is acting under some enactment, he is protected. But where a person merely pretends that he was so acting and knows that he should not act under that enactment, he cannot be said to be acting in pursuance of any such enactment. No doubt under s. 44 of the Criminal Procedure Code, it is the duty of every person to make a report to the Police of the commission of certain specified offences, but there is no such duty cast upon a citizen, much less on a Police Officer, to make such a report when no facts exist. He would certainly not be acting in pursuance of s. 44 of the Criminal Procedure Code, if he concocts a purely false story and then makes a report of such a false story, knowing it to be false. [p. 134, col. 2.]

Consequently, where a defendant has done an act or omitted to do an act, knowing that he had no ground whatsoever for so acting or omitting to do an act, he does not come within the purview of Art. 2. It is only defendants who have acted honestly, although they might have exceeded the actual power conferred upon them by an enactment who would be protected. Of course, where it is established that the act done was in strict accordance with an enactment, there would be an obvious protection. But even where the power was exceeded, there would be protection in cases of good faith and *bona fide* belief. [*ibid*]

Thus where a suit is filed for damages on the ground that the defendant, a Police Constable, who cherished a grudge against the plaintiff, made a false report at the Police Station stating that the plaintiff was leading a riotous mob, if the defendant were to satisfy the Court that at the time when he made the report he acted honestly on some information received, he would be protected, even though the report might turn out to be absolutely false but not so to the knowledge of the defendant. [p. 134, col. 2; p. 135, col. 1.]

[Case-law reviewed.]

S. C. A. from the decision of the District Judge of Bareilly, dated April 16, 1930.

Mr. *B. Malik*, for the Appellant.

Mr. *Muhammad Ismail*, for the Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit for damages on the ground that the defendant, a Police constable, who cherished a grudge against the plaintiff, made a false report on August 28, 1927, at the Police Station stating that the plaintiff was leading a riotous mob. It was not till March 15, 1928, that this first information report was produced in Court when the plaintiff became aware of its existence. The suit was filed on August 28, 1928. The defendant in addition to denying the allegation that there was any malice or bad faith on the part of the defendant and denying that the report was false, further pleaded that the claim was barred by limitation. Both the Courts below have applied Art. 2 of the Limitation Act and dismissed the claim, without going into the question of whether the defendant had, in fact, acted in good faith or not. The case came up in second appeal before a learned Judge of this Court, who referred it to a Bench of two Judges which then referred this case to a Full Bench.

In England where the question of interpretation of a similar Statute containing the words "act done in pursuance of an enactment", has arisen, the view has been invariably expressed that the defendant cannot seek the protection of the enactment unless he shows that he

acted in good faith. In *Selmes* v. *Judge* (1). Lord Blackburn remarked.

"It has long been decided that such a provision as that contained in this section is intended to protect persons from consequences of committing illegal acts, which are intended to be done under the authority of an Act of Parliament, but which by some mistake are not justified by the terms and cannot be defended by its provision. .. ...I agree that if a person knows that he has not under a statute, authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute"

We may also refer to Halsbury's Laws of England, Vol. 23, p. 344, para 965, where rulings on the interpretation of the corresponding section of the Public Authorities Protection Act (1893) are mentioned. See also *Smith* v *Shaw* (2).

In *Richard Spooner and Bomanjee Nowrojee* v. *Juddow* (3), their Lordships of the Privy Council observed:

"Our books actually swarm with decisions putting a contrary construction upon such enactments and there can be no rule more firmly established, than that if parties *bona fide* and not absurdly believe that they are acting in pursuance of Statutes, and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act."

In the Indian Limitation Act of 1871, Art. 2, ran as follows:—

"For doing, or for omitting to do an act in pursuance of any enactment in force for the time being in British India."

Taking the Article in its strict literal sense, it might well have been contended that the statute would have no application unless the act was done in strict pursuance of the enactment in force, and accordingly where the action was in excess of the power conferred by the statute, the Article of the Limitation Act would have no application. But the view expressed consistently was that even if the action is in excess of the powers conferred by the statute, there would be the protection provided the action was in good faith.

For the first time in 1877, the language of the Article was slightly changed and ran as follows:

"For compensation for doing, or for omitting to do, an act alleged to be in pursuance of any enactment in force for the time being in British India."

The words "alleged to be" were added which had not appeared in the previous enactment, and yet the Courts did not consider that the introduction of these new words had made any substantial change in the law as it had stood before. In the case of *Ganesh Das* v. *C. F. Elliot* (4) it was laid down that the words "alleged to be in pursuance of any enactment" must be reasonably construed, and that the person who seeks to take advantage of the shorter period of limitation must show that he had reasonable ground for justifying his action under the particular enactment on which he then relied and not arbitrarily asserted or thought so, *i.e.* he must, in short, have assumed to act in the honest exercise of a supposed statutory power. The same view was reaffirmed in the case of *Narpat Rai* v. *Kirpal Singh* (5), and it was laid down that to bring a suit under the above article, it is requisite for the defendant to show that he acted with ordinary care and intelligence, and honestly believed his act to be in pursuance of an enactment for the time being in force. The same view was also assumed in the case of *Jai Ram* v. *Gurmukh Singh* (6). In the Bombay High Court also a Division Bench of that Court in the case of *Ranchordas* v. *Municipal Commissioner for the City of Bombay* (7), relying on the English authorities already quoted held that where the person seeking the protection of the Act cannot claim that his conduct has any relation to the "execution of the act" if he knowingly and intentionally acts in contravention of its provisions, he would not be entitled to the protection if he did not act *bona fide*.

In the case of *Municipal Board of Mussoorie* v. *H. B. Goodall* (8), Art. 2 was not applied by the High Court, but Art. 28 was applied, because it was considered that there was a special provision applicable to illegal issue of warrant of distress whereas Art. 2 would be a general article only.

Our attention has not been drawn to any ruling in India between 1877 and 1908 in which it was ever held that the defendant is entitled to the protection of Art. 2 even if he acted dishonestly and in bad faith, knowing that he had no right to act under any enactment. In 1908 the new Limitation Act was enacted and Art. 2 was reproduced exactly as it was in the Act of 1877. There is accordingly a fair presumption that the legis-

(1) (1871) 6 Q B 724 at p. 727.
(2) (1829) 109 E R 453 at p 456.
(3) 4 M I A 353 at p 379; 6 Moo. P C 257; 1 Sar. 363.
(4) 124 P R 1881.
(5) 65 P R 1886.
(6) 105 P R 1886.
(7) 25 B 387; 3 Bom. L R 158.
(8) 26 A 482; 1 A L J 195; A W N 1904, 95.

lature accepted the interpretation put by the Courts on the language of Art. 2, as it had stood in the Act of 1877.

Even under the new Act there is plenty of authority for the view that where a person acts dishonestly, knowing that he has no right to proceed under any enactment, he cannot bring himself within the scope of Art. 2. See *Wali Ullah* v. *Raj Bahadur* (9), *Richard Watson* v. *The Municipal Corporation of Simla*, 2 Ind. Cas. 819 (10) and *Dhondu Dagdu* v. *Secretary of State for India* (11).

The learned Advocate for the respondent relies on the case of *Mukat Lal* v. *Gopal Sarup* (12). No doubt in that case the Bench expressed the opinion that for the purposes of Art. 2, it was not absolutely necessary that the defendant in doing or omitting to do the act should *bona fide* believe that he was acting correctly and in accordance with law. But the actual facts of that case were such that this general observation was not actually called for. In that case an *Amin*, who had been ordered to sell a certain property at auction, was proceeding to sell it in accordance with the provisions of the Code of Civil Procedure. The plaintiff's case was that he tendered the amount of the decree, but the *Amin* refused to take the money and proceeded to sell the property. The complaint, therefore, was that the defendant had omitted to perform a duty which had been imposed upon him by the Code of Civil Procedure, while he was acting in pursuance of that Code. It was in these circumstances that the Bench held that however imporperly the defendant might have acted in refusing to take the money the suit was governed by Art. 2 of the Limitation Act, and no question of the good faith of the defendant arose. The case, therefore, is distinguishable on the ground that there the plaintiff had admitted that the defendant was purporting to proceed under the Code of Civil Procedure, though he had omitted to comply with one of its provisions making it incumbent upon him to accept the money when tendered.

The case of *Municipal Board of Benares* v. *Behari Lal* (13), does not directly decide this point. Article 2 of the Limitation Act was actually not applied to that suit which was held to be governed by s. 326 (3) of the Municipalities Act.

In the case of *Shariful Hasan* v. *Lachmi Narain* (14). Article 2 of the Limitation Act was applied to a case where the District Judge had found that the defendant had a *bona fide* belief that he had a legal right to act, and had also found that the defendant had in fact such legal authority. There the Sub-Inspector, who apparently had cherished some malice against the plaintiff, arrested him on a complaint made by a person who was present on the spot and was prepared to identify the plaintiff. Having arrested him he also handcuffed him and took him to the Police Station. The District Judge had come to the conclusion that the Sub-Inspector had not exceeded his powers and had authority both to arrest the plaintiff and also to handcuff him. It was in these circumstances that the Bench held that the mere fact that the Sub-Inspector had a previous malice against the plaintiff would not deprive him of the protection of Art. 2 of the Limitation Act, because he obviously acted under s. 54 of the Criminal Procedure Code and was justified in acting under that section. In the judgment emphasis was laid on the fact that there was a finding of the District Judge that the defendant had a *bona fide* belief that he had the legal right to act and that he had such legal authority. This case is, therefore, no authority for the proposition that even where the facts are false to the knowledge of the defendant, he can seek shelter behind the provisions of Art. 2.

The language of the article is no doubt very unhappy, and the use of the ambiguous words "alleged to be" causes considerable difficulty. On the one hand, the learned Advocate for the plaintiff contends before us that these words are a mere superfluity, and have no special significance, and accordingly much attention has not been paid to those words in the various judgments delivered by the Indian Courts. He urges that these words must mean doing or omitting to do an act as alleged by the plaintiff. On the other hand, the learned Advocate for the respondent contends that these words must mean "alleged" at the time of the commission or the omission of the act, *i. e.*, alleged by the defendant. That the words do

(9) 21 Ind. Cas. 426; 16 O C 211.
(10) 2 Ind. Cas. 819.
(11) 17 Ind. Cas. 673; 37 B 101; 14 Bom. L R 949.
(12) 48 Ind. Cas. 815; 41 A 219; 16 A L J 1017.
(13) 95 Ind. Cas. 1030; 48 A 560; 24 A L J 632; A I R 1926 All. 538.
(14) 135 Ind. Cas. 558; (1931) A L J 853; A I R 1932 All. 16; Ind. Rul. (1932) All. 94.

not mean alleged by the plaintiff in the plaint or alleged by the defendant in the written statement is clear from the decision of their Lordships of the Privy Council in the case of *Punjab Cotton Press Co., Ltd.* v. *Secretary of State* (15), where the canal authorities had cut the bank of a canal to avoid accident to an adjoining Railway and not to the canal itself, and in consequence thereof the plaintiffs' adjacent mills had been damaged, it was held by their Lordships of the Privy Council that Art. 2 was not applicable, as the act alleged was not done in pursuance of any enactment. Their Lordships pointed out that it was quite clear that upon the plaintiffs' showing that was an act which the defendants performed at their own hands, and which, so far as the statute were concerned, they did not seem on the statement contained in the plaint in a position to justify. Their Lordships pointed out that Art. 2 should not be applied as if it were proved against the averment of the plaintiffs, and that there should be an enquiry as to whether the action was done for any purpose of protecting the canal or as alleged by the plaintiffs only for the purpose of protecting the railway and letting the water away. The case was accordingly remanded to the Lahore High Court for a further investigation.

The question is certainly not free from difficulty, and we are alive to the danger of persons who profess to act in the exercise of powers conferred upon them by enactments being harassed by frivolous suits and called upon to establish their good faith in some cases. At the same time it would be unfair to concede exemption to persons who, knowing that there is no ground for any such action invent a false story and profess to act under some enactment by abusing its provisions. It seems to us that although the words chosen by the legislature are not happy, their introduction was intended to obviate the difficulty of the article being interpreted too strictly. Taking it literally, it was not wide enough to cover the case of a person who in good faith had acted in pursuance of an enactment, when it was found later on that he had exceeded his powers. To protect such person it was necessary to widen the scope of the article and give him protection where, although the power was exceeded, he still acted in good faith and honestly believed that he was acting in pursuance of the enactment. But the additional words should not be interpreted as implying that the legislature has shortened the period of limitation in favour of persons who, knowing the falsity of the facts, did an act or omitted to do an act in order to harm another person. As in England, the expression "in pursuance of any enactment" must be interpreted as meaning acting in conformity with an enactment and not merely pretending to act or acting under colour of such an enactment. Where a person honestly believes that he is acting under some enactment, he is protected. But where a person merely pretends that he was so acting and knows that he should not act under that enactment, he cannot be said to be acting in pursuance of any such enactment. No doubt under s. 44 of the Criminal Procedure Code it is the duty of every person to make a report to the Police of the commission of certain specified offences, but there is no such duty cast upon a citizen, much less on a Police Officer, to make such a report when no facts exist. He would certainly not be acting in pursuance of s. 44 of the Criminal Procedure Code, if he concocts a purely false story and then makes a report of such a false story, knowing it to be false. It would, therefore, follow that where a defendant has done an act or omitted to do an act, knowing that he had no ground whatsoever for so acting or omitting to do an act, he does not come within the purview of Art. 2. It is only defendants who have acted honestly, although they might have exceeded the actual power conferred upon them by an enactment who would be protected. Of course, where it is established that the act done was in strict accordance with an enactment, there would be an obvious protection. But even where the power was exceeded, there would be protection in cases of good faith and *bona fide* belief. We are, therefore, of opinion that although the language of the section is unhappy, there is no good ground for departing from the view which had been expressed under the old Act and in support of which there is a preponderance of authority in India.

If the defendant were to satisfy the Court that at the time when he made the report he acted honestly on some

(15) 103 Ind. Cas. 1; A I R 1927 P C 72; (1927) M N 334; 4 O W N 4/1; 31 C W N 835; 28 P L R 453; M L T 343 (P C).

information received, he would be protected, even though the report might turn out to be absolutely false but not so to the knowledge of the defendant.

We accordingly allow this appeal and setting aside the decrees of the Courts below send the case back to the trial Court through the lower Appellate Court for disposal according to law.

N. *Appeal allowed.*

LAHORE HIGH COURT

First Civil Appeal No. 1872 of 1933
July 10, 1934
YOUNG, C. J. AND DIN MOHAMMAD, J.
ALLAH WADHAYA AND ANOTHER—
PLAINTIFFS - APPELLANTS
versus
FIRM HAJI MUHAMMAD RAMZAN-AMIR-UD-DIN AND OTHERS DEFENDANTS —RESPONDENTS

Limitation Act (IX of 1908), s. 5—Appeal not filed in time due to fraud by Counsel's clerk—If sufficient reason for extension of time

Where an appeal is not filed in time due to a deliberate fraud of the Counsel's clerk and there is no fault on the part of the client who has paid everything required to be paid by him or on the part of the Counsel who trusted his clerk, there is sufficient reason for the extension of time under s. 5, Limitation Act.

F. C. A. from a decree of the Subordinate Judge, First Class, Lyallpur, dated July 7, 1933.

Messrs. *J. L. Kapur* and *B. A. Cooper*, for the Appellants.

Messrs. *Faqir Chand* and *Faqir Chand Mital*, for the Respondents.

Young, C. J.—In this case one Allah Wadhaya had a decree passed against him on March 7, 1933. He came to Lahore in order to file an appeal and was taken to one Tufail M. Malak, a Barrister practising in this Court. The Barrister agreed to take the case and, on May 15, 1933, the client paid the *Munshi* of the Barrister Rs. 442 for the stamp for filing the appeal and agreed to pay him Rs. 150 for the case. He paid him the amount of printing charges and some portion of the fees. The appeal, however, was never filed, and later, in the month of October, the client was informed that his appeal had been dismissed in default. This was incorrect information as the appeal, in fact, had never been filed. The client subsequently came to Lahore, made enquiries, saw his Counsel and discovered that the appeal had never been filed, owing to the fraud of his *Munshi* who had stolen the money deposited with him for fee and printing charges. The *Munshi* has absconded. The client engaged another Counsel and the appeal was filed on November 13. This application has now been made for extension of time under s. 5 of the Limitation Act.

We called for an affidavit from the Counsel first engaged. That affidavit we have now perused and we are satisfied that it would not be proper to say that Counsel himself has been negligent in this matter. He swears that he asked the *Munshi* several times about the appeal; that he was told that it had been filed and that the *Munshi* was waiting for the date; that, on July 7, Counsel came to the conclusion that the date would not be fixed till after the vacation and he left for Kashmir. On his return in October, the *Munshi* told him that the appeal had been withdrawn as the parties had compromised the matter. Under these circumstances the fault lies with the *Munshi* and there is no doubt that, provided the affidavit is correct, the *Munshi* has been guilty of fraud and embezzlement.

It is argued on behalf of the opposite party to this application that negligence of Counsel is no answer. It is further argued that fraud or negligence of Counsel's clerk cannot be relied on to bring the application within s. 5 of the Limitation Act. Various authorities have been quoted to us. We do not need to decide this point on negligence. We have not been referred to any authority dealing with the question of limitation having expired due to the fraud of Counsel's clerk. We are satisfied that there is a great difference between the case of limitation having expired due to negligence and limitation having expired due to the deliberate fraud of a *Munshi*. We are agreed that in the latter case s. 5 may be used for extending the time. Assuming fraud, there is no fault in this case either on the part of the client himself who had paid everything he had to pay or on the part of the Counsel who trusted his *Munshi*. It is just possible that it might be said that Counsel should not trust his *Munshi* so completely as in this case but we take into consideration the fact that Counsel was young and the *Munshi* was old and had never before given cause for complaint.

Under these circumstances we think that a case has been made out. We, therefore, extend the time under s. 5 of the Limitation Act.

The paper book will now be printed.

D. *Order accordingly.*

ALLAHABAD HIGH COURT
Full Bench.

Second Civil Appeal No. 947 of 1932
October 3, 1934
SULAIMAN, C. J., THOM AND RACHHPAL SINGH, JJ.
RAM NATH AND ANOTHER—DEFENDANTS—APPELLANTS
versus
CHIRANJI LAL AND ANOTHER—PLAINTIFFS—DEFENDANTS—RESPONDENTS

Hindu Law—Joint family business—Mortgage debt contracted by father to finance new business—Sons, when liable—Manager of ancestral joint family business—Power to borrow—Alienation, if binding on minor members—Test to decide if business is a new business—Accumulations of income of ancestral property, if ancestral property—Contract Act (IX of 1872), s. 61—Appropriation—Absence of appropriation by creditor or debtor—Duty of Court—Discharge in order of time.

Under Hindu Law where the business to finance which, money has been borrowed, is a new business, the sons are not liable for the payment of the loan contracted by the father for this business, unless the transaction was for the benefit of the family and to the benefit of the estate or it was supported by legal necessity The question whether the particular transaction in dispute was for legal necessity or was for the benefit of the estate and the joint family, is something more than the mere question whether the money borrowed was required for the purposes of a new business. The fact that it was required for a new business would not be any justification. If in addition thereto, it could be shown that there was either a pressure of necessity to continue that business, as it was the mainstay of the family or that the particular transaction was at the time beneficial to the family and the family estate, the transaction would be supported but, of course, on the latter ground. The question whether the transaction was for such benefit or not is a question of fact depending on the circumstances of the case, and it is for the Court to decide whether it was so beneficial and was such as an ordinary prudent manager would have entered into in the interest of the family. *Jagat Narain* v. *Mathura Das* (2), held not overruled by *Benares Bank Ltd.* v. *Har Narain* (7), referred to. [p. 149, col 1]

Per *Rachhpal Singh, J.*—A manager of an ancestral joint family trading business has full authority to take loans and make alienations to raise money for the purpose of that business. Such a transaction will be binding on the entire joint family including the minor members. The creditor is not bound to enquire into the finances of the business so long as the business forms the purpose of the debt. All that is necessary for him to see is that the money is really required for the purpose of the business and there is no element of speculation or gambling in the transaction. [p. 147, col. 1.]

Accumulations of income of ancestral property purchased or acquired out of the income or with the assistance of ancestral property, the proceeds of sale of ancestral property, and property purchased out of such proceeds are ancestral property. [p. 148, col. 1.]

The real test for deciding whether a business is a new business wholly unconnected with the joint family ancestral business, or is an extension of that business is to determine the source which supplied the money with which the new business was started. If the assets or income of the joint family ancestral funds are utilized for opening a new branch, then the new branch will form part of the old business. On the other hand, if the business is started by a manager without any aid from the ancestral family assets, then, it will be a new business. In that new business the other members will have no right nor will any liability attach to them in respect of it. But merely because a business has been extended it cannot be inferred that the extension was a new business started by the manager separately. [p. 148, cols. 1 & 2.]

On the principle underlying the provisions of s. 61, Contract Act, the Court should, in the absence of any appropriation by either the debtor or the creditor, direct that the payment should be applied in discharge of the debts in order of time if there be such, and if they are all of the same date, in discharge of each of such debts proportionately. [p. 143, col. 1.]

S. C. A. from a decree of the Additional Sub-Judge, Muttra, dated May 31, 1932.

Messrs. *Ram Nama Prasad*, *Ambika Prasad Dube* and *Kanhaiya Lal*, for the Appellants.

Mr. *B. Malik*, for the Respondents.

Sulaiman, C. J.—A suit was brought on the basis of a mortgage-deed dated December 9, 1918, executed by the deceased father of the defendants appellants in favour of the deceased predecessor of the plaintiffs, whose executors the latter are. In the mortgage-deed it was recited that money was required for the payment of a certain antecedent debt and for the purposes of two shops located at Muttra and Delhi, respectively. On June 28, 1922, a sum of Rs. 3,000 was paid by the mortgagor to the mortgagee without specifying any part of the mortgage-debt to which it was to be appropriated. It is now found that the shop in Muttra was a lace shop and was an ancestral business; but that the shop ta Delhi was a cloth shop and was not ancestral, though it was a family business. There is no finding as to how long this shop had been in existence before the mortgage-deed was executed, but there is a finding that it had been in existence for a number of years. The defence *inter alia* was that there was no legal necessity for the loan. Both the Courts below have decreed the claim.

The second appeal came up for hearing before a Division Bench of this Court, which has referred two questions to the Full Bench for consideration. These may be formulated as follows, (1) Whether where the business to finance which—money has been borrowed is a family business and the loan is for the benefit of the family, the sons are liable for the payment of the

loan contracted by the father; and (2) whether the payment of Rs. 3,000 should be considered, to be repayment partly of the debt incurred for the benefit of the ancestral property and partly of the debt for advancing the Delhi business and appropriated accordingly.

In earlier cases of this Court a wider meaning was attached to the expression "benefit to the estate." For instance in *Tula Ram* v. *Tulshi Ram* (1), Sir Promoda Charan Banerji, an eminent Judge of this Court, in delivering the judgment held that the mortgage-debt was binding because it was for the benefit of the estate and the family, although that could not be a case of pressing necessity. This view was followed in several cases. On the other hand, there were some later cases in which a narrower view was taken that the alienation should be only for the purpose of saving the estate from some threatened injury. There was also some conflict of opinion as to the extent to which the members of a joint Hindu family are bound by alienations made by the father as manager in connection with the requirements of a business run by him.

In *Jagat Narain* v. *Mathura Das* (2), a Full Bench of this Court came to the conclusion that in order to sustain an alienation of joint family property made by the managing member of the family the transaction must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available to him at the time. Transactions justifiable on the principle of "benefit to the estate" are not limited to those transactions which are of a "defensive character." The previous cases were reviewed at some length and principal reliance was placed on the rule laid down by their Lordships of the Privy Council in *Hanuman Prasad Pandey* v. *Babooee Munraj Koonwaree* (3), that,

"The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

The authority of the case of *Sahu Ramchandra* v. *Bhup Singh* (4) was also relied upon and the following passage from page 143* was quoted:

"In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified the expenditure, then those entitled to the estate are bound by the transaction."

Another passage from page 441* also may be quoted:

"Although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of the antecedent debt."

It was held by the Full Bench that the benefit to the estate was something distinct and different from pressing necessity.

After this pronouncement, in many cases of this Court it was held that even where pressure of legal necessity is not established, a transaction may be upheld on the ground that it was for the benefit of the estate and the family which an ordinary prudent manager would enter into, *e. g.*, *Raj Kumar* v. *Mohan Lal* (5) and *Mahesh Prasad* v. *Jagannath Chowbe* (6).

In *Benares Bank, Ltd.* v. *Har Narain* (7), their Lordships of the Privy Council then made it perfectly clear that money borrowed by the father as manager of a joint Hindu family for the purpose of a business which was not ancestral was not borrowed for legal necessity and a mortgage granted as security for such a loan was not binding on the minor members of the joint family, as it was invalid. In that case a business of taking contracts from P. W. D. (apparently a business of a sporadic character in which fresh risk would be incurred as each new contract was taken) had been started by two persons as managers of the family and it was not their ancestral business. As the business had been started by two members as managers,

(1) 60 Ind. Cas. 3; A I R 1920 All. 11; 42 A 559; 18 A L J 699.

(2) 116 Ind. Cas. 481; A I R 1928 All. 454; 50 A 969; 26 A L J 841.

(3) 6 M I A 393; 18 W R 814; 2 Suther 29; 1 Sar. 552; 19 E R 147.

(4) 39 Ind Cas. 280; A I R 1917 P C 61; 44 I A 126; 39 A 437; 21 C W N 698; 1 P L W 557; 15 A L J 437; 19 Bom. L R 498; 25 C L J 1; 33 M L J 14; 6 L W 213, 22 M L T 22 (P C).

(5) 131 Ind. Cas. 872; A I R 1931 All. 253; (1931) A L J 219; Ind. Rul. (1931) All. 440.

(6) 133 Ind. Cas 412; A I R 1931 All. 743; Ind. Rul (1931) All. 652; (1931) A L J 1036

(7) 137 Ind. Cas. 781; A I R 1932 P C 182; 59 I A 300; 54 A 564; Ind. Rul. (1932) P C 215; 35 C W N 826; 34 Bom L R 1079; 55 C L J 583, 9 O W N 599; (1932) A L J 714; 36 L W 56; 63 M L J 92; (1932) M W N 788; 13 P L T 491 (P C).

*Pages of 39 A.—[*Ed.*]

it might possibly have been started with joint funds, but it is not quite clear whether the bank had suggested that even if the business had not been an ancestral business, it had become joint family property by being blended with other properties. One thing, however, is perfectly clear that on behalf of the bank it was not contended that the particular transaction had been for the benefit of the joint family and the family estate and the claim does not seem to have been defended on any such ground. Their Lordships applying the principle laid down in *Sanyasi Charan* v. *Krishnadhan Banerji* (8), held that the manager of a joint family has no power to impose upon a minor member of the family the risk and liability of a new business started by him and that a new business is not within the purview of the verses 27 to 29 of Chap. I of the Mitakshara. In that case the bank had failed to prove that it had made reasonable and *bona fide* enquiries as to the ancestral character of the business which had led it to believe that the business was ancestral, even though in point of fact it had not been so. Accordingly the amount raised by the managers for the purposes of the new business was not considered to create a charge on the joint family property.

This authoritative pronouncement of their Lordships of the Privy Council was the subject of interpretation by another Full Bench of this Court in *Amraj Singh* v. *Shambhu Singh* (9). The majority of the Judges constituting the Bench held that the pronouncement of their Lordships of the Privy Council finally settled the question that money required for the purposes of a non-ancestral business is not sufficient in itself to justify alienation of family property and that the money for a new business started even by the father as manager of the family involving, as it does risk and liability on the minor members of the family, cannot justify an alienation. The majority, however, took the view that although the requirement of a new business was not in itself sufficient to justify alienation, their Lordships' ruling did not overrule the decision of the Full Bench of *Jagat Narain* v. *Mathura Das* (2). It was accordingly held that where the transaction was not speculative but was in the best interests of the family and for its benefit which an ordinary prudent manager would have made, it would be open to a Court to hold that the transaction is binding on the other members of the family though the loan was secured by an alienation of the family property. It was pointed out in that case that in *Benares Bank, Ltd.* v. *Har Narain* (7), it had never been suggested on behalf of the bank that the business had been started for the benefit of the family or that it had been necessary for its support and maintenance or was necessary to save the family from starvation or ruin, and that accordingly their Lordships' pronouncement did not necessarily imply that such considerations were altogether irrelevant. The question as to whether that particular transaction was necessary for the family or was for the benefit of the family or the family estate was a question of fact depending on evidence and could not be pressed in appeal if it had not been raised at the trial.

The view that the Full Bench ruling in *Jagat Narain* v. *Mahtura Das* (2) has not been overruled by their Lordships of the Privy Council when delivering the judgment in *Benares Bank, Ltd.* v. *Har Narain* (7) is further strengthened by the circumstance that although the case of *Inspector Singh* v. *Kharak Singh* (10) was cited by Counsel before their Lordships, as appears from the report on p. 301* this Full Bench ruling which had partially overruled the view expressed in *Inspector Singh* v. *Kharak Singh* (10), was not cited before their Lordships at all. It seems clear that if any question had arisen as to there being a benefit to the family or the estate, it is most likely that the Full Bench ruling also would have been referred to.

It seems to me that the recent pronouncement of their Lordships of the Privy Council in *P K. P S. Pichappa Chettiar* v. *Chokalingam Pillai* (11), also does not even indirectly overrule the Full Bench ruling. Their Lordships have laid down that where a managing member of a joint family enters into a partnership with a stranger, the other members of the family do not *ipso facto* become partners in the business so as to clothe them with

(8) 67 Ind. Cas. 124: A I R 1922 P C 237; 49 I A 108; 49 C 560; 30 M L T 228; 20 A L J 409; 24 Bom. L R 700; 35 C L J 498; 43 M L J 41; (1922) M W N 364; 26 C W N 954; 16 L W 536 (P C).

(9) 140 Ind. Cas. 509; A I R 1932 All 632; (1932) A L J 895; Ind. Rul. (1932) All. 653.

(10) 112 Ind. Cas. 881; A I R 1928 All. 403; 50 A 776; 26 A L J 577.

(11) 150 Ind. Cas 802; A I R 1934 P C 192.

*Page of 49 I. A.—[*Ed.*]

all the rights and obligations of a partner: in such a case the family as a unit does not become the partner but only such of its members as in fact enter into a contractual relation with the stranger.

It has always been a settled law that money borrowed for the purposes of an ancestral family business is *per se* a good justification for alienation of family property. In such a case the presumption is that the carrying on of the ancestral business is necessary and no further enquiry on the part of the creditor is required. As a result of their Lordships' pronouncement, it is now finally settled that the mere fact that money has been required for a business newly started by a manager or the father is not in itself sufficient to justify an alienation of the family property. But it has never so far been held that the need of a newly started business taints the transaction with illegality so much that even if there be other circumstances they would be of no avail in validating the transaction. It seems to me that the question whether a particular transaction, even though the money was required for the purposes of a new business, was for legal necessity or for the benefit of the estate in the family is a somewhat distinct question. Where the new business is the separate property of individual members of a joint family, it is quite obvious that money required for its purposes can never be for the benefit of the family or of the family estate at all. In such an event an alienation of the family property would be wholly unjustified. On the other hand, if the business though not ancestral, had previously become the joint family business, then there may be circumstances under which money required for such business may either be for legal necessity or for the benefit of the family and the family estate.

The interest of the members of the family in a business is property just as the rights in any other kind of property. It has been laid down by their Lordships of the Privy Council in many cases that separate property of a member of a family can by blending become joint family property and that for such an effect to be produced, it is not necessary that the consent of all the other members of the family, some of whom may be minors and therefore incapable of giving consent, must be obtained as a condition precedent. See *Lal Bahadur* v. *Kanhaiya Lal* (12), *Suraj Narain* v. *Ratan Lal* (13), *Radha Kan* v. *Nazma Begam* (14), and *Rajani Kant Pal* v. *Jaga Mohan Pal* (15).

In *Metharam Ramrakhiamal* v. *Rewa Chand Ramrakhiamal* (16), (at p. 294)* their Lordships of the Privy Council remarked as follows:

"The question whether a man who happening to be a member of a joint family carried on his business, whatever it was, personally for his own personal benefit without detriment to the joint family fund, or carried on such business as a member of the joint family for the benefit of the joint family, is a question of fact to be determined on the evidence."

This undoubtedly implies that even an apparently new business carried on by a member of a family may be a joint family property. In *Niamat Rai* v. *Din Dayal* (17), their Lordships of the Privy Council explained that a joint family business is a business carried on with joint family funds for the benefit of the joint family and the properties of the joint family, both movable and immovable including the shares of minor members of the family, are liable for the debts incurred in carrying on the business. But in that case, as the minor plaintiffs had apparently succeeded to the business, it might be said that so far as they were concerned, it was an ancestral business, though possibly not so in the case of some of the other members.

In the case of a joint family business where it is necessary for its proper conduct that money should be borrowed from time to time, it is within the authority of the

(12) 29 A 244; 34 I A 65; 4 A L J 227; 9 Bom. L R 597; 5 C L J 310; 11 C W N 417; 17 M L T 228; 2 M L T 147 (P C).

(13) 40 Ind. Cas. 188; A I R 1917 P C 12; 44 I A 201; 40 A 159; 20 O C 211; 21 C W N 1065; 2 P L W 160; 33 M L J 180; 15 A L J 684; 19 Bom. L R 737; 22 M L T 121; 26 C L J 267; 6 L W 509; 4 O L J 762 (P C).

(14) 45 Ind Cas 805; A I R 1917 P C 128; 45 C 733; 22 C W N 649; 16 A L J 537; 5 P L W 72; 23 M L T 332; (1918) M W N 386; 35 M L J 99; 20 Bom. L R 724 (P C).

(15) 73 Ind. Cas. 252; A I R 1923 P C 57; 50 I A 173; 50 C 439; 44 M L J 561; 32 M L T 149; 25 Bom. L R 683; 37 C L J 515; (1923) M W N 438; 18 L W 387; 27 C W N 997; 9 O & A L R 805 (P C).

(16) 44 Ind. Cas 269; A I R 1917 P C 105; 45 I A 41; 45 C 666; 16 A L J 281; 22 C W N 377; 4 P L W 197; 34 M L J 327; 7 L W 361; 23 M L T 218; 27 C L J 345; 20 Bom. L R 566; (1918) M W N 537; 12 S L R 116 (P C).

(17) 101 Ind Cas. 373; A I R 1927 P C 121; 54 I A 211; 8 Lah. 597; 29 Bom. L R 886; 52 M L J 729; 4 O W N 537; 25 A L J 599; 45 C L J 548; (1927) M W N 453; 28 P L R 463; 8 P L T 647; 26 L W 442 (P C).

*Page of 44 Ind. Cas.—[*Ed.*]

karta to borrow money for the purposes of the family business: See *Abdul Majid Khan* v. *Saraswati Bai* (18).

The cases in Bengal are generally under the Dayabhaga Law, which confers power on each co-parcener to transfer his share. In the Madras Presidency also the interest of the mortgagor is regarded as being validly transferred. In the Punjab, cases are governed mostly by the Customary Law. In the Bombay Presidency also, cases under the Mitakshara Law are rare. It is only in these Provinces that the question assumes an acute form inasmuch as hundreds of cases are decided every month by the subordinate Courts in which the question of the authority of the father as manager to raise money for a joint family business as distinct from an ancestral business and his separate business, is almost invariably raised.

Although the alienation of joint family property merely for the purposes of a newly started business is not justifiable, there is really no prohibition against a manager of a joint family in respect of starting a new business. Indeed, it is the commonest thing in this Province to start such new businesses. It may be started with the joint family funds or with separate funds and may possibly at the outset be the separate property of the manager, but if other kinds of properties can, by the conduct of the parties and by the blending of their income with the income from the joint properties, become joint property, there seems to be no good reason for holding that the interest of a particular member of a family in a business or a mill or a factory can never become joint property by being thrown into the common stock. A business started by a father might have been run for decades and the members of the family may in fact be taking part in its conduct and the family may even be maintained solely with its income, and joint funds might have been utilised for its purposes from time to time. In such an event it may be impossible to hold that the business still remains the separate property of the manager who started it originally and can never form the subject of partition between him and the other members. Such a view would amount to holding that a manager can appropriate joint funds and start a business of his own which he can keep separate and over which he can always possess full disposing power with the right to alienate or gift it to anyone he likes, without his right being questioned by the other members of the family, and can also prevent it from being brought into the common stock at the time of a partition. It would become impossible for a manager to invest any surplus joint fund, that there may be, in stocks or shares in any concern, or the other members can take all the gross assets, without undertaking the liabilities.

If there were an absolue prohibition against the starting of a new business or newly taking shares in an existing business, the family may have to be tied down to the ancestral business only, which may cease to be profitable, and therefore so long as there is some minor member of the family alive, it would be impossible to divert the activities of the family to any other line. As sons and grandsons are in being, there may almost always be some minor member of the entire family existing and accordingly it may for many generations become impossible to start a new business. But as laid down by their Lordships of the Privy Council, alienation for money required for such a new business is not justified merely because it is a business started by the manager. The want of authority really is as regards the alienation of family property for the purposes of a new business, and not that there is any absolute prohibition against the starting of a new business.

It is contended that the expression "for the sake of the family" occurring in the Mitakshara is *ejusdem generis* with what precedes it, and must be confined to the case of "compelling necessity only." Now the text of Brahaspati quoted in the Mitakshara was not confined to the father or manager only, but would apply to any co-parcener described as "a single individual." Taking the text literally, it would authorise a junior member to alienate property for the purposes behind the back of the manager. The learned Counsel for the appellant concedes that the judicial interpretation put on the text in some cases has not been to follow the words literally and give to a junior member any

(18) 147 Ind. Cas 1; A I R 1934 P C 4; 61 I A 90; 30 N L R 60; 10 O W N 1281; 6 R P C 48; 66 M L J 65; 39 L W 72; 58 C L J 518; (1934) A L J 79; 15 P L T 99; 35 P L R 10; (1934) M W N 4; 36 Bom. L R 225; 38 C W N 201; 17 N L J 1 (P C).

such authority. The expression "for the sake of the family" occurring in this text has been judicially interpreted to have a wider meaning than mere pressure of necessity. Taken literally it is more comprehensive than even "benefit to the estate." The expression is wide in scope, and even if it has been too widely interpreted, there are many other matters in the Hindu Law wherein a long course of decisions have established propositions perhaps not in strict accordance with the Hindu texts if taken literally. For instance, a distinction has been drawn betwen a voluntary alienation by the father which may be impugned on the ground of want of necessity and an involuntary auction sale to a third party which can be impugned only on the ground of the debt being tainted with illegality or immorality; or again, the non liability of Hindu sons for the payment of their father's debts which are incurred after separation; as also alienation in lieu of an antecedent debt. Reliance is next placed on the commentary on this text by the author of the Mitakshara and it is urged that the illustrations given therein are exhaustive, and therefore, exclude the plea of the benefit of family as distinct from compelling necessity. But illustrations are seldom intended to be exhaustive, *e. g.*, *Girdhari Lal* v. *Bengal Government* (19), where the enumeration of *bandhus* in the Mitakshara was held to be illustrative and not exhaustive. The statement of the law in *Hanuman Prasad Pandey* v. *Babvoee Munraj Koonwaree* (3) was based on a liberal interpretation of the words *kutumbarthe*" (for the sake of the family) and although that was a case of a manager of a minor, the law has always been understood to apply and has been invariably applied to managers of joint families.

That the words "for the sake of the family," have a wider meaning than mere compelling of a necessity would also appear from the following consideration: It is now well settled on the authority of the ruling of their Lordships of the Privy Council that money required by a manager for an ancestral business is justified and alienation in lieu of it is binding on the other members. There is no text of the Mitakshara which specifically refers to the needs of an ancestral business. Accordingly its justification rests entirely on the same verses 27 to 29 of Chap. 1. There can be numerous occasions where there may be no compelling necessity to raise money for an ancestral business. There may be plenty of funds in hand and yet the manager may borrow more money for the business, or it may be that he may feel it beneficial to enlarge the business though not unduly. In such circumstances it may be most difficult to hold that there existed a compelling necessity which was acted as a pressure and which was tantamount to legal necessity. Borrowing on such occasions can only be justified on the supposition that the transaction was for the benefit of the family inasmuch as it was carried out in connection with the family business which a prudent owner would continue. To hold, therefore, that the words "for the sake of the family" have not a wider scope would be almost destroying the very basis of the rulings under which money required for an ancestral business is considered to be fully justified.

The view that "benefit" is something different from "compelling necessity" finds some support from the remarks of their Lordships in *P. K. P. S. Pichappa Chettiar* v. *Chockalingam Pillai* (11). While considering the argument that the defendant's liability to the extent to which the family benefited, their Lordships did not simply reject the contention but thought it fit to examine the evidence and came to the conclusion that the evidence was very meagre and that there was no evidence as to the extent of such benefit.

It seems to follow that the question whether the particular transaction in dispute was for legal necessity or was for the benefit of the estate and the joint family, is something more than the mere question whether the money borrowed was required for the purposes of a new business. The fact that it was required for a new business would not be any justification. If in addition thereto it could be shown that there was either a pressure of necessity to continue that business, as it was the mainstay of the family or that the particular transaction was at the time beneficial to the family and the family estate, the transaction would be supported, but of course, on the latter ground. The question whether the transaction was for such benefit or not is a question of fact depending on the circumstances of the case, and it is for the Court to decide whether it was so beneficial and was such as an ordinary prudent manager

(19) 12 M I A 448; 4 B L R P C 44; 2 Suther 159; 10 W R 31.

would have entered into in the interest of the family.

The second question is how the payment of Rs. 3,000 towards the mortgage debt is to be appropriated. The contention on behalf of the defendants is that the whole of it should go towards the discharge of that part of debt which was binding on the mortgaged property and that no portion of it should be set off against the other part for which the family property was not liable. On the other hand, it is contended on behalf of the plaintiffs that if the whole of this sum is not to go towards the payment of the unsecured portion of the debt, then there should at least be an apportionment.

So far as the English Law is concerned, it seems to be well settled that a creditor is entitled to make an appropriation even during a pending action : see the case of *Seymour* v. *Pickett* (20). It was held by a Bench of this Court in *Kundan Lal* v. *Jagannath* (21), that an appropriation of payment must be made by the debtor at the time of paying and by the creditor at the time of receiving the money. If neither of them makes the appropriation, the law appropriates the payment to the earliest debt. The facts of that case were somewhat different and it was the debtor who was insisting that the payment should go towards the earliest debt. But this view has been expressly dissented from in the other High Courts, and the various cases are summarised in a judgment of the Calcutta High Court in *Kunjamohan Shah Poddar* v. *Karunakanta Sen* (22).

Reading ss. 59, 60 and 61 together it is clear that so far as the right of the debtor to make the appropriation under s. 59 is concerned, it can be exercised only when a debtor makes the payment with the express or implied intimation that the payment is to be applied to the discharge of a particular debt. It would follow that this intimation, express or implied, must be made at the time when the payment is made. On the other hand, under s. 60 it is only when the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied that the creditor may apply it at his discretion to any lawful debt. This discretion obviously is to be exercised if the debtor has omitted to give an intimation and where there are no other circumstances. It seems to me that the creditor need not exercise this right at once, but he can at his discretion exercise it even later. There is nothing in the section particularly as a past perfect tense "has omitted" has been used to indicate that the creditor loses this right if he does not exercise it at the very time when the payment is received. In many cases it may be impossible to make the appropriation there and then; for instance, when the payment is made at a time when the amounts due under the various heads are not known and the account books are not easily accessible Now, when neither the debtor nor the creditor has made any appropriation, then under s. 61 it is a duty of the Court to apply the payment in discharge of the debts in order of time and if the debts are of equal standing, in discharge of each proportionately.

It is contended on behalf of the defendants that s. 61 in terms cannot apply to this case because here there are not more than one debt, but there was one debt only. But although the loan was one, the purposes for which the amounts were taken were different. Even though the section may not in terms apply to the present case, there can be no doubt that the principle underlying that section must apply. This principle has been applied by their Lordships of the Privy Council to the appropriation by the Income-tax Commissioner of certain payments towards the interest which accrued on the amount due although the principal and interest would strictly speaking constitute only one debt: *vide Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraj of Darbhanga* (23). It is also clear from that case that the Income-tax Commissioner could not possibly have made the appropriation immediately the amount was paid. It was only when the accounts for the year were made up that credit was given for the sum and the interest due was reduced.

In the present case althongh on the one hand this money appears to have been raised by a sale of a part of the mortgaged property which was ancestral, there is nothing to show that the creditor was informed of the sources at the time when the payment was made. Again one part of the debt was due from the mortgagor personal-

(20) [(1905) 1 K B 715; 74 L J K B 413; 92 L T 519

(21) 30 Ind. Cas. 92; A I R 1915 All. 378; 37 A 649: 13 A L J 993.

(22) 149 Ind. Cas. 262; A I R 1934 Cal. 40; 60 C 1265; 6 R C 552.

(23) 142 Ind. Cas. 437; A I R 1933 P C 108; 60 I A 146; 12 Pat. 318; Ind. Rul. (1933) P C 77; (1933) M W N 439; 64 M L J 612; 37 L W 701; 37 C W N 598; (1933) A L J 527; 14 P L T 341; 35 Bom. L R 731; 57 C L J 318 (P C).

ly and another part from him in his representative capacity as manager of the family. Therefore, it might well have been argued that the creditor was entitled to appropriate the payment towards the discharge of the debt due personally from the person who made the payment rather than the debt due from him in his representative capacity. Again one part of the debt was so to say an unsecured debt: whereas the other was a secured debt. The period of limitation for the unsecured debt would have expired in about two years' time; whereas the period of limitation for the other debt would not have expired till after about eight years. The mortgagee did not in fact bring any suit for recovery of the unsecured debt before the expiry of the prescribed period. This also might well have been made the basis of an argument that the creditor would be justified in making the appropriation towards the unsecured debt in preference to the secured debt.

But this position was not taken up in the Courts below and the learned Advocate for the plaintiffs before the Devision Bench confined his argument to the proportionate appropriation of Rs. 3,000 towards the two parts of the mortgage debt. It is, therefore, unnecessary to consider the larger question whether there would be any presumption as to the way in which the mortgagee should be deemed to have made the appropriation in the eye of the law. On the principle underlying the provisions of s. 61 it seems that the Court should in the absence of any appropriation by either the debtor or the creditor, direct that the payment should be applied in discharge of the debts in order of time if there be such and if they are all of the same date in discharge of each of such debts proportionately.

The learned Counsel for the defendants-appellants has relied strongly on *Budha Mal* v. *Bhagwan Das* (24). But in that case no question of appropriation really arose, the main question being whether there should be a deduction on account of the fact that part of the rents of the estate had been received by the agent of the plaintiff. Apparently there was along with the mortgage another transaction of lease and the plaintiff's principal man of business had recieved on account of the arrears of rent a sum of Rs. 10,000. Their Lordships held that this sum should be deducted from the amount claimed by the mortgagee on account of the payment of the Government revenue and maintenance allowance to the widow in the account and that the balance could be recovered. I do not think that that case in any way helps the appellants.

In my opinion, therefore, the sum of Rs. 3 000 which was paid by the mortgagor should be split up into two portions of Rs. 2,000 which should be assumed to have gone to discharge a part of the secured debt and a sum of Rs. 1,000 which should be deemed to have gone towards the discharge of the unsecured portion of the debt.

Thom, J.—I concur. Had the decision in *Jagat Narain* v. *Mathura Das* (2), stood alone, there could have been no question that the mortgage executed by the manager of the joint family was binding upon the minor members of the family. It was contended, however, that this decision has been by implication overruled by the Privy Council in their decision in *Benares Bank, Ltd.* v. *Har Narain* (7). In that case, however, the question of whether the money was borrowed for the benefit of the family does not appear to have been raised. The plea that the money was borrowed for the benefit of the family was not taken in the pleadings and no evidence was led upon the point. The matter, therefore, was not considered by the Privy Council.

The decision in *Jagat Narain* v. *Mathura Das* (2) followed the decision of the Privy Council in *Hanuman Prasad Panday* v. *Babooee Munraj Koonwaree* (3). That decision is clear authority for the proposition laid down in *Jagat Narain* v. *Mathura Das* (2).

The decision in that case is by a Full Bench of this Court. In my judgment in the Benares Bank case the Privy Council never intended to lay down the general proposition that a loan taken by the manager of a joint Hindu family for the purpose of starting a new business could never be binding upon the minor members of the family. There is ample authority not only in the original texts but in the decisions of the Privy Council and of this Court for the proposition that where the starting of a new business is a prudent step taken by the manager of the family for the benefit of the family a loan taken for this purpose or for the carrying on of the new business is a valid loan and is binding upon the minor members of the family. Indeed it would be most unfortunate if the law were otherwise. In

(24) 18 C 302; 17 I A 392; 5 Sar. 632 (P C).

the present economic and social state of the development of this country, it must often be absolutely necessary in the interests of the joint Hindu family and for the purpose of conserving the estate of that family not only to discontinue an old ancestral business but to embark upon a new business, and for that purpose to negotiate loans.

I agree that the sum of Rs. 3,000 repaid should be in this case appropriated proportionately to the discharge of the secured and the unsecured debt. The point raised in this branch of the case is not in terms covered by s. 61, Contract Act, but in my judgment the principle underlying that section should be applied. Learned Counsel for the plaintiffs has not contended as in my view he could reasonably have contended, that the sum repaid by the borrower should be applied in the first instance to the discharge of the unsecured debt. He has contented himself with the claim that the sum of Rs. 3,000 should be applied proportionately to the discharge of both the secured and unsecured debt. We, therefore, do not decide the general question as to whether where no appropriation is made either by the borrower or the lender, sums repaid should be applied in the first instance to the discharge of that part of a debt which may be unsecured.

Rachhpal Singh, J.—I agree. My Lord the Chief Justice has considered the principal question involved in this case in his elaborate and exhaustive judgment and I am in entire agreement with him in holding that the view taken in the Full Bench ruling in *Jagat Narain* v. *Mathura Das* (2) has not been overruled by the ruling of their Lordships in *Benares Bank, Ltd.* v. *Har Narain* (7).

In *Amraj Singh* v. *Shambhu Singh* (9) the question which has been re-agitated before us had come up for consideration before a Full Bench. The majority view was that the *Banares Bank, Ltd.* v. *Har Narain* (7) had not overruled the Full Bench case reported in *Jagat Narain* v. *Mathura Das* (2).

In recent ruling of their Lordships of the Privy Council *P. K. P. S. Pichappa Chettiar* v. *Chockalingam Pillai* (11), there are observations which support the view taken by the Full Bench in *Jagat Narain* v. *Mathura Das* (2). These observations go to show that where a creditor seeks to enforce his claim against a minor member of a joint family in respect of money due from the manager of the family, the question as to whether or not the loan benefited the joint family will be the deciding factor in the case.

A perusal of the ruling of their Lordships of the Privy Council in *Benares Bank, Ltd.* v. *Har Narain* (7), shows that there were three points on which their Lordships gave their decision. These points were: (1) It was contended that a new business, which had been started by two managers of the joint family, was ancestral and therefore, the minor members of the family were liable for the debt due. Their Lordships, after a consideration of the evidence in that case, came to the conclusion that the business in that case was not ancestral. (2) Another point taken by the appellants in that case was that a business started by the father as manager, even if new, must be regarded as ancestral. Their Lordships rejected this contention. (3) Another point urged was that even if the business was not ancestral, the transaction was binding because the appellants had made reasonable and *bona fide* enquiries which led them to believe that the business was ancestral, and that there was necessity for raising the money for the purpose of the business. Their Lordships, on the evidence produced in that case, came to the conclusion that the appellants had failed to prove that they had made reasonable enquiries as to the character of the business.

These are the only three points decided by their Lordships of the Privy Council. I am clearly of opinion that the question, as to whether or not the transaction was for the benefit of the family, was never decided in *Benares Bank, Ltd.* v. *Har Narain* (7). As remarked by King, J., in *Amraj Singh* v. *Shambhu Singh* (9), at p. 908*), in *Benares Bank Ltd.* v. *Har Narain* (7):

> "It was not even argued and presumably, therefore, it was not even arguable upon the facts that it was a prudent transaction, or for the benefit of the estate."

It appears to me that there is no justification for the contention that the Full Bench case *Jagat Narain* v. *Mathura Das* (2), has been overruled by implication as a result of the decision of their Lordships in *Benares Bank, Ltd.* v. *Har Narain* (7).

In my opinion, the real question actually decided by their Lordships in *Benares Bank, Ltd.* v. *Har Narain* (7) is that a Hindu father, acting as a manager of the joint family, cannot make an aliena-

*Page of (1932) A. L J.—[*Ed.*]

tion which might bind the minor members, when money is advanced to him for the purpose of starting a new business and which business is non-ancestral. The ruling of their Lordships will have no application to a case where the father, acting as manager, borrows money by alienating family property, for the purpose of financing a business which is ancestral property and which has been in existence as family business antecedent to the date on which the alienation is made.

Before proceeding further, I wish to point out that there is a clear distinction between transactions made by a manager of a joint Hindu family which does not carry on any trading business and the transaction entered into by the manager of joint Hindu family carrying on an ancestral trading business. Where a manager of a joint Hindu family, which does not carry on any trade, takes a loan or makes an alienation, the creditor has to prove that the transaction was either for family necessity or for the benefit of the family. But on the other hand, where a joint family is carrying on an ancestral business as traders, then, the creditor has only to prove that the money was lent or alienation made for the purpose of carrying on the ancestral business. It is not necessary for him to prove further that the transaction was made for the benefit of the family.

One of the earliest cases on the point is *Ramlal Thakursidas* v. *Lakhshmichand* (25). It was held there that ancestral trade descends like other Hindu property upon the members of an undivided family. It was further held that:

"In carrying on such a trade infant members of the family will be bound by the acts of the manager which are necessarily incidental to and flowing out of the carrying on of that trade and that the manager can pledge the property and credit of the family for the ordinary purpose of that trade, and third persons dealing *bona fide* with such manager are not bound to investigate the status of the family, minor members being bound by the necessary acts of the manager."

This proposition of law has been quoted by Sir D. Mulla in his Hindu Law, Edn. 7, p. 282. He has, however, in his book substituted the words "mortgage or sell" for the word "pledge" used in the above cited ruling. I find myself in agreement with the following observations made in *Ramlal Thakursidas* v. *Lakhshmichand* (25):

"The general benefit of the undivided family is considered by Hindu Law to be paramount to any individual interest and the recognition of a trade, as inheritable property, renders it necessary for the general benefit of the family that the protection, which the Hindu Law generally extends to the interest of a minor, should be so far trenched upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of that family property; but that infringement is not to be carried beyond the actual necessity of the case."

The next case to which I wish to refer is *Raghunathji Tarachand* v. *Bank of Bombay* (26), Chandavarkar, J., in his judgment expressed the following opinion:

"The rule of Hindu Law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose is subject to at least one important exception Where a family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the very existence of the family."

The law on the subject is discussed with much learning in this ruling by Chandavarkar, J. The reason for vesting the manager of a joint family ancestral trading firm is stated by him to be this:

"Under the Hindu Law a joint family which carries on a trade handed down from its ancestors becomes a trading family; trade being one of its *Kulachar* it attracts to itself all the necessary incidents of trade."

The learned Judge cites several texts of of Hindu Law in support of his view. At one place in his judgment the learned Judge observes:

"The reason of this must be that it is merchants alone who know best what the rules of their profession, adopted in the interest of trade are. The implication is that such rules must be followed in the interest of trade. Nowhere is it stated that these rules do not apply to a joint family carrying on a trade as its *Kulachar* or family business merely because it occupies also the status of a joint family."

In *Malaiperumal Chettiar* v. *Arunachalla Chettiar* (27), Sadasiva Aiyar, J., held that the ordinary presumption in the case of a trading caste or family is that the entire family credit and all the joint family properties are embarked in the business even as regards the minor members. It appears to me that when a joint family carries on an ancestral business it gives out to the world that the manager of the family has the power to carry on the business on its behalf. If this were not so, then, it will be difficult for the manager

(25) 1 B H C R App. 51.

(26) 2 Ind. Cas. 173; 34 B 72; 11 Bom. L R 255.

(27) 41 Ind. Cas. 224; A I R 1918 Mad. 706; 6 L W 417.

to carry on the trade as other people would not have dealings with it. In my opinion, it is not open to minors in such a family to say that the transactions made by the manager in the ordinary course of business are not binding on them. The reason is that the business is carried on on the credit of the family property. The family property is held by the profits earned in the business, and it would, therefore, be unjust to hold that members who were being maintained by the profits made out of the business should not be liable for the debts incurred for the carrying on of that very business.

I wish to emphasise, even at the risk of repetition, that there is a difference between transactions to which a manager of a joint Hindu family which has no ancestral trading business is a party and transactions made by the manager of a joint Hindu family which is doing ancestral trade business. The reason is obvious. When a creditor lends money to or accepts an alienation made by a member of a joint Hindu family, he is aware or ought to be aware that the manager is dealing with the property owned by several co-parceners. He is supposed to know that under the Hindu Law, the *karta* of the family can borrow money or make alienations only where there is a family necessity or where money is required for the benefit of the estate. If he lends money to the *karta* of the family without satisfying himself whether there is a necessity for the loan, he does so at his own risk. If it is found that the loan taken by the *karta* of the joint family was not for the benefit of the joint family or for family necessity, then, he must lose. But different considerations will prevail when the manager of an ancestral joint family business, acting as manager of the business, enters into a transaction with a third party. Here, the income of the trade is the only source which maintains the joint family. When the joint family carries on an ancestral business it gives out to the world that it will carry on business exactly on the same terms as any other firm. In the words of Chandavarkar, J., *Raghunathji Tarachand* v. *Bank of Bombay* (26):

"The implication is that such rules must be followed in the interest of trade and nowhere is it stated that these rules do not apply to a joint family carrying on a trade as its *Kulachar* or family business merely because it occupies also the status of a joint family."

The manager in the case of a joint ancestral trading business, has an implied authority to contract debts for its purposes, and the creditor is not bound to enquire into the purpose of the debt in order to bind the whole family. It will be impossible for a joint family doing ancestral trading business to carry on the business, if its manager is not to have authority to contract debts for the purpose of the business, the reason being that that power is necessary for the very existence of the family. In such a case all that a creditor has to prove is that the family was doing ancestral trading business and that the money was required for the purpose of that business.

There may be cases in which an ancestral joint family business which at one time was yielding a handsome income which maintained the entire family in comfort might have to be run at a loss. It may be necessary for the manager to take a loan for establishing the business, but the effort may prove to be futile. In such a case it will be wrong to hold that the other members of the joint family would not be bound by the loan taken by the manager. If the business had become profitable once again, all the members of the family would have been benefited by it. It would not be right to hold that as the attempt to improve it had failed, so the other members of the joint family were not liable for the loan contracted by the manager. A recent ruling of their Lordships of the Privy Council reported in *Niamat Rai* v. *Din Dayal* (17) may be referred to in this connection. Their Lordships held that in an ancestral joint family business which is carried on for the benefit of the joint family, the entire property of the joint family is liable for the debts incurred by the manager in carrying on the business. It was further held that where a joint family business had resulted in a loss, it was for the manager to decide whether it would be better to raise more money to put into the business, or to close it down, and a lender or purchaser was not bound to enquire into or prove the reasonableness or soundness of the manager's decision and action. Another case on the point is *Ramakrishna Muraji* v. *Ratan Chand* (28). A very recent case on the point is reported in *Abdul Majid Khan* v. *Saraswati* (18).

On a consideration of all the cases cited

(28) 132 Ind. Cas. 613; A I R 1931 P C 136; 58 I A 173; 53 A 190; (1931) A L J 458; 53 C L J 390. 33 Bom. L R 988; 35 C W N 841; Ind. Rul (1931) P C 197; 34 L W 175; 61 M L J 665 (P C).

above, it will appear that a manager of an ancestral joint family trading business has full authority to take loans and make alienations to raise money for the purpose of that business. Such a transaction will be binding on the entire joint family including the minor members. The creditor is not bound to enquire into the finances of the business so long as the business forms the purpose of the debt. All that is necessary for him to see is that the money is really required for the proper purpose of the business and there is no element of speculation or gambling in the transaction.

In the case before us, it appears that the joint family carried on two businesses. One at Muttra and the other at Delhi. It has been found that the Muttra business was ancestral. If the creditor can establish that money was advanced to the manager for the benefit of the ancestral joint family business at Muttra, then, in my opinion the mortgage made by the manager will certainly bind the minor members of the joint family. I would go further and hold that the transaction will be binding without the proof of "benefit to the estate" provided that the creditor can prove that the loan was taken by the manager of the joint family business for the proper purpose of financing the ancestral joint family business. To a case of this description the ruling of their Lordships of the Privy Council will have no application.

As regards the business at Delhi the lower Appellate Court has not given any finding whether this business was ancestral. All that we know is that this business was not inherited by the joint family as an ancestral business. It appears that it was started by the father of the minors some years before the date on which the mortgage in question was created by him and a part of the loan taken was transferred by the mortgagor to the accounts of this Delhi business. If this business was new business started by the manager of the joint family, then the ruling in *Benares Bank, Ltd.* v. *Har Narain* (7) would apply and a loan taken for financing a new business will not bind the minor members of the joint family. Before the Bench hearing this appeal can decide the question as to whether or no the loan taken for the purpose of this Delhi business is binding on the minors, it will be necessary to determine whether this was a new business started by the manager or whether it was an ancestral business. The decision of this question will depend on the evidence which the parties might have produced or may be permitted to be produced in the case. It was argued before us on the authority of *Benares Bank, Ltd.* v. *Har Narain* (7) that every business started by a manager of joint Hindu family which does not descend by inheritance as ancestral business, should be deemed to be a new business which can never be ancestral. I find myself unable to agree with this contention. The learned Counsel for the appellant relied on the following observations made by their Lordships of the Privy Council in *Benares Bank, Ltd.* v. *Har Narain* (7) :

"It was urged on behalf of the Bank that this business was ancestral and that the minors were liable for the debt to the extent of their interest in the joint family property. On the other hand, it was contended that the business was the personal business of Jagannath and the family had no interest in it. Their Lordships have examined the evidence, and they consider that the business was started by Jagannath and Raghunath as managers of the family. The business therefore cannot be said to be ancestral so as to render the minors' interest in the joint family property liable for the debts."

It was on the strength of these observations that it was contended that this was a rule of universal application to the effect that a new business started by a manager of a joint Hindu family can never become ancestral property of the joint family. As I have already stated I find myself unable to agree with this contention. The above observations of their Lordships only mean this that there can be no presumption that a business started by a manager of the joint Hindu family becomes ancestral property. This proposition of law is well settled. There can be no presumption that a business started by a manager or a coparcener is to be treated as ancestral property. This is a point which is to be decided on the facts of each case. It is very necessary to bear in mind that the case of *Benares Bank, Ltd.* v. *Har Narain* (7) was one in which the joint family had not been carrying on any ancestral trading business. On the other hand, it was a case, in my opinion, of a joint family in which there was no ancestral business. It is further important to note that in *Benares Bank, Ltd.* v. *Har Narain* (7), there was no plea taken by the Bank that new business had become ancestral because it had been acquired with the aid of the joint family funds. In my opinion *Benares Bank, Ltd.* v. *Har Narain* (7) is an authority for one proposition only and that is that a loan taken by a manager of a

joint Hindu family, for the purpose of starting a new business will not bind the other members of the joint family. There may be cases in which the manager of a joint Hindu family starts a new business with the aid of joint family funds. Then there may be cases in which a co-parcener starting a business may blend it with the joint family property. In both these cases the business will be treated as ancestral property.

As I have already remarked there had been no plea in *Benares Bank, Ltd.* v. *Har Narain* (7), that the new business started by the managers had been financed by the joint family income or had been treated by the co-parcener as a joint family business; therefore, their Lordships were not considering this aspect of the case. It appears to me that the law on this point is well settled. Accumulations of income of ancestral property, property purchased or acquired out of the income or with the assistance of ancestral property, the proceeds of sale of ancestral property, and property purchased out of such proceeds are ancestral property. Mulla's Hindu Law, p. 246, Edition 7.

In the case before us, if it be found that the Delhi business was started by the manager out of the income of the ancestral family business at Muttra, then the Delhi business, according to Hindu Law, would be considered to be ancestral family business of the joint family. A loan taken for the purpose of financing the Delhi branch would be binding on the minors if the creditor is able to establish that the loan was taken for the purpose of the business. It is not correct to say that every new business started by the manager of a joint Hindu family carrying on an ancestral trading business is a new business which can never be ancestral. There are in this country any number of trading families who have an ancestral business which has branches at various places. Take the following example: A joint family is carrying on an ancestral trading business at Allahabad. Its members decide to open a branch at Nainital, because they consider that if a branch is opened at Nainital, it will yield a good profit. Stocks for the Nainital Branch are purchased out of the assets held by the joint family business at Allahabad, can it be said that the business started at Nainital is not ancestral family business? I think not.

The real test for deciding whether a business is a new business wholly unconnected with the joint family ancestral business, or is an extension of that business is to determine the source which supplied the money with which the new business was started. If the assets or income of the joint family ancestral funds are utilized for opening a new branch, then, the new branch will form part of the old business. On the other hand, if the business is started by a manager without any aid from the ancestral family assets, then, it will be a new business. In that new business the other members will have no right nor will any liability attach to them in respect of it. But merely because a business has been extended, it cannot be inferred that the extension was a new business started by the manager separately. In *Benares Bank, Ltd.* v. *Har Narain* (7), their Lordships have referred to one of their previous ruling, *Sanyasi Charan* v. *Krishnadhan Banerji* (8). In that case their Lordships held that the *karta* of a joint family cannot impose on a minor member of it the risk and liability of a new business started by himself and the other adult members. In that case it was found that the money had been borrowed exclusively for the purpose of the orphanage business. Their Lordships further found that this new business was neither the ancestral nor an extension of the ancestral business. These observations clearly go to show that the decision in the case would have been different if their Lordships had found that the money had been borrowed for the purpose of ancestral business or for the purpose of an extension of the ancestral business. They add further that there can be an extension of the ancestral business. I am therefore of opinion that the *Benares Bank, Ltd.* v. *Har Narain* (7), would not be applicable to a case in which money had been borrowed or alienation made by the manager of an ancestral joint family business for the proper purpose of financing that ancestral joint family business. The question as to whether in a particular case a business newly started or old, is an ancestral family business will depend on the evidence produced in each case. I have discussed this aspect of the case at some length though for the purpose of answering the reference made to the Full Bench it was not altogether necessary to do so. My reason is that I wish to make it clear that the *Benares Bank, Ltd.* v. *Har Narain* (7), will have no application to the case before us in case it is found that the alienation

was made by the manager for the purpose of the ancestral business carried on by the joint family. On the other hand, if the business for which the money was borrowed is a new and non-ancestral business started by the father, then, the sons are not liable for the payment of the loan contracted by the father unless it be established that the transaction was for the benefit of the family and estate or was for legal necessity.

As regards the second point about appropriation, I agree with the view taken by the learned Chief Justice. For the reasons given above I agree with my Lord the Chief Justice that the two questions referred to the Full Bench should be answered as proposed by him.

By the Court.—Our answers to the questions referred to us are as follows :

(1) Where the business to finance which money has been borrowed is a new business, the sons are not liable for the payment of the loan contracted by the father for this business, unless the transaction was for the benefit of the family and to the benefit of the estate or it was supported by legal necessity. (2) The payment of Rs. 3,000 should be considered to be repayment of the debt incurred for the benefit of the ancestral property and partly for advancing the Delhi business and appropriated accordingly.

N. *Reference answered.*

LAHORE HIGH COURT

Criminal Appeal No. 60 of 1933

May 18, 1933

BHIDE AND CURRIE, JJ.

GUJAR SINGH—ACCUSED—APPELLANT

versus

EMPEROR OPPOSITE PARTY

Evidence Act (I of 1872), ss. 114, 133—Statement of approver uncorroborated and unconvincing—Benefit of doubt to accused.

Where there is no material corroboration of the statement of the approver and the statement in itself is not convincing, it is most unsafe to convict the accused on that statement and he should be given the benefit of the doubt.

Cr. A. from an order of the Sessions Judge, Gurdaspur, dated December 20, 1932.

Mr. *L. Saunders*, for the Appellant.

Mr. *Muhammad Monier*, for the Crown.

Currie, J.—Two men, Gujar Singh, a *Jat*, and Puran, a *Sadhu*, were tried on a charge of murdering, in conjunction with Dharam Singh, approver, one Radha, a *Jhiwar*, on the night of April 30/May 1, 1932. The present appellant Gujar Singh has been convicted and sentenced to death, while Puran was acquitted. It may be noted that two of the assessors were not satisfied that the bones recovered were those of Radha or that Radha had been murdered. The other two assessors held that he had been murdered by Gujar Singh, and one of them considered Puran also guilty. According to *Musammat* Tej Kaur (P. W. No. 6) her husband Radha had gone on Saturday, April 30, to Qadian, to buy some cloth and to obtain funds by the sale of gold *phuls* belonging to her. On his return he went to sleep at his shop. When she went to the shop next morning she found him absent; the *charpoy* had not been spread but was standing up, while the bedding was lying on the ground. She made enquiries for two or three days and eventually sent Maghar, *Jhiwar* (P. W. No. 8) to see if her husband was with his sister *Musammat* Kesari (P. W. No. 7) at Saidowal. He had not been there and *Musammat* Kesari returned with Maghar to Aulakh village. The two women made further search and eventually encountered Gurdit Singh (P. W. No. 11), who informed them that Labhu *Brahman* (P. W. No. 9) had seen dogs devouring a dead body in a field between Aulakh and Sooch villages. The women proceeded there and, in a depression, in a filed belonging to Bhan Singh, found some bits of cloth, principally pieces of a shirt, a tuft of hair and a pencil, which were recognised as belonging to Radha. That night, May 7, *Musammat* Tej Kaur went and lodged the report Ex. P. C. at Qadian Police Station, at 11 P. M. Next day, May 8, the Sub-Inspector Dula Singh (P. W. No. 27) proceeded to the scene and, on further search, recovered a human nail, a human tooth pegged with gold, some bits of skin and some more shreds of cloth. On the same day Gurdit Singh *Lambardar* threw suspicion on Gujar Singh, Dharam Singh and Puran, none of whom were to be found in the village.

The following day, information was received from the *Lambardar* of Sooch (P. W. No. 19) that a human skeleton was lying on the brink of a pond and, on going there, a skull and some bones were discovered near a pool of water and some clothes were recovered from the water which have been identified by *Musammat* Tej Kaur as those of her husband Radha. The bones

are described by P. W. No. 1 Captain Ram Lal, Assistant Surgeon. He was of opinion that they were those of a male but was unable to suggest any cause of death. At his suggestion they were submitted to the Professor of Anatomy, Captain Nat (P. W. No. 2), who has expressed the opinion that the bones are those of a man aged from 40 to 50. This witness was unable to say definitely whether the tooth recovered belonged to the skull from which the four upper incisors were missing though it did fit the socket. Dharam Singh and Puran were arrested on May 9, and the Sub-Inspector ascertained that Gujar Singh had gone to Kali Mitti in Shinghbhum District and steps were taken for his arrest.

On May 9, Dharam Singh produced a bamboo-stick and Rs. 10 in cash. The Sub-Inspector, on May 11, took the two women, *Musammat* Hussaini and *Musammat* Ratno, and the two suspects to Batala to have their statements recorded. They were not recorded that day but the following day the statements were recorded by the *Tahsildar* at Aliwal. The statements of Dharam Singh and Puran were in the nature of confessions. That confession of Puran has been ruled out by the learned Sessions Judge as inadmissible, holding that the *Tahsildar* being a Magistrate of the Second Class and not especially empowered, had no authority to record it. Mr. Muhammad Monier, who appeared for the Crown, contended that it should be taken into consideration on the ground that it could be considered to be an oral confession to Sube Khan, *Tahsildar*. No attempt, however, was made by the prosecution to introduce it in this manner and, in my opinion, it cannot, therefore, be used. Apart from this, it has been retracted and its intrinsic worth must be negligible. Gujar Singh was arrested and sent up from Singhbhum reaching Qadian on the night of May 22, and, on May 23, he produced some earrings (*anantis*), which were alleged to be the property of Radha. Finally on May 31, the District Magistrate tendered a pardon to Dharam Singh whose statement was recorded by a Magistrate of the First Class, on June 1, 1932. That the bones are those of Radha admits of little doubt, and taking into consideration the circumstances under which they were found, it is practically certain that he was murdered. The question is whether it has been proved that Gujar Singh and the approver were his murderers.

As regards the alleged motive for the murder, according to the approver, Gujar Singh had a liaison with *Musammat* Hussaini (P. W. No. 12), the wife of Mina. Some three weeks before the murder Gujar Singh took *Musammat* Hussaini into his *deorhi*. She was followed by Gaman (P. W. No. 14), a brother in-law of *Musammat* Hussaini, who quarrelled with him. *Musammat* As Kaur, Gujar Singh's wife, appeared on the scene and threatened that, if Gujar Singh had behaved in this manner, she in return, would take Radha as her paramour, and *Musammat* Hussaini alleges that *Musammat* As Kaur actually did so. It may be noted that this story of *Musammat* As Kaur threatening to take up with Radha did not appear in the statements of *Musammat* Hussaini or Gaman as made originally to the Police, and this part of the story at least would appear to be a subsequent addition. The approver further alleges, and in this he is corroborated by *Musammat* Hussaini, that Radha had formed the liaison with *Musammat* Hussaini to which Gujar Singh had taken exception. There is no independent evidence to support this. As regards the approver himself he states that he was on bad terms with the deceased Radha because he had an intrigue with Radha's sister-in-law *Musammat* Ratno (P. W. No. 13) to which Radha had taken exception. As a blind, however, he had got Radha, about a week prior to the murder, to assist to take possession of the house of one Shaman against whom he had obtained a decree. There is considerable discrepancy between the statements of the approver and *Musammat* Ratno as to the details of their liaison, and I am not satisfied that their statements are true.

The approver Dharam Singh's is the sole evidence as to what is alleged to have happened. (His Lordship then discussed the evidence of the approver and other circumstances in the case, and concluded). There is thus no material corroboration of the statement of the approver. As already remarked, the statement in itself is not convincing and, in my opinion, it would be most unsafe to convict the appellant on the statement of Dharam Singh alone, and I would give him the benefit of the doubt and acquit him.

Bhide, J.—I agree.

D. *Accused acquitted.*

MADRAS HIGH COURT

Civil Appeal No. 126 of 1929
April 20, 1934
Ramesam and Curgenven, JJ.

S. A. R. M. S. P. A. ANNAMALAI CHETTI and another—Appellants

versus

S. A. R. M. S. P. PALANIAPPA CHETTIAR and others—Respondents

Hindu Law—Joint family—Partition—Plaintiff's right to interest subsequent to suit—Difference between claim to interest on amount due to plaintiff and claim to share of interest received by family pending suit.

In a suit for partition, the plaintiff is entitled to get his share of the income which has accrued due to the family by way of interest between the date of suit and the date of the decree. The claim for interest in such a case is not for interest on a sum found due by the defendants to the plaintiff but is for the plaintiff's share of the income of the family which income is derived in the shape of interest, and there is no principle of equity or justice in disallowing interest to the plaintiff in such a case *Diwan Chand Kirpa Ram & Co.* v. *Weld & Co.* (2), *Bruland* v. *Earle* (3), *Jyotibati Chaudharain* v. *Lachhmeshwar Prasad* (4), *Ramaswamy Aiyar* v. *Subramania Ayyar* (5), *Turner* v. *Burkinshaw* (6) and *Ghulusam Bivi* v. *Ahamadsa Rowther* (8), distinguished. *Kesho Ram* v. *Dina Nath* (7), relied on. *Hiralal Ichhalal* v. *Narasilal Chaturbhujdas* (9), referred to.

A. against the decree of the Court of the Subordinate Judge of Sivaganga, dated October 31, 1918, in O. S. No. 65 of 1925.

Messrs. *S. Varadachariar* and *V. Ramaswamy Ayyar*, for the Appellants.

Mr. *K. V. Krishnaswamy Ayyar*, for the Respondents.

Judgment.—This appeal arises out of a suit by Nattukottai Chetti (1st plaintiff) against his father (1st defendant), his half-brothers (2nd, 3rd and 7th defendants), step-mother (4th defendant) and half-sisters (5th and 6th defendants) to recover his share of the family property. The 2nd plaintiff is the son of the 1st plaintiff. The matter came up on a former occasion before this Court and was disposed of by Kumaraswami Sastri, J. and one of us. We then found that the plaintiffs were entitled to one-fourth share of the family property and the case was sent back for ascertaining the amount due to the plaintiffs in respect of the various items claimed. The Subordinate Judge has now passed a final decree. The plaintiffs have filed this appeal and there is also a memorandum of objections filed by defendants Nos. 1, 4 and 7 (respondents Nos. 1, 3 and 4).

[Their Lordships after dealing with certain items, which are not material for the purposes of this report, proceeded :]

The next item argued by the appellants relates to interest from the date of plaint up to the date of decree. Interest prior to the date of plaint was allowed by the Commissioner. Nothing more was said about further interest before the Subordinate Judge. It is now suggested for the appellants that the subsequent interest was overlooked by the Subordinate Judge. It is urged for the respondents that the plaintiffs never claimed it. But it does not appear that there is any particular stage at which any specific claim should be made about this item. The plaintiffs might have mentioned it in the course of the arguments before the Subordinate Judge but it cannot be said that they should lose it simply because no express reference was made to it. It has been argued by Mr. K. V. Krishnaswami Ayyar for the respondents that the plaintiffs are not entitled to this item of interest in any event and he relied on some decisions, which will be presently referred to. In *Suleman* v. *Abdul Latif* (1), it was observed by the Privy Council that in an action to dissolve and wind up the affairs of a partnership, interest should be allowed to the plaintiff only from the date of the final decree. Having regard to the observations at p. 479 of Lindley on Partnership, this principle must be confined to cases of partnership. It is observed in Lord Lindley's book that on principle each partner ought to be entitled to interest on sums overdrawn by the other partners. But the practice is the other way and apparently the decision in *Suleman* v. *Abdul Latif* (1), must be taken to be in conformity with the English practice. In *Diwan Chand Kirpa Ram & Co.* v. *Weld & Co.* (2), the case relates to a claim for damages for breach of contract. The lower Court did not grant interest up to the date of the decree. Their Lordships observed that such interest was not a matter of course. They made observations in favour of the plaintiff but were not prepared to vary the decree on mere conjecture. This case does not help the respondents. In *Bruland* v. *Earle* (3), a sum of money was found due from the defendant and the question related to a direction for payment of interest on the amount so found and it was observed that such a matter was a matter for the discretion of

(1) 124 Ind. Cas. 891; 58 C 208 at p 212; A I R 1930 P C 185; (1930) A L J 868; 34 C W N 737; Ind. Rul. (1930) P C 267; 32 Bom. L R 1152; 59 M L J 121; 52 C L J 10; 32 L W 184; 24 P L R 328 (P C.)

(2) 88 Ind. Cas. 54; (1925) M W N 459; A I R 1925 P C 150

(3) (1905) A C 590.

the Court. But in the present case it must be noticed that the plaintiffs' claim is not strictly for interest. The plaintiffs' claim is for a portion of the income of the family during the years that intervened between the date of suit and the date of decree. It is merely an accident that such income is in the shape of interest. The claim is not for interest on a sum found due by the defendants to the plaintiffs but is for the plaintiffs' share of the income of the family which income is derived in the shape of interest. This circumstance distinguishes the case before us from the case in *Bruland* v. *Earle* (3), as well as the case in *Diwan Chand Kirpa Ram & Co.* v. *Weld & Co.* (2). In *Jyotibati Chaudharain* v. *Lachhmeshwar Prasad* (4) and *Ramaswamy Aiyar* v. *Subramania Ayyar* (5), the question related to interest on mesne profits, and in this respect, resemble the two cases already distinguished and may be distinguished similarly. The case in *Turner* v. *Burkinshaw* (6), relates to a claim by a principal against an agent, and as the agent should have the money always ready to be accounted for to the principal, it cannot be presumed that he earns interest on the amount. That cases should be distinguished on that ground. In the case before us the parties belong to a trading family and the presumption is that the money of the family is always invested. As a matter of fact the whole evidence shows that the 1st defendant has always been investing his moneys. In *Kesho Ram* v. *Piru Mal Dina Nath* (7), Broadway, C. J., observed that there was no reason for disallowing the interest prayed for. He also observed that the Subordinate Judge obviously lost sight of this question of interest and except the omission there was nothing to show that he refused to grant interest. There is no principle of equity or justice in disallowing interest to a member of the family during the period of the litigation though presumably the defendants have been making income in the shape of interest. The case in *Ghulusam Bivi* v. *Ahamadsa Rowther* (8), relates to mesne profits only and the principle of that decision ought not to be extended to claim for interest. The decision in *Hiralal Ichhalal* v. *Narasilal Chaturbhujdas* (9), related to the application of the rule of *damdupat* in a suit for redemption. The first Court declined to award interest and no complaint was made about it before the District Judge and the High Court refused to interfere. We do not think that this decision helps the respondent. The plaintiffs are, therefore, entitled to the interest claimed at 9 per cent.

There is another item of Rs. 1,250 which relates to the marriage expenses of the 7th defendant. The 7th defendant is a son of the 1st defendant born after the filing of the plaint. The High Court on the former occasion disallowed the marriage expenses of the 1st defendant's sons. This is obviously a mistake for the marriage expenses of the daughter of the 1st defendant who is not a party to this suit and whose marriage expenses ought to be provided for as in the case of the 5th and 6th defendants. This item is the subject of grounds Nos. 4 and 5 of the memorandum of objections. It is enough to correct the direction of the Subordinate Judge to be one providing for the marriage expenses of the daughter Alagammi instead of the 7th defendant.

Now we come to the memorandum of objections. The first item relates to a sum of Rs. 1,064-3-6. The respondents contend that this item is part of the *stridhanam* amount of Peria Kalyani invested with M. R. S. Firm of Pegu and that there is nothing to show that the 1st defendant collected this item of *stridhanam*. The lower Court allowed this item in favour of the plaintiffs. If really this is an item of *stridhanam* and not collected by the 1st defendant, no doubt the contention of the respondents would be good. But if there is such a *stridhanam* to which Peria Kalyani was entitled, probably it would have been included in the amount of *stridhanam* returned to the family or conversely if such a gift was made to Peria Kalyani, it would appear as an item of expense amongst the various items of gift made to Peria Kalyani. It does not so appear. On the other hand looking at the fact that the 1st defendant had been investing various sums of money in the names of the female members of the family and that he is unable to give any intelligible account of this item, we must hold that it is not proved to be the *stridha-*

(4) 126 Ind. Cas. 372; A I R 1930 Pat. 260; Ind. Rul. (1930) Pat. 612.
(5) 74 Ind. Cas. 804; 46 M 47; 16 L W 297; 43 M L J 406; A I R 1923 Mad. 147.
(6) (1867) 2 Ch. App. 488.
(7) 104 Ind. Cas. 146; A I R 1927 Lah. 679; 9 Lah. L J 347.
(8) 51 Ind. Cas. 140; 42 M 296; 9 L W 541; (1919) M W N 284.
(9) 18 Ind. Cas. 909; 37 B 326; 17 C W N 573; 13 M L T 415; (1913) M W N 428; 11 A L J 432; 17 C L J 474; 15 Bom. L R 483; 25 M L J 101; 40 I A 68 (P C.)

nam of Peria Kalyani at all. He says in his deposition:

"I have not entered in the marriage expense accounts Rs. 1,000, in the name of Kalyani for being invested with M. R. S. of Pegu. The entry of Rs. 1,064-4-6 in Ex. VII M under date 9th *Purattasi*, *Pingala* has not been written off in the day book. It might have been paid V. E. A. out of the amounts invested with them in Kalyani's name."

This is in re-examination. In cross-examination he says:

"This amount is not now with the said firm. I do not remember what became of the same. I cannot say who got it back. I cannot say how it began."

After such answers by the 1st defendant it is impossible to decide this item in his favour. This item must, therefore, be disallowed.

The next item relates to the marriage expenses of the 5th defendant. It is argued that only Rs. 5,000 was given for the marriage of the 5th defendant whereas the actual expenses amounted to Rs. 11,906. This marriage was performed during the pendency of the suit. We think it has not been proved that the 1st defendant spent Rs. 11,906, for the marriage of the 5th defendant. There is merely the bare statement of the 1st defendant and there is nothing else for proving this item. This item must, therefore, be disallowed. The amount of Rs. 1,250, will be deducted from any sum due by the 1st defendant to plaintiffs up to date of marriage and the balance will carry interest.

The next item is an item of Rs. 2,000. This seems to be a slip and if the figures show that it has been included in the final figures, the learned Advocate for the appellants agrees that it may be allowed.

The last item in the memorandum of objections relates to the correctness of the figure relating to interest. This objection was not taken in the Court below and must be disallowed.

There is only one item that remains, *viz.*, costs. The Subordinate Judge allowed the plaintiffs three-fourths costs. The suit was originally for the recovery of half of the family property on the ground of a special agreement that he was entitled to such a share described as *Pathribhagam*. But in the result they have been allowed only one-fourth share and we think that they should have been awarded only half costs. We have already observed that as to the marriage of the 1st defendant's daughter a sum of Rs. 5,000 ought to be allowed and the reference to the 7th defendant in the lower Court's judgment is a mistake. This disposes of all the grounds in the memorandum of objections.

A decree will be passed in accordance with the above findings. As the appellants have substantially succeeded they will get their costs in the appeal calculated on Rs. 21,727 *i. e.* excluding Rs. 1,250 which is merely a mistake. The memorandum of objections has failed in respect of substantial items and has succeeded in respect of only some small items. The respondents will pay half the costs of the appellants on the memorandum of objections.

It has been suggested before us by the respondent that the house should be sold and the proceeds divided in accordance with the Partition Act. This suggestion was not made in the Court below and we cannot entertain it here.

The respondent also desires that he should be allowed a right of way through the *verandah* adjoining to *D* and *E* series rooms allotted to him but it appears that this *verandah* is common to the parties as conceded by the appellants.

Order.—(*April 20, 1934.*)—The third item in the appeal will carry interest at 9 per cent. per annum from date of plaint to date of decree and further interest at 6 per cent. per annum on the aggregate amount. Otherwise the decree as drafted will remain.

A.

LAHORE HIGH COURT

Second Civil Appeal No. 1200 of 1933
April 26, 1934
ABDUL RASHID, J.

MUNSHI RAM—DEFENDANT—APPELLANT
versus
RAM SARAN AND ANOTHER—PLAINTIFFS—RESPONDENTS

Suits Valuation Act (VII of 1887), s. 9—Rules framed under, by Lahore High Court, r. 4—Suit for perpetual injunction and order to demolish wall—Valuation of—Appeal in suit—Whether lies to District Judge—Punjab Courts Act (VI of 1918), s. 38.

A suit, in which the plaintiffs in the plaint seek to establish or to negative any right to maintain or close a door or a widow or raise or alter or demolish a wall, must be valued by the plaintiff at a sum exceeding Rs. 100 and not exceeding Rs. 500, according to r. 4 framed by the Lahore High Court under s. 9 Suits Valuation Act. A suit for issue of a perpetual injunction ordering the defendant to demolish a wall built by him near the plaintiff's ventilator and to restrain him from building a second storey on his shop within five feet of the plaintiffs' windows. falls under this rule and must be valued at a sum exceeding Rs. 100 and not exceeding

Rs. 500. In such a suit a first appeal lies only to the District Judge.

S. C. A. from the decree of the First Class Sub-Judge, Sialkot, dated May 25, 1933.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Achhru Ram*, for the Respondents.

Judgment.—The facts bearing on the question of law involved in this appeal may be shortly stated. On March 15, 1932, the plaintiffs, Ram Saran and Ram Dhan, sons of Mohan Lal, instituted a suit for the issue of a perpetual injunction to the effect that the defendant be ordered to demolish the wall built by him near plaintiff's *raushandan* (ventilator), and that he be restrained from building a second storey on his shop within five feet of the window of the plaintiffs. The value of the suit for purposes of jurisdiction and court-fee was stated to be Rs 10. The defendant objected that the value for purposes of jurisdiction and court-fee had been wrongly fixed. As a result of this objection the learned Subordinate Judge passed an order on April 6, 1932, directing the plaintiffs to correct the plaint by raising the value for the purposes of jurisdiction to Rs. 110. On February 28, 1933, objection was taken to the value for purposes of court-fee, and it was contended on behalf of the defendant that as two reliefs had been claimed, court-fee was payable on each of those two reliefs. Thereupon the value of the suit for purposes of court-fee and jurisdiction was fixed at Rs. 20.

The trial Court dismissed the plaintiffs' suit with costs on March 14, 1933. The plaintiffs preferred an appeal to the Senior Subordinate Judge. The appeal was accepted and a decree, as prayed for in the plaint, was passed in favour of the plaintiffs. The defendant has preferred a second appeal to this Court and it has been urged strenuously on his behalf that the learned Subordinate Judge had no jurisdiction to hear the appeal of the plaintiffs, and that the plaintiffs ought to have preferred an appeal to the District Judge. In my opinion this objection is sound and must be given effect to. In the rules framed by this Court under s. 9 of the Suits Valuation Act, it is laid down that a suit in which the plaintiffs in the plaint seek to establish or to negative any right to maintain or close a door or a window or raise or alter or demolish a wall, must be valued by the plaintiff at a sum exceeding Rs. 100 and not exceeding Rs. 500. The relief claimed by the plaintiffs comes within the purview of the rule mentioned above and, therefore, the plaintiffs' suit must be valued for purposes of jurisdiction at any sum exceeding Rs. 100 and not exceeding Rs. 500 which the plaintiffs may fix. Objection regarding valuation having been raised at the earliest possible opportunity, s. 11, Suits Valuation Act, cannot be availed of on behalf of the respondents. It has been held in *Chelor* v. *Kali Das* (1), and *Banni* v. *Mangu* 114 Ind. Cas. 440 (2), that where an inferior Court disposes of an appeal which should have been heard by a superior Court, there is ground for holding that the parties have been prejudiced.

It was contended on behalf of the respondents that the plaintiffs' suit does not fall within the purview of r. 4 of the Rules framed under s. 9, Suits Valuation Act. It was maintained that plaintiffs in the plaint do not seek to establish any of the rights mentioned in r. 4, and merely want to have their right of easement recognised. I hold that there is no force in this contention. In essence the suit of the plaintiffs is to get the wall of the defendant demolished and to prevent him from building the upper storey of his shop within five feet of their (the plaintiffs') window. In this view of the case the plaintiffs' suit clearly falls within the purview of r. 4 referred to above. For the foregoing reasons I accept this appeal, set aside the order of the learned Senior Subordinate Judge passed as an Appellate Court and direct him to return the memorandum of appeal to the plaintiffs for presentation to the proper Court. As the defendants' Counsel did not raise the question of jurisdiction before the Senior Subordinate Judge, I leave the parties to bear their own costs in this Court.

N. *Appeal allowed.*

(1) 44 Ind. Cas. 816: A I R 1918 Lah. 369; 21 P R 1918.

(2) 114 Ind Cas. 440.

CALCUTTA HIGH COURT

Letters Patent Appeal No. 19 of 1933

August 21, 1934

MITTER AND NASIM ALI, JJ.

GOPI KRISHNA SAHA—PLAINTIFF—APPELLANT

versus

SURENDRA NATH CHAUDHURY AND OTHERS—DEFENDANTS—RESPONDENTS

Landlord and tenant—Claim for additional rent

on ground of excess area—Onus—Presumption that standard of measurement prevalent when Record of Rights is finally published is also standard at inception of tenancy—Practice—Finding of fact based on evidence, whether final.

In a suit for additional rent for excess area the burden of proving that the defendants are holding excess land for which they are liable to an additional rent is in the first instance on the landlord.

In such a case the plaintiff is entitled to the benefit of the presumption that the standard of measurement which was prevalent at the date when the Record of Rights was finally published, was also the standard of measurement at the inception of the tenancy. *Ishan Chandra Mitter* v. *Ramranjan Chakravarty* (1), *Birendra Kishore* v. *Bhole Mia* (2) and *Sasanka Kumar Nayak* v. *Hitlal Sow* (3), referred to.

A finding of fact arrived at by a Court of fact is final, if such finding is based on evidence.

L. P. A. against the judgment of Mr. S. K. Ghose, dated June 1, 1933.

Messrs *S. C. Basak* and *Surendra Nath Basu* (*Sr.*), for the Appellant.

Messrs. *Sarat Chandra Roy Chaudhury* and *Nagendra Nath Chaudhury*, for the Respondent.

Mr. *Bireswar Chatterjee*, for the Deputy Commissioner.

Mitter, J.—This is an appeal under s. 15, Letters Patent, from a judgment of my learned brother S. K. Ghose, J. The suit in which this appeal arises was brought by the plaintiff who is the appellant before us for additional rent for excess area. The Court of first instance dismissed the suit. The lower Appellate Court gave a modified decree to the plaintiff granting additional rent for an excess of 70 *bighas* odd only. On appeal to this Court, S. K. Ghose, J., has allowed the appeal and has restored the decree of the Munsif dismissing the plaintiff's suit. Hence this present appeal under s. 15, Letters Patent.

The plaintiffs case is that he has purchased the *putni* and *dar putni* rights of *Mouza* Chatiani in the year 1334 B. C. The defendants are said to be the holders of a *jote* bearing rent of Rs. 34-10-8 per year. The case made by the plaintiff in the plaint further is that this rent was assessed with reference to an area of 78 *bighas* odd without specific boundaries on a standard of 18 inches to a cubit and that the *jama* was not a *mokarari jama*. It was further stated that according to the finally published Record of Rights, which records were published in 1925, the defendants are possessing an area of 180 *bighas* and it is said that the defendants are liable to additional rent for excess area of 102 *bighas*. On this basis the plaintiff claims a sum of Rs. 126 odd per year. The defence of the defendants in substance is that the holding is a *mokarari* holding which has been held by them from very ancient times, even from before the permanent settlement of 1719 and that the existing rent is a consolidated rent and was not with reference to measurement of any particular area. It is further stated that measurement, if any, was made according to a standard of 26 inches per cubit and according to such standard of measurement the area would be 109 *bighas* odd. It is further said that there was no encroachment on the lands of the *zamindar* or the *patnidars*. The burden of proving that the defendants are holding excess land for which they are liable to an additional rent is undoubtedly in the first instance on the landlord.

The origin of the tenancy is lost in antiquity and it is very difficult at this distance of time to give evidence to show as to what was the area which was actually settled with the defendants. It is said on behalf of the plaintiff that there is an admission by the defendants that there was a *potta* in respect of this tenancy that, according to the case of the defendants, that *potta* was stolen and it would be presumed, it is said, that the *potta*, if produced, would have gone against the defendants. The Subordinate Judge has relied on an admission of defendant No. 1 in certain previous deposition wherein it is stated that the settlement of the *jote* was with reference to area and it is further stated that the area was 110 *bighas* measured by the standard of measurement of 26 inches to a cubit. The Subordinate Judge also rested his decision on his view with regard to the standard measurement, which he held to be 18 inches to a cubit which is also the present standard of measurement on the basis of which lands have been surveyed by the Survey Officers in preparing Records of Rights, and on this basis accepting the original holding to be 109 *bighas* as admitted by the defendants, he has granted an enhancement in respect of the excess area, namely, 180 *bighas*. It was complained before S. K. Ghose, J., that the finding about this standard of measurement was based on no evidence and was, therefore, liable to be challenged in second appeal. That contention was accepted by S. K. Ghose, J. Before us it has been contended by Dr. Basak who appears for the appellant that the learned Judge of this Court was bound to accept the finding of fact on the question of

standard of measurement arrived at by the lower Appellate Court. Undoubtedly a finding of fact arrived at by a Court of fact is final if such finding is based on evidence. In the present case the position is this: the plaintiff is entitled to the benefit of the presumption that the present standard of measurement was the standard which obtained at the time of the inception of the tenancy. There are authorities to that effect in the books. Reference may be made to a very early case, namely, *Ishan Chandra Mitter* v. *Ramranjan Chakravarti* (1) where Ashutosh Mookerjee, J., stated this (at p. 132*).

"Here the plaintiff alleges that the standard of measurement now prevalent is a cubit of 18 inches, and that this measure was in use when the leases were granted in 1859. The defendant asserts, on the other hand, that the standard of measurement prevalent in 1859 was a cubit of 20 inches. Of this he gives no evidence, the District Judge has accordingly held that the measure now in use was also in use in 1859. It is disputed that whichever measure be adopted the land within the boundaries would be in excess of the area mentioned as that with reference to which the rent was fixed at the inception of the tenancy; the only question, therefore, is as to the quantity of this excess. It is impossible to say that the District Judge has, under circumstances just stated, erred in holding that the state of things now in existence may be presumed to have existed also in 1859."

The same view was also taken by B. B. Ghose, J. and Panton, J., in *Birendra Kishore* v. *Bhole Mia* (2). There the learned Judges observed this:

"With regard to the question of standard of measurement, the presumption must be that the standard of measurement at the time of letting out was the same as it is now unless anything to the contrary is proved. As there is no proof to the contrary, it must be presumed that the same standard has continued. It is not a case of letting out by a statement of the area, and if the area is found to be in excess of what was let out, the landlord is evidently entitled to increase of rent for such increase of area."

And in a very recent case, Mallik, J., was inclined to take the same view: see *Sasanka Kumar Nayak* v. *Hitlal Sow* (3). Following these authorities undoubtedly the plaintiff in this case is entitled to the benefit of the presumption that the standard of measurement which was prevalent at the date when the Record of Rights was finally published was also the standard of measurement at the inception of the tenancy. But in the present case that presumption has been rebutted by the evidence which has been afforded by Thuller's Manual of Surveying 1875 Edition at p. 402 from which it would appear that on account of the difficulties arising out of the varying standards of measurement, the Government laid down a uniform standard of measure in 1849; and this has been referred to by the Munsif in his judgment at p. 7 of the paper-book. The presumption which we could carry back beyond 1849 has been rebutted by the evidence in this particular case, that there was no uniform standard of measurement prior to 1849. The cases in which the presumption has been pleaded are all cases after the year 1849. Besides, in those cases the Courts had not the evidence which has been placed before them that the Government had introduced a uniform standard of measurement after 1849 so far as the measures with which the Government had to deal were concerned. We are, therefore, of opinion that the learned Judge of this Court has rightly stated that there is no proof as to what was the standard of measurement beyond the year 1849. There is no doubt that this tenancy was created nearly half a century before 1849. Therefore the basis on which the lower Appellate Court came to the conclusion that the plaintiff had proved that the standard of measurement at the time of the inception of the tenancy was 18 inches to a cubit, is false, and the learned Judge of this Court was right in interfering with that finding which was based on no evidence in the case. In these circumstances we are of opinion that the plaintiff has failed to discharge the burden of proof for establishing the excess of area for which he claims additional rent. The appeal accordingly fails and it is dismissed with costs.

D. *Appeal dismissed.*

(1) 2 C L J 125.
(2) 97 Ind. Cas. 385; A I R 1927 Cal. 15.
(3) 145 Ind. Cas 856; A I R 1933 Cal. 617; 60 C 431; 37 C W N 450; 6 R C 151.

*Page of 2 C. L. J.—[*Ed.*]

ALLAHABAD HIGH COURT

First Civil Appeal No. 144 of 1932
November 24, 1933
NIAMAT-ULLAH AND BAJPAI, JJ.
Musammat RASOOLAN BIBI—APPELLANT
versus
Musammat RAM KUAR AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1, O. I, r. 3—Mortgage suit—Person claiming ownership in derogation of title of mortgagor—Whether necessary party to suit—Determination of such title to be avoided in suit

A person who claims the right of ownership in a mortgaged property in denial and derogation of the

mortgagor, is not a necessary party in the mortgage suit. As the determination of his title in the suit is bound to lead to confusion, it should be avoided. *Radha Kunwar* v. *Reoti Singh* (1) and *Gobardhan* v. *Manna Lal* (2), referred to

F. A. from an order of the Sub-Judge, Allahabad, dated June 7, 1932.

Mr. *S. N. Seth*, for the Appellant.

Mr. *Damodar Das*, for the Respondents.

Judgment.—This is an appeal by the defendant, *Musammat* Rasoolan Bibi, against an order of remand passed by the lower Appellate Court. The plaintiff, *Musammat* Ram Kuar, brought a suit for recovery of money and sale on the basis of a mortgage against four defendants, *Musammat* Husaini Bibi, *Musammat* Sajan Bibi, Abdul Ghafur and *Musammat* Rasoolan. Her case against the first three defendants was that they were the representatives of the mortgagor, and as such interested in the mortgaged property and the right to redeem. So far as *Musammat* Rasoolan, the fourth defendant, was concerned, the only allegation against her in the plaint was that she was in possession of the mortgaged property, in what capacity she was in possession was not mentioned. *Musammat* Rasoolan filed a written statement and she claimed to be owner of the property. She denied the mortgagor's title and the mortgagee's right to sue and set up a paramount title in herself. The other defendants also contested the suit. The Court of first instance dismissed the plaintiff's title in its entirety. So far as *Musammat* Rasoolan was concerned, he decided only one issue in controversy between her and the plaintiff. The issue was whether *Musammat* Rasoolan Bibi has been unnecessarily made a party to the suit and is the suit bad against her. The finding of the learned Munsif was that:

"question of paramount title ought not to be gone into in a mortgage suit. Persons claiming paramount title ought not to be made parties to mortgage suit ..... If she has got any title to the house and her rights are affected in any way she ought to get them determined in a separate suit. If the plaintiff or her successors-in-interest or the heirs of Abdulla feel that their rights, if any, in the house cannot be sufficiently enforced because of *Musammat* Rasoolan or her possession over the house, they ought to bring a separate suit against her."

With these observations he held that *Musammat* Rasoolan Bibi upon her plea was unnecessarily made a party to the suit. *Musammat* Rasoolan had further claimed that she had been in possession of the house in suit as owner adversely for over 12 years. The learned Munsif held that it was not necessary to decide that issue. As we stated before, the plaintiff's suit was dismissed in its entirety and, therefore, she went in appeal to the lower Appellate Court. That Court decided in favour of the mortgagee so far as Sajan Bibi and Abdul Ghafur, representatives of the mortgagors, were concerned, and disallowed their objections, but he was of the opinion that it was not right to leave the question of Rasoolan's title to be decided in a separate suit and, he therefore remanded the suit for the decision of *Musammat* Rasoolan's proprietary title which she set up on the ground that she was in possession adversely to the mortgagor for over 12 years.

It is contended before us on behalf of *Musammat* Rasoolan Bibi that the decision of the trial Court was correct inasmuch as she had claimed a paramount title and the determination of her title was absolutely foreign to the mortgage suit. The general provision regarding the joinder of defendants is to be found in O. I, r. 3, Civil Procedure Code, wherein it is stated that all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same transaction is alleged to exist. The special provision regarding mortgage suits is to be found in O. XXXIV, r. 1, Civil Procedure Code, wherein it is stated that subject to the provisions of the Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. Now, it is clear that *Musammat* Rasoolan had nothing to do with the transaction of the mortgage either by herself or by her predecessor, nor can it be said that she had any interest in the mortgage security or in the right of redemption when she, as a matter of fact, says that the mortgagor had absolutely no right to mortgage the property. It is thus clear that the only right which *Musammat* Rasoolan was claiming was the right in the property as owner of the same in denial and derogation of the right of the plaintiff's mortgagor and the determination of such a title in a suit based upon a mortgage was bound to lead to confusion. It was held by their Lordships of the Privy Council in *Radha Kunwar* v. *Reoti Singh* (1), that in a suit for sale under a mortgage joinder, of persons claiming an adverse title was an irregulari-

(1) 35 Ind. Cas. 939; A I R 1916 P C 18; 43 I A 187; 38 A 488; 14 A L J 1002; 20 C W N 1279; 20 M L T 211; (1916) 2 M W N 200; 31 M L J 571; 18 Bom. L R 850; 24 C L J 303; 5 L W 456 (P C).

ty and that it could only tend to confusion. The same view was taken in the case of *Gobardhan* v. *Manna Lal* (2), where Banerji and Raoof, JJ., held that in a suit brought by a mortgagee to enforce his mortgage, a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit. We are, therefore, of the opinion that the remand of the case for determination of the title of Rasoolan Bibi was absolutely unnecessary.

We, therefore, allow this appeal and set aside the order of remand with costs to Rasoolan Bibi in this Court as well as in the lower Appellate Court. The order of the Court of first instance awarding costs to Rasoolan Bibi is maintained. A decree under O. XXXIV, r. 4, will be prepared against Sajan Bibi and Abdul Ghafur. The plaintiff will be entitled to add his costs to the decretal amount to be recoverable from the mortgaged property. The usual six months are allowed for payment.

N. *Appeal allowed.*

(2) 46 Ind. Cas. 559; A I R 1918 All. 81; 40 A 584; 16 A L J 639.

CALCUTTA HIGH COURT

Civil Appeal No. 28 of 1934

June 20, 1934

COSTELLO AND LORT-WILLIAMS, JJ.

SHAILABALA DASEE—PLAINTIFF—APPELLANT

versus

GOBARDHANDAS LADSARIA—DEFENDANT—RESPONDENT

Civil Procedure Code (Act V of 1908), O. IX, r. 9—Calcutta High Court Rules and Orders (Original Side), Chap. X, r. 36—Res judicata—Suit dismissed under Chap. X, r. 36—Plaintiff, if debarred from bringing fresh suit.

On general principles there is nothing to prevent a plaintiff, whose suit has been dismissed for want of prosecution, from instituting forthwith a suit against the same defendant upon the same cause of action and, in the absence of any rule made by the Court to deal with such a state of affairs, where the suit is dismissed under the provisions of Chap. X, r. 36, Calcutta High Court Rules and Orders (Original Side), the plaintiff is at liberty to bring a fresh suit if he be so minded.

[Case-law referred to.]

C. A. from an Original Suit No 941 of 1931.

Messrs. *Pugh, N. C. Chatterjee* and *S. K. Basu*, for the Appellant.

Messrs. *Roy, S. R. Das* and *S. K. Ray Chaudhuri*, for the Respondent.

Costello, J.—In this appeal from a judgment of Buckland, J., dated January 24, 1934, a point of considerable importance arises. The learned Judge himself said:

"In this case a preliminary point of considerable importance has been raised, on behalf of the defendant, by the learned Advocate-General."

The suit was brought to recover a sum of Rs. 50,000 or such damages as the Court might allow, for breach of a covenant contained in a lease, whereby the defendant covenanted to return the property demised by the lease in good order and condition. It appears that a suit, which admittedly was precisely the same as the present suit (the previous suit being numbered 1771 of 1928) was instituted by the same plaintiff against the same defendant and on the same cause of action; that is to say, Shilabala Dasee was the plaintiff in Suit No. 1771 of 1928 and she is the plaintiff in the present suit, and Gobardhandas Ladsaria was the defendant in Suit No. 1771 of 1928, and he is defendant in the present suit. On May 22, 1930, Suit No. 1771 of 1928 was dismissed by an order of Lort-Williams, J., under the provisions of Chap. X, r. 36 of the Rules of this Court. There was no appeal from that order, but an application was made, said to be by way of review to have that order set aside. It so happened that that application came before me. I say "it so happened," but I recollect that the reason why it came before me was (as was in effect admitted at the time) that the parties, or rather the plaintiff of set design waited until Lort-Williams, J., had proceeded on leave and until there was another Judge dealing with the interlocutory matters. The application for review was dismissed by me on August 6, 1930, and again there was no appeal from that order. The present suit was instituted on May 2, 1931, and as I have stated, the cause of action and the issues in this suit are identical with those of the 1928 suit. The learned Judge says in his judgment:

"In these circumstances, it is contended, on behalf of the defendant, that this suit cannot proceed upon the ground of *res judicata*, but not upon the limited grounds which are to be found in s. 11, Civil Procedure Code, but upon the broader principles which were referred to and recognised by their Lordships of the Privy Council in *Hook* v. *Administrator-General of Bengal* (1).

(1) 60 Ind. Cas. 631; A I R 1921 P C 11; 48 I A 187; 48 C 499; 19 A L J 366; 40 M L J 423; 29 M L T 336; (1921) M W N 313, 33 C L J 405; 3 U P L R (P C) 17; 23 Bom. L R 648; 25 C W N 915; 14 L W 221 (P C).

Reliance is also placed upon the inherent powers of the Court which are preserved by s. 151, Civil Procedure Code, and I have also been referred to the judgment of Sir Francis Maclean, C. J., in *Ram Gopal Mazumdar* v. *Prasunna Kumar Sanial* (2) in support of the proposition that the plaintiff, having elected to proceed, as she did, by applying to have the order of dismissal set aside, and having failed on that application, is not entitled now to litigate the matter afresh by a separate suit."

The learned Judge stated the point which he had to determine briefly, and concisely, in these terms:

"whether an order of dismissal under Chap. X, r. 36 of the Rules of this Court operates as a bar to a fresh suit."

The rule in question runs thus:

"Suits and proceedings, which have not appeared in the Prospective List within six months from the date of institution, may be placed before a Judge in Chambers, on notice to the parties or their Attorneys, to be dismissed for default unless good cause is shown to the contrary, or be otherwise dealt with as the Judge may think proper.".

The authority of that Rule was challenged, in the year 1924, in *Udoy Chand* v. *Khetsidas Tilokchand* (3) where, however Sir Lancelot Sanderson, C. J., held that the rule is not *ultra vires* and that the Court has jurisdiction to dismiss a suit for default when it appears on the Special List. It was also held in that case that the decision of a Judge on the Original Side of the High Court dismissing a suit for want of prosecution under Chap. X, r. 36 of the Rules of the Court, is a judgment within the meaning of cl. 15 of the Letters Patent and, accordingly, an appeal lies from that decision. It is obvious therefore, on the authority of that case, that it would have been open to the present plaintiff, had she so chosen, to have appealed against the order of my learned brother Lort-Williams, dated May 22, 1930. Buckland, J., came to the conclusion that, once a suit has been dismissed under the provisions of Chap. X, r. 36, it is not open to the plaintiff to bring a fresh suit on the same cause of action. He expressed his opinion quite definitely in these words:

"I have no reasonable doubt that the object and intention of the rule is to enable the Court, finally, to dismiss such a suit unless the Judge is satisfied that there are grounds for allowing it to proceed."

It was pointed out that, on notice being sent to the parties, they have an opportunity to, and frequently do, appear. Thereupon, the Judge can take into consideration any affidavits filed, and anything that Counsel may put before the Court on behalf of the parties. The learned Judge has given a number of reasons as to why he comes to the conclusion that once a suit is dismissed for default under Chap. X, r. 36 of the Rules of this Court, the plaintiff is not entitled to bring a fresh suit on the same cause of action. I am bound to say that, with the reasoning of the learned Judge, so far as it goes, I respectfully and entirely agree. As a matter of common sense and of first impression, one cannot fail to be of opinion that it is undesirable that a plaintiff should be allowed, in circumstances such as the present, to suffer no greater penalty and incur no more serious handicap than the payment of certain costs to the defendant.

It has been pointed out by the learned Judge, in his judgment, and emphasized by the learned Advocate-General in his address to us, that a plaintiff of means might use the procedure of the Court as an instrument of oppression and that, having launched his suit against any person, he might delay the prosecution of that suit so that it ultimately appeared on the Special List, as it has been called, and the suit was dismissed. Forthwith he might launch a fresh suit and indeed a succession of suits at any rate until the alleged cause of action became no longer available by reason of the operation of the statute of limitation. I wholly sympathise, if I may use the term, with the expression of opinion given by the learned Judge in his judgment. But we have to consider whether that judgment is justified by any provision in law. It is admitted by the learned Advocate-General that neither the precise terms of s. 11, Civil Procedure Code, nor the general principles of the doctrine of *res judicata*, as explained in a number of decisions of their Lordships of the Judicial Committee of the Privy Council, including the cases of *Munni Bibi* v. *Tirloki Nath* (4), and *Maung Sein Done* v. *Ma Pan Nyun* (5) are of any avail to the defendant in the present proceeding.

(2) 10 C W N 529; 2 C L J 508.

(3) 81 Ind. Cas. 1048; A I R 1924 Cal. 1025; 51 C 905; 28 C W N 916.

(4) 132 Ind. Cas. 598; A I R 1931 P C 114; 58 I A 158; 53 A 103; (1931) A L J 453; 35 C W N 661; 53 C L J 552; 33 Bom. L R 979; Ind. Rul. (1931) P C 182; (1931) M W N 742; 61 M L J 196; 34 L W 459 (P C).

(5) 137 Ind. Cas. 328; A I R 1932 P C 161; 59 I A 247; 10 R 322; Ind. Rul. (1932) P C 184; 36 C W N 726; 55 C L J 403; 34 Bom. L R 1040; 63 M L J 64; 9 O W N 647; (1932) A L J 735; 33 P L R 519; 36 L W 1 (P C).

It is undoubtedly right to say that here there is no case of *res judicata*, because the Original Suit, No. 1771 of 1928, was never heard and determined, and in no sense could it be said that the plaintiff's case had been disposed of on its merits. We have, therefore, to see whether there is any other principle or provision, either in the general adjectival law or in the rules of this Court, which prevents the plaintiff from proceeding with the suit, out of which this appeal arises. The learned Advocate-General has sought to rely on a number of orders and rules contained in the First Schedule to the Civil Procedure Code, but none of them, in my opinion, are really material for our present purpose. He has also argued that the provisions of s. 12, Civil Procedure Code, do not stand in his way. That section lays down that:

"Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies."

As far as one can see, the rules in Sch. I, Civil Procedure Code, which do bar a fresh suit in respect of the same cause of action, are these: O. II, r. 2, O. IX, r. 9, O. XXII, r. 9 and O. XXIII, r. 1. None of these have any application to the present circumstances. In my opinion, s. 12 operates against the contention of the defendant in the present suit. Mr. Pugh argued that we must deduce from it that, unless there is a rule either in the Code of Civil Procedure or in the Rules of this Court, there is nothing in the general provisions of law to prevent the plaintiff instituting a fresh suit, after the former suit has been dismissed under the provisions of Chap. X, r. 36 of this Court. It is to be remembered that r. 36, Chap. X, of the Rules of this Court is apparently designed to serve the same purpose as r. 12, O. XXXVI of the Rules of the Supreme Court in England, and to a large extent Chap. X, r. 36 of this Court is analogous to O. XXXVI, r. 12 of the English procedure, one of the main differences being, however, that in this Court the Registrar takes the initiative on finding that suits are not being prosecuted with due vigour and diligence, whereas under the English procedure, it is left to the defendant to stimulate the activities of the plaintiff either by himself causing the action to be set down for trial; or by taking out a summons asking that the action may be dismissed for want of prosecution. There is no very direct, certainly no very modern decision, as to what precisely is the effect of an order made under the provisions of O. XXXVI, r. 12, as regards the rights of the plaintiff to bring a fresh suit.

We find in the notes in the Annual Practice of 1934, at p. 2213, a statement to the effect that, where an action has not been set down for trial under O. XXXVI, r. 32, the effect of a dismissal is not clear. The note seems to be based upon the judgment of Sir George Jessel, M. R. in *In re Orrell Colliery and Fire-Brick Co.* (6), and the judgment of Kay, J. in *Magnus* v. *National Bank of Scotland* (7).

The case of *In re Orrell Colliery and Fire-Brick Co.* (6), was decided in the year 1879. There it was held that where an action has been commenced against a Company and continued by leave after a winding-up order, and before trial, an order had been obtained to dismiss the action for want of prosecution, the plaintiff in the action was not debarred from bringing forward a claim in the same matter in the winding-up. Sir George Jessel, M. R. said at p. 682* of the report:

"It is very much to be desired that a new rule should be made to meet cases of this kind. But in the meantime the former practice applies except so far as it has been altered by the Judicature Act and the rules of Court, and I find nothing in them which varies it on this point.

"Formerly a man could abandon his action by not taking any further steps in it, whether it were brought at Common Law or in Chancery. In the former case the defendant signed judgment of non-pros, which exactly described what had happened; in the latter case he would have the bill dismissed for want of prosecution, but in either case the plaintiff could bring a new action for the same matter, with this exception only, that in Chancery, if the cause had been set down to be heard, the dismissal of the bill for want of prosecution, was equivalent to dismissal on the merits, and was a bar to a new action."

"In this case, if the action had been set down for hearing, there might have been a question whether the former rule of Common Law or that of the Court of Chancery ought to prevail. But in a case where, as here, the action had not been set down, there was only one rule, namely, that a fresh action might be brought. If the new rules had been intended to make an alteration in this respect, it would have been so expressed. But that has not been done, and consequently the practice is the same as it was before the rules were made."

As far as one can ascertain, the position in this Court seems to be the same as it was in England at the time when the *In re Orrell Colliery and Fire-Brick Co.* (6),

(6) (1879) 12 Ch. D 681: 48 L J Ch. 655.
(7) (1888) 36 W R 602; 57 L J Ch. 902; 58 L T 617.

*Page of (1879) 12 Ch. D.—[*Ed.*]

was decided. A year or two later, and in between *In re Orrell Colliery and Fire-Brick Co.* (6) and *Magnus* v. *National Bank of Scotland* (7), there was the case of *Gilder* v. *Morrison* (8). There, by a Master's order, an action was to be dismissed, unless notice of trial were delivered by a certain day. Through a mistake of the Solicitor's clerk, notice of trial was not delivered within the required time. The Judge in Chambers refused, in the exercise of his discretion, to extend the time fixed by the Master's order. On appeal, the Court declined to interfere with the Judge's discretion. Grove, J., in his judgment observed :

"I am of opinion that this is a case in which we should not interfere with the discretion of the learned Judge. *Carter* v. *Stubbs* (9), on which the plaintiffs' Counsel relies, is the exact converse of the present case. There the learned Judge thought fit to vary the Master's order, and the Court of Appeal, as well as the Divisional Court, refused to interfere with his discretion. If this were a solitary instance of an application of this kind, we might be inclined to grant the indulgence asked for ; but cases of this kind are becoming too common, and in the interests of clients this carelessness on the part of Solicitors and their clerks must be put a stop to. If we encouraged such conduct, we should practically be abolishing the rules made under the Judicature Acts, and a negligent party might postpone a case day after day, and set all the rules at defiance, if he knew that he could be reinstated in the position which he had lost by his own carelessness or intentional disobedience of the rules merely by payment of the costs."

Then the learned Judge continued in the words following and they are the important part of his judgment for our present purpose :

"A new writ may be issued immediately in this case, so that the right of the plaintiff is not lost, as he merely has to pay the costs incurred so far as a penalty for his carelessness, and begin over again."

Then we come to the case of *Magnus* v. *National Bank of Scotland* (7) which was decided in the year 1888. In that case, there was a consent order, dismissing an action for want of prosecution, and it was held that, unless it proceeded upon a compromise of the cause of action, there was no bar to another action between the same parties for the same matter. The former practice of the Court of Chancery on this point is unaffected by the rules of Court under the Judicature Act. The plaintiffs in the action, having made default in making discovery and answering interrogatories, told the defendants they intended to abandon the action, and would pay their costs. Not having done this, the defendants issued a summons to dismiss the action for want of prosecution. The plaintiffs, thereupon, paid the defendants' costs, and at the hearing of the summons they appeared, and consented to an order dismissing the action as against the defendants. The plaintiffs then brought a fresh action against the same defendants for the same matter, whereupon the defendants raised the question of law whether the plaintiffs were not estopped, by reason of the order on the summons. The Court held that the order, not having proceeded upon a compromise of the cause of action, was no bar to the fresh action. The judgment of Kay, J., is very illuminating upon the point which is now before us. He is reported, at p. 601* of the report, as saying :

"Now if that consent order had proceeded on a compromise of the cause of action, it would have been an absolute bar to a new action. But here the order was made on a summons to dismiss for want of prosecution, an order on which would not be a bar, and therefore, unless it is shown that the consent proceeded upon the compromise of the cause of action, I cannot see how it is possible to say this would be a bar. Can it be said that when you attend on a summons to dismiss for want of prosecution, and submit to an order by consent, that order is a bar to another action ? That seems to me against all the rules of the Court. There is great deal more in this than mere technicality, because the principle of the Court is that unless the merits of the case have been dealt with, the dismissal of one action is not a bar to another action of the same kind. That is a very ancient rule of the Court of Chancery which I should be sorry to see disturbed."

A little lower down in the judgment the learned Judge said :

"The object of this summons to dismiss for want of prosecution was to prevent the plaintiffs going on with that action. Everybody knows that would not prevent another action being brought. Of course the plaintiffs were compelled by the terms of the order to pay all the costs of that action."

Now, on the authority of the three cases to which I have referred, it seems to me that on general principles there is nothing to prevent a plaintiff, whose suit has been dismissed for want of prosecution, from instituting forthwith a suit against the same defendant upon the same cause of action and, in the absence of any rule made by the Court to deal with such a state of affairs, it is clear that, in circumstances such as the present, where the suit was dismissed under the provisions of Chap. X, r. 36, the plaintiff is at liberty to bring a fresh suit if he be so minded. I feel impelled to say that, unlike Kay, J.,

(8) (1882) 30 W R 815.
(9) (1880) 6 Q B D 116; 50 L J Q B 161; 29 W R 132; 43 L T 746.

*Page of (1888) 36 W R.—[*Ed.*]

I should not be sorry to see the practice altered and an appropriate rule made by this Court negativing, or at any rate circumscribing the right of the plaintiff to bring one or two and possibly more actions against the same defendant on the same cause of action, where the first and the second or the subsequent action has been disposed of under the provisions of the rule which we are now considering. I go further than that and say that, in my opinion, it is highly desirable that a rule of that character should be made by this Court, unless the matter is dealt with by other authority and suitable provisions inserted, either in the body of the Civil Procedure Code or in the rules contained in the schedule to that Code. We have now, however, only to administer the law as we deem it to exist at the present time. For the reasons which I have given, we are compelled to come to the conclusion that this appeal must be allowed. The result is that the case must go back to be disposed of on its merits. The appellants will have the costs of this appeal. The cost of the Court below will abide the result of the further proceedings.

Lort-Williams, J.—The subject for consideration in this appeal is the effect of the dismissal of a suit for want of prosecution under r. 36, Chap. X of the rules of this Court on the Original Side.

The learned Judge (Buckland, J.) has decided that the plaintiff is precluded by such dismissal from bringing a fresh suit upon the same cause of action. I cannot understand upon what principle of law such a decision can be supported. This is a very drastic rule, which provides that a Judge may dismiss for default any suit which has not appeared in the Prospective List within six months from the date of institution. Such orders are sometimes necessarily made in a somewhat summary way, and I am supprised to find that it has been suggested, nay more, decided that the effect of the many decisions which I have given under the provisions of this rule was to deprive the plaintiffs for ever of the right to agitate their claims.

Of course, there are well-known principles of law which preclude the plaintiff from bringing a fresh suit upon the same cause of action, *e. g.*, the principle of *res judicata*. But no one has suggested that, in the circumstances of such a dismissal for default, there has been anything in the nature of a trial or decision upon the merits.

And, of course, where special rules have been made by or for the Court, which forbid the bringing of a fresh suit, the plaintiffs are bound by them so long as these rules are *intra vires* of the rule-making authority; such, for example, are to be found in O. IX, Civil Procedure Code. But there is no similar provision in r. 36, or elsewhere in the rules of this Court, or in the Code of Civil Procedure, which is relevant to the present discussion. On the contrary, s. 12 of the Code provides that:

"Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies."

Inferentially it seems to follow that where no such rules exist, no such preclusion is intended to apply. In the absence of such rules, I know of nothing to prevent a plaintiff, whose suit has been dismissed under the provisions of r. 36, from bringing a fresh suit upon the same cause of action, except the law of limitation. The law upon this subject has been clearly stated by Sir George Jessel, M. R., in *In re*: *Orrell Colliery and Fire-Brick Co.* (6) as follows:

"Formerly a man could abandon his action by not taking any further steps in it, whether it were brought at Common Law or in Chancery. In the former case the defendant signed judgment of non-pros., which exactly decribed what had happend; in the latter case he would have the bill dismissed for want of prosecution, but in either case the plaintiff could bring a new action for the same matter, with this exception only, that in Chancery, if the cause had been set down to be heard, the dismissal of the bill for want of prosecution was equivalent to dismissal on the merits, and was a bar to a new action."

and by Kay, J., in *Magnus* v. *National Bank of Scotland* (7) as follows:

"The practice in this Court was well setteld long before I went to the bar. In Lord Redesdale's book I find the law thus stated on p. 238 of the original edition: "A decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill, if the dismission was upon hearing, and was not in terms directed to be without prejudice. But an order of dismission is a bar only when the Court determined that the plaintiff had no title to the relief sought by his bill, and therefore an order dismissing a bill for want of prosecution is not a bar to another bill." . . . . There is a great deal more in this than mere technicality, because the principle of the Court is that unless the merits of the case have been dealt with, the dismissal of one action is not a bar to another action of the same kind. That is a very ancient rule of the Court of Chancery which I should be sorry to see disturbed . . . . The object of this summons to dismiss for want of prosecution was to prevent the plaintiffs going on with that action. Everybody knows that would not prevent another action being brought. Of course, the plaintiffs were

compelled by the terms of the order to pay all the costs of that action."

In Seton's "Judgments and Orders," Edn. 7, 1912, Vol. I, at p. 136, it is stated upon the authority of these decisions that where an action has been dismissed for want of prosecution, the plaintiff must pay the costs of the old one first; and a similar statement appears in Daniell's Chancery Practice, Edn. 8, 1914, Vol. I, at p. 474.

In my opinion, it would be difficult to support the making of any rule, which, in such circumstances, would preclude the bringing of a fresh suit upon the same cause of action, unless the first suit had been set down for trial. If that has been done, the plaintiff cannot complain that he has not had an opportunity of having his case heard, and if he fails to proceed with the prosecution of his claim, and it is dismissed for default, the Court, in such circumstances, would be justified in making a rule that no fresh suit should be brought upon the same cause of action. In a case, such as the present, where there has been a dismissal of the suit, but not upon the merits, I think it ought to be provided that no fresh suit shall be instituted until all costs incurred in the first suit have been paid by the plaintiff to the defendant. I agree with my learned brother that this appeal must be allowed with costs.

D. *Appeal allowed.*

LAHORE HIGH COURT

Criminal Revision No. 42 of 1934
April 6, 1934
ADDISON, J.

DHAN SINGH—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 239—Offences under ss. 406, 174, Penal Code, not committed in course of same transaction—Joint trial, if legal—Acquittal under s. 406, Penal Code, if makes trial under s. 174 legal.

The joint trial of the accused under ss. 406 and 174, Penal Code, the offences not being committed in the course of the same transaction, is illegal. The mere fact that the accused has been acquitted of the charge under s. 406, Penal Code, does not make his trial under s 174, Penal Code, illegal. *Jai Singh* v *Emperor* (1), referred to.

Cr. R. reported by the Additional Sessions Judge, Hissar, dated January 8, 1934.

Facts.—One Jasraj Singh was a defaulter of *takavi* to the extent of Rs. 55-12-0. On November 5, 1932, a warrant for the attachment of his movable property, Ex. P-D, was issued by the Assistant Commissioner, First Grade, Sirsa, under s. 70, Land Revenue Act. Bishan Singh, Field *Qanungo*, Sirsa, executed this warrant on December 10, 1932. The defaulter paid him Rs. 20 in cash. A milch she-buffalo with a *katta* (calf) belonging to the defaulter was attached for the remaning sum and was entrusted to Dhan Singh, petitioner, as *sapurdar*. No *sapurdnama* was executed.

A warrant of sale Ex. P-A, was issued by the Assistant Commissioner, First Grade, on December 15, 1932, for the sale of the attached property. It was directed to Field *Qanungo*, Sirsa Circle, for execution It was to be returned after execution by January 15, 1933. It was not returned by the Field *Qanungo* after execution before the date fixed. The *Tahsildar*, Sirsa, therefore issued an order Ex. P-B, to the Field *Qanungo* that he should inform the *sapurdar* about the date fixed for sale and should execute the warrant of sale without delay. Siri Chand. Field *Qanungo*, therefore sent a *hukamnama*, Ex. P-C, addressed to Dhan Singh, petitioner, directing him to produce the attached property at Sirsa on March 12, 1933, before noon; P. W. No. 2, Parbhu *chaprasi*, was given this *hukamnama* for service on February 25, 1933. This *hukamnama* was returned by Parbhu, P. W. No. 2, with a report that Dhan Singh refused to accept service of the notice and stated that he would not go to Sirsa and would not produce the attached cattle, *vide* his reports, Ex. P-C 2.

The petitioner was charged under s. 406, Penal Code, for misappropriating the attached property and under s. 174, Penal Code, for having disobeyed the *hukamnama*, Ex. P-C, issued by Siri Chand, P. W. No. 1, to personally attend Sirsa on March 12, 1933. He was tried for both the offences at one trial. The petitioner has been acquitted under s. 406, Penal Code, and convicted under s. 174, Penal Code, and sentenced to a fine of Rs. 25 or in default, to one month's rigorous imprisonment. The petitioner admitted that he was the *sapurdar* of the attached property, but he denied the charge and pleaded not guilty. He stated that he was never served with a notice to produce the attached property for sale or to attend personally at Sirsa.

Report.—The *hukamnama* Ex. P-C, was issued by the Field *Qanungo* in obedience

to the order, Ex. P-B, of the *Tahsildar*. The distress and sale of movable property of the defaulter can only be conducted by the Assistant Collector, First Grade. Whether the *Tahsildar* who issued the order Ex. P-B, had authority to do so is doubtful. The *hukamnama*, Ex. P-C was not therefore a lawful order issued by a public servant legally competent to issue the same. The service of this notice upon the petitioner is equally defective and remains unproved. The report itself was not written on the spot. A copy of the notice was not affixed at the house of the petitioner when he refused to accept its service. The attesting witnesses of the report have not been produced. Ganpat Singh and Birdh Singh, P. Ws. Nos. 3 and 4, have supported the petitioner and stated that he was not present in the village in those days. There is nothing on the file to prove that the omission to attend personally in obedience to the *hukamnama* was intentional. None of the ingredients of the offence under s. 174, Penal Code, has therefore been proved in this case.

Taking all the above facts into consideration, I am of opinion that the conviction of the petitioner under s. 174, Penal Code, cannot be sustained and should be set aside.

The joint trial of the petitioner under ss. 406 and 174, Penal Code, is not, in my opinion, legal. Both the offences were not committed in the course of the same transaction and the accused could not be tried for them at one trial. The mere fact that the petitioner has been acquitted of the charge under s. 406, Penal Code, does not make his trial under s. 174, Penal Code, legal : *Vide, Jai Singh* v. *Emperor* (1). It is, however, unnecessary to quash the proceedings and to order a fresh trial because upon the evidence produced in the case the charge under s. 174, Penal Code, has not even been proved. It would simply embarrass the petitioner and put him to unnecessary expense and trouble to do so.

Accordingly I forward the record to the High Court of Judicature at Lahore with the recommendation that the conviction should be set aside and the accused be acquitted and the fine be ordered to be refunded.

Mr. *L. M. Datta*, for the Petitioner.

Order.—It appears that the *hukamnama* was not served while the two charges could not be gone into in the same trial. For these reasons, I accept the petition, set aside the conviction and sentence and direct that the fine, if paid, be refunded.

D. *Petition accepted.*

(1) 43 Ind. Cas 324; A I R 1918 Lah. 148; 19 Cr. L J 100; 44 P R 1917 Cr.

MADRAS HIGH COURT

Civil Suit No. 204 of 1933

February 22, 1934

STONE, J.

A. M. A. MURUGAPPA CHETTY —PLAINTIFF

versus

N. V. N. NACHIAPPA CHETTY AND ANOTHER—DEFENDANTS

Promissory note—Pro-note not paid at maturity—Creditor, if can sue on original debt — Contract—Jurisdiction—Money agreed to be paid and actually paid at Madras—Agreement and subsequent promissory note made outside Madras—Suit at Madras for recovery of money paid—Jurisdiction—Interest.

When a cause of action for money lent is once complete in itself, and the debtor then gives a promissory note to the creditor for payment of the money at a future time, the creditor, if the note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the note, under such circumstances as to make the debtor liable upon it to some third person. *Saminathan* v. *Palanippa* (2) and *Sheikh Akbar* v. *Sheikh Khan* (5), relied on.

A letter was given which empowered the holder of that letter to go to the plaintiff's Madras firm and require the plaintiff's agent at Madras to pay at Madras to the order of the defendant. After this the defendant executed a promissory note in favour of the plaintiff for the same amount, the promissory note containing a clause for interest. These transactions took place outside Madras. The payment, however, was made in Madras. The suit for recovery of money lent and interest thereon was filed at Madras :

Held, that since the payment was agreed to be made and in fact made at Madras, part of the cause of action had arisen at Madras and therefore the Madras Court had jurisdiction:

Held, further, that the suit having been based on the contract of loan and not on the promissory note, the plaintiff was only entitled to interest at a reasonable rate from the date of demand and not at the rate provided by the promissory note.

Messrs. *K. S. Krishnaswami Aiyangar* and *T. Krishnaswami Aiyangar*, for the Plaintiff.

Messrs. *A. Suryanarayana* and *A. Srinivasa Aiyangar*, for the Defendants.

Judgment.—In this case the plaintiff is suing defendant No. 1 personally and defendant No. 2 in respect of his share in the joint family property for the sum of Rs. 12,000 with interest on the principal sum of Rs. 10,000 with half-yearly rests calculated at Re. 0-12-6 per cent. per mensem until the date of decree and there-

after at 6 per cent. on the total amount until realisation in the following circumstances. On November 17, 1930, defendant No. 1 went to the plaintiff and asked him to give a letter that would enable him (defendant No. 1) to obtain from the plaintiff's Madras office the sum of Rs. 10,000. That was a matter that took place outside the jurisdiction of this High Court. A letter was given which empowered the holder of that letter to go to the plaintiff's Madras firm and require the plaintiff's agent at Madras to pay at Madras to the order of defendant No. 1 Rs. 10,000 together with the *nadapu* rate of interest from November 17, 1930, to the date of presentation, and debit the said amount in the name of defendant No. 1 and note on the letter that payment had been made. To follow out the history of that letter, I will go somewhat out of historical sequence. Defendant No. 1 did not take that letter to Madras, did not present it for payment at Madras, and was not paid by the plaintiff at Madras, but he endorsed it over to a third party at a place outside the jurisdiction of this Court and that third party took it to Madras, received the money at Madras and the fact of the receipt by that person is endorsed on the letter. Now, to return to the sequence of events, after that letter had been given, defendant No. 1 gave to the plaintiff a promissory note which is expressed to be payable on demand, no place of payment being mentioned. The relevant part of it is as follows :

"The amount due by me (defendant No. 1) by reason of having received from you (the plaintiff) a *hundi* directing me (defendant No. 1) to receive the money with interest from your Madras firm is Rs. 10,000. For this amount of Rs. 10,000, the interest shall be calculated at Re. 0-12-6 per cent. per mensem and the total of the interest and principal I (that is defendant No. 1) shall on demand pay you (the plaintiff) or your order and get a return of this promissory note."

Upon that is endorsed

"for the sum of Rs. 10,000 mentioned in the pro-note herein, I shall pay interest at Re. 0-12-6 per mensem once every six months."

That promissory note was given at a place outside the jurisdiction of this Court. On October 27, 1932, on behalf of the plaintiff a lawyer's letter was sent to defendant No. 1, the material terms of which are as follows :

"In respect of the promissory note executed by you in favour of our said clients for Rs 10,000 with compound interest thereon at Re. 0-12 6 per cent. per mensem with half-yearly rests, there is now due and owing by you to our clients the sum of Rs. 10,000 for principal and Rs. 1,449-0-6 for interest making in all a total sum of Rs. 11,449-0-6 and that you have in spite of repeated demands failed and neglected to pay the amount due."

They thereupon gave notice that payment must be made within ten days or proceedings will be taken. No action was taken on that letter and payment was not made. The only other fact that it is necessary to mention is that in the debit and credit account of the plaintiff there appears as credited to the defendant the sum of Rs. 470-3-6 which is made up of the interest and interest on interest due on the promissory note at the rate above mentioned, that is, Re. 0-12-6 per cent. per mensem with six-monthly rests. The defence is that those facts disclosed only one cause of action and that cause of action is upon the note, and, if upon the note, this Court has no jurisdiction, alternatively, or rather in addition, it is said that the cause of action, assuming there is a cause of action on the loan, does not arise within the jurisdiction of this Court. With regard to the contention that in circumstances like these the plaintiff is restricted to his action on the note, the question was considered by Fletcher Moulton, L. J., as he then was, in *In re A Debtor* (1) at p. 350*. Fletcher Moulton, L. J., there observes as follows :

"A parallel case where a bill is taken in payment for goods sold, exactly illustrates what is the effect of taking a bill. It is perfectly true that it is only a conditional payment. It is a payment if the bill is paid; and if it is in your hands when it becomes due and is dishonoured, the debt revives. But if you have availed yourself of the character of the bill as a negotiable instrument, and have passed it out of your possession so that the right to proceed on that bill is vested in some one else and not in you at the date of the dishonour, the suspension of the debt continues just as much as if the bill was not overdue. A moment's consideration will show that the Courts would not be administering justice if they did not hold this to be the case, because otherwise you could sue for the price of the goods, while another man, through possession by your act of the negotiable instrument which had been given for the price, could make the debtor pay the amount over again. Therefore I am satisfied that it is a fundamental principle applying to all cases where bills are taken either in satisfaction of a debt or in suspension of the exercise of any legal rights, that the satisfaction or the suspension lasts only so long as the bill is not overdue, unless you have parted with it so that another person is dominus of the bill, and then it lasts until you have got it back into your possession."

Now in this case the bill is in the possession of the plaintiff and in this case the demand letter of October 27, 1932, is a

(1) (1908) 1 K B 344; 77 L J K B 409; 98 L T 652.

*Page of (1908) 1 K. B.—[*Ed.*]

demand for payment in respect of the promissory note, executed by defendant No. 1, that is to say, it is a demand for the payment of the note. This is a case of a demand promissory note not payable at any particular place and therefore falls within the exception to s. 64, Negotiable Instruments Act, and thereupon no presentation is necessary to make it overdue. So that here there has been a demand, there has been no payment, there is no need for presentation; therefore on the demand having been made, no payment having been made and the time allowed having expired, the note became overdue. As it has become overdue and as it is in the possession of the plaintiff and is therefore within the case mentioned by Fletcher Moulton, L. J., the plaintiff is in this position: he can either sue on the note or he can put the note on one side and sue on the debt. But it is said that there is a long line of cases to show that there can be no debt where there is a promissory note taken contemporaneously with the loan so that you have only one transaction, and in support of that proposition the following cases have been mentioned: *Saminathan* v. *Palaniappa* (2), *Y. V. Ragavayya* v. *G. Ramayya* (3), *Muthu Sastrigal* v. *Visvanatha Pandarasannadhi* (4) and *Sheikh Akbar* v. *Sheikh Khan* (5). Of those authorities I am of course bound by *Saminathan* v. *Palaniappa* (2) which is a decision of the Judicial Committee of the Privy Council delivered, I observe, by Lord Moulton as he then was. As I read that case, he is reiterating once again what he said in *A Debtor, In re The Debtor Ex parte* (1), when he says: 'So long as the notes were outstanding, there was no right of action otherwise than upon the notes" and he is saying that for the reason that he has mentioned at p. 350* of the previous case in the passage that I have quoted. I am also of course bound by *Y. V. Ragavayya* v. *G. Ramayya* (3) which is a decision on the appellate side of this High Court. But as I read that judgment it does not in the least conflict with the conclusion that I am arriving at in this case and is, in my opinion, enunciating the same legal principles as were stated by Fletcher Moulton, L. J. As to whether the original cause of action is the note itself and/or whether there is also another cause of action, that in my opinion is a question of fact, and on the facts here it seems to me to be too clear for argument that there are two causes of action. Had the transaction in question stopped with the giving of the letter empowering defendant No. 1 to go to Madras and collect Rs. 10,000, it would not be arguable but that the plaintiff had a cause of action springing out of the contract of loan. What is there that makes the letter given by defendant No. 1 to the plaintiff and a promissory note to secure the re-payment of that loan a merger or a novation extinguishing the earlier contract and turning these two contracts into one, a contract contained in a promissory note? I cannot understand under what principle of law the first contract is to be regarded as extinguished. It seems to me that this is a case such as is mentioned in *Sheikh Akbar* v. *Sheikh Khan* (5):

> "When a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person."

There the Chief Justice of Calcutta is expressing precisely the same point that Fletcher Moulton, L. J., was expressing in *A Debtor, In re The Debtor, Ex parte* (1) and that in my opinion is exactly this case, a contract of loan followed by the giving of a promissory note to secure its payment, a case that happens thousands of times a year so far as England is concerned, in that department of life connected with money-lenders. That being so, it seems to me that here the plaintiff could, if he chose, have sued on the note and he can if he chooses, sue on the debt. He has chosen to sue on the debt. Now the next point arises, that being so, has this Court jurisdiction to entertain this claim? That will depend, in my opinion, upon this: is it necessary for the plaintiff, properly pleading the relevant facts on which to found his claim, to mention any fact that is a relevant fact which arose within the jurisdiction of this Court? What he has to allege is a loan and what he has to show is that he has made a loan; and although for myself I am a little doubtful whether the long series of decisions on this point of jurisdiction do not, somewhat loosely, regard pleading points and regard as

(2) 26 Ind. Cas. 228; 41 I A 142 (P. C.)
(3) 29 M 111; 15 M L J 181.
(4) 21 Ind. Cas. 861; A I R 1914 Mad. 657; 38 M 660.
(5) 7 C 256; 8 C L R 528.

*Page of (1908) 1 K. B.—[*Ed.*]

relevant points that I should have somewhat doubted were necessary to be pleaded, agreeably to that long line of decisions, I am satisfied that a plaintiff would have been regarded as pleading relevantly if he had alleged in his plaint "I did in fact advance this money in Madras" and I think that in this case that would have been a necessary allegation because it was a term of the contract that he should advance the money in Madras, and before the plaintiff could have sued on the contract that the plaintiff made, it would be necessary for him to allege performance of the terms on his side of the bargain. He would thus have to allege (1) a term that he was to give a letter that would enable money to be paid at Madras, (2) the fact that the amount so to be paid depended upon the date of collection at Madras, (3) the date of collection, (4) the fact of payment. So he would have to allege *inter alia* (1) the date of presentation of that letter, and (2) the payment on that letter; and both presentation and payment must be at Madras.

It follows from that that part of the cause of action has arisen at Madras and from that this Court has jurisdiction. There is, however, this difference between suing upon the original contract of loan and suing upon the promissory note. I have had no evidence, and it does not appear from the documents put before me, that there has been any special agreement for interest apart from the note. It is upon the note that the endorsement is made with regard to a particular rate of interest payable with six-monthly rests. That in my opinion is part of the contract related to the promissory note and has nothing to do with the contract of loan. In order to find the terms of the contract of loan, I must, I think, look at the contract of loan which was concluded, so far as the evidence goes, at the time that the letter authorising defendant No. 1 to collect Rs. 10,000 in Madras was given. The subsequent variations were all the variations of the terms of the promissory note which is another contract. Looking at it like that, it appears to me that what defendant No. 1 has undertaken to do is to have made against him a debit of the amount paid to him or the person to whom he endorsed this note and to repay that debit. What is the amount of debit? The debit is Rs. 10,000. His contract therefore is to return Rs. 10,000. There is no provision with regard to interest. With regard to interest, however, I am entitled as from the date of the notice demanding the payment of this sum, although that notice is a demand for the payment under the note, I am entitled, I think, to give interest at a reasonable rate. There will, therefore, be judgment for Rs. 10,000 together with interest at 6 per cent. from October 27, 1932, to the date of payment with proportionate costs against defendant No. 1 personally and against defendant No. 2 to the extent of the assets in his hands.

A. D. *Suit decreed.*

LAHORE HIGH COURT

Second Civil Appeal No. 415 of 1933

May 31, 1934

RANGI LAL, J.

AZIZ MUHAMMAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat HAJRAN AND OTHERS—DEFENDANTS AND OTHERS—PLAINTIFFS—RESPONDENTS

Custom (Punjab)—Gift—Arains *of District Jullundur—Daughter of sonless proprietor getting property from father by written deed of gift—Whether can gift it to her sister—Gift in lieu of services—Rule of reversion, if applies.*

Among the *Arains* of the Jullundur District, a daughter of a sonless proprietor can gift ancestral property received by her from her father by a written deed of gift to her sister.

The rule of reversion does not come into operation when the gift is in lieu of services.

S. C. A. from the decree of the District Judge, Jullundur, dated December 2, 1932.

Mr. *M. A. Majid*, for the Appellant.

Mr. *Muhammad Munir*, for the Respondents.

Judgment.—The question of custom involved in this second appeal is whether among the *Arains* of the Jullundur District a daughter of a sonless proprietor can gift ancestral property received by her from her father by a written deed of gift to her sister. It is admitted that the gift by the father was valid by custom. The learned Counsel for the appellants, who are the donor's collaterals in the third degree, contended that his powers of alienation were restricted and he could not have conferred on his donee any powers better than those possessed by him. It was further urged that the rule of reversion would be set at naught if a donee is allowed to make a gift of the property received by gift. There is no authority

in support of the contention that a donee can never acquire a stronger position than his donor. When the limited estate of an ordinary proprietor is transferred by gift and the title so conveyed is open to attack for a certain number of years and if during those years no attack is made, the donee's title becomes infinitely stronger than that of the donor. Similarly a vendee, whose sale is not challenged within the prescribed period, may acquire by the lapse of time a much stronger position than his vendor and a subsequent sale by him may be far less vulnerable than the original sale in his favour (*vide* Civil Appeal No. 1957 of 1923). There is, to my mind, no force in the contention that the original donor in this case could not confer on his donee greater rights than those possessed by him.

The rule of reversion relied on by the learned Counsel has no application to this case. The gift was in lieu of services and it is well-established that in such cases the rule of reversion does not come into operation. If the power to make a gift is recognized by custom, it would be for the plaintiffs to show that the gift did not confer full rights on the donees. In the present case no attempt to discharge that onus was made by the plaintiffs. Anyhow, the *riwaj-i-am* seems to me to clinch the matter. According to the English version of it, among the *Arains* of Jullundur a daughter has full powers of alienation when she inherits (see answer to question No. 47). When a daughter does not inherit, but is a donee from her father, her position is naturally much stronger. The Urdu version of the *riwaj-i-am* makes it quite clear that she has full powers of alienation where she inherits in the absence of the collaterals up to the fifth degree or when she is a donee from her father by means of a written instrument.

The learned Counsel for the appellants also urged that if a gift had been made in favour of the donor's son, he would not acquire full powers of alienation. This argument ignores the consideration that in the case of a gift in favour of the donor's son, the gift is tantamount to an acceleration of succession, while in the case of a gift to a daughter, she is to be regarded as a stranger. The decision of the learned District Judge is, in my opinion, correct. I dismiss the appeal with costs.

D. *Appeal dismissed.*

LAHORE HIGH COURT

Miscellaneous First Civil Appeal No. 213 of 1933

December 11, 1933

DALIP SINGH, J.

AHMAD BAKHSH AND ANOTHER—APPELLANTS

versus

MUSLIM BANK OF INDIA, LTD., LAHORE, AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, rr. 40 (3), 37—Judgment-debtor not arrested but pleading poverty to notice under r. 37—Surety undertaking to pay—Court, if can demand such bond.

Where the judgment-debtor has never been arrested, there cannot be an order directing his release. Consequently, the Court has no jurisdiction to demand a bond for the payment of decretal amount under O. XXI, r. 40 (3), Civil Procedure Code, when judgment-debtor pleads poverty to notice under r. 37 of O. XXI, Civil Procedure Code.

Misc. F. C. A. from an order of the Senior Sub-Judge, Lahore, dated January 13, 1933.

Facts.—The Muslim Bank of India, Ltd., Lahore, obtained a decree against Fazal Din and others. In the execution of the decree a notice was issued to judgment-debtors under O. XXI, r. 37, Civil Procedure Code, to show cause why they should not be arrested. They appeared and filed objections under O. XXI, r. 40, Civil Procedure Code, pleading poverty and inability to pay. The Court ordered that while the matters mentioned in sub-r. (2), r. 40, were being inquired into, they be released on bail on furnishing security. The surety bond stated that the surety will be liable if the judgment-debtors fail to appear or pay the decretal amount. The objections of the judgment-debtors were disallowed. The judgment-debtors, however, did not make default in appearance. The decree-holders tried to realize the decretal amount from the sureties on the undertaking to pay the decretal money. The executing Court held that they were liable to pay. The sureties appealed on the ground that security could be taken only for appearance and the further undertaking to pay the decretal amount taken from them was without jurisdiction.

Messrs. *Shamair Chand* and *Balkishen*, for the Appellants.

Messrs. *Aziz Ullah* and *Abdul Aziz*, for the Respondents.

Judgment.—The objection taken is that the Court had no jurisdiction to demand a bond in the terms of the present bond under O. XXI, r. 40 (3) and that O. XXI

r. 40 (1), has no application. The later clause does not appear to have any application as the application to arrest the judgment-debtor was not disallowed, but was finally allowed on April 6, 1932, and as the judgment-debtor had never been arrested, there was not and could not be an order directing his release. The decree-holder mistook his remedy which could not be a demand for a surety for the decretal amount and interest pending inquiry as to the alleged poverty of the judgment-debtor. I therefore accept this appeal as there is no allegation that the sureties did not produce the judgment-debtor on any date required by the Court. No order as to costs throughout.

D. *Appeal accepted.*

OUDH CHIEF COURT

Criminal Revision Application No. 103 of 1934

February 11, 1935

KING, C. J.,

On difference of opinion between

SRIVASTAVA AND NANAVUTTY, JJ.

BIBI ASGHARI KHANAM—ACCUSED —APPLICANT

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1893), ss. 145, 537—Magistrate, if can take action merely on sworn testimony of complainant—Omission to record grounds for being satisfied of likelihood of breach of peace—Whether cured by s. 537—Such omission if a ground for setting aside Magistrate's final order.

Per *King, C. J. and Srivastava, J.*—There is nothing in the language of s. 145, Criminal Procedure Code to suggest that the Magistrate cannot take action merely on the sworn testimony of the complainant himself, if the Magistrate believes it to be true. If a Magistrate believes the statement of one witness to be true, he is at perfect liberty to act upon it for the purpose of passing an order under s. 145 (1). It is not incumbent upon him to hold a preliminary inquiry himself by examining further witnesses, nor is it necessary for him to call for a report from the Police. If the Magistrate is satisfied on the strength of the testimony of one witness then he can pass an order under s 145 (1). [p. 177, col. 2; p. 178, col. 1.]

When the Magistrate is so satisfied regarding the likelihood of a breach of the peace, his omission to say so in his order is a mere omission to frame his order in accordance with law and as long as no failure of justice or prejudice to the accused has been occasioned, the omission is covered by s. 537, Criminal Procedure Code and cannot furnish a reason for setting aside the Magistrate's final order. *Kapoor Chand* v. *Suraj Prasad* (1) and *Barmha Singh* v. *Emperor* (2), relied on [p. 175, col. 2; p. 177, col. 1.]

Per *King, C. J.*—Magistrates are not to understand that defects in procedure are of no importance. Slipshod procedure is to be condemned even though it does not necessarily result in vitiating the whole proceeding. [p. 178, col. 2]

Per *Nanavutty, J.*—Before passing an order under s. 145 (1), the Magistrate should call upon the complainant to produce evidence on his behalf to prove that there really was a dispute between him and the opposite parties concerning the plots he mentioned in his complaint, and that that dispute was of such a nature as was likely to cause a breach of the peace. And this preliminary inquiry is necessary to enable the Magistrate to satisfy himself that such a dispute did exist and that it was, in all probability, likely to cause a breach of the peace. [p. 171, col. 2.]

The omission of the Magistrate to satisfy himself of the existence of a dispute concerning land which, in his opinion, was likely to cause a breach of the peace is an omission which goes to the root of the matter as there is an initial want of jurisdiction on the part of the Magistrate to initiate proceedings under s. 145 of the Code, and such an infringement of the Code does not come within the purview of s. 537, for it vitiates at the very outset the entire proceedings of Magistrate. *Kapoor Chand* v. *Suraj Prasad* (1) and *Barmha Singh* v. *Emperor* (2), not applied. [p. 172, col 2.]

Cr. R. App. against the order of the Sessions Judge of Fyzabad, dated May 28, 1934.

Mr. *Hyder Husain* and Dr. *Qutubuddin Ahmad*, for the Applicant.

Messrs. *M. Wasim* and *Ali Hassan*, for the Opposite Party.

Srivastava, J.—(*November* 1, 1934)—This is an application for revision under s. 439 of the Code of Criminal Procedure, against the order of the learned Sessions Judge of Fyzabad dismissing the revision application of the applicant against an order of an Assistant Collector of the First Class of Sultanpur passed under s. 145, Criminal Procedure Code. It arises out of a dispute as regards possession of certain plots of land in village Maniarpur.

The main contention urged by the learned Counsel for the applicant is that the order of the Magistrate was illegal inasmuch as the initial order passed by him under s. 145 does not contain any statement about his being satisfied that here was any dispute likely to cause a breach of the peace or the grounds of his being so satisfied. It was further contended that the applicant denied the existence of any dispute likely to cause a breach of the peace and adduced evidence in support of the said denial, but the Magistrate even in his final order did not record any finding about the existence of any danger of breach of the peace. The learned Counsel for the opposite party admits that the initial order recorded by the Magistrate does not strictly comply with the provisions of s. 145, but points out that the statement of the complainant recorded at the back of his application shows that he had stated on oath that there was a likelihood of breach

of the peace and in the circumstances when the Magistrate ordered notice to be issued under s. 145, Criminal Procedure Code, it must be presumed that he was satisfied in his mind that there was a dispute likely to cause breach of the peace. He has further argued that the omission of the learned Magistrate to comply with the letter of the law is at best an irregularity which is cured by s. 537, Criminal Procedure Code. He also maintains that even if this omission were treated as an illegality, s. 537 would apply to the case and has relied upon the decision of a Full Bench of the Allahabad High Court in *Kapoor Chand* v. *Suraj Prasad* (1), in support of his argument. The learned Counsel for the parties are agreed that there is no decision of this Court as to whether such omission is to be treated as an illegality or a mere irregularity, or as regards the application of s. 537 to such a case. I think that both these questions are of considerable importance, and it is desirable that they should be decided by a Bench of two Judges.

I accordingly certify the case as a fit one for being heard by a Bench of two Judges under s. 14 (2) of the Oudh Courts Act.

Nanavutty, J.—(*January* 19, 1935)—This is an application for revision of an order of Babu Sriniwas, Magistrate of the first class in the District of Sultanpur, passed under s. 145 of the Code of Criminal Procedure directing that the complainant's possession over the plots in dispute should remain undisturbed until he is duly evicted therefrom by an order of a Court competent to pass such an order. This application for revision first came up for hearing before a learned Judge of this Court, who, by his order dated November 1, 1934, certified that this was a fit case for being heard by a Bench of two Judges under s. 14 (2) of the Oudh Courts Act.

The facts out of which this application for revision arises are briefly as follows:—

Bibi Umatul Fatima, one of the six sisters who were the proprietors of Maniarpur estate gave a lease in 1919 of certain plots in village Maniarpur to one Narain. A private partition was effected between the proprietors of this *taluqdari* estate, and on August 27, 1919, that private partition was made a rule of the Court, and under this partition village Maniarpur was to be held jointly by all six proprietors of the estate for the purpose of *Mohurrum* expenses and other religious ceremonies. On May 25, 1922, the lease in favour of Narain (Ex. E), was held by the Munsif of Sultanpur to be invalid. On July 24, 1933, the complainant Ragho Ram filed the present application under s. 145 of the Code of Criminal Procedure alleging that he was a transferee or sub-lessee from Narain under the sub-lease, Ex. 7, and complaining that 19 persons including the *taluqdaria* and her servants had interfered with his possession and that there was fear of a breach of the peace, and that he was in danger of his life. This application was filed in the Court of *Babu* Sriniwas, Sub-Divisional Magistrate of Sultanpur. The Magistrate had the deposition of the complainant recorded on the back of his complaint, and thereupon he immediately passed an order in the vernacular directing that notices should be issued to the opposite parties under s. 145 of the Code. Accordingly an order, purporting to be one under sub-s. (1) of s. 145 of the Code, was drawn up in Urdu fixing a certain date for the hearing of the case, and summoning the parties to produce their evidence in support of their respective claims in regard to possession of the plots in dispute. On March 17, 1934, the Magistrate made his preliminary order under s. 145 absolute. A revision was filed in the Court of the Sessions Judge of Fyzabad, but it was summarily rejected by him, as he was of opinion that the Magistrate had arrived at a pure finding of fact that the complainant Ragho Ram was in actual possession of the plot in dispute, and that there was no law point involved in the application for revision. Against that order of the learned Sessions Judge the present application for revision was filed on July 14, 1934.

The learned Counsel of both parties have been heard at great length, and a number of rulings have been cited on both sides in support of their respective contentions.

The first question for determination is whether the learned Magistrate *Babu* Sriniwas had jurisdiction to pass a preliminary order under sub-s. (1) of s. 145 of the Code. To give jurisdiction

(1) 142 Ind. Cas. 537; 55 A 301; (1933) A L J 188; Ind Rul. (1933) All. 125; 34 Cr. L J 414; L R 14 A 48 Cr.; A I R 1933 All. 264; (1933) Cr. Cas. 434 (F B.)

to a Magistrate to take proceedings under s. 145 of the Code, three things are absolutely necessary, namely.

In the first place the Magistrate must be satisfied that there exists a dispute concerning any land or water of the boundaries thereof; in the second place the Magistrate must be further satisfied that in respect of such dispute, there is a reasonable apprehension of a likelihood of a breach of the peace occurring unless the Magistrate takes prompt measures to prevent the commission of such breach of the peace; in the third place the property in respect of which such dispute exists must be within the local limits of the Magistrate's jurisdiction.

Unless all these three conditions exist, the Magistrate would have no jurisdiction to pass any such preliminary order under s. b-s. (1) of s. 145 of the Code. In the present case I am satisfied that the Magistrate *Babu* Sriniwas, being the Sub-Divisional Magistrate of Sultanpur Tahsil, within which is situate village Maniarpur, where the dispute is said to exist, had the local jurisdiction necessary to pass an order under s. 145, Criminal Procedure Code. I am, however, not satisfied that there is any evidence on the record that the Magistrate satisfied himself that there was in fact a dispute concerning land or that that dispute was of such a nature as the Magistrate had reasonable grounds for believing was likely to create a breach of the peace. The Code of Criminal Procedure contains certain provisions as to the manner in which a Magistrate should proceed on receipt of a complaint filed in his Court. Under s. 200 of the Code of Criminal Procedure upon receipt of a complaint the Magistrate is bound to examine the complainant at once upon oath, and the substance of the examination should be reduced to writing and shall be signed by the complainant and also by the Magistrate. This provision of the Code the Magistrate complied with when he examined the complainant Ragho Ram and recorded his deposition on oath on the back of the complaint. The next step for the Magistrate was to satisfy himself that there was a *prima facie* case justifying him in taking action under s. 145 of the Code. In other words he had to satisfy himself that there did exist, in fact a dispute concerning land, and that that dispute was of such a nature as was likely in his opinion to cause a breach of the peace. For the purpose of satisfying himself that such a dispute did exist the Magistrate should have, before passing an order under sub-s. (1) of s. 145, called upon the complainant Ragho Ram to produce evidence on his behalf to prove that there really was a dispute between him and the opposite parties concerning the plots he mentioned in his complaint, and that that dispute was of such a nature as was likely to cause a breach of the peace. This preliminary enquiry was necessary to enable the Magistrate to satisfy himself that such a dispute did exist and that it was in all probability likely to cause a breach of the peace. If the Magistrate had no time to hold this preliminary enquiry himself, he could have sent the complaint of Ragho Ram to the officer in charge of the Police Station within whose jurisdiction village Maniarpur lay or he could have sent the complaint to the *Tahsildar* of Sultanpur or to any other Magistrate of the Second or Third Class Subordinate to him for the purpose of recording the evidence adduced by the complainant and submitting a report showing whether there was such a dispute and whether such dispute was likely to cause a breach of the peace. The Magistrate adopted none of these three alternative measures which the Code of Criminal Procedure empowered him to take, but without holding any such preliminary enquiry, and without satisfying himself as to the truth of the complaint made by Ragho Ram he passed an order to the following effect:

"bad tahrir bayan mustaghis hukum hua ke notice benam fariq sani batayun August 10, 1933, *ba akhaz talbana jari kiya jawe ke apne apne bayan tahrir babat kabza jaedad mutanzia dakhil karen."*

The order under sub-s. (1) of s. 145 of the Code which was drafted in pursuance of the order in vernacular quoted above is as follows:

"Ba hukum jenab Babu Sriniwas Sahib Bahadur, Magistrate darje awal, zilla Sultanpur, murkhe July 24, 1933".

Dafa 145 *zabta fauzdari.*

Notice *benam* Bibi Umatul Fatima, Bibi Kaniz Fatima, Bibi Asghari Khanum, Badali Khan, *Babu* Iqbal Husain Khan, Bibi Hyderi Khanum, Riasat Husain, Ghulam Abbas, Zakir Hussain, Bande Husain, Nisar Husain Khan, Muhammad Naqi, Sat Narain Lal, Bhooloo Khatiq, Wasiq Khan, Jawad Husain, Mirza Inayat Hussain and Narain.

'Tum logon ko zaria notice haza is amr ki ittla di jati hai ke ijlas haza men batayun August 10 1933 *hazir hokar apne apne kabze ka saboot pesh karo aur bayan tahriri dakhil karo."*

It is clear from the above order that the

Magistrate never gave a thought to the question whether in fact there did exist any dispute concering land between the parties, and whether such dispute was likely to cause a breach of the peace. Even in the final order of March 17, 1934, passed by the Magistrate there is no expression of opinion and no finding by him that a dispute did in fact exist between the parties and that such dispute was likely to cause a breach of the peace.

The learned Counsel for the complainant opposite party, Mr. Wasim, has ingeniously argued that the very fact that the Magistrate did purport to act under s. 145 of the Code of Criminal Procedure goes to prove that he was satisfied that in fact there was a dispute which was likely to cause a breach of the peace. I cannot for a moment accept this contention.

In order to create jurisdiction necessary for him for initiating proceedings under s. 145 of the Code, the Magistrate had to give a finding that a dispute did exist, and that it was of such a nature as was likely to cause a breach of the peace. The mere expression of opinion by the complainant himself that there was likelihood of a breach of the peace cannot obviously furnish materials for the Magistrate to proceed under s. 145 of the Code. The words in sub s. (1) of s. 145 of the Code to the effect "he shall make an order in writing stating the grounds of his being so satisfied" necessarily connote that the Magistrate must in the first place be satisfied that there was a dispute likely to cause a breach of the peace, and then he has to proceed to give in writing the grounds of his being so satisfied. The failure of the Magistrate to record the ground which satisfied him that there was a dispute likely to cause a breach of the peace is a thing apart from the question of his belief that such a dispute did exist which was likely to cause a breach of the peace. If the Magistrate omits to give the grounds of his belief that such a dispute did exist, then his omission to do so may be cured by s. 537 of the Code of Criminal Procedure as was held by the Full Bench of the Allahabad High Court in *Kapoor Chand* v. *Suraj Prasad* (1). That Full Bench ruling of the Allahabad High Court does not, however, support the contention of the learned Counsel for the complainant opposite party that even where the Magistrate does not satisfy himself of the existence of a dispute, which in his opinion is likely to cause a breach of the peace, still his omission to do so can be cured by s. 537 of the Code. The omission by the Magistrate *Babu* Sriniwas to satisfy himself of the existence of a dispute concerning land which in his opinion was likely to cause a breach of the peace is an omission which goes to the root of the matter, for there is in the present case an initial want of jurisdiction on the part of the Magistrate to initiate proceedings under s. 145 of the Code, and such an infringement of the Code does not come within the purview of s. 537, for it vitiates at the very outset the entire proceedings of the Magistrate.

The argument of the learned Counsel for the complainant opposite party that the very fact that the Magistrate did take proceedings under s. 145 shows that he must have satisfied himself that there was a dispute concerning land which, in his opinion, was likely to cause a breach of the peace, is an argument which makes no appeal to my mind. It merely begs the whole question. Not only must the Magistrate have materials before him to enable him to satisfy himself that there was a dispute concerning land which, in his opinion, was likely to cause a breach of the peace, but such materials must be on the record so as to satisfy the High Court in revision that the Magistrate had reasonable grounds for entertaining the belief that there was a dispute concerning land likely to cause a breach of the peace.

In the present case, as I have stated above, save for the bare statement made by the complainant himself, there is not an iota of evidence on the record to enable this Court in revision to say that the Magistrate had any materials on the record to enable him to come to the conclusion that there did exist in fact a dispute concerning land which raised a reasonable apprehension in the mind of the Magistrate that it was likely to cause a breach of the peace. The mere '*ipso dixit*' of the complainant himself is obviously insufficient either to satisfy the Magistrate or the High Court in revision that such a dispute concerning land did exist as was likely to cause a breach of the peace.

Apart, therefore, from the question of any finding as to the likelihood of a breach of the peace, there are in the present case no materials on the record from which this Court can presume that the Magistrate had satisfied himself that there was a dispute

between the parties concerning land which was likely to cause a breach of the peace. In the Full Bench ruling of the Allahabad High Court, *Kapoor Chand* v *Suraj Prasad* (1), the facts were very different. The City Magistrate of Cawnpore, Mr. Burron, had on receipt of the complaint of Sarju Prasad, the servant of one Chuni Lal Garg, recorded the statement of the complainant on oath and then directed a Police enquiry into the matter, and upon receipt of the Police report, he passed an order to the following effect:

"There appears to be *some basis for this complaint* to judge from the Police report. As I am unable owing to pressure of work, to dispose of it myself, I transfer it for such action as may be thought fit along with the connected application to the Court of *Babu* Anand Saroop Sahib for disposal."

Babu Anand Saroop on inspection of the record ordered that notice under s. 145 of the Code be issued in accordance with law. The facts of the Allahabad case are thus vitally different from the facts in the present case. In the present case the Magistrate Mr. Sriniwas did not send the complaint of Ragho Ram to the Police for enquiry, nor did the Police "*suo motu*" make any report that there was a dispute concerning land between the parties, and that such dispute was likely to cause a breach of the peace. In the second place in the Full Bench case of the Allahabad High Court, the City Magistrate of Cawnpore had definitely accepted the opinion of the Police, and had stated that there was some basis for the complaint of Sarju Prasad to Judge from the Police report. The materials on the record of that case not only satisfied the first class Magistrate, who took action under s. 145 of the Code, but it also satisfied the Hon'ble Judges of the Allahabad High Court that there were materials on the record to prove that in fact a dispute did exist between the parties which in the opinion of the Magistrate was likely to cause a breach of the peace.

In my opinion, therefore, the Full Bench ruling of the Allahabad High Court has no applicability to the facts of the present case.

The learned Counsel for the complainant Ragho Ram also referred to a ruling of the Allahabad High Court reported in *Barmha Singh* v. *Emperor* (2). In that ruling it was held by two learned Judges of the Allahabad High Court that in proceedings under s. 145 of the Code, the mere omission of the Magistrate to record under sub-s. (1) of s. 145 the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed is an irregularity in procedure which can be cured by s. 537 of the Code, and that it did not deprive him of jurisdiction to take further proceedings under that section. The principle laid down in that decision is also not challenged in the present case, but its applicability to this case is questioned. Here not only has the Magistrate omitted to record the grounds of his being satisfied that a dispute likely to cause a breach of the peace did exist, but he has, by his omission to satisfy himself that there was in existence a dispute of such a nature as was likely to cause a breach of the peace, deprived himself of exercising jurisdiction to take proceedings under s. 145 of the Code. It is one thing for the Magistrate to omit to record the grounds for his being satisfied that a dispute likely to cause a breach of the peace did exist, but where there is an initial want of jurisdiction on the part of the Magistrate owing to his failure to satisfy himself of the existence of a dispute of such a nature as was likely to cause a breach of the peace, then the proceedings taken under s. 145, Criminal Procedure Code, are void *'ab initio.*

As was pointed out in *Emperor* v. *Bechhu Chaube* (3).

'The test to be applied in considering whether a particular infringement of the provisions of the Code of Criminal Procedure is one which does or does not come within the purview of s. 537 appears to me to be this;

Does the error go to the whole root of the trial?

Does it, in fact, vitiate the proceeding?

Has the Court assumed an authority which it does not possess?

Has it broken the vital rules of procedure?

If the error is of such a nature, the proceedings are vitiated in their very inception and s. 537 has no application"

In a recent ruling of the Rangoon High Court reported in *Nga U Khine* v. *Emperor* (4), Mr. Justice Dunkley laid down the law on the subject in the following clear pronouncement:

"In order that an infringement of the provisions of the Criminal Procedure Code, should be of such a nature that it does not come within the purview of s. 537 of the Code, it must go to the root of the trial and must in fact vitiate the proceedings. It must in fact amount to an assumption by the Court of a jurisdiction which it does not possess, or a failure to exercise a jurisdiction which it does

(2) 142 Ind. Cas. 532; 54 A 1002; (1932) A L J 865; A I R 1932 All. 681; (1932) Cr. Cas. 936; L R 13 A 54 Cr.

(3) 71 Ind. Cas. 115; 45 A 124 at p 126; 20 A L J 874; A I R 1923 All. 81; 24 Cr. L J 67.

(4) 155 Ind. Cas. 66; 13 R 1.

possess. *Subramaniya Iyer* v. *Emperor* (5), and *Emperor* v. *Bechhu Chaube* (3)."

In *Abdul Rehman* v. *Emperor* (6) their Lordships of the Judicial Committee distinguished the case of *Subramanya Iyer* v. *Emperor* (5) from the facts of the case before them and pointed out that the procedure adopted in *Subramanaya's case* (5) was one which the Code obviously prohibited, and it was possible that it might have worked actual injustice to the accused, and they summed up their view of this matter at the end of the judgment in the following words:—

"To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal un-accompanied by any probable suggestion of any failure of justice having been thereby occasioned is not enough to warrant the quashing of a conviction which in their Lordships' view may be supported by the curative provisions of ss. 535 and 537."

In the present case since there are no materials on the record from which this Court can be satisfied that the Magistrate, before he passed his order under s. 145 of the Code, had made any preliminary enquiry to convince himself that there was likelihood of a breach of the peace arising out of the alleged dispute concerning land, and since the Magistrate did not make any such preliminary enquiry, the conclusion is obvious that he usurped a jurisdiction not vested in him.

The dispute was purely of a civil nature, and the only reason justifying him in taking action under s. 145 of the Code was that he had satisfied himself that the dispute concerning land was of such a nature as was likely to cause a breach of the peace.

For the reasons given above I am of opinion that the order of the Magistrate dated March 17, 1934, should be set aside. I would accordingly allow this application for revision, and would set aside the order of the Magistrate, dated March 17, 1924.

It will, of course, be open to the present Sub-Divisional Magistrate of Sultanpur, if he is satisfied that there does exist even now a dispute concerning the land in dispute, and that that dispute is likely to cause a breach of the peace, to take fresh proceedings under s. 145 of the Code of Criminal Procedure.

Srivastava, J.—(*January* 24, 1935) I have had the benefit of reading the judgment of my learned brother Nanavutty, J., but I regret that even after reading it with all the care and attention which it deserves, I have not been able to change the opinion formed by me at the close of the arguments in the case. I need not repeat the facts which have been stated at length in the judgment of my learned colleague. It would be enough to say that the opposite-party in his complaint made to the Sub-Divisional Magistrate had clearly alleged that a large body of the applicant's servants, who were also made parties to the proceedings, came to the land in suit on which he had sowed the *kharif* crop armed with *lathis*, interfered with his possession, and were threatening to kill him if he went near the land. He added that if they were not properly dealt with, there was the likelihood of a breach of the peace. When he was examined on oath by the Magistrate, he again made statements to the same effect. Immediately after this statement had been recorded by him, the Magistrate ordered notices to be issued calling upon the parties concerned in the dispute to file their written statements in respect of possession of the land in dispute, and notices under s. 145 (1), Criminal Procedure Code, were issued accordingly.

The main contention of the learned Counsel for the applicant is that as the initial order of the Sub-Divisional Magistrate under sub-s. (1) makes no mention of his being satisfied that there existed a dispute likely to cause a breach of the peace, nor does it state the grounds of his being so satisfied, therefore the order was quite illegal and the subsequent order passed by him making his preliminary order under s. 145 absolute must be set aside. He did not contend that the omission of the Magistrate to comply with the letter of the law has in fact occasioned any failure of justice, but maintained that the Magistrate's non-compliance with the imperative provisions of sub-s. (1) of s. 145, Criminal Procedure Code constituted an illegality which, whether there was any failure of justice or not, could not be cured by s. 537 of the Code of Criminal Procedure. The relevant words of s. 537 are as follows:—

"..... no ..... order passed by a Court of competent jurisdiction shall be reversed or altered

(5) 25 M 61; 11 M L J 233; 3 Bom. L R 510; 28 I A 257; 5 C W N 866; 2 Weir 271; 8 Sar. 160 (P C.)

(6) 100 Ind. Cas. 227; 51 I A 96; A I R 1927 P C 44; 31 C W N 271; 25 A L J 117; (1927) M W N 103; 38 M L T 64; 8 P L T 155; 4 O W N 283; 28 Cr. L J 259; 6 Bur L J 65; 5 R 53; 52 M L J 585; 29 Bom. L R 813; 45 C L J 441 (P C.)

on.. - revision on account—
(a) of any error, omission or irregularity in the... .. order .. . ...in any .. proceedings under this Code . .....unless such error, omission, irregularity ... - ... .has in fact occasioned a failure of justice"

Explanation.—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

It is hardly possible to lay down any formula for determining whether any particular infringement of the provisions of the Code of Criminal Procedure does or does not constitute an error, omission or irregularity within the meaning of the section, but I am clearly of opinion that the infringement of a provision of the Code worded in an imperative form would not necessarily mean that it constitutes an illegality which is outside the purview of s. 537. Instances can be easily cited of provisions in the Code relating to trivial matters of procedure couched in mandatory terms, the transgression of which cannot be regarded as anything more than a mere technical defect which cannot possibly have the effect of nullifying the proceedings. I am equally clear that if a Magistrate acts in plain disobedience of an express prohibition contained in the Code it would be an illegality which cannot be condoned under s. 537 of the Code of Criminal Procedure. The case of *Subramanya Iyer* v. *Emperor* (5) is an instance of such a case. The Magistrate in that case had acted in contravention of the prohibition clearly implied in the rule laid down under s. 234 of the Code of Criminal Procedure. The following observations of their Lordships in that case are instructive:

"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment. The illustration of the section itself sufficiently shows what was meant."

"The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity."

In a later case, *Abdul Rahman* v. *Emperor* (6) their Lordships referring to the procedure which had been adopted in *Subramanya Iyer* v. *Emperor* (5) as follows:—

"The procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused."

I do not think that the last portion of the sentence just quoted was intended to qualify the earlier decision. However this case is of importance as an authority in support of the view that infringement of a mandatory provision of the Code does not necessarily exclude it from the purview of s. 537. In this case the imperative provision of s. 360, Criminal Procedure Code, that the evidence of each witness "shall be read over to him" was not complied with, but their Lordships held that:

" The bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which in their Lordships' view may be supported by the curative provisions of ss. 535 and 537."

Turning to the facts of the present case, we find that there was sufficient material in the allegations contained in the complaint and in the statement made by the complainant on oath on which the Magistrate could be satisfied that a dispute likely to cause a breach of the peace existed. Section 145, authorises the Magistrate to act under the section whenever he "is satisfied from a Police report or other information" that such a dispute exists. I am not aware of any provision which makes it obligatory for the Magistrate to call upon the complainant to produce witnesses or to make preliminary inquiry or to call for a report from the Tahsildar or the Police before making the initial order under sub-s. (1) of that section. The words of the section appear to be wide enough to authorise the Magistrate to act on any information which satisfies him of the likelihood of a breach of the peace. If the material which was before the Magistrate in the present case on which he could well be satisfied of the existence of such a dispute had not been there, the position would have been different. But when with such material before him a Senior Magistrate, who had the charge of a Sub-Division, ordered the issue of a notice under s. 145, there is every reason to think that the information received by him from the complainant sufficiently satisfied him of the existence of an apprehension of a breach

of the peace so as to induce him to take action under that section. No doubt he did not strictly comply with the provisions of s. 145, in omitting to state in the order that he was satisfied about the likelihood of a breach of the peace and the grounds on which he was so satisfied, but I do not think that this omission deprived him of jurisdiction to act under that section. The jurisdiction that is conferred on a Magistrate by s. 145, arises from the existence of a dispute likely to cause a breach of the peace concerning any land or water or the boundaries thereof within the local limits of his jurisdiction. Any defect in following the procedure laid down in s. 145, cannot, in my opinion, take away the jurisdiction so conferred. In the present case it is not denied that there was a dispute concerning land within the local limits of the jurisdiction of the Sub-Divisional Magistrate who issued the notice in question. He had received information from the complainant which was supported by him on oath that the said dispute was likely to cause a breach of the peace. These facts were sufficient to invest him with jurisdiction to take necessary steps under the section. It should also be noted that when the applicant appeared in pursuance of the notice, she did not raise any objection about the notice being defective by reason of the omission of which so much capital is sought to be made before us. Under the circumstances, I am of opinion, that it is nothing more than an omission or irregularity within the meaning of s. 537. I have already mentioned that it is not the applicant's case that this omission or irregularity has occasioned any failure of justice, and so far as I can see, the applicant has not in any way been prejudiced on this account. I am, therefore, of opinion that we are debarred by the provisions of s. 537 of the Code of Criminal Procedure from making any interference with the order of the Magistrate by reason of this technical defect in his initial order.

The present case appears to me to be almost on all fours with the decisions of the Allahabad High Court in *Barmha Singh* v. *Emperor* (2) and *Kapoor Chand* v. *Suraj Prasad* (1). The principles laid down in these cases, with which I am in entire agreement, are fully applicable to the case. The view taken by me as regards the scope of s. 537, of the Code of Criminal Procedure is also supported by the decision of the Rangoon High Court in *Nga Hla U* v. *Emperor* (7), I completely endorse the reasoning adopted by Brown, J., in that case.

For the above reasons I am of opinion that the order of the Magistrate must be upheld, and would accordingly dismiss this application.

Srivastava and Nanavutty, JJ.—(*January* 24, 1935).—As the Judges composing this Bench are equally divided in opinion, the case should be laid before the Hon'ble Chief Judge for necessary orders about the case being heard by a third Judge for his opinion under s. 429 of the Code of Criminal Procedure.

King, C. J.—(*February* 11, 1935).—This application arises out of proceedings taken by a Magistrate under s. 145 of the Code of Criminal Procedure. The facts of the case have been fully given in the judgment of Mr. Justice Nanavutty, and I need only touch upon them briefly.

Certain ladies were joint proprietors of a village and one of those ladies, Ummatul Fatima, gave a perpetual lease of some plots to one Narain. Narain assigned the lease for Ragho Ram who got posssession. The co-sharers of Ummatul Fatima obtained a declaration in the Civil Court that this lease, granted by one co-sharer, was invalid. The Court refused to grant the prayer for possession of the land in dispute. So the possession of Ragho Ram remained undisturbed. Instead of seeking to eject Ragho Ram by process of law, the co-sharers attempted to oust him from possession by force. Ragho Ram then made an application to the Sub-Divisional Officer under s. 145 of the Code of Criminal Procedure against nineteen persons, nine of whom were the *zemindars* and the other ten were their servants or relations. Ragho Ram asserted that he had been in possession of the plots in dispute for some years and that he had sown the *kharif* crops during the current year also and that on July 7, 1933, certain of the opposite parties came to the land armed with *lathis* and tried to turn him out by force. The applicant also alleged that on July 23, when he went to the field again for getting the crops weeded, the opposite party again appeared, armed with *lathis*, and prevented him forcibly from weeding the crops and threatened to kill him if he did not desist from cultivating the plots in dispute. The Magistrate took the statement of Ragho Ram on oath and he supported the allegations made in his

(7) 89 Ind. Cas. 312; 3 R 139; A I R 1925 Rang. 258; 26 Cr. L J 1336.

complaint. Thereupon the Magistrate issued an order purporting to be an order under s. 145, sub-s. (1) directing notices to be issued to the opposite parties that they should attend the Court on a certain date and put in written statements of their claims to possession of the land in dispute. The Magistrate took the evidence of the parties and finally passed an order declaring that Ragho Ram was in possession of the land in dispute and directing that he should remain in possession unless duly ejected by some order of a Court.

The opposite party applied to the learned Sessions Judge in revision but he dismissed the application. A second application for revision was filed in this Court and was referred to a Bench of two Judges. As the two learned Judges differed in opinion, the case has been referred to me under s. 429 of the Code of Criminal Procedure, for opinion.

The main point argued by the learned Counsel for the applicant Bibi Asghari Khanam is that the order passed by the Sub-Divisional Officer under s. 145, sub-s.(1) is vitiated by the fact that the Magistrate did not state that he was satisfied regarding the existence of a dispute likely to cause a breach of the peace, much less did he state the grounds of his being so satisfied. It is argued that as there is nothing to show that the Magistrate was satisfied regarding the existence of a dispute likely to cause a breach of the peace he had no jurisdication to take action under s. 145.

The territorial jurisdiction of the Magistrate is not disputed. It is also admitted that a dispute existed concerning the land. The only question is whether the Magistrate was satisfied that the dispute was likely to cause a breach of the peace, and if he was so satisfied, then whether his omission to state the grounds of his being so satisfied was an omission sufficient to vitiate the whole proceeding.

There is good authority for the view that if the Magistrate is satisfied regarding the existence of a dispute likely to cause a breach of the peace, then the mere failure to state the grounds of his being so satisfied, in his preliminary order under s. 145 (1), is not a fatal defect, but is only an admission which is curable under the provisions of s. 547 of the Code of Criminal Procedure, if it has not occasioned any failure of justice or any prejudice to the accused persons. The learned Advocate for the applicant has not challenged this view but he argued that there is nothing upon the record to show that the Magistrate was satisfied that a dispute existed likely to cause a breach of the peace or that the Magistrate ever applied his mind to such a question and therefore the proceedings are vitiated.

I think it must be conceded that a Magistrate cannot take action under s. 145, sub-s. (1) unless he is satisfied regarding the existence of a dispute likely to cause a breach of the peace. If he is not so satisfied, then I think he would have no jurisdiction to take action. The omission to record the grounds of his being so satisfied is another matter, and it is not now argued before me that the omission to state the grounds was such a defect or omission that could not be cured under s. 537. I may mention that it has not even been argued that any failure of justice was occasioned or that the accused have been prejudiced by the omission to state the grounds in the preliminary order under s. 145, sub-s. (1).

The main question, therefore, seems to be whether we can reasonably hold that the Magistrate was in fact satisfied regarding the existence of a dispute likely to cause a breach of the peace. Before the Magistrate issued his preliminary order, he had received a written complaint and he had taken the sworn testimony of the complainant. I have already referred to the substance of the complaint and I think it is clear that if the Magistrate believed the complaint to be true, or even approximately true, then there was undoubtedly a strong apprehension of a breach of the peace. According to the complainant the opposite party were trying to turn him out from his fields by force and threatened to kill him if he ventured to continue cultivating his fields.

Mr. Justice Nanavutty takes the view that the Magistrate could not have been satisfied of the likelihood of a breach of the peace merely from the statement of the complainant and that the Magistrate should have held some preliminary inquiry by examining further witnesses or by calling for a report from the Police or from the *Tahsildar*. I am unable to accept this view. There is nothing in the language of the section to suggest that the Magistrate cannot take action merely on the sworn testimony of the complainant himself, if the Magistrate believes it to be true. The section itself shows that a

Magistrate can take action merely on the strength of a Police report or "other information," so he can take action without having before him any sworn testimony whatever. It is impossible to lay down any rule as to the amount of evidence which should satisfy a Magistrate. In my opinion if a Magistrate believes the statement of one witness to be true, he is at perfect liberty to act upon it for the purpose of passing an order under s. 145 (1). It is not incumbent upon him to hold a preliminary inquiry himself by examining further witnesses, nor is it necessary for him to call for a report from the Police. If it were held that some such procedure were absolutely necessary, then I think that the object of s. 145 would be largely frustrated. It might be advisable to take action immediately in order to prevent a breach of the peace, and I think it would be very dangerous to hold that a Magistrate could not take action under s. 145 without holding a preliminary inquiry, as suggested by Nanavutty, J. If the Magistrate is satisfied on the strength of the testimony of one witness then he can pass an order under s. 145 (1).

In my opinion the Magistrate had before him sufficient materials for holding that there was a likelihood of a breach of the peace. If the facts stated by complainant were even approximately true, there was a strong probability of a breach of the peace. When we find that the Magistrate had such materials before him and that he proceeded to issue an order under s. 145, sub-s. (1), I think it may safely be inferred that he was satisfied that the dispute was likely to cause a breach of the peace. The mere fact that a Magistrate issues an order under s. 145, sub-s. (1), would not necessarily lead to the inference that the Magistrate was satisfied regarding the existence of a dispute likely to cause a breach of the peace. The Magistrate might have no information before him suggesting the likelihood of a breach of the peace and yet, if he were very inexperienced, he might take action under s. 145. But when we find, as in the present case, that the Magistrate had ample ground for apprehending a breach of the peace and that he did issue an order under s. 145, sub-s. (1), I am prepared to hold that he was satisfied regarding the likelihood of a breach of the peace although he omitted to say so in his order.

On this view there was no want of jurisdiction on the part of a Magistrate but a mere omission to frame his order in accordance with law. As no failure of justice or prejudice to the accused has been occasioned, I think the omission is covered by s. 537 and cannot furnish a reason for setting aside the Magistrate's final order.

This view is in accordance with the decision of the Full Bench of the Allahabad High Court in *Kapoor Chand* v. *Suraj Prasad* (1) and a decision of a Bench of the Allahabad High Court in *Barmha Singh* v. *Emperor* (2). I was a party to both these decisions and see no reason to change my view. In the case last mentioned the Magistrate's order under s. 145 (1) contained absolutely no mention of the fact that he was satisfied regarding the existence of a dispute likely to cause a breach of the peace much less did it contain any mention of the grounds for such satisfaction. It was, however, held that the omission did not vitiate the proceeding.

I agree with the view taken by Mr. Justice Srivastava and hold that there is no ground for interference in revision.

In conclusion, although I consider that there is no ground for interfering with the order in revision, I would not have the Magistrate to understand that defects in procedure are of no importance; slipshod procedure is to be condemned even though it does not necessarily result in vitiating the whole proceeding.

Srivastava and Nanavutty, JJ.—*March 5, 1935.*—The only question urged in support of this application was that the initial order of the Sub-Divisional Magistrare under sub-s. 1 of s. 145 of the Criminal Procedure Code was illegal, because the Magistrate made no mention of his being satisfied that there existed a dispute likely to cause a breach of the peace nor stated the grounds of his being so satisfied. The Judges constituting this Bench were unable to agree as regards this question and the matter was referred to a third Judge, who has now decided that the order in question could not be interfered with on that ground. The result, therefore, is that this application for revision must fail. It is accordingly dismissed.

N. *Appeal dismissed.*

LAHORE HIGH COURT

Second Civil Appeal No. 1395 of 1933
May 10, 1934
RANGI LAL, J.
AKKU—DEFENDANT—APPELLANT
versus
ALI AKBAR AND OTHERS—PLAINTIFF—RESPONDENTS

Custom (Punjab)—Alienation — Necessity—Recital in deed, how far evidence of necessity—No finding that alienor has been extravagant—Vendor need not prove that previous debts paid out of sale consideration were contracted for necessary purposes.

The recital in a deed is clear evidence of the representation it makes and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then when proof of actual inquiry as regards the necessity for alienation has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed. *Banga Chandra Dhur Biswas* v. *Jagat Kishore* (1), relied on.

In the absence of a finding that an alienor has been recklessly extravagant or has been wantonly wasting his property, the vendee is not required to prove that previous debts whether owing to himself or to third persons which have been paid out of the sale consideration were contracted for necessary purposes He has only to prove the existence of such debts and once that is established and it is not proved that they have been incurred for immoral or illegal purposes, their payment becomes a valid necessity sufficient to support the sale.

S. C. A from the decree of the District Judge, Jullundur, dated May 31, 1933.

Mr. *Achhru Ram*, for the Appellant.

Mr. *Abdul Karim*, for the Respondents.

Judgment.—This second appeal arises out of a suit to challenge four alienations made by the father of the plaintiffs. We are now concerned with only two of them, namely, a mortgage dated February 23, 1921, for a sum of Rs. 140 and a sale of the same date for a sum of Rs. 900. The mortgage has been set aside entirely and the sale has been converted into a mortgage for a sum of Rs. 540. The consideration for the mortgage is made up thus:

	Rs.	A.	P.
"(*a*) Borrowed in cash for the purchase of cattle	100	0	0
(*b*) Borrowed in cash for the purchase of fodder	35	0	0
(c) Expenses of stamp and registration	5	0	0
Total ...	140	0	0

The learned District Judge expressed himself thus in regard to this mortgage :

"The money borrowed under the mortgage was for purchase of cattle and fodder, and for both these purposes *zamindars* can get advances from Government in the shape of *takawi* loans for which no security is required and which are re-paid by convenient instalments with a low rate of interest. With all these advantages so readily available Umer Din acted unreasonably in borrowing money for the purpose at high interest and on security. These were not antecedent debts and it lay upon the alienee to prove necessity. He failed to do this, and the debt was therefore rightly disallowed."

The learned Judge fell into an error in supposing that the sum of Rs. 140 was borrowed at a high rate of interest. The mortgage was with possession and no interest was payable. There is nothing on the record to show that a *takawi* loan on easy terms was available to the mortgagor. The finding of the learned District Judge is, therefore, vitiated by a wrong assumption of fact and a conjecture for which there is no basis on the record. It appears that he was inclined to believe the recitals in the deed because he remarked that the money was borrowed for the purchase of cattle and fodder. He, however, failed to consider whether under the circumstances of the case this recital was sufficient proof of necessity or not. In *Banga Chandra Dhur Biswas* v. *Jagat Kishore* (1) their Lordships of the Privy Council held that after a long period has elapsed between the alienation and the suit to set it aside when all those who could have given evidence on the relevant points have grown old or have passed away, a recital consistent with the probabilities and circumstances of the case assumes greater importance and cannot lightly be set aside. The recital is clear evidence of the representation and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then when proof of actual inquiry has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed. It is a matter of common knowledge that a *zamindar* is frequently under the necessity of borrowing money for purchase of cattle and fodder. The alienation in question took place in 1921 and the suit to set it aside was brought by the sons of the alienor in 1932. It was futile to expect the alienee to adduce strict proof of necessity at this distance of time. The alienation should, in my opinion, have been upheld.

The consideration for the sale in question is made up thus:

"(*a*) Due to the alienee on account of a previous mortgage Rs. 340. (*b*) Due to Amir Khan, previous mortgagee, Rs. 300 (*c*) Due to Ali Sher,

(1) 36 Ind. Cas. 420; A I R 1916 P C 110; 43 I A 249; 44 C 186; 20 M L T 335; 31 M L J 563; (1916) 2 M W N 336; 4 L W 458; 8 Bom L R 868; 24 C L J 487; 1 P L W 1; 21 C W N 225 (P C).

previous mortgagee, Rs. 100. (*d*) Due to Sardar Khan on a *bahi* entry, Rs. 90. (*e*) Expenses of stamp and registration, Rs. 20. (*f*) Paid in cash for sinking a well, Rs 50."

Item (*c*) has been wholly disallowed, and out of item (*a*) a sum of Rs. 80 only has been allowed. In regard to item (*c*), the learned District Judge has made the following remarks:

"Payment to Ali Sher not proved. Ali Sher not examined; no separate receipt."

It is true that Ali Sher was not examined, but the learned District Judge failed to consider that the alienee produced the registered mortgage deed bearing an endorsement from Ali Sher. The land mortgaged to Ali Sher was represented by *khasra* No. 801 and it forms part of the land sold to Akku defendant. There is no doubt that the land was in the latter's possession because the plaintiffs brought a suit in respect of it. He could have acquired possession only after redemption from Ali Sher. The failure of the learned District Judge to consider these points vitiates his finding. As for item (*a*), the first question for consideration is whether the alienee was called upon to prove the necessity for it. The learned District Judge has failed to consider this aspect of the case. It is well-established that in the absence of a finding that an alienor has been recklessly extravagant or has been wantonly wasting his property, the vendee is not required to prove that previous debts whether owing to himself or to third persons which have been paid out of the sale consideration were contracted for necessary purposes. He has only to prove the existence of such debts and once that is established and it is not proved that they have been incurred for immoral or illegal purposes, their payment becomes a valid necessity sufficient to support the sale. In the present case it has been found by the Courts below that the alienor was neither extravagant nor inclined to waste his property wantonly, and there is no dispute as to the existence of the previous mortgage in favour of the alienee. The latter was, under the circumstances of the case, not called upon to prove any necessity for it especially when it was not expressly challenged in the suit. One of the items disallowed out of the sum of Rs. 340 was a sum of Rs. 80 due to Umar Din, prior mortgagee. The learned District Judge remarked as follows in regard to this item:

"The only evidence was the statement of Akku, defendant, Umar Din not produced, nor any receipt by him."

In this case also Akku produced the original mortgage deed and proved its execution because he was an attesting witness to it. The land mortgaged to Umar Din is now in possession of Akku and has been sued for by the plaintiffs. In regard to the remaining items which have been disallowed, the recitals in the deed should have been considered to be sufficient under the circumstances of the case. For these reasons, I accept the appeal and dismiss the suit in regard to these alienations with costs throughout.

D. *Appeal allowed.*

OUDH CHIEF COURT

Civil Reference No. 1 of 1935

March 1, 1935

SRIVASTAVA AND ZIA-UL-HASAN, JJ.

In the matter of THE COMMISSIONER OF INCOME TAX, C. P. AND U. P.

Power of attorney—Construction—Income-tax return signed, verified and filed by agent—Whether permitted by terms of power of attorney—No evidence as to knowledge of assessee—Income-tax authorities not changing their position due to implied representation—Estoppel, if arises—Income Tax Act (XI of 1922), s. 23—Production of account books by assessee—Whether implies ratification of filing of return by agent—Duty of Income-tax authorities to satisfy themselves of agent's authority to file returns.

A return of income for an year was filed on behalf of a *taluqdar* by his *mukhtar* who also signed and verified the return. The relevant clause of the *mukhtarnama* was as follows:

Therefore, I appoint .. .. .. as my *mukhtar-i-ams* and any suits (*nalishat*) filed by them in Civil Courts, Revenue Courts, Collectorates, Criminal Courts, Appellate Courts, in the Settlement Department, Cantonment, Police, Municipalities in British India, Chief Court, High Court, Commissioner's Court, Board of Revenue and other Government departments, or any applications (*darkhwasts*) filed by them on my behalf .. .. ..or plaints, memoranda of appeal, or written-statements, or affidavits filed in support of any application .. .. All such proceedings shall be accepted by me as having been done by me personally;—

Held, (1) that though there was no mention of the income-tax department, the words "other Government departments" were sufficiently wide to include the department of Income-tax. [p. 182, col. 1.]

(2) that the general object of the power was that the agent should be able to represent his principal in proceedings in Courts so as to dispense with the necessity of the principal appearing personally but it did not give the agent any authority to sign or verify the return of income for the purposes of assessment of income-tax. *The Bank of Bengal* v. *Ramanathan Chetty* (2), and *Bryant* v. *La Banque du Peuple* (5), referred to. [*ibid.*]

(3) that there was no evidence that the return was filed with the authority or even with the knowledge of the assessee and even if he had the knowledge, as the income-tax authorities had not in any way changed their position to their detriment on account of any implied representation on the

part of the assessee about the *mukhtar's* authority to sign and verify the return, no question of estoppel could arise.

(4) that the production of the account books by the assessee in pursuance of notice, did not constitute any ratification in respect of the return of income. [p 183, col. 2.]

It is the duty of the Income-tax Officers before they accept returns signed and verified by agents to satisfy themselves about the authority of such agents to do so. [p. 183, col. 1.]

C. Ref. made by the Commissioner of Income-tax, C. P. and U. P.

Mr. *H. S. Gupta*, Government Advocate, for the Commissioner of Income-tax.

Messrs. *Wasim*, *Khaliquzzaman* and *Faiyaz Ali*, for Syed Muhammad Taqi.

Judgment.—This is a reference by the Commissioner of Income-tax, Central and United Provinces, under s. 66 (2) of the Indian Income Tax Act (XI of 1922).

The facts which have given rise to this reference are briefly these :—

A return of income for the year 1932-33 was filed on behalf of Raja Saiyid Mohammad Mehdi, *Taluqdar* of Pirpur, District Fyzabad, by one Asghar Husain Khan, a *mukhtar* of the Raja. The said return was also signed and verified by the same Asghar Husain Khan. The Income-tax Officer of Fyzabad did not accept the return and called upon the assessee to produce his accounts. When the accounts were produced, he found that the return in question did not contain a correct statement of the income, and therefore, assessed the Raja on a larger income than that shown in the return At the same time he issued a notice to the Raja to show cause why a penalty under s. 28 of the Act should not be levied upon him. The Income-tax Officer did not accept the explanations which were given on behalf of the Raja for the omission of certain items of income from the return in question and levied a penalty against him of Rs. 5,000. The Raja filed an appeal against this order of the Income-tax Officer to the Assistant Commissioner, who dismissed the appeal. He then made an application under s. 66 (2) of the Act demanding a reference to the High Court of certain question of law arising out of the order imposing the penalty under s. 28. Thereupon the Commissioner of Income-tax made the present reference. The questions referred by him are as follows :—

(1) In the circumstances of this case, was the return of income filed by Asghar Husain Khan, the *mukhtar-i am* of the assessee, such a return as could be held to be binding on the assessee ?

(2) If the answer to question No. (1) is in the affirmative, was it essential for the Assistant Commissioner to establish that the false return had been filed with the knowledge and connivance of the assessee before he could confirm the order of the Income-tax Officer imposing penalty under s. 28 of the Income Tax Act?

As regards the first question, it has been argued on behalf of the assessee that the return in question is not binding on him, firstly because according to the provisions of the Income Tax Act, the return must be signed by the assessee himself, and secondly, because on a proper interpretation of the power of attorney in favour of Asghar Husain Khan, he had no authority to sign or verify such a return on behalf of the Raja. As regards the general question whether under the provisions of Income Tax Act a return of income required to be filed under s. 22 cl. (2) must be signed and verified by the assessee himself or can be signed and verified by an authorised agent, it has been objected by the learned Government Advocate that this question was not specifically raised by the assessee before the Commissioner of Income-tax and is not included within the questions referred by him to this Court. The learned Counsel for the assessee, on the other hand, maintains that the question is fully covered by the grounds raised by him in his application for reference under s. 66. He further contends that in any case this Court has authority to re-settle issues and answer all questions of law, which properly arise out of the order complained off. In view of the opinion which we have formed as regards the second ground, we do not think it necessary to express any opinion as regards the powers of this Court in the matter of re-settling issues, and would, under the circumstances, leave the general question raised on behalf of the assessee undecided.

Next as regards the question about the authority of Asghar Husain Khan to sign and verify the return on behalf of the assessee, the determination of this question in our opinion must proceed mainly upon the interpretation of the *mukhtarnama* given in appendix D of the case sup-

mitted by the Commissioner of Income-tax. The relevant clause of this *mukhtarnama* is as follows:—

Therefore, I appoint . . . . . as my *muhhtar-i-ams* and any suits (*nalishat*) filed by them in Civil Courts, Revenue Courts, Collectorates, Criminal Courts, Appellate Courts, in the Settlement Department, Cantonment, Police, Municipalities in British India, Chief Court, High Court, Commissioner's Court, Board of Revenue and other Government departments, or any applications (*darkhwasts*) filed by them on my behalf . . . or plaints, memoranda of appeal, or written-statements, or affidavits filed in support of any application . . . All such proceedings shall be accepted by me as having been done by me personally.

Though there is no express mention of the Income-tax Department, yet we think that the words "other Government departments" are sufficiently wide to include the department of Income-tax.

It has been argued that the return of income filed under s. 22, cl. (2) of the Income Tax Act should be regarded as an application or a written statement within the meaning of the terms of the *mukhtarnama*. It has also been pointed out that when the *mukhtar* was authourised to file affidavits in support of an application, it should include the authority to file a return of income such as is required by s. 22. We find ourselves unable to accede to the argument. In *Jonmenjoy Coonddo* v. *George Alder Watson* (1), in which case also the question was as regards the interpretation of a power of attorney, their Lordships of the Judicial Committee remarked as follows:—

"In order to see what was intended by these words, they must be looked at in connection with the context, as well as with the general object of the power."

It seems to us that the general object of the power in the present case was that the agent should be able to represent his principal in proceedings in Courts so as to dispense with the necessity of the principal appearing personlly. This is clearly borne out by the preamble of the document, in which it is said that the executant appoints the persons named in the document as his general agents, because he has often to institute and defend cases (*muqadmat*). Again in The *Bank of Bengal* v. *Ramathan Chetty* (2), their Lordships of the Judicial Committee referred with approval to the following observations in *Bryant* v. *La Banque du Peuple* (3) and applied the canon of construction laid down therein to the case before them

"That where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power it is neceesary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication."

In Khatiar's Law of Agency in British India (page 176) a number of cases have been cited in support of the proposition that a power of attorney must be strictly construed as giving only such authority as it confers expressly or by necessary implication. Applying these principles to the construction of the *mukhtarnama* in favour of Asghar Husain Khan, we are clearly of opinion that it does not give him any authority to sign or verify the return of income for the purposes of assessment of income-tax. We are unable to agree with the learned Government Advocate that it can be treated either as an application or as a written statement within the meaning of the *mukhtarnama*. An application in the sense in which it has been used in the *mukhtarnama*, in our opinion means a document containing some request to the authority to whom the application is made. The return in question cannot be treated as an application in this sense. It is merely a declaration of the assessee as regards his income. We have also looked into the prescribed form for such returns. It does not contain any request or prayer addressed to the Income-tax authorities. It is also impossible to treat it as a written-statement which term appears to have been used in the *mukhtarnama* in the technical sense of a written reply to a plaint filed in Court.

We have little doubt that when this *mukhtarnama* was drafted, the idea of the *mukhtars* signing and verifying income-tax returns or even of their representing the principal before the income-tax authorities was not present in the mind of the person who drafted it. The central idea of it was to make provision for represen-

(1) 11 I A 94; 10 C 901; 4 Sar 523; 8 Ind Jur. 387 (P. C.).

(2) 32 Ind. Cas. 419; 43 I A 48; 30 M L J 232; 20 C W N 329; 39; 3 L W 210; 19 M L T 176 (1916) M W N 150; 14 A L J 217; 23 C L J 348; 18 Bom. L R 357; 9 Bur L T 1; 43 C 527; 8 L B R 536 (P. C.)

(3) (1893) A C 170 at p 177; 2 L J P C 68; 1 R 336; 68 L T 546; 41 W R 600.

tation of the principal in Court litigations and proceedings.

It is also argued by the learned Government Advocate that in any case the agency need not be created expressly but can also be implied. In the case of Asghar Husain Khan who was appointed a *mukhtar* by a written deed, there seems no question of any implied agency. The powers conferred upon him as agent have been definitely set forth in the written *mukhtarnama* and we can see no justification for going outside its terms.

Lastly it has been argued that the present case is one of an agency by estoppel. Reliance has been placed on the fact that Asghar Husain Khan had also verified the return for the preceding year 1931-32 and that in previous year such returns were signed by the manager or some *mukhtar* of the assessee. We have a mention of this also in the order of reference of the Commissioner of Income-tax, which shows that Raja Saiyid Muhammad Mehdi was assessed to income-tax for the first time in the year 1927-28 and that the return for that year was verified by a *mukhtar* Saiyid Hasan Raza. We know nothing about the returns filed in the two following years but in 1930-31 the Raja appended his signature to the return under that of his manager, who had verified it. These facts do not show any uniform practice on the part of the assessee. Moreover, as stated before, we have no information as to the return for two years. In any case we do not think that the facts stated above are sufficient to substantiate a plea of estoppel.

"Whoever deals with an agent is put on his guard by that very fact, and does so at his risk. It is his right and duty to inquire into and ascertain the nature and extent of the powers of the agent, and to determine whether the act or contract about to be consummated comes within the province of the agency and will or not bind the principal. It is the duty of third persons at their peril to ascertain what kind of an agent one is who represents himself as such and the extent of his powers."

(Katiar's Law of Agency, pages 155-156).

It seems to us that it is the duty of the Income tax Officers before they accept returns signed and verified by agents to satisfy themselves about the authority of such agents to do so. The Income-tax Officer had easy means for gaining such knowledge by looking into the *mukhtarnama*, which was a registered document. There is no evidence before us to show that the return in question had been filed with the authority or even with the knowledge of the Raja, but assuming that he had the knowledge, it seems obvious that the income-tax authorities have not in any way changed their position to their detriment on account of any implied representation on the part of the Raja about Asghar Husain Khan's authority to sign and verify the return. We are, therefore, of opinion, that in the circumstances no question of estoppel can arise.

Reference is also made by the learned Government Advocate to Pollock's Law of Contract at p. 649 and Katiar's Law of Agency at p. 176 in support of the contention that where the authority of an agent is conferred in ambiguous terms so as to be fairly capable of more than one construction every act done by him in good faith, which is warranted by any one of those construction is deemed to have been duly authorised. We think that there is no room for application of this principle in the present case, because the terms of the *mukhtarnama* appear to us to be quite clear and unambiguous.

It was also contended that the act of Asghar Husain Khan in filing the return, even though at the inception unauthorised, should be deemed to (*sic*) have subsequently been ratified by the Raja, when in compliance to the notice issued by the Income-tax Officer under s. 23 of the Income Tax Act, he made Asghar Husain Khan appear and produce the accounts, which the Raja had been called upon the produce. When the Raja was called upon to produce his account books he was in duty bound to do so. Section 23 allows an assessee to produce the evidence himself or to cause it to be produced by some other person. It was a mere accident that the person deputed for the production of the accounts was Asghar Husain Khan. We think that in the circumstances the production of these account books cannot constitute any ratification in respect of the return of income.

The result, therefore, is that we answer the first question in the negative. In view of the answer given to this question, the second question does not arise. We make no order as to costs.

N. *Order accordingly.*

MADRAS HIGH COURT

Civil Appeal No. 280 of 1929
July 23, 1934

VARADACHARIAR AND BURN, JJ.

AT. N. AT. CHOCKALINGAM CHETTIAR—PLAINTIFF—APPELLANT

versus

RAMA MU RAMA PALANIAPPA CHETTIAR—DEFENDANT—RESPONDENT

Negotiable Instruments Act (XXVI of 1881), s. 4—Promissor and promisee clearly indicated and also definite promise to pay but worded in participal form—Document, whether a promissory note—Loan and note contemporaneous—No anterior liability apart from note—Contract Act (IX of 1872), s. 62.

Where in the opening portion of a document the promissor and the promisee are clearly indicated and there is a definite promise to pay though it is worded in the participal form, the document is a promissory note. *Kadir Moithin Pulavar* v. *Pandurang Naidu* (1), referred to.

Where the promissory note as well as the loan are contemporaneous, there is really no question of a definite anterior liability apart from the note. *Shanmuganatha Chettiar* v. *Srinivasa Ayyar* (2), distinguished.

A. against the decree of the Temporary Sub-Judge, Devakottai, in O. S. No. 138 of 1928.

The Advocate-General and *A. Nagaswami Iyer*, for the Appellant.

Messrs. *K. Rajah Ayyar* and *V. Ramaswami Iyer*, for the Respondent.

Varadachariar, J.—Plaintiff-appellant sued to recover a sum of money on the basis of what is referred to in the plaint as a "signed letter" given by the defendant on April 12, 1920. That letter bears only a one anna stamp and the lower Court has held that it is a promissory note 'not payable on demand" and is, therefore, insufficiently stamped. It dismissed the suit, holding that the suit is based only on that inadmissible letter, and not on any original debt as an independent cause of action. In the appeal the learned Advocate-General has contended that that letter is not a promissory note at all or, if it is a promissory note, it is payable on demand and is, therefore, duly stamped. The appellant has also taken the precaution of applying to this Court for permission to amend the plaint, by basing the claim alternatively on the "debt" independently of the said letter.

In support of the first contention urged on behalf of the appellant, *viz.*, that the document in question is not a promissory note, reliance is placed upon the fact that the document does not in terms contain a promise to pay to a specified person. The terms of the document are set out in the judgment of the lower Court. It is in these terms:

"30th *Panguni, Sitharthi*—Kallal At. N. A. T. '*varau*' (credit) 'the same place R. M. M. R. M. '*patru*' (debit) for the two *hundis* taken by me and sent for our Penang firm as on 13th idem Rs. 9,500 at Rs 95 (exchange rate) three months *thavanai* 11 annas interest, rings 10,000, for these 10,000 rings adding from *thavanai, thavanai* interest and principal will be paid and this letter taken back by me."

The document begins in the way in which similar documents in vogue among Chetties run, mentioning the fact of the money having been lent by A. T. N. A. T. and having been received by R. M. M. R. M. The English translation puts the concluding words in the passive voice. Perhaps it will be a more accurate rendering of the original to have these words in the active voice, *i. e.*, "paying the principal and interest as per above terms I shall take back this letter." The point of the argument on behalf of the appellant is that the document does not say "paying to you"; and in support of that contention, reliance was placed upon a decision of this Court in *Kadir Moithin Pulavar* v. *Pandurang Naidu* (1). No exception can be taken to the principle laid down in that case that in considering whether a document is a promissory note or not, it is material to see whether the payee is named there. But neither that case nor any other decision lays down, in which part of the document the payee is to be named, or by what kind of language. On the other hand Illus. (*b*), s. 4, Negotiable Instruments Act, clearly shows that the reference to the payee need not be found in the words of promise. The illustration runs thus:

"I acknowledge myself to be indebted to *B* in Rs. 10,000 to be paid on demand for value received."

This is declared to be a promissory note within the meaning of the definition. In the document now in question, the promissor and the promisee are clearly indicated in the opening portion of the document and there is a definite promise to pay though it is worded in the participal form. There is, therefore, no force in the first contention. The second contention is that the reference to three months *thavanai* is only a provision for calculation of compound interest with three-monthly rests and does not make the document payable otherwise than on demand. There was at one time some difference of opinion in the reported decisions in this Court, as to whether in the case of these *thavanai*, documents among Nattukottai Chetties

(1) 146 Ind. Cas. 543; A I R 1954 Mad 25; 6 R M 305; 38 L W 846; (1933) M W N 1243.

he money becomes due immediately on the expiry of the first *thavanai* or only upon an express demand after the expiry of the *thavanai* but there was at no time any doubt whatever that during the first *thavanai* the money was not repayable. That this is the well established usage amongst Chetties in the case of these *thavanai* documents is shown by the plaintiff's admission as his own witness in the case, that the amount is not repayable within three months as it is given on three months' *thavanai*. This contention therefore also fails.

As regards the application to amend the plaint by inserting a prayer based upon the original cause of action, it is difficult to read the plaint as containing any basis for such a prayer and it is therefore very doubtful if the appellant will be justified in asking for it at this stage. But even apart from that consideration it will, in the circumstances of this case, serve no purpose to the appellant to allow such an amendment. The note as well as the loan were contemporaneous and there is really no question of a definite anterior liability apart from the note. Further considerable amounts have admittedly been repaid to the plaintiff and unless the plaintiff could enforce the particular terms as to interest, exchange, etc., contained in the letter and that, in the particular way in which he wishes to interpret those terms, he will get nothing in the suit. It will therefore be no good to him merely to fall back upon the theory of an implied debt from the mere fact of a loan; he must be permitted to prove the very terms contained in the suit letter under the guise of an original debt. To permit him to do so will be in the very teeth of s. 91, Evidence Act. The learned Advocate-General admitted that the cases in this Court are opposed to this contention of his, where the debt and the note are simultaneous but he relied upon certain passages in *Shanmuganatha Chettiar* v. *Srinivasa Ayyar* (2), as recognizing that a claim on a debt may exist alongside of and independently of a claim on a promissory note. In that case there was no difficulty or obstacle in the way of legally proving the note itself. The executants were held liable under the note and the only question that was considered by the learned Judges was whether the partners of the executants could be held liable for the debt as a partnership debt. That is very different from the present case. No question of s. 91 was involved there and the learned Judges themselves referred to the cases under the Stamp Act, and distinguished them on that ground. For these reasons, the application for amendment must be disallowed with costs. The appeal fails and is dismissed with costs.

A.-D. *Appeal dismissed.*

(2) 35 Ind. Cas. 219; A I R 1917 Mad. 108; 40 M 727; (1916) 2 M W N 14; 31 M L J 138; 4 L W 27; 20 M L T 172.

ALLAHABAD HIGH COURT

Criminal Revision No. 1062 of 1934
February 11, 1935
KENDALL, J.
SHANDER OR SHANKER AND OTHERS —APPLICANTS
versus
EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 144—Knowledge of order—Question of evidence—Prosecution, nature of proof required by—They can only prove circumstances enabling Court to infer if accused knew of the order or not.

The question of whether a person has knowledge of an order promulgated under s. 144 is a matter of evidence. Where it appears that the order had been promulgated for several weeks, that there had been disturbances in the city, and that notices containing the order had been posted up at various places in the city and none of the accused persons pleaded ignorance of the order when making statements in the Magistrate's Court, it is scarcely conceivable that they had no knowledge of the order passed.

In such cases the prosecution cannot be expected to prove everything that takes place in the minds of the accused They can only prove the circumstances which will enable the Court to infer either that the accused knew of the order or that the accused did not know of it.

Cr. R. against from an order of the Sessions Judge of Agra, dated October 22, 1934.

Mr. *B. S. Darbari*, for the Appellants.

The Assistant Government Advocate, for the Crown.

Judgment.—The present applicants have been convicted by a First Class Magistrate of Agra of an offence under s. 188 of the Indian Penal Code, and that order has been maintained by the lower Appellate Court. The facts briefly are that the applicants were caught throwing bricks at the houses of their neighbours. There were eleven of them, and at this period the relations between the Hindus and Muhammadans of Agra city were very strained, and consequently a notice had been promulgated under s. 144, Criminal Procedure Code, preventing the members of the public when frequenting or visit-

ng certain places within the Municipal area from collecting bricks, carrying sticks, etc., or missiles and gathering in public places, etc. A number of arguments have been addressed to me in support of the present application for revision, but they are of a purely argumentative description.

It has been said that as the notice under s. 144 was addressed to the "public when frequenting or visiting" these specified areas, it was not sufficiently precise. I have been referred to one or two decisions in which it has been held that a Municipal area or a city are not sufficiently precise. But the areas specified in the present notice are obviously much more precise, and although this is a point that might be argued in appeal. I am by no means satisfied that the decision of the lower Appellate Court is wrong. It has next been argued that as the applicants are themselves residents of one of the areas specified in the notice, they cannot be said to be frequenting that area. To live in an area is of course to frequent it, though a resident would ordinarily be said to reside in and not to frequent his part of the city. It has also been argued that although a number of brickbats were collected, it has not been definitely proved that the applicants collected them there, and that although the evidence showed that they were throwing brickbats, there was nothing in the notice to prevent them from throwing these brickbats, although they were forbidden to collect them or to carry them. This is only a quibble. Before throwing the missiles the applicants must have lifted them, and I presume that lifting comes under the definition of carrying.

The only ground that has been given me which calls for serious consideration is that the applicants had no knowledge of the promulgation of the order under s. 144, Criminal Procedure Code. It has undoubtedly been held by the Calcutta and the Lahore High Courts that it is not sufficient for the the prosecution to prove that an order has been promulgated to succeed in obtaining a conviction under s. 188. Under that section

"whoever knowing that by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, etc., disobeys such direction, shall be punished."

The question of whether the person has knowledge of the order promulgated must be a matter of evidence, and in the present case we know that the order had been promulgated for several weeks, that there had been disturbances in the city, and that notices containing the order had been posted up at various places in the city. It is scarcely conceivable that the applicants had no knowledge of the order passed. Not one of them pleaded ignorance of the order when he made his statement in the Magistrate's Court, though this plea was taken by some of them in the written statements subsequently filed. It was not, however, made one of the grounds of appeal to the Sessions Judge, nor was it apparently argued before him. The prosecution cannot be expected to prove everything that takes place in the minds of the accused. They can only prove the circumstances which will enable the Court to infer either that the accused knew of the order or that the accused did not know of it. In the present case it appears to me that the circumstances justified the inference that the applicants had this knowledge, and that the plea of ignorance is not made in good faith, or it would have been made at once.

There appears to me to be no substance in any of the arguments for the applicants. The application is, therefore, dismissed.

N. *Application dismissed.*

LAHORE HIGH COURT

Civil Revision Petition No. 645 of 1933
March 8, 1934
JAI LAL, J.

PYARE LAL - DECREE-HOLDER —PETITIONER
versus
KALE KHAN AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTIES

Civil Procedure Code (Act V of 1908), ss. 151, 152, O. XXIII, r. 1—Suit for possession—Proceedings in Criminal Court pending — Plaintiff given possession of some land—Appeal granting possession of the rest - Criminal Court's order upset—Application for amendment of decree of Civil Court —Maintainability —Declaratory suit—Evidence closed—No formal defect—Application to withdraw with liberty to bring fresh suit—Whether should be granted

P brought a suit under s. 9, Specific Relief Act, for possession of land against *K* and others *K* brought a suit against *P* for a declaration of his title to the same land and both the suits were tried simultaneously. Criminal proceedings between the parties were also pending about the same time and possession of a part of the land in suit was restored to *P* by the Criminal Court Counsel for the plaintiff, made a statement in Court that his client had received possession of a part of the land in dispute.

Counsel for *K* and others stated that an appeal had been preferred against the award of possession to *P*. The suit proceeded and finally the Judge granted a decree to *P* for possession of the land in suit excluding that portion in respect of which a statement had been made by his Counsel that possession had been given to him by the Criminal Court. Subsequent to the judgment and the decree that followed it, an application was made on behalf of *P*, purporting to be under ss. 151 and 152, Civil Procedure Code, alleging that at the date of the judgment and the decree the order of the Criminal Court awarding possession of a part of the disputed land to *P* had been set aside by the Appellate Court and *P* had been dispossessed of that land. A prayer was therefore made that the judgment and decree be amended under the sections mentioned above so as to include that land also in the decree. In the suit brought by *K* against *P* it was alleged on behalf of *K* that a third person, not party to the suit, had taken possession of the disputed property and, therefore a decree, if passed in *K's* favour, would become infructuous. An application was, therefore, made to withdraw the suit with liberty to institute a fresh suit. This application was granted by the Court:

Held, that this was not a case in which action under s. 152, Civil Procedure Code, could be taken because on the material on the record the judgment and decree were correct. But if the facts alleged by the petitioner were true, the trial Court should have, in the peculiar circumstances of the case, proceeded under s. 151 to make the necessary amendments in its judgment and decree because during the pendency of the suit there had been a change in the circumstances of the case which had restored the parties to the position in which they were on the date of the institution of the suit.

Held, also, that as regards the case by *K* against *P* the circumstances did not satisfy the requirements of O. XXIII, r. 1 according to which permission to withdraw the suit with liberty to bring a fresh suit can be awarded only if the suit is likely to fail on account of some formal defect. There was no formal defect in this case. The evidence of the parties had been closed and the only question involved was whether *K* or *P* had title to the property and that question could be decided irrespective of the consideration whether a third person had or had not taken illegal possession of the property; presumably according to both the parties the third party's possession was illegal and hence the suit should not be allowed to be withdrawn.

C. R. P. from an order of the Second Class Sub-Judge, Lahore, dated June 21, 1933.

Mr. *Devi Dass*, for the Petitioner.

Mr. *Kidar Nath Chopra*, for the Opposite Parties.

Order.—Pyare Lal brought a suit under s. 9, Specific Relief Act, for possession of land against Kale Khan and others. Kale Khan brought a suit against Pyare Lal for a declaration of his title to the same land and both the suits were tried simultaneously. It appears that criminal proceedings between the parties were also pending about the same time and possession of a part of the land in suit was restored to Pyare Lal by the Criminal Court. Counsel for the plaintiff Pyare Lal consequently made a statement in Court that his client had received possession of a part of the land in dispute. Counsel for Kale Khan and others stated that an appeal had been preferred against the award of possession to Pyare Lal. The suit proceeded and finally the Judge granted a decree to Pyare Lal for possession of the land in suit excluding that portion in respect of which a statement had been made by his Counsel that possession had been given to him by the Criminal Court.

Subsequent to the judgment and the decree that followed it, an application was made on behalf of Pyare Lal purporting to be under ss. 151 and 152, Civil Procedure, Code alleging that at the date of the judgment and the decree the order of the Criminal Court awarding possession of a part of the disputed land to Pyare Lal had been set aside by the Appellate Court and Pyare Lal had been dispossessed of that land. A prayer was, therefore, made that the judgment and decree be amended under the sections mentioned above so as to include that land also in the decree. This application has been dismissed by the trial Judge who has held that on the record as it existed on the date of the judgment, there is no mistake either in the judgment or the decree, that is to say, no accidental omission or error.

It is obvious from what has been stated above that the petitioner was negligent in not informing the Court of the change of possession in pursuance of the order of the Appellate Criminal Court. But I am of opinion that this is not a case in which action under s. 152, Civil Procedure Code could be taken because on the material on the record the judgment and decree are correct. But I consider that if the facts alleged by the petitioner were true, the trial Court should have, in the peculiar circumstances of this case, proceeded under s. 151 to make the necessary amendments in its judgment and decree because during the pendency of the suit there had been a change in the circumstances of the case which had restored the parties to the position in which they were on the date of the institution of the suit.

I accept this petition and remand the case to the trial Judge with direction to re-hear the application of the petitioner under s. 151, Civil Procedure Code. In the other suit brought by Kale Khan against Pyare Lal it was alleged on behalf

of the plaintiff that a third person not party to the suit had taken possession of the disputed property and therefore, a decree if passed in plaintiff's favour would become infructuous. An application was, therefore, made to withdraw the suit with liberty to institute a fresh suit. This application was granted by the Court and the defendant has presented this application for revision.

In my opinion the circumstances do not satisfy the requirements of O. XXIII, r. 1, according to which permission to withdraw the suit with liberty to bring a fresh suit can be awarded only if the suit is likely to fail on account of some formal defect. There was no formal defect in this case. The evidence of the parties had been closed and the only question involved was whether the plaintiff or the defendant had title to the property and that question could be decided irrespective of the consideration whether a third person had or had not taken illegal possession of the property; presumably according to both the parties the third party's possession was illegal.

I accept this petition and set aside the order of the trial Judge granting permission to withdraw the suit and direct him to proceed with the suit on its merits in accordance with law. The costs of both these applications shall abide the result.

D. *Order set aside.*

ALLAHABAD HIGH COURT

Privy Council Appeal No. 38 of 1934

February 11, 1935

SULAIMAN, C. J. AND BENNET, J.

MR. KAPLIDEVA MALVIYA AND OTHERS —APPELLANTS

versus

THE HON'BLE THE CHIEF JUSTICE AND THE HON'BLE JUDGES OF THE HIGH COURT AT ALLAHABAD —OPPOSITE PARTIES

Civil Procedure Code (Act V of 1908), ss. 109, 110, 112—Proceedings for contempt for publication of article in newspaper by Advocate — Whether in the exercise of inherent jurisdiction of Court and of a criminal nature—Leave to appeal to His Majesty in Council—Whether can be granted.

Where the High Court took cognizance of contempt committed by the publication of an article in a newspaper by an Advocate and ordered notice to be issued to the writer, editor and printer and publisher to show cause why they should not be convicted and punished for contempt, the proceedings are in the exercise of the inherent jurisdiction of the High Court and of a criminal nature. A mere misdescription in the notice issued by the office will not make the proceeding one of a civil nature. Nor can it be said that merely because the Advocate was an officer of this Court, the proceeding against him was of an administrative character. The conviction and the fine imposed are themselves sufficient to show at least that the proceeding was not of a civil nature. The matter is of an exclusive jurisdiction and the order is final. *In the matter of Edward Hutchinson Pollard* (2), relied on. *In the matter of a Special Reference from the Bahama Islands* (3), referred to.

Section 110, Civil Procedure Code has no application to such a case Nor is s. 109 applicable and s. 112, sub-s. (2) expressly makes the Code inapplicable to matters of criminal jurisdiction. Further as the question for consideration being not so much of jurisdiction as of an interpretation of the passage objected to, the case cannot be certified as being otherwise a fit one for appeal to His Majesty in Council.

The Right Hon'ble Sir *Tej Bahadur Sapru*, and Messrs. *P. N. Sapru*, *M. N. Rama*, *G. S. Pathak*, *S. N. Verma* and *Ajudhiya Nath*, for the Applicants.

Mr. *Muhammad Ismail* (Government Advocate), for the Opposite Parties.

Judgment.—This is an application for leave to appeal to His Majesty in Council from an order* convicting the applicants, an Advocate and editor and a printer and publisher of the offence of contempt of Court and sentencing the Advocate to a fine of Rs. 100 and ordering each of the three persons to pay Rs. 100 as costs. The offence is found to have been committed on account of the publication of an article by him headed "A Scandalous Situation" in the *Leader*. The learned Counsel for the applicant contends that his application for leave falls under s. 109, Civil Procedure Code, and urges before us that the order of the High Court has been passed in the exercise of its civil jurisdiction, particularly as the original notice issued to him was headed "Civil Side Revisional Jurisdiction." The learned Government Advocate takes preliminary objection that no application for leave to appeal lies inasmuch as (1) contempt is a criminal matter and the punishment is in the exercise of the criminal jurisdiction of the High Court, and (2) that the inherent jurisdiction exercised by this Court as a Court of Record is exclusive and the order passed is final.

The first question for consideration is whether proceedings for contempt of the High Court are at all in the nature of a civil proceeding. A Division Bench of this Court took cognizance of contempt committed by the publication of the

*SEE 154 Ind. Cas. 955—[*Ed.*]

Advocate's article. The Bench ordered notices to be issued to the Advocate as well as the editor and the printer and the publisher of the paper "to show cause why they should not be convicted and punished for the offence of contempt of this Court." In the order itself as signed by the Judges, there was no suggestion that the notice was being issued in the exercise of any civil jurisdiction. On the other hand, as the opposite party were called upon to show cause why they should not be convicted and punished for the offence of contempt, the order was *prima facie*, in the exercise of the criminal jurisdiction or the inherent jurisdiction of this Court. The office numbered the case as "Miscellaneous Case No. 435 of 1934", *In the matter of an Advocate of Allahabad* (1), and on the day's list also the case was shown simply as "Miscellaneous Case No. 435 of 1934", without mentioning that it was a Miscellaneous Civil case. But the notice that was issued by the Office to the Advocate was written out on a printed form which had the words "Civil Side Jurisdiction" printed on it. The notice was issued under the signature of the Deputy Registrar, and the printed words were not struck out, but the word "Revisional" was added. The contents of the notice, however, warned the Advocate to appear personally to show cause why he should not be convicted and punished for the offence of contempt of the High Court committed by the publication. The Advocate could not possibly have been misled by the issue of the notice on a printed form used for notices on the Civil Side. No particular form of the notice is prescribed by the rules of this Court. The Advocate had been called upon to appear in order that he may have an opportunity to show cause. We are, therefore, unable to hold that a mere misdescription in the notice issued by the office could, in any sense, make the proceeding one of a civil nature. The Advocate could not have been under any misapprehension as to the true character of the proceeding. We are of opinion that the form used for the notice is wholly immaterial for the purposes of deciding what the nature of the jurisdiction exercised was and that the misdescription was of too trivial a nature and cannot possibly confer civil jurisdiction on the High Court.

We have not the least doubt in our minds that the proceedings were in the exercise of the inherent jurisdiction of this Court and of a criminal nature. We would not say that merely because the Advocate was an Officer of this Court, the proceeding against him was of an administrative character. The conviction and the fine imposed are themselves sufficient to show, at least that the proceeding was not of a civil nature. *In the matter of Edward Hutchinson Pollard* (2), their Lordships clearly laid down that the contempt of Court was "a criminal offence".

In the matter of a Special Reference from the Bahama Islands (3), the last two paragraphs of the report of their Lordships at page 149* indicated that the sentences passed amounted in effect to general committal for contempt and was of a punitive character.

This view has, of course, been followed in India. *Governor of Bengal* v. *Moti Lal Ghose* (4). It has been held by a Full Bench of this Court that the proceedings to punish contempt of Court is in the exercise of the inherent jurisdiction vested in a Court of Record, and the procedure is summary. See *Hadi Husain* v. *Nasir-ud-Din Haidar* (5). In the Contempt of Courts Act of 1926, express power has been conferred to punish contempt of Subordinate Courts, but no necessity has been felt to confer any jurisdiction for punishing contempt of the High Court, which has always been assumed to exist.

It is, therefore, clear that s. 190, Civil Procedure Code, has no application to such a case. As defined in s. 2, Civil Procedure Code, "decree" is the formal expression of an adjudication which conclusively determines the rights of the parties and "order" is a decision of a Civil Court. Not only, therefore, s. 109 is in terms inapplicable, but s. 112, subs. (2) expressly makes the Code inapplicable to matters of criminal jurisdiction.

We also agree with the learned Government Advocate that the matter was of an exclusive jurisdiction, and the order is final.

(1) 154 Ind. Cas. 955; A I R 1935 All. 1; (1935) A L J 125; (1935) Cr. Cas. 1; 7 R A 827.

(2) (1868) 5 Moore. P C (N S) 111; L R 2 P C 106; 16 E R 457.

(3) (1893) A C 138.

(4) 20 Ind. Cas 81; 41 C 173 at p. 252; 14 Cr. L J 321; 17 C W N 1253; 18 C L J 452.

(5) 97 Ind. Cas. 108; 48 A 711; 24 A L J 849; A I R 1926 All. 623.

*Page of (1893) A.C.—[*Ed.*]

In the case of *Magnus Smith* v. *The Justices of Sierre Leone* (6), their Lordships expressed the opinion that "they can make no order respecting the fine imposed by the Court below upon Mr. Smith". But their Lordships rescinded the order for striking him off the rolls.

In the case of *Williams Rainy* v. *The Justices of Sierra Leone* (7), their Lordships of the Privy Council laid down as the opinion not only of the members of the Committee, who heard the petition but also of the other members who usually attended, that they could not interfere with such a subject and remarked:

"In this country every Court of Record is the sole and exclusive Judge of what amounts to a contempt of Court. It is within the competency of the Court to impose fines for contempt; and unless there exists a difference in the constitution of the Recorder's Court at Sierra Leone, the same power must be conceded to be inherent in that Court .....we are of opinion that it is a Court of Record, and that law must be considered the same there as in this country; and, therefore, that the orders made by the Court in the exercise of its discretion imposing these fines for contempts, are conclusive, and cannot be questioned by another Court, and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders. All we can say is, that we have no jurisdiction to entertain such a petition impugning the propriety of such orders and praying the remission of the fines."

These cases were quoted with approval by their Lordships of the Privy Council in *Sourendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court at Fort William in Bengal* (8).

Nor have we any power to certify this case as being otherwise a fit one for appeal to His Majesty in Council. The question for consideration was not so much of jurisdiction as of an interpretation of the passage objected to. The Bench in construing its implications took into consideration the various circumstances attending its publication. The article had been written by an Advocate of standing and repute practising in the High Court; special importance and significance would be attached to it by the public reading the article; the *Leader* had a wide circulation in this country, and the article would have been widely read; the affidavit filed by the Advocate was considered by the Bench not to be so candid as that of the others; there was no apology or expression of regret, and it was not suggested in the Advocate's explanation that the reference was not to the present members of the High Court Bench. They took into account the fact that the article was written in connection with the elections to the Bar Council under this very High Court, and came to the conclusion that the assertion that the raising to the Bench of a comparatively "undeserving" lawyer "is a fairly frequent occurrence in our judicial history" amounted to an unwarranted defamation of the High Court likely to lower its prestige in the eyes of the public and to shake their confidence in its capacity to administer justice, and did not agree that the repetition of the alleged claim of the members of the Bar to select Judges "with better results" was innocent. The Bench remarked:

"We have given careful consideration to all that learned Counsel has urged in defence of his clients and with some knowledge of the conditions which exist and of the effect that such an article is likely to produce in the minds of the public, we are clearly of opinion that the passage in respect of which notice to the opposite parties has been issued, constitutes a contempt of Court, of which the High Court in the interests of the administration is bound to take cognisance."

They held that

"We are clearly of opinion that the words in the passage convey unwarranted and defamatory aspersion on the character and ability of a number of Judges of the High Court who have recently been elevated to the Bench .... We are of opinion that it tends to lower the High Court in the eyes of the public."

In our opinion, on the question whether the allegation amounted to a contempt of Court or not the Division Bench had exclusive jurisdiction and its order is final. We must, therefore, decline to grant leave to appeal to His Majesty in Council. The application is dismissed with costs. We assess the cost of the Crown Counsel at Rs. 100.

N. *Application dismissed.*

(6) (1811) 3 Moore. (N S) 362.
(7) (1852) 8 Moore (N S) 47 at p. 54.
(8) 10 C 109; 10 I A 171; 4 Sar. 474 (P C.)

MADRAS HIGH COURT

Second Civil Appeal No. 1703 of 1931
September 4, 1934
MADHAVAN NAIR, J.
SIGAPPI—DEFENDANT—APPELLANT
versus
KATHAYEE—PLAINTIFF—RESPONDENTS

Practice—Defendant submitting to the ruling of Court as to burden of proof and producing his evidence—Subsequent refusal—Plaintiff's evidence over—Application for further evidence by defendant refused—Held, he ought to be allowed to adduce evidence subject to paying plaintiff's costs—Burden of proof.

When a suit was taken up the Vakils on both sides were absent. The Munsif then put the plaintiff into the witness-box and elicited an answer to a question. By that time the plaintiff's Vakil

turned up and said that the burden of proof was not on the plaintiff and that the defendant should begin. The Munsif then put the defendant's agent into the box as a witness on the defendant's side and began to examine him himself. After some examination the case was adjourned. The defendant's Vakil turned up later and continued the examination of the witness. Later on, the defendant put in an application that the burden of proving issues lay on the plaintiff and that he (plaintiff) should be directed to begin. The defendant's petition was dismissed. The examination of the defendant's witness No 1 was continued and witness No. 2 on her side was also examined in part and some documents were filed. The suit was then adjourned. On the adjourned date defendant's witness No. 1 was re-called and examined, but the defendant's Vakil declined to proceed with the further chief examination of defendant's witness No. 2. The plaintiff's Vakil was then allowed to cross-examine him and his evidence was closed. The defendant's Vakil put in a memorandum that day declining to let in any further evidence as the burden of proof lay on the plaintiff. The evidence on the plaintiff's side was then taken and the case was proceeded with. When the plaintiff's evidence was closed, the defendant's Vakil wanted permission to adduce evidence on the defendant's side. This permission was refused by the Munsif and the case was finally closed and a decree was given in favour of the plaintiff :

Held, that the defendant's Pleader was not justified in refusing to adduce further evidence, after he had submitted to that ruling and proceeded with the examination of defendant's witnesses Nos. 1 and 2. In view of the circumstances it was necessary in the ends of justice that an opportunity should be given to the defendant to adduce evidence. But this concession could be given only on condition that he pays all the costs of the plaintiff except the institution fee up to date irrespective of the result of the suit.

S. C. A. against decree of the Sub-Judge, Devakottah, dated January 24, 1931.

Messrs. *E Vinayaka Rao* and *Aravamuda Ayyangar*, for the Appellant.

Messrs. *K. Bhashyam* and *M. S. Krishnaswami Ayyangar*, for the Respondents.

Judgment.—The defendant is the appellant. The second appeal arises out of a suit instituted by the plaintiff for a declaration of title to the suit properties, for a permanent injunction, and, if necessary, for recovery of possession of the same free from interference from the defendant. The plaintiff is the wife of the deceased son of the defendant. The defendant's son died in November 1926. According to the plaintiff's evidence, she collected the crops from the suit lands of the year of the death of her husband. The next year she cultivated the lands and the defendant, and her men destroyed the crops. Then the present suit was filed on July 28, 1928. On the merits, the defendant's contention was that the plaintiff cannot claim any right to the properties as her son was disqualified for various reasons from inheriting them. The plaintiff was given a decree by the first Court and this decree was confirmed in appeal. The defendant did not give her entire evidence before the trial Court In this second appeal the question is whether the defendant should now be allowed an opportunity to put before the Court all her evidence. The failure of the defendant to adduce her entire evidence arose as a result of a ruling given by the District Munsif as to the burden of proof with reference to two issues in the case. These issues are Issues Nos. 4 and 7. Issue No. 4 is :

"whether the plaintiff was in possession at the date of suit, and if not, whether the suit for declaration and injunction is maintainable.

Issue No. 7 is an additional issue. It is "whether the plaintiff or her predecessors in title had possession within 12 years before suit."

When the suit was taken up the Vakils on both sides were absent. The Munsif then put the plaintiff into the witness-box and elicited an answer to a question. By that time the plaintiff's Vakil turned up and said that the burden of proof was not on the plaintiff and that the defendant should begin. The Munsif then put the defendant's agent into the box as a witness on the defendant's side and began to examine him himself. After some examination the case was adjourned. The defendant's Vakil turned up later and continued the examination of the witness. Later on, the defendant put in an application that the burden of proving Issues Nos. 4 and 7 lay on the plaintiff and that he (plaintiff) should be directed to begin. On this application the District Munsif passed the order :

"On hearing both parties I already called upon the defendant to begin, since on the main issue the burden is upon her, etc."

The defendant's petition was dismissed. The examination of the defendant's witness No. 1 was continued and witness No. 2 on her side was also examined in part and some documents were filed. The suit was then adjourned. On the adjourned date defendant's witness No. 1 was re-called and examined, but the defendant's Vakil declined to proceed with the further chief examination of defendant's witness No. 2. The plaintiff's Vakil was then allowed to cross-examine him and his evidence was closed. The defendant's Vakil put in a memorandum that day declining to let in any further evidence as the burden of proof lay on the plaintiff. The evidence on the plaintiff's side was then taken and the case was proceeded with. When the plaintiff's evidence was closed the defen-

dant's Vakil wanted permission to adduce evidence on the defendant's side. This permission was refused by the Munsif and thus the case was finally closed and a decree was given in favour of the plaintiff.

In the lower Appellate Court it was argued, as was done before me, that the burden of proof with regard to Issues Nos. 4 and 7 rightly lay on the plaintiff, that the learned Munsif was wrong in calling upon the defendant to begin, and as the procedure was thus irregular, the defendant should be given a further chance to adduce all her evidence. The learned Subordinate Judge was distinctly of opinion that the burden lay on the plaintiff. But in his view the learned District Munsif's ruling that the defendant should begin first was right because on the "presumptions" arising in the case the plaintiff had discharged the initial burden; and therefore when the case was begun, the defendant had to prove her case by showing how the plaintiff's husband was disentitled to inherit the properties. There can be no doubt that the initial burden with respect to these issues (Issues Nos. 4 and 7) to prove that the plaintiff was in possession lay on the plaintiff. The learned Subordinate Judge thought that this burden was discharged because of the presumption that the defendant's possession of the properties was on behalf of her son, the husband of the plaintiff who was a minor, that after the death of the plaintiff's husband, the plaintiff and defendant lived together for some time, that the properties must have been enjoyed by them both, and that, if there is a presumption in favour of the plaintiff that her husband was in possession till his death in November 1926, then it is not necessary for her to lead any evidence assuming that she was out of possession on the date of the suit as her husband's possession was well within the statutory period. (See the end of para. 8 of the judgment.) The suit being thus in time, the main point for decision would be whether the defendant has shown that the plaintiff's husband was disqualified from inheriting the properties.

In this view the burden of proof will lie on the defendant and the defendant will have to adduce evidence first. This seems to be one way of looking at the question, but it is clear this was not the basis for the ruling given by the learned District Munsif. From his order it is clear that the process of reasoning adopted by the learned Judge was not at all present to his mind. What he said was this, that he called upon the defendant to begin "since on the main issues the burden is upon her"; that is to say, the main issue being whether the plaintiff's husband was disqualified from inheritance for the reasons mentioned in the defendant's written statement. Of this, of course, the burden is upon the defendant. The order of the District Munsif reads as if he decided without expressing any opinion regarding the burden of proof with respect to Issues Nos. 4 and 7, that the defendant should begin as on the main issue the burden was upon her. Though the learned Judge was of opinion that the District Munsif's ruling was right, he yet considered the question whether the failure of the defendant to adduce evidence should not be condoned as that failure must have been due to a *bona fide* mistake on the part of her Vakil who must have thought, though wrongly, that the burden of proof lay on the plaintiff and that the plaintiff should first begin to adduce her evidence; and decline to condone the failure as the defendant had been given full opportunities to adduce evidence and had deliberately refused to adduce the same. The question is whether in these circumstances a fresh opportunity should be given to the defendant to adduce her evidence. I have given the matter my anxious consideration. As the grounds for the order of the District Munsif are not clear, and as undoubtedly the learned Subordinate Judge has declared his order correct on a ground which I do not think was present to the mind of the learned District Munsif, one can well hold that the position did not appear to be absolutely clear to the mind of the defendant's Advocate; and this probably is the explanation for his conduct in refusing to adduce evidence, though if this was the main reason one fails to see why he continued to adduce evidence for some time after the ruling and declined to give further evidence only afterwards. Even though it is assumed that the District Munsif did not give any definite ruling, or even if the ruling given is assumed to be wrong, still the defendant's Pleader was not justified in refusing to adduce further evidence, after he had submitted to that ruling and proceeded with the examination of defendant's witnesses Nos. 1 and 2. In view of the circumstances detailed above, I think it is necessary in the ends of justice that an opportunity should be given to the defendant to adduce her evidence. But having regard to her conduct this concession can be given

to her only on condition that she pays all the costs of the plaintiff except the institution fee up to date irrespective of the result of the suit and should in no way endeavour to obtain possession of the properties from the plaintiff during the pendency of the suit. Mr. Vinayaka Rao has candidly stated that he is willing to be put upon terms. I would therefore set aside the decree of the lower Court and remand the case for disposal to the lower Court according to law after allowing the defendant to adduce further evidence. The plaintiff will be allowed to adduce whatever evidence she thinks necessary to meet the further evidence adduced by the defendant. The costs incurred in the lower Court will be provided for in his decree by the learned Judge.

A.-D. *Order accordingly.*

CALCUTTA HIGH COURT

Civil Appeal No. 100 of 1933

June 1, 1934

COSTELLO AND LORT-WILLIAMS, JJ.

RANJIT RAY—APPELLANT

versus

D. A. DAVID—RESPONDENT

Companies Act (VII of 1913), s. 109 (d)—Assignment of book-debt by company as security for securing existing debt, whether amounts to mortgage of that debt—Registration, if essential—Transfer of Property Act (IV of 1882 as amended by Act XX of 1929), ss. 130, 134.

An assignment of a book-debt as security for the purpose of securing an existing debt, constitutes a mortgage of that debt and unless it is registered as required by the provisions of s. 109 (*d*) of the Companies Act, the assignment will be inoperative as against the liquidator and the creditors of the Company. *Saunderson & Co.* v. *Clark* (3), relied on.

S. C. A. from Original Suit No. 20 of 1932.

Messrs. *S. M. Bose* and *A. N. Bose*, for the Appellants.

Mr. *Sudhish Ray*, for the Respondent.

Costello, J.—The facts of the case out of which this appeal arises are fairly simple. The point of law which has to be determined upon a consideration of those facts is however one of some difficulty. A suit was brought by the liquidator of the Co-operative Hindusthan Bank, Limited, to recover from certain persons, who are the Wardens of the Armenian Church, a sum of money for work and labour done on behalf of the Wardens of the Church by a firm named Carr, Morrison & Co., Ltd. That firm has gone into liquidation and the liquidator of it, Mr. G. C. Read, is a party to this suit. The Wardens of the Armenian Church, so far as these proceedings are concerned, have in effect called upon the other two parties to interplead. They have paid into Court a sum of Rs. 2,971-12-9 which was the amount ultimately agreed as being owing in respect of the work done by Carr, Morrison & Co. The conflict of claims between the liquidator of the Bank and the liquidator of Carr, Morrison & Co., arises from the fact that Carr, Morrison & Co. borrowed from the Bank the sum of Rs. 3,000 and executed in favour of the Bank a promissory note, dated July 8, 1930. In addition, the Company assigned two bills, or rather 'invoices,' which were made out by Carr, Morrison & Co. as builders and contractors, addressed to the Wardens of the Armenian Church of Calcutta. One of those bills was for a sum of Rs. 5,737-10-0 and the other bill was for Rs. 6,935-3-0. The bills were numbered respectively 166 and 167 and they were both dated July 5, 1930. On the same date, a letter was addressed by Carr, Morrison & Co., to the Wardens of the Armenian Church in these terms:

Re: No. 2, Middleton Row.

"We beg to hand you herewith our final bills in respect of the above work (repairs, sanitary and plumbing), for favour of payment, at your early convenience.

The enclosed bills aggregate Rs. 12,720-13-0, against which you have, from time to time, advanced the sum of Rs. 7,000 only, leaving a balance of Rs. 5,720-13-0 still due.

These final bills cancel the running bills previously issued, *viz.*, Nos. 122, 123, 125 and 126.

These bills are assigned and endorsed for valuable consideration to the Co-operative Hindusthan Bank, Ltd., Calcutta, and we will thank you to make payment to them direct to our a/c, at 12-2, Clive Row, Calcutta . . .

Upon the back of the bills there was the following endorsement:

Please pay to Co-operative
Hindusthan Bank, Ltd.,
Carr, Morrison & Co., Ltd.
(Sd.) P. M. Morrison,
Managing Director.
Carr, Morrison, & Co., Ltd.
(Sd.) C. Carmichael,
Managing Director."

The position therefore was that by the endorsement on the back of the bills, coupled with the notification contained in the letter of the same date, Carr, Morrison & Co., assigned to the Bank the benefit of the debt then owing to them by the Wardens of the Armenian Church. The bills and the letter of July 5, were sent through the Bank and, on July 8, were forwarded by the Bank to the Wardens of the Armenian Church, under cover of a letter, which is in these terms:

"Please receive the following bills which have been endorsed to this Bank for valuable consideration and the cheque for which when passed should be drawn in favour of this Bank and sent to us for credit of the account of Carr, Morrison & Co, Ltd., with this Bank."

At the foot of the letter, there is a tabular statement in the following form:

No.	Drawer.	Currency.	Amount.
			Rs. as. p.
26493.	Yourselves...	D	5,720 13 0

Enclosures—

(1) One letter dated July 5, 1930, of Carr, Morrison & Co., Ltd.

(2) Bills Nos. 166 and 167, dated July 5, 1930, for Rs. 5,737-10-0 and Rs. 6,965-3-0.

Certain correspondence passed between the Bank and the Wardens of the Armenian Church, in which it appears that the Wardens of the Church disputed the amount said to be due from them to Carr, Morrison & Co., but ultimately, after two of the Wardens had gone into the matter, they admitted liability to the extent of Rs. 2,971-12-9, which, as I have already said, is the amount claimed in the suit, out of which this appeal arises.

The defendants, Carr, Morrison & Co. (in liquidation), by their Liquidator, G. C. Read, contended in the suit that the plaintiff, as the Liquidator of the Co-operative Hindusthan Bank, was not entitled to recover the amount from the Wardens of the Armenian Church and that the sum owing by the Wardens of the Armenian Church should be treated as a debt due to Carr, Morrison & Co., (in liquidation), and the liquidator of Carr, Morrison & Co., took the point that the assignment of the debt due from the Wardens to the Bank was of such a nature that we ought to treat it as if it were a mortgage and being a mortgage, it ought to have been registered under the provisions of s. 109 (*d*), Companies Act. That section provides that certain mortgages and charges are to be void, if not registered. The words of the section, so far as material for our present purposes, are these:

"Every mortgage or charge created..... by a Company and being either a mortgage or charge on any book-debts of the Company, shall so far as any security on the Company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the Company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration.....within twenty-one days after the date of its creation, by without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable."

Then there are certain provisos which are not relevant to our present inquiry. The liquidator of Carr, Morrison & Co., contended that the assignment constituted by the letter of July 5, 1930, and the endorsement on the bills dated July 5, 1930, was of such a nature that it ought to be considered as a mortgage and therefore subject to the provisions of s. 109 which I have just read. The learned Judge at the trial, by his judgment dated May 31, 1933, stated the point which he had to determine in this form:

"He (*i. e.*, the Liquidator of Carr, Morrison & Co.) puts in issue the validity of the alleged assignment of the plaintiff Bank. He says that the assignment was not absolute but was by way of charge and that, inasmuch as it was not registered, it is inoperative against the defendant Company by reason of s 109 (1) (*d*), Companies Act....."

The matter falls to be decided upon a consideration of the provisions of s. 130, Transfer of Property Act, which by sub-s. (1) provides that:

"The transfer of an actionable claim, whether with or without consideration, shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent ....,shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer ... ... be given or not."

It seems clear that in this case there was a transfer by Carr, Morrison & Co., to the Bank of an actionable claim and that such transfer was by an instrument in writing 'signed' by the transferors. It follows therefore that the transfer was complete and effectual upon the execution of the instrument in writing, that is to say, the letter of July 5, taken in conjunction with the endorsements on the two bills Nos. 166 and 167. It also follows that on the execution of these documents all the rights and remedies of the transferors, that is to say, Carr, Morrison & Co., vested in the transferees, the Co operative Hindusthan Bank, Ltd. Actually in the present case, notice of the transfer was given to the debtors by the letter of July 8, 1930, which I have already quoted. Sub-s. (2), s. 130 provides that:

"The transferee of an actionable claim may, upon the execution of the instrument of transfer ....., sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto."

It is manifest from the judgment of the present Chief Justice in *Sadasook Ramprotap* v. *Hoare Miller & Co.* (1) that s. 130, Transfer of Property Act, contains a special scheme which has some of the features both of the English Common Law and of the principles of equity and it is analogous to the provisions which are contained in s. 25 (*b*), Judicature Act, 1873, which are now enacted in s. 126, Law of Property Act, 1925. It is unsafe, however, to endeavour to decide the point of the kind now before us by any extensive reference to the English authorities. For the purpose of the present case, it is important at the outset to recall that the Judicial Committee have decided that the assignment of an actionable claim, such as debt, although absolute in form may nevertheless in its effect operate by way of security only. The authority for that proposition is to be found in the judgment or Lord Moulton in *Mulraj Khatau* v. *Vishwanath Prabhuram* (2), where his Lordship said:

"The appellant bases his claim on an assignment in writing. . . . . dated August 13, 1909. It is in form an absolute assignment and was according to the evidence given under pressure from the appellant to whom Dwarkadas Dharamsey was then indebted in a much larger sum. The validity of the assignment is therefore established. It may well be that although absolute in form it was intended to be only by way of security so as to be subject to a right of redemption, but this does not affect the rights of the parties under the circumstances of the present case."

The assignment effected by the letter and the endorsement of July 5, 1930, was apparently intended to operate as an absolute assignment so as to pass to the Bank the whole of the rights and interest of Carr, Morrison & Co. It may be that, upon a scrutiny of the exact language used in the letter of July 5, 1930, it was the intention of Carr, Morrison & Co. that the whole of the amount properly recoverable by them from the Wardens of the Armenian Church should be paid to the Bank and credited to the account of Carr, Morrison & Co., with the result that if the amount paid by the Wardens of the Armenian Church was in excess of the amount owing by Carr, Morrison & Co., to the Bank on their overdraft, the balance would remain to the credit of the account of Carr, Morrison & Co. But it is not possible for us to consider or even to speculate as to what the result would have been upon the adoption of that view of the transaction, because the learned Judge found as a fact that the debts were assigned not as an out-and-out transaction but merely as security for the overdraft. The relevant passage in the judgment is in these words:

"I should hold that the words were sufficient to effect a transfer of the debt to the Bank, even if any of the parties were at liberty in view of their pleadings to dispute that proposition—a matter of some doubt. The question then is whether evidence is admissible to show a collateral agreement between the parties that the assignment of the debt was not absolute but was by way of security for the loan by the Bank. The evidence on which the liquidator relies and which the Bank seeks to exclude is contained in a letter of March 2, 1931, written by the Bank's Solicitor and stating that the bills were assigned by Carr, Morrison & Co. to the Bank for security. It has also been pointed out that when the Wardens questioned the amount of the bills, the Bank declined to discuss the question without reference to Carr, Morrison & Co. Ltd., thereby admitting that Carr, Morrison & Co, Ltd. had still an interest in the debt. I am prepared on the letter to say that the issue of fact raised by Carr, Morrison & Co, Ltd., should be decided in their favour. I am of opinion that there was an agreement between Carr, Morrison & Co., Ltd., and the Bank that the debts were assigned not as an out-and-out transfer but as security for an overdraft. I have now to decide whether evidence is admissible in proof of an oral agreement to this effect having regard to the language of s 92, Evidence Act."

We have not to concern ourselves in this appeal as to whether the learned Judge was right in resorting to the letter of March 2, 1931, and the course of dealings between the parties subsequent to the assignment, in order to arrive at a decision as to what in substance was the nature of the transfer effected by the endorsement of July 5, 1930, because no objection has been taken on that score, and moreover, the learned Counsel who appeared for the liquidator of the Bank have conceded that the assignment was by way of security only, even though in form it may have been an out-and-out transfer of all the rights and interests of Carr Morrison & Co. in the book-debt in respect of the liability of the Wardens of the Armenian Church towards Carr, Morrison & Co. We, therefore, have to decide the matter on the footing that there was an assignment of a book debt by way of security to ensure re-payment by Carr, Morrison & Co. to the Bank of the overdraft. Put into figures, the position was that there was an assignment of the debt due on a bill for Rs. 5,720-13-0 in order to secure repayment of a debt to the amount of Rs. 3,500. In those circumstances, s. 134, Transfer of Property Act, comes into action if I may so put it. Section 134 says:

"Where a debt is transferred for the purpose of securing an existing or future debt, the debts trans-

(1) 80 Ind. Cas. 632; A I R 1923 Cal. 719; 27 C W N 733; 41 C L J 176.

(2) 17 Ind. Cas. 627; 37 B 198; 40 I A 24; (1912) M W N 1247; 12 M L T 652; 11 A L J 7; 24 M L T 60; 17 C W N 209; 15 Bom. L R 9; 17 C L J 162 (P. C).

ferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the cost of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same."

Briefly stated, the effect of that section is this: that if a debt is transferred by way of security, the transferee is entitled to discharge the debt due by the transferor to him. Then, if there is any residue, that is, after payment of the cost of recovery and the amount actually due by the transferor to the transferee, that belongs to the transferor. The position created by the precise language of s. 134 seems to be somewhat anomalous, because where there is a transfer under s. 130, all the rights and remedies of the transferor vest in the transferee. The expression "all rights" must of course include the right of ownership, and yet s. 134 says that the residue, if any, belongs to the transferor which is only another way of saying that if there is anything left over, after the debt between the transferor and the transferee is satisfied, the transferor is the owner of the balance whatever it may be. The anomaly consists in this, that there is a contradiction between the provisions of s. 130 and those of s. 134. One would have expected that instead of saying any "residue belongs to the transferor," the section would have said "the residue, if any, shall be re-transferred by the original transferee to the original transferor." However, it seems reasonably clear that what is intended is that where a debt is transferred for the purpose of securing an existing debt then the whole matter should be interpreted, as far as possible, upon the analogy of a mortgage of any other kind of property. That the transferor still has some residuary interest in the transfer is clear from the fact that under the terms of s. 134 it would be possible for him to receive the original debt, and as I have already pointed out, the residue actually belongs to him. It seems to me, therefore, that even if there had been in form an absolute assignment and subsequently the transferor pays off his debt to the transferee then the transferor would be in the position of being entitled to receive from his debtor the whole amount of the debt which had been transferred upon the basis that in those circumstances the residue would, in fact, be the whole debt. I have no doubt whatever, even without referring to the marginal note, that this s. 134 is intended to deal with a case of mortgage-debt.

The main difficulty which confronts us in the present instance is to determine whether an assignment for the purpose of securing an existing debt is a mortgage of such a character as falls within the ambit of s. 109 (*d*), Companies Act. To put the matter tersely, the difficulty which I first felt in the matter is the determination of the question whether or not an assignment of a book-debt is really a mortgage of that book-debt, but I think that difficulty is entirely solved by the judgment of Lush, J. in *Saunderson & Co.* v. *Clark* (3). In that case, a limited Company, in consideration of an advance from their bankers, executed an assignment which, after reciting that the Company were entitled to £80. 7*s*. from the defendant, that it had been agreed that that debt should be assigned to the bankers, and that by a letter of even date the defendant had been directed by the Company to pay the debt in question to the bankers, assigned unto the bankers so much of the defendant's debt "as may be necessary to indemnify, the assignees" for the amount advanced by them to the Company. After executing that deed, the Company wrote to the defendant requesting him to pay the debt due to them to the bankers. A few days later the Company went into voluntary liquidation. The assignment to the bankers was not registered. The liquidator claimed to recover the debt from the defendant on the ground that the assignment to the bankers, being unregistered, was void as against him, but the defendant insisted upon paying the debt to the bankers. It was held that the liquidator was entitled to recover, inasmuch as by s. 93, Companies (Consolidation) Act, 1908, the unregistered assignment was void as against him, and because it was impossible for the parties to a transaction by way of mortgage or charge to alter the effect of s. 93, Companies (Consolidation) Act, 1908, by adopting a form which does not accord with the real transaction between them. Section 93, Companies (Consolidation) Act, 1908, was the section corresponding to s. 109, Companies Act. The corresponding provisions of the English Law are now contained in s. 79, English Companies Act (1929). The passage in the report of the judgment of Lush, J., which has most bearing on the present problem occurs at p. 580* and is in these words:

(3) (1913) 29 T L R 579.

*Page of (1913) 29 T. L. R.—[*Ed.*]

"Mr. Schiller on behalf of the defendant had contended that the deed operated as an absolute assignment of the book-debt, a sale in fact, in consideration of the advance. He (Lush, J.,) did not think that the deed was capable of that construction. The recital appeared to suggest it, but the operative part treats the book-debt as given only as an indemnity, which must mean as a security, and it provides for payment of interest by the Company on the advance, thus treating them as debtors. Moreover, it had been given along with a director's guarantee, and the banking account, which was in evidence, showed that the Company were debited as debtors with the amount of the advance. The bankers themselves called their interest in the book-debt a charge in a letter they wrote to the defendant, dated January 4, 1910."

In passing I may recall that the bankers in the present case in their letter of March 2, 1931, described the assignment as being a further security. Lush, J., continued thus:

"The legal effect of the deed of December 24, 1909, therefore was this. The Company, accepting the loan as a loan to themselves, transferred their interest in the book-debt to the bankers as a security, and were consequently entitled to a re-transfer on paying off the loan. In other words, they mortgaged the book-debt to secure an advance. On January 1, 1910, the Company went into voluntary liquidation, and the mortgage therefore became subject to the provisions of the Companies Act, 1908, s. 93."

The words of Lush, J., to my mind indicate that if there is an assignment of a book-debt as security (to use the words of s. 134) for the purpose of securing an existing debt, then that constitutes a mortgage of that debt. Therefore the provisions of s. 134 are applicable and the matter must be dealt with as directed by that section. The moment one comes to the conclusion that a mortgage has been effected by means of an assignment, even though the transfer might in form be an absolute assignment, it inevitably follows that the transaction should have been registered as required by s. 109, Companies Act; or to put the matter the other way round, it follows that unless it is registered as required by the provisions of that Act, the assignment will be inoperative as against the liquidator and the creditors of the Company. In that view of the matter, and having regard to the fact that Counsel for the appellant admitted that this was an assignment by way of security, it follows that the decision arrived at by the learned Judge was correct and this appeal must be dismissed with costs. As regards payment of costs in this appeal, we make the appellant liable personally.

Lort-Williams, J.—I agree. But I desire to say that, in my opinion, the letter of March 2, 1931, upon which Panckridge, J., has relied, was not admissible in evidence within the meaning of s. 92, proviso (2), Evidence Act, or otherwise. The three documents dated July 5, 1930, coupled with the covering letter dated July 8, 1930, in my opinion, are unambiguous, and amount to an absolute transfer of the debts to the Bank, and not one by way of security only. The agreement sought to be established by reference to the letter of March 2, is inconsistent with these documents and may not be proved. If and when the bank had collected the debt, they would have become the debtors of Carr, Morrison & Co., to the extent of the sum collected, subject of course to the state of Carr, Morrison & Co.'s account, and to whether they were in debt or credit at that time.

In view, however, of the fact that Counsel for the Bank has conceded, for the purpose of the decision in this case, that the documents amount to a transfer by way of security, such as is contemplated by s. 134, Transfer of Property Act, and that, in my opinion, such an assignment is a mortgage of book-debts within the meaning of s. 104, Companies Act, and is void against the liquidator unless registered, this appeal must be dismissed with costs.

D. *Appeal dismissed.*

LAHORE HIGH COURT

Criminal Revision No. 906 of 1933

December 16, 1933

BHIDE, J.

HARI RAM—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Evidence Act (I of 1872), s. 114, illus. (b)—Corroboration of statement of accomplice—Nature of—Circumstantial evidence—Sufficiency of.

It is a well established rule of practice to require corroboration of the statement of an accomplice connecting the accused person with the crime; but corroboration is not required in all details. Even slight corroboration is sufficient for the purposes of this rule, if the Court is satisfied thereby about the genuineness of the accomplice's story, so far as it implicates the accused person. To insist on corroboration of the story in every detail, would practically mean requiring independent proof which will do away with the necessity of relying on the testimony of the accomplice at all The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But evidence in corroboration must be independent.

[p. 199, col. 2.]

[Case-law discussed.]

Cr. Rev. from an order of the Additional Sessions Judge, Amritsar, dated June 2, 1933.

Mr. *Bhagat Ram Puri*, for the Petitioner.

Mr. *D. C. Ralli*, for the Crown.

Order.—Criminal Revisions Nos. 906, 1383 and 1384 of 1933 arise out of cases in which the facts are connected and the points for decision are of a similar character and it will be convenient to dispose of them together.

One Prem Kumar was undergoing a sentence of imprisonment for five years under s. 20, Arms Act, in the Borstal Jail. He was transferred to the Mayo Hospital for treatment and on April 11, 1932, managed to escape from the hospital with the help of two persons named Ram Nath and Inder Nath (petitioner in Criminal Revision No. 1384 of 1933). He was taken to the printing press of Sotindar Nath (petitioner in Criminal Revision No. 1383 of 1933) and was kept there for three or four days. He then left Lahore and wandered from place to place for some time. He reached Amritsar about the middle of November and was kept concealed on the top floor of a house, with the help of Hari Ram (petitioner in Criminal Revision No. 906 of 1933), who also used to supply him food, etc., till the Police got a clue about Prem Kumar's whereabouts and arrested him on December 28, 1932. On the basis of these facts, Hari Ram and Sotindar Nath have been separately tried and convicted under s. 216, Penal Code. Hari Ram has been sentenced to rigorous imprisonment for 18 months while Sotindar Nath has been sentenced to rigorous imprisonment for one year and nine months and a fine of Rs. 100. Indar Nath has been found guilty under s. 224-109, Penal Code, in a separate trial and has been sentenced to rigorous imprisonment for two years.

The principal witness in all these cases was Prem Kumar himself, and it is not disputed that his evidence does implicate the petitioners and support their convictions. It is, however, urged that the evidence of Prem Kumar is in the nature of the testimony of an accomplice and there is little or no evidence in corroboration of it to sustain the convictions of the petitioners.

In the case of Hari Ram, there is ample evidence in corroboration of the statement of Prem Kumar as regards Hari Ram supplying food, etc., and this was not challenged, but it was urged that there was no evidence in support of Prem Kumar's statement that Hari Ram was aware of the fact that he had escaped from lawful custody and that in the absence of corroboration as regards Hari Ram's knowledge of this fact, his conviction cannot be sustained. I do not think this argument is sound. It is true that it is a well established rule of practice to require corroboration of the statement of an accomplice connecting the accused person with the crime; but corroboration is not required in all details. As pointed out by a Division Bench in a recent case, *Sher Singh* v. *Emperor* (1), even slight corroboration is sufficient for the purposes of this rule, if the Court is satisfied thereby about the genuineness of the accomplice's story, so far as it implicates the accused person. To insist on corroboration of the story in every detail, would practically mean requiring independent proof which will do away with the necessity of relying on the testimony of the accomplice at all. In the present instance therefore, there being sufficient corroborative evidence in other respects, it was not necessary, even according to the established rule of practice referred to above, to require independent corroborative evidence of the statement of the approver as regards the knowledge of Hari Ram about Prem Kumar being an absconder. It may, however be pointed out that the circumstances in which Prem Kumar was secretly kept on the top floor of the house and supplied with food, etc., the discovery of the key of Hari Ram's office with Prem Kumar, etc., are facts which indicate that Hari Ram must have been aware of the fact that Prem Kumar was an absconder and go to support Prem Kumar's statement in this respect.

The above remarks also apply to the case of Sotindar Nath. Sotindar Nath has admitted that he allowed Prem Kumar to stay in a room of the printing press for two or three days but it is urged on his behalf that he did so innocently and was not aware of the fact that Prem Kumar had escaped from lawful custody. Prem Kumar of course states that he was informed of the fact, but it is urged that there is no corroboration of Prem Kumar's statement in this respect. But Prem Kumar's statement is corroborated in several other material particulars and it

(1) 140 Ind. Cas 19; A I R 1932 Lah. 621; (1932) Cr. Cas. 913; 33 Cr. L J 916; 14 Lah. 111; Ind. Rul. (1932) Lah. 679; 34 P L R 285.

was not essential that it should have been corroborated in this particular. Prem Kumar is a resident of the United Provinces and his location in a room in the press after his sudden arrival for two or three days instead of his being lodged in the residential house as an ordinary guest goes to indicate guilty knowledge. It was urged that the employees in the press and customers used to see Prem Kumar, but the latter was a stranger in Lahore and there was little risk involved in his being kept there for 2 or 3 days only. It was further argued that Sotindar Nath used to be sent away, when Prem Kumar's friends came to talk with him. But this very fact was sufficient to arouse Sotindar Nath's suspicion. Prem Kumar and his friends may not have cared to take Sotindar Nath into confidence as regards all their plans, but this would not show that Sotindar Nath was acting innocently. There is no allegation of any enmity on the part of Prem Kumar and the corroboration of his statement in other particulars together with the manner in which he was kept in the press, are in my opinion sufficient to justify his conviction.

As regards Indar Nath (a boy aged about 16 or 17) the learned Sessions Judge has held that there was no corroboration of the accomplice's statement implicating Indar Nath, but he was of opinion that the conviction of an accused person on the uncorroborated testimony of an approver is not absolutely illegal and in the special circumstances of this case, the sole testimony of the accomplice could be safely taken as a basis for conviction. The learned Counsel for the petitioner has urged that the learned Sessions Judge has erred in law in taking this view as the established rule of practice as to necessity of corroboration of the statement of an accomplice is practically tantamount to a rule of law: *Balmokand* v. *Emperor* (2), *Barkati* v. *Emperor* (3), *Hakam Singh* v. *Emperor* (4) and *Ranbir Singh* v. *Emperor* (5). In any case the accomplice Prem Kumar whose testimony has been relied upon is not a man of such character or antecedents or of such undoubted veracity that his word could be safely relied on without any corroboration. It was further pointed out that Prem Kumar had in fact told lies on certain points.

I am somewhat doubtful whether it would be justifiable to interfere in revision when a Court being aware of the rule of practice referred to above, and being alive to the risk involved in convicting a person on the uncorroborated testimony of an accomplice proceeds to base a conviction on the same, giving its reasons for doing so. But leaving aside this aspect of the question, it seems to me that the learned Sessions Judge was not right in holding that the testimony of Prem Kumar in this case was not corroborated. The learned Magistrate who had tried the case had relied upon the testimony of Muhammad Hussain, P. W. No. 8, who deposed that Indar Nath, petitioner, was with Prem Kumar when the latter arrived at the press of Sotindar Nath to seek shelter after his escape from the hospital. The learned Sessions Judge has not disbelieved this evidence but has held it to be insufficient as a piece of corroborative evidence, as this evidence did not establish that Indar Nath had abetted the offence of escaping from lawful custody, which had been already completed by them. I do not think this view of the learned Sessions Judge as regards the nature of the corroborative evidence required in such cases is correct. An authoritative exposition of the law on this subject is to be found in *Reg* v. *Baskerville* (6) in which after a review of previous authorities the rule laid down was as follows:

"We hold that evidence in corroboration must be independent which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it... .....The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration except to say that corroborative evidence is evidence which shows or tends to show, that the story of the accomplice that the accused committed the offence is true, not merely that the crime has been committed, but it was committed by the accused. The corroboration need not be direct evidence that the accused committed the

(2) 28 Ind Cas. 733; A I R 1915 Lah. 16; 16 Cr. L J 354; 17 P R 1915 Cr.; 11 P W R 1915 Cr.; 246 P L R 1915.

(3) 103 Ind. Cas. 49; A I R 1927 Lah. 531; 28 Cr. L J 625; 8 A I Cr. R 273.

(4) 123 Ind. Cas 513; A I R 1929 Lah. 850; (1929) Cr. Cas. 626; 31 Cr. L J 517; Ind. Rul. (1930) Lah 433.

(5) 136 Ind. Cas. 19; A I R 1932 Lah. 204; (1932) Cr. Cas. 248; 33 Cr. L J 242; Ind. Rul. (1932) Lah. 195; 33 P L R 241.

(6) (1916) 2 K B 658; 86 L J K B 28; 80 J P 446; 60 S J 696; 115 L T 453.

crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *Reg* v. *Birkett* (7)."

The above rule has been followed in several recent cases by this Court; see *inter alia*, *Barkati* v. *Emperor* (3), *Hakam Singh* v. *Emperor* (4) and *Sher Singh* v. *Emperor* (1).

It would appear from the above that it is not necessary that corroboration should relate to the actual commission of the crime; for to require such evidence would be (as pointed out already) tantamount to requiring independent proof of the offence, and this would practically do away with the necessity of the testimony of the accomplice.

What is necessary is corroboration in some material particulars which will satisfy the Court of the truth of the accomplice's story in so far as it implicates the accused. In *Reg* v. *Baskerville* (6) the accused was charged with having committed acts of gross indecency with two boys. There was no direct corroborative evidence as to the actual commission of the offence, but a letter written by the prisoner to one of the boys and his previous conduct were considered to be sufficient corroboration of the testimony of the boys —who on their own statement were accomplices in the crime. In *Reg* v. *Birkett* (7), which was cited with approval in *Reg* v. *Baskerville* (6), the prisoner was charged with theft of sheep and the only evidence available in corroboration of the testimony of an accomplice was the discovery of a quantity of mutton in the house of the prisoner corresponding with the size of the sheep. In *Barkati* v. *Emperor* (3), the prisoner was charged with murder and the only corroborative evidence available related to the association of the prisoner with the accomplice immediately before the commission of the offence. There was a difference of opinion between Broadway, J., and Agha Haidar, J., and on a reference being made to a third Judge (Fforde, J.) it was held after a consideration of the authorities on the subject that the corroborative evidence referred to above was legally sufficient to justify the conviction of the prisoner. A similar view was taken in *Sher Singh* v. *Emperor* (1), wherein the corroborative evidence consisted of recovery of certain ornaments belonging to the deceased and this evidence was considered to be sufficient to support the conviction under ss. 396 and 302, Penal Code, on the basis of the testimony of the approver. It would thus appear that the corroborative evidence in none of these cases related to the actual participation of the accused in the crime with which he was charged; but still it was held to be sufficient to establish the truth of the accomplice's evidence implicating the accused persons. In the present instance the evidence of Muhammad Hussain as regards the petitioner accompanying Prem Kumar when he went to the house of Sotindar Nath soon after his escape stands on a similar footing. It corroborates Prem Kumar's story in a material particular and "connects or tends to connect him with the the crime." In view of the fact that even the uncorroborated testimony of Prem Kumar appeared to the learned Sessions Judge to be sufficient for a conviction, this additional piece of evidence in corroboration should have been held to be quite sufficient to statisfy the requirements of the rule of practice. It may be pointed out here that there is also some further corroboration of the accomplice's statement to be found in the written statement of the petitioner Indar Nath and his defence witnesses in so far as they admit that it was Indar Nath who supplied Prem Kumar with the address of Sotindar Nath.

In my judgment the corroborative evidence on the record was sufficient to support the conviction of Indar Nath and in the circumstances there is no valid ground for interference with it in revision. As regards the sentences, Hari Ram seems to have taken a very prominent part in harbouring Prem Kumar at Amritsar, and I do not think there are any extenuating circumstances to justify reduction of his sentence. Sotindar Nath seems to have played a much less prominent part. It appears that Prem Kumar was not taken to his house with his consent by any previous arrangement and he kept him in the press only for a few days. The maximum sentence of imprisonment on him was, in my opinion uncalled for. I reduce his sentence to rigorous imprisonment for nine months. The fine and the imprisonment in default will stand. Indar Nath is a youth aged 17 only. He is not in any way connected with Prem Kumar and appears to have been used as a tool by the principal culprit Ram Nath and possibly by others who kept themselves in the back-ground. In view of the fact that Prem Kumar himself was

(7) (1856) 8 C & P 732.

sentenced to rigorous imprisonment for two years only for the main offence of escaping from lawful custody, the sentence passed on him seems to be clearly excessive. Considering all the circumstances it seems to me that the period of imprisonment already undergone by him will be sufficient to meet the ends of justice and I accept the petition only to the extent of reducing the sentence to this period.

D. *Revision accepted in part.*

CALCUTTA HIGH COURT

Letters Patent Appeal No. 2 of 1934
August 21, 1934
MITTER AND NASIM ALI, JJ.
ABDUL JALIL—APPELLANT
versus
ASRAF ALI AND OTHERS—RESPONDENTS

Bengal Patni Taluqs Regulation (VIII of 1819), s 8—Proceeding for realization of arrears of rent, whether against defaulters personally—Notice published and sale held—Defaulter dead at the time of sale—Sale, validity of.

The proceedings taken under the Patni Regulation for realization of arrears of *patni* rent are not taken against the defaulter personally at all but are taken against the tenures. Consequently, where the necessary notice as required by the Regulation has been duly published, the sale is not invalid merely because at the time when the sale was held the defaulter was dead. There is no procedure in the Patni Regulation which enables the Collector to bring on the record the heirs of the defaulting *patnidar*, if he has died in the meantime, nor is there any provision in the statute which makes it incumbent on the *zemindar* to seek out such heirs and to apply to the Collector that the sale should be held after bringing the heirs of the deceased *patnidar* on the record *Raj Narain Mitter* v *Ananta Lal Mandal* (1), doubted.

L. P. A. against the judgment of Patterson, J., dated January 26, 1934.

Mr. *Narendra Kumar Das*, for the Appellant.

Mr. *Chandra Sekhar Sen*, for the Respondents.

Mitter, J.—This is an appeal under s. 15, Letters Patent, against the decision of my learned brother, Patterson, J., who reversed the decision of the Courts below and has dismissed the suit of the plaintiff. The plaintiff instituted the suit in which this appeal arises for a declaration of his alleged *taluki* title to an undivided 2/3rds share of the lands described in the schedule to the plaint and for recovery of posssession of the same jointly with defendant No. 8. There was a further prayer in the plaint that the sale of the land held under the Patni Regulation on November 18, 1918, was void and did not affect the interest of the plaintiff in any way. Amongst the several defendants to the suit defendant No. 7 alone contested the suit. It is to be noticed that although the sale under the Regulation took place on November 18, 1918, the present suit was not instituted till neary ten years after, on February 7, 1928. The facts on which this suit is based, lie within a narrow compass. It appears that by reason of the arrears in payment of rent, the *patni taluk* in question was sold at a mid-year sale on November 18, 1918. Notices according to the terms of the Regulation were duly served on October 29, 1918. The *patnidar* died on November 10, 1918, and the sale which is now impugned took place on November 18, 1918. The ground of the suit is that as the heirs of the deceased *patnidar* were not brought on the record and as the Collector, held the sale in pursuance of the Regulation, the proceedings before the Collector which culminated in the sale, are void and without jurisdiction. It is contended that on general principles, any proceeding taken against a dead person is of no effect against those that succeed to his estate. This ground did prevail with the Courts below which decreed the suit. On appeal to this Court, Patterson, J., came to the conclusion that the Regulation nowhere provides that it is incumbent on the *zamindar* to ascertain who are the actual holders of any particular *patni taluk* or to enter the names of the actual holders in his books, and that all that it does in this respect is to require the *zamindar*, on the fulfilment of certain conditions, to register and otherwise give effect to alienations of *patni taluks* on an application being made to him to that end. After considering the relevant provisions of the Regulation, the learned Judge has come to the conclusion that as all conditions precedent to the sale are fulfilled prior to the death of the defaulter and the *zamindar* is under no obligation to trace out and substitute the heirs of the defaulter, the sale was a good one and must be allowed to stand. He has accordingly dismissed the plaintiff's suit. The present appeal, as has been already stated, is against this decision.

We are of opinion that the conclusion arrived at by Patterson, J., is right. The provisions of the Patni Regulation which relate to the service of notices with regard to sales held under the Regulation are contained in s. 8 of the Regulation. Section 8 says that on the first day of *Kartic* in the middle of the year, the

zamindar shall be at liberty to present a petition to a Civil Court of the district and a similar one to the Collector, containing a specification of any balances that may be due to him on account of the expired year from all or any *talukdars* or other holders of an interest of the nature described in cl. 1, s. 8. The said petition containing this specification shall then be stuck up in some conspicuous part of the *cutchery* with a notice that if the amount claimed be not paid before the first *Agrahayan*, the tenures of the defaulters will, on that day, be sold by public sale in liquidation. In the case of a mid-year sale it is further stated that either the entire amount due shall be paid or so much of it as shall reduce the arrear including any intermediate demand for the month of *Kartic*, to less than one-fourth of the total demand of the *zamindar*, according to the *kistiband*, calculated from the commencement of the year to the last day of *Kartic*. Then it is stated that a notice shall be sent by the *zamindar* to be similarly published at the *cutchery* or at the principal town or village upon the land of the defaulter. The *zamindar* shall be exclusively answerable for the observance of the forms above prescribed and the notice required to be sent into the *mofussil* shall be served by a single peon who shall bring back the receipt of the defaulter or of his manager, for the same or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notices having been brought and published on the spot. Now it appears clear from these provisions with regard to the publication of notices that the proceedings taken under the Patni Regulation for realization of arrears of *patni* rent are not taken against the defaulter personally at all but are taken against the tenures.

In these circumstances there would be no doubts in this case that the necessary notice as required by the Regulation having been duly published, it seems difficult to hold that the sale is invalid merely because at the time when the sale was held the defaulter was dead. There is no procedure in the Patni Regulation which enables the Collector to bring on the record the heirs of the defaulting *patnidar*, if he has died in the meantime, nor is there any provision in the statute which makes it incumbent on the *zamindar* to seek out such heirs and to apply to the Collector that the sale should be held after bringing the heirs of the deceased *patnidar* on the record. In the absence of any such provision and having regard to the scheme and policy underlying the very stringent provisions of the *patni* sale law which is really enacted for the purpose of making it possible for the *zamindars* to pay the Government revenue in time, we do not think that it can be held that the sale held under the circumstances as in the present case was a void or invalid sale. We are, therefere, of opinion that Patterson, J., came to the right conclusion. Our attention has been drawn by the learned Advocate for the respondent to the case of *Raj Narain Mitter* v. *Ananta Lal Mandal* (1), where one of the learned Judges, Tottenham, J., held that even if the *patnidar* had died before all the proceedings under the Regulation were taken, the sale would not by reason of that circumstance be invalid. The learned Judge observed at p. 717* of the report thus:

"Issues Nos. 5 and 6 relate to the fact that two of the recorded *patnidars* were dead before these proceedings under the Regulation were taken. We think that the fact is immaterial, and that the Court below was wrong in holding that the proceedings were illegal by reason of their having been directed against dead persons; for proceedings under the Patni Regulation taken for the realization of the *patni* rent are not taken against persons at all, but against the tenure. And the *zamindar* is quite right in setting out in his petition and notices the name of the *patni* and the names of the *patnidars* as recorded in his books. The findings therefore of the lower Court upon these issues cannot avail the plaintiffs."

This was the opinion of Tottenham, J. who was one of the Judges who were dealing with the matter. C. M. Ghosh, J., did not express any such opinion. It is not necessary for the purposes of this appeal to express any opinion as to how far this decision is correct, in view of the provisions contained in s. 8 of the Regulation. Section 8 in para. 2 states:

"The *zamindar* shall be exclusively answerable for the observance of the forms above prescribed, and the notice required to be sent into the *mufussil* shall be served by a single peon who shall bring back the receipt of the defaulter, or of his manager, for the same."

This evidently implies, or at any rate refers to, the case of a defaulter who is alive and not the case of a defaulter who is dead. Be that as it may, without expressing our final opinion, but as at present inclined, we say that we have some doubts as to the soundness of the decision of Tot-

(1) 19 C 703.

*Page of 19 C.—[*Ed.*]

tenham, J., in the case referred to above. The result is that this appeal fails and it is dismissed with costs.

Nasim Ali, J.—I agree.

D. *Appeal dismissed.*

LAHORE HIGH COURT

Civil Miscellaneous Petition No. 157 of 1932

June 22, 1934

ADDISON AND SALE, JJ.

SALIG RAM RAM LAL—PETITIONER

versus

COMMISSIONER OF INCOME-TAX, LAHORE—OPPOSITE PARTY

Income Tax Act (IX of 1922), s. 25-A—Whether contemplates partition by metes and bounds.

Section 25-A, Income Tax Act, contemplates an actual partition by metes and bounds of the joint family property.

C. Misc. Petn. from an order of the Commissioner of Income-tax, Punjab, North-Western Frontier and Delhi Provinces.

Messrs. *Achhru Ram* and *Kirpa Ram Bajaj*, for the Petitioners.

Mr. *Asa Ram Aggarwal* for Mr. *J. N. Aggarwal*, for the Opposite Party.

Addison, J.—The business Salig Ram-Ram Lal was assessed for the year 1930-31 as a Hindu undivided family. The family consists of Ram Lal and his only son Amar Nath. In connection with the assessment for that year Ram Lal the head of the family put in a deed dated March 17, 1930, to the effect that the business was being run as a firm constituted by himself and his son Amar Nath, the shares of the partners being equal. The capital as well as the profits of the firm from April 10, 1926, to March 31, 1930, were to be distributed among the partners and it was claimed that the agreement would consequently take effect for previous years as well. An application was submitted for registration of the firm under s. 2 (14) and 26-A, Income Tax Act. There was also a definite claim on the ground that partition had taken place. Previous assessments had been made on the family as a Hindu undivided family. The Income-tax Officer inquired into the matter and came to the conclusion that the instrument of partnership was a bogus one and had only been executed for the purpose of deriving an improper advantage from the provisions of the Income Tax Act. He gave weightly reasons for coming to this decision and refused to register the partnership. As a result the family was assessed as an undivided Hindu family. There was an appeal to the Assistant Commissioner of Income-tax who came to the conclusion on the evidence not only that there had been no separation in status of the members of the family but also that the joint family property had not been partitioned among the two members constituting it. He, therefore, held that the Income-tax Officer had correctly refused to register the firm. The assesee then approached the Commissioner of Income-tax under ss. 33 and 66 (2), Income Tax Act. He declined to interfere under s. 33 and refused to make a reference to this Court on the ground that the question was one of fact. The assessee has now put in an application under s. 66 (3), Income Tax Act asking this Court to require the Commissioner of Income-tax to state a case and to refer it for decision.

In the petition it is stated that the following points of law arise out of the order of the Assistant Commissioner:

(1) Whether s. 25-A, Income Tax Act, contemplates actual partition of the joint property by metes and bounds? (2) Whether under the circumstances of the present case petitioner firm should be assessed as a registered firm constituted under the instrument of partnership dated March 17, 1930, or a Hindu undivided family firm? (3) Was the Income-tax Officer legally justified in refusing the registration of the firm under the provisions of s. 2 (14) and s. 26-A of the Act? (4) Whether the Assistant Commissioner's finding that the arrangement of partnership was bogus and was executed to escape proper tax is based on proper evidence or materials."

Section 25-A of the Act, runs as follows:—

"Where at the time of making an assessment under s. 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition had taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and if he is satisfied that a separation of the members of the family has taken place and that the joint family property has been partitioned among the various members or groups of members in definite portions he shall record an order to that effect."

The opinion of the Commissioner was that the Income-tax Officer could only pass an order under s. 25-A if he was satisfied first, that separation of the family had taken place and, secondly, that the joint family property had been partitioned among the various members or groups of members in definite portions. It was only after that, that the question of registering the parties as a firm arose. Thus the only question in his opinion was whether the assessee was still a member of a Hindu undivided family or of a firm con-

stituted under a deed of partnership. This the Commissioner held to be a question of fact.

The principal contention before us was that s. 25-A did not contemplate an actual partition by metes and bounds of the joint family property. It seems to us that it is impossible so to hold. If actual partition had not been contemplated, the clause "and that the joint family property has been partitioned among the various members or groups of members in definite portions" would not have been added to the section; for the clause immediately preceding it would be sufficient if the law was that actual partition of the property was not necessary. The preceding clause is "if he is satisfied that a separation of the members of the family has taken place." In Hindu law separation of the members of the family can take place without actual partition, and when this takes place, the members of the family change their status from coparceners to tenants-in-common of the joint property which ceases to be joint Hindu faimly property. There was, therefore, no necessity for the addition of the second clause if it was not intended that actual partition by metes and bounds was necessary as well. The words are clear and it is impossible to hold that the legislature added the second clause without intending that it should have a meaning. It was not disputed before us that if actual partition is necessary the Commissioner's decision is right. No question of law arises, therefore, as there was ample evidence on which the Income-tax Authorities could base their finding.

The only other contention raised before us was that registration should have been allowed under s. 26-A of the Act. At the time in question no appeal was given under s. 30 of the Act against a decision refusing to register a firm under s. 26-A. The decision, therefore, of the Income-tax Officer was final in this respect and this concludes the question. We might add, however, that it seems to us that s. 25-A is the only section applicable when a joint Hindu family claims to have ceased to be such and the members claim to be assessed as separate entities. The further question whether they should be registered as a firm only arises after that. As already remarked there was ample material on which the Income-tax Authorities could base their finding that the so-called deed of partnership was bogus. This disposes of all the points arising in the case and we dismiss the petition with costs.

D. *Petition dismissed.*

RANGOON HIGH COURT

Special Second Civil Appeal No. 136 of 1934

August 29, 1934

DUNKLEY, J.

MA PO AND OTHERS—APPELLANTS

versus

MA BWIN AND ANOTHER—RESPONDENTS

Registration Act (XVI of 1908), s. 49—Mortgagors basing their claim for possession, on redemption of sub mortgage—Mortgages unregistered—Maintainability of suit.

In order that the ruling in *Maung Sin* v. *Maung So Min* (1) 129 Ind. Cas. 511 should be applicable, there must be privity of contract between the real owner and the person in possession, under which contract the person in possession has been allowed to obtain possession. When the plaintiffs-mortgagors do not suggest that the mortgagees are in possession of property by their leave and licence, but they base their claim on the fact that they have redeemed the mortgages in favour of the sub-mortgagees and assert that because they have redeemed these mortgages from the sub-mortgagee they are entitled to possession of the lands, their suit is a suit for possession of lands which have been redeemed and of which the person in possession has failed to deliver possession after the redemption, and, therefore, it depends entirely upon proof of the mortgages. If the mortgages are incapable of proof for want of registration, the suit of the plaintiffs must of necessity fail. *Maung Sin* v. *Maung So Min* (1), explained, *Ma Thaing* v. *Maung Chit On* (2), referred to.

S. S. C. A. against a decree of the District Court, Shwebo, dated February 28, 1934.

Mr. *A. N. Basu* for Mr. *Ko Ko Gyi*, for the Appellants.

Mr. *R. K. Roy*, for the Respondents.

Judgment.—This appeal clearly fails. It was alleged by the plaintiffs-appellants that the lands of which they claimed to be entitled to possession, in the suit before the Township Court of Kanbalu, were originally the property of their ancestors, that these lands and another piece of land had been mortgaged by usufructuary mortgage to the ancestors of the respondents, and that subsequently the ancestors of the respondents had sub-mortgaged by usufructuary mortgage the same lands to one Thet Pyin, who was a defendant in the original suit. They further alleged that they had redeemed these lands by paying the mortgage amount to Thet Pyin, but had only been able to obtain possession of one holding, of which Thet Pyin was in possession, although the redemption also referr-

ed to the two holdings now in suit, and in consequence of this redemption from Thet Pyin they claimed to be entitled to possession of these two holdings also. It is admitted that the respondents have, through their predecessors-in-title, been in possession of the lands in suit, for over thirty years. All the documents of mortgage on which the appellants relied are unregistered documents and are therefore invalid to prove any of the mortgages alleged. In his judgment in Appeal No. 22 of 1933, which was a preliminary appeal in connection with this same suit, the learned District Judge of Shwebo relying upon the decision in *Maung Sin* v. *Maung So Min* (1), held that these unregistered documents of mortgage, although invalid to prove the mortgages for want of registration, were nevertheless admissible in evidence for the purpose of showing the nature of the possession of the respondents, but the judgment in *Maung Sin* v. *Maung So Min* (1), when correctly interpreted, is no authority for this conclusion of the learned District Judge. In *Maung Sin* v. *Maung So Min* (1), a suit for possession based on title was brought by the owner of the land against the person who was in possession thereof, and it was held that, although the mortgage under which the defendant was in possession was invalid for want of registration, yet in such a suit for possession based on title, the mortgage document was admissible in evidence for the very restricted collateral purpose of showing that the person in possesssion was in possession by licence of the real owner and not in his own right.

In order that this ruling should be applicable there must be privity of contract between the real owner and the person in possession, under which contract the person in possession has been allowed to obtain possession. In the present case nothing of that kind is alleged. The appellants do not suggest that the respondents are in possession of this property by their leave and licence, but they base their claim on the fact that they have redeemed the mortgages in favour of the defendant Thet Pyin, who is not a party to this appeal, and assert that because they have redeemed these mortgages from Thet Pyin they are entitled to possession of these lands. Consequently, their suit is a suit for possession of lands which have been redeemed and of which the person in possession has failed to deliver possession after the redemption, and therefore, it depends entirely upon proof of the mortgages. The mortgages being incapable of proof for want of registration, the suit of the appellants must of necessity fail. See *Ma Thaing* v. *Maung Chit On* (2). But furthermore, even supposing that these mortgages had been capable of proof, the appellant's suit would nevertheless fail. They base their suit on a mortgage with possession to the ancestors of the respondents, and a sub-mortgage with possession by the ancestors of the respondents to Maung Thet Pyin. Maung Thet Pyin has denied that these particular lands now in suit were ever mortgaged to him, and there is no evidence whatever to show that they were ever so mortgaged; moreover, it is quite plain that he never obtained possession of these lands. The appellants paid a certain amount of money to Thet Pyin and in consequence they obtained possession of the land which was in Thet Pyin's possession. Thet Pyin obviously could not give them possession of lands of which he was not in possession, and from the fact that he never obtained possession of the lands in suit the presumption arises that they were not included in the sub-mortgage in his favour. From whatever angle this case is viewed, it is plain that the claim of the appellants must fail.

This appeal is, therefore, dismissed with costs, Advocate's fee in this Court three gold *mohurs*.

D. *Appeal dismissed.*

(1) 129 Ind. Cas. 511; A I R 1931 Rang. 40; 8 R 556 Ind. Rul, (1931) Rang. 79.

(2) 117 Ind. Cas. 577; A I R 1929 Rang. 179; 7 R 140.

PRIVY COUNCIL.

Appeal from the Allahabad High Court

February 7, 1935

LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, SIR LANCELOT SANDERSON, AND SIR SHADI LAL

MAQBUL AHMAD AND OTHERS—APPELLANTS

versus

ONKAR PRATAP NARAIN SINGH AND OTHERS—RESPONDENTS

Limitation Act (IX of 1908), ss. 4, 14, 3, Sch. I, Art. 181—Application for execution of final mortgage decree—Time during which preliminary decree was executed—Whether can be deducted in computing limitation—Ss. 4 and 14, distinction between—Computation under s. 14—How to be made—Period of long vacation—When can be deducted—Discretion of Court to relieve decree-holders in cases of hardship—Whether

exists—Duty of Court to notice the Act and give effect to it even if not referred to in pleadings.

It cannot be said, apart from any other objection, that an application to obtain execution under a preliminary mortgage decree is an application for the same relief as the application to the Court for a final mortgage decree for sale in the suit. Consequently, it is not permissible, on the basis of s. 14, Limitation Act, in computing the period of limitation prescribed for an application for execution, to exclude the period during which the decree holder was seeking execution under the preliminary decree. [p 207, col. 2.]

There is a marked distinction in form between ss. 4 and 14. The language employed in s. 4 indicates that it has nothing to do with computing the prescribed period. Where there is ground for excluding certain periods under s 14, in order to ascertain what is the date of the expiration of the prescribed period, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period. [p 207, col. 2.]

The provision in s. 4 means the proper Court in which the application ought to have been made and when it is impossible to say that the application was made to the proper Court on the day on which that Court re-opened, s. 4 will not apply. [p. 208, col. 1.]

There is no authority to support the proposition that there is some sort of judicial discretion which would enable the Court to relieve the decree-holders from the operation of the Limitation Act in a case of hardship, particularly when it is alleged that the decree-holder was in regard to the proceedings which he took by way of execution in some way misled by some mistake in the form of the preliminary decree. It is impossible to hold that, in a matter which is governed by Act, an Act which in some limited respects gives the Court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. Section 3 of the Act is peremptory and the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings. *Basvanappa* v. *Krishnadas-Govardhandas Madiwale* (1), overruled [p. 208, col. 2]

Mr. *A. Majid*, for the Appellants.

Messrs. *A. M. Dunne*, *K. C.* and *W. Wallach*, for the Respondents.

Lord Tomlin.—This is an appeal from a decree of the High Court of Judicature at Allahabad dated May 6, 1929, by which a decree dated April 29, 1924, made by the Subordinate Judge at Basti was affirmed. The decree of the Subordinate Judge had dismissed the application of the decree-holder in a mortgage-suit to have the preliminary decree in the suit made absolute. The present appeal is brought by representatives of the decree-holder since deceased, complaining of the decrees to which reference has been made.

The facts of the case are shortly these. A preliminary mortgage-decree was obtained on May 7, 1917, which was amended in some respects not material to be particularised on May 22, 1917.

There were a number of mortgagors interested in different villages comprised in the mortgage, and some of them appealed to the High Court against the preliminary decree. There were in fact two such appeals. One appeal succeeded, with the result that certain villages were excluded from the decree, and the suit of the mortgagee was dismissed as against those appellants. So far as they were concerned, that was the end of the matter.

There was a second appeal, by which certain of the mortgagors sought to exclude other villages from the decree, and that appeal failed.

The decrees of the High Court disposing of those appeals were made on June 7, 1920.

After the decrees of the High Court dealing with the appeals in the way that has been indicated, the decree-holder proceeded to seek execution under the preliminary decree and between December 23, 1920, and November 8, 1921, he was occupied with those proceedings. It was held that he was not entitled to proceed by way of execution under the preliminary decree, and that all he could do was to take the proper steps to obtain a final decree in the suit.

The Additional Subordinate Judge, before whose Court the mortgage-suit was instituted and by whom the preliminary decree had been made, was, after the making of the preliminary decree, abolished and his jurisdiction was transferred to the Subordinate Judge at Basti.

At a later stage another Additional Judge was appointed, with specified jurisdiction, and on June 20, 1923, being the day after the end of the long vacation, the decree-holder made an application for a final decree for sale in the Court of the new Additional Subordinate Judge. His petition was returned to him on August 6, 1923, with an intimation that he had presented it in the wrong Court, that the Additional Subordinate Judge had no jurisdiction, and that the Court of the Subordinate Judge at Basti was the proper Court in which to proceed.

Accordingly, on the day on which he got back his petition, he presented it in the Court of the Subordinate Judge at Basti. When that application came on, it was objected to upon the ground that it was out of time and barred by Art. 181 of the

Limitation Act, three years since June 7, 1920, having expired.

The decree-holder, however, sought to escape from that defence by alleging that he was entitled to the exclusion of three periods in computing the prescribed period. The first period was from December 23, 1920, to November 8, 1921, while he was seeking execution under the preliminary decree which he contended, ought to be excluded in computing the prescribed period under the provisions of s. 14 of the Limitation Act. The second period was from May 20, 1923, to June 19, 1923, being the period of the long vacation, which he claimed should have been excluded under the provisions of s. 4 of the Limitation Act. The third period was from June 20, 1923, to August 6, 1923, being the period between the date of the application to the Additional Subordinate Judge and the presentation of the petition to the Subordinate Judge. That he urged should be excluded by virtue of s. 14 of the Limitation Act.

The Courts in India have determined the matter against the appellants, the decree-holder's representatives, holding, that the period during which execution proceedings were proceeding cannot be excluded from the calculation under s. 14, and that though the period from June 20, 1923, to August 6, 1923, ought to be allowed, no allowance should be made in respect of the period which represents the long vacation, namely from May 20, 1923, to June 19, 1923. The result was that the application on August 6, 1923, was held to be out of time and barred by Art. 181.

The appellants before their Lordships' Board by their Counsel have presented five propositions: firstly, that the period during which the execution proceedings were pending should be excluded; secondly, that the vacation period should be excluded; thirdly, that the period up to August 6, which has in fact been allowed to the decree-holder was properly allowed to him; fourthly, that the application was in fact made to the proper Court on June 20, 1923, and that the Additional Subordinate Judge was the proper Judge to deal with it; and, lastly, that the Court had a general judicial jurisdiction, outside the Limitation Act, to relieve a suitor from the provisions of the Act in a case where hardship is established.

It will be convenient to call attention to the provisions of the relevant sections of the Limitation Act. They are ss. 3, 4 and 14 (2). By s. 3 it is provided:

"Subject to the provisions contained in ss. 4 to 25 inclusive, every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by the first schedule, shall be dismissed, although limitation has not been set up as a defence."

Section 4 provides:

"Where the period of limitation prescribed for any suit, appeal or application, expires on a day when the Court is closed, the suit, appeal or application, may be instituted, preferred or made on the day when the Court re-opens."

Section 14 (2) provides:

"In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the same relief, shall be excluded where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

If the appellants were entitled to succeed in regard to the first period, that is, from December 23, 1920, to November 8, 1921, having regard to the length of that period, that would be sufficient for them. Their Lordships, however, are of opinion that the Courts in India were clearly right in the way they dealt with the point. It is impossible to say, apart from any other objection, that the application to obtain execution under the preliminary decree was an application for the same relief as the application to the Court for a final mortgage decree for sale in the suit.

That being so, it is not permissible, on the basis of s. 14, in computing the period of limitation prescribed, to exclude that particular period.

The second period is the period of the long vacation. In regard to that matter the appellants seem to their Lordships to be in a position which is in the nature of a dilemma. It is to be noted that there is a marked distinction in form between s. 4 and s. 14. The language employed in s. 4 indicates that it has nothing to do with computing the prescribed period. What the section provides is that, where the period prescribed expires on a day when the Court is closed, notwithstanding that fact, the application may be made on the day that the Court re-opens; so that there is nothing in the section which alters the length of the prescribed period; whereas in s. 14, and other sections of a similar nature in the Act, the direction begins with the words: 'In computing the period of limitation prescribed for any application", certain periods shall be excluded,

It, therefore, seems to their Lordships that, where there is ground for excluding certain periods under s. 14, in order to ascertain what is the date of the expiration of the prescribed period, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period; that is to say, if the prescribed period is three years, and twenty days ought to be excluded in order to determine when the prescribed period expires, twenty days have to be added to the three years, and the date of the expiration of the prescribed period is thus ascertained.

That being so, the appellants appear to be in this difficulty. They have been allowed, and (as their Lordships think), properly allowed, the period from June 20, 1923, to August 6, 1923. At p. 33 of the record, this passage in the judgment of the High Court appears:

"Even, therefore, if the three years and forty-eight days are counted from that date, the time expired some time about July 25, 1923. That did not fall within the long vacation. It, therefore, follows that the plaintiffs are not entitled to the benefit of s. 4."

That view of the way to calculate the prescribed period seems to their Lordships to be correct; but, even if it were not correct and it were necessary to turn to s. 4, the language of s. 4 is such that it seems to their Lordships to be impossible to apply it to a case like the present. What it provides is that, where the period of limitation prescribed expires on a day when the Court is closed, the application may be made on the day when the Court re-opens. In their Lordships' view that means the proper Court in which the application ought to have been made and, on that view of it, it is impossible to say that this application was made to the proper Court on the day on which that Court re-opened. Therefore, on either view of the case, the appellants necessarily fail in regard to that period.

That would be enough to dispose of the appeal but for the fact that two further points have been put before their Lordships: First that the application was in fact made to the proper Court on June 20, and that the Additional Subordinate Judge was the proper Judge. The point does not appear to have been raised in the Courts in India. It was assumed, as a fact, that the Additional Subordinate Judge had no jurisdiction. There is no material before their Lordships upon which they could entertain the suggestion that they should interfere with that finding and, in their view, that is a point which cannot be made here.

Secondly, it was urged that there was some sort of judicial discretion which would enable the Court to relieve the appellants from the operation of the Limitation Act in a case of hardship and that this was a case of hardship, and in particular because it was alleged that the decree-holder was in regard to the proceedings which he took by way of execution in some way misled by some mistake in the form of the preliminary decree. It is enough to say that there is no authority to support the proposition contended for. In their Lordships' opinion it is impossible to hold that, in a matter which is governed by Act, an Act which in some limited respects gives the Court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. It is to be noted that this view is supported by the fact that s. 3 of the Act is peremptory and that the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings.

Their Lordships only desire to add one other word, and it is this, that the decision which has been referred to in the case of *Basvanappa* v. *Krishnadas Govandhandas Madiwale* (1) cannot, in their view, be supported, having regard to the provisions of ss. 3, 4 and 11 of the Limitation Act.

As Counsel for the appellants referred to s. 5 of the Act and suggested that there was some discretion under that section which could be exercised by the Court in this case, it is right to say that in their Lordships' view that section has no application at all to the circumstances of this case.

In the result, therefore, their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The costs of the appeal must be paid by the appellants.

N. *Appeal dismissed.*

Solicitors for the Appellants.—Messrs. *Francis* and *Harker*.

Solicitors for the Respondents.—Messrs. *Hy. S. L. Polak & Co.*

(1) 59 Ind. Cas. 743; 45 B 443; 22 Bom. L. R 1387.

LAHORE HIGH COURT

First Civil Appeal No. 1836 of 1929
November 30, 1933

TEK CHAND AND AGHA HAIDAR, JJ.

SRI RAM—PLAINTIFF—APPELLANT
versus
KHAWAJU AND OTHERS—DEFENDANTS—RESPONDENTS

Specific Relief Act (I of 1877), s. 42—Court Fees Act (VII of 1870), s. 7 (iv) (c)—Father referring matter to arbitration—Decree in terms of award—Son filing suit for mere declaration that father had no authority and that proceedings subsequent to reference are null and void—Maintainability—Consequential relief must be asked—Court-fees payable—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Plaint, amendment of—If can be allowed at the stage of hearing of appeal—Court-fees—Courts must look to substance of claim and not only form.

The father of the plaintiff had agreed to refer the matter in dispute to arbitration and a decree had been passed in the terms of the award. The son subsequently filed a suit for a mere declaration, that the father had no authority to agree to refer the matter to arbitration and that the proceedings from the date of reference to the date of the decree were null and void:

Held, that the suit was not maintainable. The plaintiff must have asked for consequential relief and such a relief can only be for setting aside the decree which has already been passed by a competent Court and should have paid *ad valorem* court-fee according to the provisions of s. 7 (*iv*), (*c*), Court Fees Act.

Held, also, that the High Court would not be justified in permitting the plaintiff to remodel his plaint and thus alter the frame of the suit at the stage of hearing of the appeal. *Hakim Rai* v *Ishar Das Gorkh Das* (1), relied on.

Courts of justice have not to look at the mere form of the suit but should try to find out what the real substance of the claim is. Although it is open to a party to save the amount of the court-fee by framing the plaint in a manner permitted by the law, still the litigants should not be permitted, to deprive the Revenue Authorities of what is due to them by adopting methods of pleading which cannot be supported by the language of the relevant Statute.

F. C. A. from the decree of the Senior Sub-Judge, Delhi, dated May 31, 1929.

Messrs. *Shamair Chand* and *Nawal Kishore*, for the Appellant.

Messrs. *Kishan Dayal* and *Bhagwat Dayal*, for the Resondents.

Agha Haidar, J.—This appeal arises out of a suit for declaration. The trial Court, without entering into the merits of the case dismissed the suit on the preliminary ground that the suit in its present form was not maintainable. The plaintiff has come up to this Court in appeal. The facts of the case so far as they are necessary for the disposal of the appeal are as follows:

There is a firm at Delhi carrying on business under the name and style of Chhanga Mal-Mangi Lal. It consists of two members only, namely, Mangi Lal, defendant No. 1, and Sri Ram, his son the plaintiff. This firm through Mangi Lal instituted a suit on December 6, 1926, in the Court of the Subordinate Judge, Delhi, against Khawaju and Raju, defendants Nos. 2 and 3, for the recovery of a sum of Rs. 20,380 3-0 on the basis of *bahi* account. During the course of the suit the parties referred the case to arbitration. Mangi Lal, on behalf of the plaintiff firm, joined in the reference and signed the agreement referring the subject-matter of the suit to arbitration. On March 15, 1928, the award was given and a decree for a sum of Rs. 14,000 in terms thereof was passed against defendant No. 2 only. On May 1, 1928, the present suit was instituted by the plaintiff Sri Ram, son of Mangi Lal. After stating that the plaintiff and Mangi Lal were partners in the firm "Chhanga Mal-Mangi Lal" and referring to the proceedings in the previous suit, the plaintiff alleged that defendant No. 1, Mangi Lal, was not authorised on behalf of the firm, "Chhanga Mal-Mangi Lal" to refer the case to arbitration and that he acted in collusion with defendants Nos. 2 and 3 and, without any authority, knowledge, consent and information of the plaintiff. It was further alleged that the decree, which was passed under the terms of the award, had caused substantial loss to the firm and to the plaintiff, that the proceedings from the date of the execution of the agreement to reference were null and void as against the plaintiff and he was entitled to have the above mentioned proceedings from the stage at which the agreement to refer to arbitration was executed, declared null and void. He accordingly prayed that:

"It may be declared that the agreemnt to refer to arbitration, award and decree dated March 15, 1928, passed in terms of the award, that is, all the proceedings from November 24, 1927, the date of execution of the said agreement, in Suit No. 35, *In re* firm 'Chhanga Mal Mangi Lal' against Khawaju and Raju are absolutely null and void as against the firm Chhanga Mal and Mangi Lal and himself, and that the suit in question, from the stage at which the aforesaid agreement was executed, is triable by the Subordinate Judge, First Class, Delhi."

A number of pleas were raised in the written statement filed by defendants Nos. 2 and 3; but for the purposes of the present appeal, it is only necessary to refer to the additional plea (*f*) contained in para. 6 of the written statement where it is pleaded that the suit was not maintainable in its present form. It may be noted that the valuation of the suit originally was

Rs. 130 and a court-fee of Rs. 10 had been paid on it. Subsequently this was altered and Rs. 6,300 was shown as the valuation. As a result of certain proceedings, with which we are not concerned in the present appeal, the case was transferred on January 16, 1929, by the learned District Judge, Delhi, to the Court of Sardar Sewa Singh, Senior Subordinate Judge, Delhi, who framed the following issue: "Is the suit for pure declaration in the present form maintainable?" No evidence was led and the learned Senior Subordinate Judge recorded the finding that the suit was not entertainable in the form in which it has been brought. He accordingly dismissed the claim.

Mr. Shamair Chand on behalf of the plaintiff-appellant has argued that the decision of the learned Judge of the Court below was erroneous and that, as his claim was for a pure declaration, the Court ought to have entertained the suit in the form in which it was brought. No doubt there are cases which lay down that a suit for a pure declaration can be maintained and that it is not the business of the Court to find out what would be the result of the decree which may be granted in such a suit. It must, however, be remembered that Courts of justice have not to look at the mere form of the suit but should try to find out what the real substance of the claim is. Although it is open to a party to save the amount of the court-fee by framing the plaint in a manner permitted by the law, still the litigants should not be permitted to deprive the Revenue Authorities of what is due to them, by adopting methods of pleading which cannot be supported by the language of the relevant statute. In the present case a decree has already been obtained. The plaintiff sought the proceedings from the date of the agreement up to the date of the passing of the decree to be declared null and void as against the firm Chhanga Mal-Mangi Lal including himself. His learned Counsel, Mr. Rattan Lal, in his statement dated March 5, 1929, explicitly admitted that the plaintiff's suit was for a simple declaration, that he did not want any consequential relief and that all that his client wanted was that the decree should be declared null and void without its being cancelled or set aside. Now this is an impossible position to take up. If the contention of the learned Counsel for the appellant were to prevail, there would be two decrees in the suit and they may be divergent in their effect. This would create an *impasse* which cannot be allowed. The plaintiff cannot possibly succeed unless he is prepared to ask for consequential relief and such a relief can only be for setting aside the decree which has already been passed by a competent Court. The result, therefore, is that the plaintiff ought to have prayed for the consequential relief and should have paid *ad valorem* court-fee according to the provisions of s. 7 (4) (*c*), Court Fees Act. Mr. Shamair Chand finally urged that he should be granted an opportunity to amend the plaint and pay the proper court-fee; but, having regard to the attitude of his client's Counsel in the Court below and also in view of the fact that even in the grounds of appeal filed in this Court, no such prayer is asked, I do not think this Court would be justified in permitting the plaintiff-appellant to remodel his plaint and thus alter the frame of the suit at this stage. If any authority were needed for this proposition, we have a case of this Court reported as *Hakim Rai* v. *Ishar Das Gorkh Das* (1). With the statement of law contained in this case I fully agree.

This being so, I would affirm the decree of the trial Court and dismiss with costs the appeal preferred by the plaintiff-appellant.

Tek Chand, J.—I agree that the suit was not maintainable in the form in which it had been brought and that this appeal should be dismissed with costs.

D. *Appeal dismissed.*

(1) 102 Ind. Cas. 46; A I R 1927 Lah. 499; 8 Lah. 531; 9 Lah. L J 400.

PATNA HGH COURT

Civil Revision Petition No. 528 of 1934

February 1, 1935

WORT, J.

DR. SUKUMAR GUPTA—

PETITIONER

versus

THE CHAIRMAN, DISTRICT BOARD, GAYA—PLAINTIFF—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXI, r. 1 (2) (a) (b)—Suit not found to fail by reason of formal defect—Grounds for allowing plaintiff to file fresh suit not stated—Order allowing plaintiff to withdraw suit and file fresh suit—Whether Court has jurisdiction to pass—Cl. (b) of sub-r. (2), if to be read ejusdem generis *to cl. (a).*

Unless the Court brings the case within cl. (*a*) of sub-r. 2 of O. XXIII, r. 1, Civil Procedure Code, or set out grounds why the plaintiff should be allowed to bring a fresh suit, the Court has no jurisdiction to pass an order allowing the plaintiff to withdraw a suit and to bring a fresh suit. *Nathuni Ram* v. *Sheo*

Koer (1) and *Uchant Ahir* v. *Basawan Ahir* (2), relied on.

Clause (*b*) of sub-r. 2 of O. XXIII, r. 1, Civil Procedure Code, although disjunctive, must be read *ejusdem generis* to cl. (*a*).

C. R. P. from an order of the Munsif, First Court of Gaya, dated August 1, 1934.

Mr. *K. N. Moitra*, for the Petitioner.

Mr. *Rajkisore Prasad*, for the Opposite Party.

Judgment.—This Rule was directed against the order of the Munsif of Gaya allowing the plaintiff to withdraw a suit and to bring a fresh suit. The learned Judge purported to act under O. XXIII, r. 1 of the Code of Civil Procedure in making that order. The matter seems to me to be a very clear one, and I have no doubt whatever that the order of the Judge in the Court below was wrong. But the only question which arises is whether this Court has power to set aside the order in revision as relating to a matter of jurisdiction?

It is contended by the learned Advocate appearing on behalf of the respondent to this application that the question which the learned Judge had to decide was one within his jurisdiction and therefore the application before this Court must fail. In this connection, however, I propose to and indeed I must follow the decision of this Court more particularly in *Nathuni Ram* v. *Sheo Koer* (1), and *Uchant Ahir* v *Basawan Ahir* (2). But in addition to following those authorities I propose shortly to state my reasons.

The case of *Robert Watson & Co.* v. *The Collector of Rajshahye* (3), is important only in the sense that it decided that the *mofussil* Courts in India had no jurisdiction to enter a non-suit as the Courts in England had at that time. Therefore the only jurisdiction that a Court in the *mofussil* can possibly have in these matters is contained in the Civil Procedure Code: Order XXIII r. 1, and any attempt to make an order such as this, which in effect is an order of a non-suit, unless it can be brought within the specific provisions laid down by the legislature, must be held to be without jurisdiction.

Now what the learned Judge in this case has done is to discuss the grounds upon which the plaintiff's suit must fail, or, in other words, the grounds upon which the plaintiff ought to be allowed to withdraw his suit. Had the matter rested there, the petitioner before this Court would be in a very considerable difficulty, because it might be argued that what the learned Judge was deciding was merely a question of law. But what actually happened was that the learned Judge discussing the grounds upon which the suit must fail, which were certainly not grounds under cl. (*a*) sub-r. 2 of r. 1, goes on to state that he found it a fit case in which leave to bring a fresh suit should be granted to the plaintiff. In other words, he proceeded first of all to decide on what grounds the suit would fail under cl. (*a*) and then made his order under cl. (*b*) for let it be noted that the two sub-clauses are disjunctive. Now it is obvious that there was no formal defect in the suit. It was a matter of evidence, and had the matter gone on and been heard and determined, it is quite possible the plaintiff's suit would fail not for some formal defect but fail by reason of the lack of evidence. That does not bring it under cl. (*a*). Now the learned Judge has come to no conclusion whatever which would appear to be the basis or can be the basis of his order that it was a fit case in which leave should be given to bring a fresh suit. Some of the authorities have purported to hold that cl. (*b*) must be read *ejusdem generis* with cl. (*a*), and there is a great deal to be said, if I may say so, for that point of view; because there can be no ground for bringing a fresh suit unless it be that the plaintiff has got evidence to support his cause of action, and that indeed cannot be a ground for holding that the plaintiff's action should be withdrawn and a fresh suit to be allowed. Therefore from that point of view it seems clear that cl. (*b*), although disjunctive as I have said, must be read *ejusdem generis* to cl. (*a*).

But I do not purport to decide the case on that ground. I decide it on the ground that the Judge has not brought the case within cl. (*a*) quite clearly, and has set out no grounds at all why the plaintiff should be allowed to bring a fresh suit. Unless he does one or the other of those, the learned Judge certainly had no jurisdiction to make the order.

That being so, the order of the Munsif

(1) 46 Ind. Cas. 179; 3 P L J 460; 5 P L W 104; (1918) Pat. 220.

(2) 61 Ind. Cas. 639; 6 P L J 112; 2 P L T 634.

(3) 13 M I A 160; 3 B L R P C 48; 12 W R P C 43; 2 Suther. 269; 2 Sar. 500 (P. C).

will be set aside with costs; hearing fee two gold *mohurs*.

N. *Order set aside.*

LAHORE HIGH COURT

Second Civil Appeal No. 938 of 1929
June 1, 1934

ADDISON AND ABDUL RASHID, JJ.

Musammat JANAT BIBI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GHULAM HUSSAIN AND ANOTHER—PLAINTIFFS—RESPONDENTS

Custom (Punjab)—Decision in custom case, if a judgment in rem—*Evidence Act (I of 1872), s. 13—Punjab Courts Act (VI of 1918), s. 41 (3)—District Judge refusing certificate—Second appeal, if competent—High Court, whether can send case back ordering grant of certificate.*

A decision in a custom case is not a judgment *in rem*. It is only relevant under s. 13, Evidence Act, as a judicial instance of the custom being recognized. It may be that, owing to faulty prosecution, one decision may be arrived at between certain parties while there may be another decision in a suit arising between other persons.

Where a District Judge considers an application before him and finds that a certificate should not be granted, a second appeal is not competent without a certificate and the High Court has no power to send back the case to him for re-consideration or with an order to grant the required certificate. *Lehna Singh* v. *Jagat Ram* (2), *Jaita* v. *Har Chand* (3), *Mula* v. *Hoshiara* (4) and *Chinti* v. *Ishar* (5), relied on.

S. C. A. from the decree of the District Judge, Jhelum, dated January 2, 1929.

Mr. *A. N. Chona*, for the Appellants.

Mr. *Muhammad Monir*, for the Respondents.

Addison, J.—The collaterals of one Fateh Din sued for possession of certain land on the ground that it was ancestral and Fateh Din was not competent to bequeath it to the defendant. The trial Judge dismissed the suit holding that the will was valid under custom. On appeal the District Judge held that *Gujars* of Jhelum had no power under custom to make wills. He accordingly decreed the claim. Against this decision the defendants have preferred this second appeal without the certificate required under the provisions of s. 41 (3), Punjab Courts Act. They have also put in a petition on the revision side, praying that the refusal of the District Judge to grant this certificate should be set aside.

The Counsel for appellants relied upon *Pahlwan Khan* v. *Bayga* (1) as establishing that there was a custom among Muhammadan *Gujars* of Tahsil Jhelum whereby a sonless proprietor had a right to bequeath his ancestral land to an associated collateral to the exclusion of other collaterals of the same degree. This decision was not published till long after the District Judge had decided the appeal before him. Further, a decision in a custom case is not a judgment *in rem*. It is only relevant under s. 13, Evidence Act, as a judicial instance of the custom being recognized. It may be that, owing to faulty prosecution, one decision may be arrived at between certain parties while there may be another decision in a suit arising between other persons.

The principal question before us is, whether this Court has power to compel the District Judge to grant the certificate in question. It is necessary in this connection to set out s. 41 (1) and (3), Punjab Courts Act:

"41 (1) An appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court on any of the following grounds, namely: (*a*) the decision being contrary to law or to some custom or usage having the force of law: (*b*) the decision having failed to determine some material issue of law or custom or usage having the force of law; (*c*) a substantial error or defect in the procedure provided by the Code of Civil Procedure, 1908, or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits. (3) Notwithstanding anything in sub-s. (1) of this section, no appeal shall lie to the High Court from a decree passed in appeal by any Court Subordinate to the High Court regarding the validity or the existence of any custom or usage unless the Judge of the lower Appellate Court has certified that the custom or usage is of sufficient importance, and that the evidence regarding it is so conflicting or uncertain that there is such substantial doubt regarding its validity or existence as to justify such appeal."

In *Lehna Singh* v. *Jagat Ram* (2), before Campbell, J., the question raised was the existence of a custom and it was held by him that the words

"'notwithstanding anything in sub-s. (1) of this section', with which sub s. (3), s. 41, Punjab Courts Act, commences, preclude a Court of second appeal in the absence of a certificate from going into the question of whether the first Appellate Court had erred in law or procedure."

This seems to be the correct view. Under s. 41 (1) a second appeal lies if the decision is contrary to law or to some custom or usage having the force of law, but the right of appeal given in sub-s. (1) is taken away by the opening words of sub-s. (3) which are to the effect that:

"notwithstanding anything in sub-s. (1) of this

(1) 114 Ind. Cas. 705; A I R 1929 Lah. 192; 10 Lah. 581.

(2) 73 Ind. Cas. 924; A I R 1933 Lah. 377.

section no second appeal shall lie to the High Court regarding the validity of the existence of any custom or usage unless the Judge of the lower Appellate Court has certified that the custom or usage is of sufficient importance, and that the evidence regarding it is so conflicting or uncertain that there is such substantial doubt regarding its validity or existence as to justify an appeal."

The plain meaning of this section is that without the certificate in question no second appeal lies to the High Court.

It is not necessary to refer to all the decisions on this question, but I may allude to *Jaita* v. *Har Chand* (3), a decision of a Division Bench. An application for a certificate was made to the lower Appellate Court, but was dismissed on the ground that there was no material on the record on which any decision, as to the custom alleged, could be arrived at. It was held by the High Court that a question of custom was involved, and that even if the decision of the learned District Judge on the merits of the case be erroneous, a second appeal was not competent without a certificate. Similarly it was held by Shah Din, J. in *Mula* v. *Hoshiara* (4), that where a certificate to appeal on a question of custom is not granted, no second appeal lies to the High Court and it is immaterial on what ground the same is refused. Again Shah Din and Le Rossignol, JJ., held in *Chinti* v. *Ishar* (5), that although the District Judge's view regarding the reversion of the property to the plaintiffs was erroneous, no second appeal was competent without a certificate under s. 41 (3), Punjab Courts Act. That was a case in which the District Judge had rejected the application for grant of a certificate on the ground that he entertained no doubt that *Musammat* Chinti was not an heir of the donee. It was also held by Johnstone, J., in *Allah Din* v. *Salam Din* (6), that the question of *onus probandi* could not be raised without a certificate under s. 41 (3), Punjab Courts Act.

In the present case the District Judge recorded a clear order on the application for grant of a certificate that there was absolutely no conflict or uncertainty with respect to the point involved in this case. He, therefore, considered the application which was before him and found that the certificate should not be granted. In these circumstances I have not the slighest doubt that the second appeal is incompetent without a certificate, and that there is no power in this Court to send the case back to him for re-consideration or with an order to him to grant the required certificate. It follows that this appeal and revision petition must both be dismissed. Parties will bear their own costs in the revision petition, but the respondents' costs of the appeal will be borne by the appellants.

Abdul Rashid, J.—I agree.

D. *Appeal dismissed.*

(3) 72 Ind. Cas 403; A I R 1923 Lah. 589; 5 Lah. L J 298; 6 Lah. L J 452.

(4) 27 Ind. Cas. 723; A I R 1915 Lah. 380; 24 P W R 1915; 85 P L R 1915.

(5) 43 Ind. Cas. 299; A I R 1918 Lah. 70; 100 P R 1917; 71 P W R 1917.

(6) 31 Ind. Cas. 497; A I R 1915 Lah. 460; 96 P R 1915; 169 P W R 1915.

PATNA HIGH COURT

Appeal from Original Decree No. 255 of 1930

February 18, 1935

MUHAMMAD NOOR AND AGARWALA, JJ.

DULHIN PARBATI KUER—DEFENDANT—APPELLANT

versus

BAIJNATH PRASAD NARAIN SINGH AND ANOTHER—PLAINTIFFS AND ANOTHER—DEFENDANT—RESPONDENTS

Hindu Law—Widow's estate — Joint life-tenants succeeding—Whether one can relinquish her right of survivorship — Succession, when will open out, if relinquishment takes place — Inheritance—Wife, if sapinda *of husband—Death of step-daughter—* Stridhana, *if devolves on step-mother—Widow carrying on litigation regarding estate of husband—Decree, if binding on reversioners—*Res judicata, *principle of—Whether applies—Suit by widows to regain portion of their husband's estate—Suit lost due to technical defect—Decree for costs and mesne profits obtained by creditor—Widows, if personally liable for mesne profits—Accretions and accumulations—Intention of widow—Onus of proof—Execution—Certificate sale — Re-conveyance of what is sold—Effect.*

Under Hindu Law, if more than one female joint life tenants succeed to an estate they may divide their life tenancy and hold portions of the estate separately if they like and this arrangement will continue till their life. In other words, they may convert the joint estate into estates held in severalty. One or more of them may relinquish her or their right of survivorship in that portion of the estate which is held by the other. In that case if one dies, the estate in her possession will not revert to the other who has relinquished but will go to her heirs as if it were her *stridhan*, and if she alienates any portion of the estate, the alienee will continue in possession of the estate till the death of the last survivor The joint tenant, who has surrendered her right of survivorship, cannot question the succession or alienation. The inevitable result, therefore, is that succession will not open till the last survivor is dead [p 218, col. 1.]

[Case-law reviewed.]

A wife, according to Hindu Law, is a *sapinda* of her husband, and hence on the death of the daughter when her *stridhan* property reverts to the next-of-

kin, it devolves on the father's wife (step-mother) who is a *sapinda*. *Bai Kesserbai* v. *Hunsraj Morarji* (6) relied on. [p. 218, col. 2.]

In carrying out litigation regarding the estate of her husband a widow represents the estate and the decree obtained against her is binding upon the reversioners, provided that the litigation is honest and is fairly conducted. The rule of *res judicata* as indicated in s. 11 of the Civil Procedure Code, is not strictly applicable to such cases, but the principle itself has been held to apply so as to bind reversioners by decision in litigation fairly and honestly conducted given for or against Hindu females who represent the estate in such litigation. The question in each case will be whether the estate was properly represented by her. She might have been labouring under a personal disability or an estoppel. But unless a decision itself was given on a ground personal to herself, it will not any the least be binding on the reversioners. [p 221, col. 2: p. 222, col 1.]

Where two widows along with their other cosharers brought the suit to regain a portion of their husband's estate which was lost on account of the revenue sale, and the widows had a ground to have the sale set aside but lost the suit on account of a technical defect and the decree obtained by a creditor for costs and mesne profits was a decree which could have been realised from the estate of the husband of the widows and the widows carried on the litigation from the income of the estate:

Held, that they should not be held personally liable for the mesne profits.

A Hindu widow has got an absolute right over the income of the estate and if she acquires any property from the saving of that income, it is optional with her either to keep the property separate from the estate or mix it up with it. In the absence of evidence of a contrary intention of the widow, the property does not form part of her husband's estate and the onus of proving that it was not treated by her as her separate property is upon him who alleges it to be so. *Ishri Dutt Koer* v. *Hansbutti Koerain* (14), *Sriram Jankiji Birajman Mandis* v. *Jagdamba Prasad* (15) and *Nirmala Sundari Devi* v. *Deva Narayan Das Chowdhury* (16), relied on. [p. 222, col. 1.]

Nothing is sold in execution of a certificate sale except the right, title and interest of the judgment-debtor When what is sold is reconveyed to the judgment-debtors, they regain what is lost to them on account of the certificate sale. [p. 219, col. 2.]

Appeal from a decision of the Subordinate Judge of Muzaffarpur, dated September 12, 1930.

Messrs. *S. M. Mullick* and *Harnarain Prasad*, for the Appellant.

Messrs. *Manohar Lal*, *G. P. Singh* and *A. K. Mitter*, for the Respondents.

Muhammad Noor, J.—The suit out of which this appeal arises relates to the properties of one Raghubans Narayan Singh who died in 1886, without any son, and was succeeded by his two widows, Deo Murat Kuer and Birita Kuer. Deo Murat Kuer had two daughters, Bhagwat Kuer and Asturan Kuer, both being issueless. Birita Kuer had no issue. *Musammat* Deo Murat Kuer is dead, but Birita Kuer is still alive. It is an admitted fact that the two widows came to some arrangement by which each took separate possession of a moiety of the estate of their husband with an understanding that each would have an absolute right unfettered by the other in the share which she got. In other words, instead of having a joint estate, they held it in severalty. According to the plaintiffs there was also an oral agreement between them that the one would not claim the right of survivorship in that portion of the estate which was held by the other. It seems that before her death Deo Murat Kuer, by a deed of gift, dated April 19, 1901, made a gift of some, if not of all the properties which she was in possession of, to her second daughter Asturan Kuer. This, as it appears, was done with the consent of the other daughter *Musammat* Bhagwat Kuer who was herself very rich through her husband. In this way Asturan Kuer came in possession of at least some of the properties of her father which were being separately held by her mother Deo Murat Kuer. Deo Murat died in 1916, and her co-widow does not seem to have claimed any of the properties in her possession on the ground of survivorship. If there was any property which was not covered by the deed of gift. It was taken by her daughter Asturan Kuer. Asturan Kuer died on December 16, 1928, and a few days before her death, namely, on December 12, 1928, she executed a deed of absolute sale in respect of certain properties in favour of the appellant Dulhin Parbati Kuer. According to the plaintiffs this deed was for the benefit of her husband defendant No. 1 Kumar Raghbe Surendra Sahi. This deed is the subject-matter of the present litigation. The plaintiffs, who are the two grandsons of Brij Bihari Singh, a brother of Brij Lal Singh, the father of Raghubans Narayan Singh, have instituted the present suit for recovery of possession of the properties covered by the deed of sale on the ground that they appertain to the estate of Raghubans Narayan Singh and that they (plaintiffs) succeeded to them on the death of Asturan Kuer as the next reversioners of Raghubans Narayan Singh. They have characterised the deed of sale as fabricated, illegal and void. The plaintiffs' case is that as by virtue of the mutual arrangement between the two widows of Raghubans Narayan Singh each gave up the right of survivorship in the share held by the other, on the death of one, her share was to be dealt with as if the other did not exist and, therefore,

on the death of Deo Murat Kuer her daughter, Asturan Kuer, continued in possession of her properties as an heiress of her father, the other daughter Bhagwat Kuer raising no objection. They claim that in respect of that property succession opened on the death of Asturan Kuer and that the plaintiffs as the next heirs to Raghubans Narayan Singh have succeeded to those properties. They, therefore, seek possession of them by setting aside the deed of absolute sale executed by Asturan Kuer. They pray in the alternative that if for any reason the Court be of opinion that possession could not be decreed to them on account of Birita Kuer being alive, then it be declared that the deed of absolute sale, dated December 12, 19 8, executed by Asturan Kuer in favour of defendant No. 2, was illegal and void and was ineffectual against the reversionary heirs to the estate of Raghubans Narayan Singh and a declaratory decree to that effect be passed. The learned Subordinate Judge has decreed the suit, holding that on the death of Asturan Kuer the plaintiffs were entitled to the immediate possession of that part of the estate of Raghubans Narayan Singh which was being held by one of his widows Deo Murat Kuer. He has held the deed of sale to be genuine and executed for love and affection, that no cash consideration passed and that it was in fact a deed of gift. The claim for mesne profits prior to institution of the suit was dismissed on the ground that the plaintiffs did not claim any specific sum. The defendant No. 2 has preferred this appeal. There is a cross-objection on behalf of the plaintiff-respondents which is directed against the finding of the learned Subordinate Judge that the deed of absolute sale was a genuine document and against the dismissal of the claim for mesne profits for the period prior to institution of the suit.

Only two points have been urged before us in appeal. One is that the plaintiffs are not entitled to immediate possession of any portion of the estate of Raghubans Narayan Singh, as one of the widows, Birita Kuer, is still living, and that the succession to the estate of Raghubans Narayan Singh has not opened. The only decree which the plaintiffs can get is a declaration that the deed of absolute sale would not be binding upon the reversioners of Raghubans Narayan Singh when the succession opens. The second point is that a portion of one of the villages in suit, namely, 3 annas 11 *gandas* 2 *kowris* 2 *karants* of Khosepur, *tauzi* No. 11374/6 was not a part of the estate of Raghubans Narayan Singh and was the personal property of Asturan Kuer and the plaintiffs are not entitled to any relief in respect of it.

It is contended on behalf of the appellant that an arrangement between the two widows to hold the estate of their husband in severalty will not, on the death of one, allow the heir of the husband to get possession of the properties held by her as long as the other widow lives. The only effect even of surrender of the right of survivorship by the other will be that the alienations of one cannot on her death be questioned by the other and the alienee will hold the properties till the other dies or, if one dies without alienation, her share will go to her heirs as if it was her *stridhan* and the heirs will hold it till the other widow died. The heirs of the husband cannot claim the properties of one as long as the other widow is alive.

Mr. Mullick relied upon the case of *Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty* (1). The facts of the case were that one Radhakrishna Chuckerbutty died, leaving a widow and three daughters Subhadra, Bishakha and Ganganeshwari. Subhadra was married to defendant No. 1. The widow and the three daughters remained joint with Radhakrishna's brother who refused to part with the share of his deceased brother in favour of the three daughters. Later on the widow died, Bishakha, the plaintiffs' mother, sued Kali Shankar for her share in her father's lands, making the two daughters defendants. The suit was compromised. Each of the sisters got a third share in the lands that Kali Shankar gave up. Subhadra, who was in possession of one-third, died without issue. Bishakha also died, and Ganganeshwari became a childless widow. The plaintiff, who was son of Bishakha, sued for possession of Subhadra's share in the lands as heir of his maternal grandfather. Radhakrishna defendant No. 1, who was husband of Subhadra, pleaded that according to the terms of the compromise by which the three daughters got the lands, he was entitled to remain in possession of his wife's share as it was her separate estate. The first Court gave the plaintiff a decree, but on appeal the lower

(1) 24 C 339.

Appellate Courts reversed that decree, holding that Hindu joint tenants such as widows or daughters, were incompetent to convert, by mere acts of their own, joint estate into estates held in severalty, and that Ganganeshwari was consequently entitled to hold Subhadra's share. In second appeal the High Court (Banerjee and Rampini, JJ.) held that the lower Appellate Court was wrong in holding that under the Hindu Law of the Bengal school (it is conceded that in this respect there is no difference between the Bengal school and the Mitakshara) when several daughters take a joint estate, they are incompetent to convert that joint estate into estates in severalty. But on the question of succession to the property left by Subhadra, their Lordships said as follows :—

"How far they (that is the sisters) were competent to do so (that is to convert a joint estate into estates in severalty) and how far this arrangement would entitle the plaintiffs to succeed in the present suit are questions which remain to be considered. Whilst taking this view of the compromise, we must, on the other hand, say that it does not, in terms, amount to a relinquishment by each daughter of her right of survivorship, so as to make shares allotted to the other daughters pass on to the reversionary heirs on their death. The petitions of compromise nowhere say that : but on the contrary, they distinctly provide that, upon the death of each daughter the properties taken by her, if not alienated by her in her lifetime, should go to her sons, grandson, etc., that is, to the heirs of her separate property which must mean *stridhan*, though the word *stridhan* is not used in the petitions. That being so, can it be said that though the compromise does not in terms entitle the plaintiffs to claim the estate left by Subhadra still the effect of the Hindu Law, which is to prevent the compromise from taking effect to its fullest extent, is to accelerate the succession of the plaintiffs who are the ultimate reversionary heirs at the present date in regard to the properties left by the deceased daughter ? We are of opinion, that this question must be answered in the negative.

Their Lordships held that the share of Subhadra would go to her heirs as if it was her *stridhan*, and not to the next reversioners of her father, that is, the plaintiff. Mr. Manohar Lal, who appears on behalf of the respondents, has contended that this case was decided on its own facts and is based on the terms of the compromise, because in the petition of compromise under which the three daughters took the property there was no mention that each relinquished her right of survivorship in the other's property. He contended that their Lordships by implication held that had there been in the petition of compromise any provision that the one relinquished her right of survivorship in the share of another, the position would have been quite different and the share would have gone to the reversioner of their father. I do not read in the judgment of their Lordships any such finding even by implication. They certainly laid stress upon the fact that the terms of the arrangement under which the three daughters took the estate did not allow the plaintiffs to come in. Relinquishment of right of survivorship also cannot accelerate the opening of succession as I shall presently show.

The next case to be considered is *Ammani Ammal* v. *Periaswami Udayan*, 74 Ind. Cas. 58 (2). That was also a case of two daughters. There is, however, no difference between daughters and widows as both of them take a life estate. There, the two daughters governed by the Mitakshara school, divided their father's properties absolutely with a right to sale, etc., and stipulated that neither of them would have any right over the properties set apart for the other. One of the daughters alienated some of the items which had fallen to her share. After her death the sons of the other daughters sued as heirs of their grandfather for recovery of possession of the share from the alienees. It was held :

(1) that the document of partition was relinquishment of survivorship of the one in the share of the other;

(2) that, as heirs of the alienor, the plaintiffs had no *locus standi* to challenge her alienation;

(3) that, as reversioners of the alienor's father, the plaintiffs could not maintain a claim for possession during the lifetime of the other co-tenant for life.

(4) that the agreement between the co-tenants for life as to the enjoyment of the estate, to which the plaintiffs were not parties, could not have the effect of accelerating their right to possession.

Dealing with the nature of partition between the two daughters, Venkatasubba Rao, J. said:—

" According to the Mitakshara School two or more daughters succeeding as heirs to their father take as joint tenants with rights of survivorship. It is well-settled that they may effect a partition each daughter giving up her right of enjoyment over the properties allotted to the other daughter during the lifetime of the latter. The question then arises can an arrangement be entered into by which each daughter may give up her interest not merely during the lifetime of the other daughter but during the whole of the lifetime ? It is difficult to see why such an agreement cannot be entered into. *A* and *B* inheriting

(2) 74 Ind. Cas. 58; 32 M L T 323; 45 M L J 1; (1923) M W N 652; A I R 1924 Mad. 75.

their father's estate partition the property, *B* agreeing that in regard to the property that falls to *A* she gives up not only her interest for the lifetime of *A* but also for her own lifetime in the event of her surviving *A*. Why should such an agreement not be valid? If the arrangement amounted to a mere partition, the result is that *B* would give up her right in the property that fell to the share of *A* only for the lifetime of *A* and *B's* right to take by survivorship the share that fell to *A* would be unimpaired. But if, to an arrangement amounting to a partition was superadded the surrender by *B* of her right to take by survivorship, the effect would be to dispose of the entire interest of *B* in favour of *A*. For convenience I have, in the illustration, referred to *B's* disposal of her interest. It makes no difference whether we consider the case from the standpoint of *A* or *B*. The act of the nature referred to above on the part of either of the co-sharers amounts to an alienation of her interest in the property falling to the share of the other. Such an alienation is both on principle and authority perfectly valid and binding.

As was pointed out in *Sadalal Ammal* v. *Gomati Ammal*, 16 Ind. Cas. 428 (3), if it is not denied that one of the joint tenants may part with her own life-interest in favour of a stranger, it becomes difficult to imagine why she may not part with it in favour of the other joint tenant. In the above case the question in regard to two co-widows was under consideration. But on this point there is no difference between the case of widows and daughters and the principle is equally applicable to the case on hand."

His Lordship then referred to the case of *Ramakkal* v. *Ramasami Naicken* (4), and observed:—

"*Ramakkal* v. *Ramasami Naicken* (4), is a very useful authority in this connection A Hindu died leaving two widows who divided his property by a partition deed under which each took possession of her share with powers of alienation over the property comprised in it Certain alienations were made by one widow who subsequently died. On the surviving widow claiming the whole of her husband's property including the portion alienated, it was held that a widow could alienate for her life any estate which came to her as such and that she could, therefore enter into such a deed as would preclude her from recovering during her life property which she had alienated to the full extent of such alienation, provided it did not extend beyond her life-interest."

If the plaintiff's contention be accepted, it will follow that on the death of Deo Murat Kuer, if there had been no daughter, succession would have opened to the estate of Raghubans Narayan Singh to the extent of her share. In that case her alienation, if any, would have been void as against the reversioner. This is exactly against what was held in the case of *Ramakkal* v. *Ramasami Naicken* (4).

Mr. Manohar Lal, has relied upon a single Judge decision of the Madras High Court in *Minakshi Ayi* v. *Subramanian Chettiar* (5), for the proposition that one of the co-widows may give up her right of survivorship and then she will have no interest in the property of the other co-widow on her death. In my opinion this proposition is well established, but it does not follow that if, on the death of one widow, the other widow does not take her share by survivorship, it will go to the next reversioner of their husband. In the above case the alienee of one of the widows successfully resisted the claim of the other and got possession of the property on the basis of an alienation by the former. The learned Judge held that by one widow relinquishing her right of survivorship the other had an absolute right to make a transfer of her divided share and that this could not be questioned by the former. Mr. Manohar Lal contended that when one of two widows relinquished her right of survivorship in favour of the other, partial succession would open on the death of the latter and her share would go to the next reversioner of their husband. No authority for this was placed before us and it seems that this proposition, if accepted, will lead to anomalous results. It will follow that succession to a man's estate may open in respect of different properties on different occasions. If there are several widows and a partition took place between them and each relinquished her right of survivorship in favour of others, succession will open on the death of each one of them and different reversioners may succeed to different properties at different times. The next reversioner at the time of the death of one widow may not be living when the other widow dies and other persons may be the next reversioners at that time. When we pointed this out to Mr. Manohar Lal he realised the inevitable result of his contention and argued that the next reversioner at the time of the death of one of the widows and his heirs will hold the property only till the last widow died, and then the entire property would go to the reversioner who is the next of kin at the time of the death of the last widow. This will mean that the heirs of a deceased male will take the property not as an absolute owner but for a temporary period and this will create an estate which is unknown in the Hindu Law. The reason for the succession of widows is based upon the fiction that the husband survives in the body of his wife. Brahaspati says:

"Of him whose wife is not deceased, half the body survives How should another take the property while half the body of the owner lives."

As Mayne has pointed out, this metaphor

(3) 16 Ind. Cas. 428; 12 M L T 283, 23 M L J 355; (1912) M W N 903.

(4) 22 M 522; 9 M L J 101.

(5) 123 Ind. Cas. 35; A I R 1930 Mad. 175; (1929) M W N 667; Ind. Rul. (1930) Mad. 451.

may be faulty, as if the husband lives even the sons cannot succeed, but nevertheless the Hindu Law never contemplates that the heirs of the husband can come in and take the property as long as a single widow survives. The only way in which a widow or widows can accelerate succession is if she, or, if there are more than one, all of them efface themselves and absolutely surrender their life estate. The law in this respect has been very clearly laid down. The surrender must be of the entire estate, and not in favour of any particular individual. Their must be their civil deaths before the reversioners of their husband can come in.

The result of the examination of the case-law on the subject seems to me to lay down the following proposition. If more than one female joint life tenants succeed to an estate, they may divide their life tenancy and hold portions of the estate separately if they like and this arrangement will continue till their life. In other words, they may convert the joint estate into estates held in severalty. One or more of them may relinquish her or their right of survivorship in that portion of the estate which is held by the other. In that case if one dies, the estate in her possession will not revert to the other who has relinquished but will go to her heirs as if it was her *stridhan* and if she alienates any portion of the estate, the alienee will continue in possession of the estate till the death of the last survivor. The joint tenant who has surrendered her right of survivorship, cannot question the succession or alienation. The inevitable result, therefore, is that succession will not open till the last survivor is dead. I am, therefore, of opinion that the plaintiffs have not succeeded to the estate of Raghubans Narayan Singh and they cannot succeed while Birita Kuer is alive, and that *Musammat* Asturan Kuer did not take the property as an heiress of her father but by virtue of the gift from her mother and if she succeeded to any property after her mother's death, she did so as an heiress of her deceased mother, as in case of relinquishment of her right of survivorship by Birita Kuer, the share in possession of Deo Murat Kuer became, for all practical purposes, her *stridhan* to be inherited by her heirs who were entitled to hold it as long as Birita was alive.

The evidence of Birita Kuer having given up her right of survivorship is, however, not very satisfactory and had the decision of the case rested upon the fact of surrender, I would have had no hesitation in holding that the relinquishment has not been proved. The story depends entirely upon the evidence of two witnesses which is to the effect that each widow orally gave up her right of survivorship in the share allotted to the other. No doubt, inference of such relinquishment can be drawn from the fact that on the death or Deo Murat Kuer, Birita Kuer did not interfere with Asturan's possession of the property. Birita Kuer has been examined in this case. She says that she was contemplating a suit. This statement of hers is not satisfactory, but it may be that she did not like to question the possession of Asturan Kuer out of love and affection for her and especially on account of the reason that Asturan was not looked after by her husband and had to fall back for her living on her mother and perhaps Birita Kuer did not like to deprive her of the means of her livelihood. On the whole, I am of opinion that the surrender of the right of survivorship by Birita Kuer has not been clearly established. The onus was upon the plaintiffs which they have not properly discharged. I do not, however, wish to pursue this matter further, as in my opinion, it makes no difference. I have come to the conclusion that in spite of the relinquishment of the right of survivorship, the plaintiffs have not succeeded to the properties.

The next point urged by Mr. Manohar Lal was that, assuming that the property of Raghubans Narayan Singh which came into the possession of Deo Murat Kuer, became her *stridhan*, on her death it was inherited by Asturan Kuer for her life and then it reverted to the next-of-kin of her father and in that view the plaintiffs had succeeded to the properties on Asturan Kuer's death. In my opinion, this is not so according to the Hindu Law, because Birita Kuer is a *sapinda* of her husband, and on the death of Asturan Kuer, when the property reverted to the next-of-kin (*sapinda* of her father), it devolved upon Asturan Kuer (Birita Kuer ?) see *Bai Kesserbai* v *Hunsraj Morarji* (6). Mr. Manohar Lal contended that the decision there was based upon Vyavahara Mayukha which is of special application in Bombay.

(6) 30 B 431; 3 A L J 484; 1 M L T 211; 16 M L J 416; 33 I A 176; 10 C W N 802; 1 C L J 9; 8 Bom. L R 446 (P C.)

But their Lordships of the Judicial Committee observed:

"If the case rested on the Mitakshara alone their Lordships are of opinion that the appellant would be entitled to succeed."

Then their Lordships quoted a passage from the Mitakshara, Chap. II, s. 11, placita 8, 9 and 11, of which placitum 11 is of importance, which runs thus:—

"Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, etc... ..... the (whole) property, as before described, belongs in the first place to her husband. On failure of him it goes to his nearest kinsmen (*sapindas*) allied by funeral oblations. But in the other forms of marriage, called *Asura*, etc ..... the property of a childless woman goes to her parents, that is, to her father and mother."

Their Lordships then proceeded:

"There can be no reasonable doubt that according to the Mitakshara definition of *sapinda* husband and wife are *sapindas* to each other."

I am, therefore, of opinion that Birita Kuer has succeeded to the *stridhan* property of her step-daughter Asturan Kuer. The result of my finding is that the plaintiffs are not entitled to a decree for possession. They are, however, entitled to a declaration that the deed of gift executed by Asturan Kuer in favour of defendant No. 2, Dulhin Parbati Kuer, so far as it relates to the estate of Raghubans Narayan Singh, will not be binding upon the reversioners when the succession opens on the death of Birita Kuer.

It is, however, contended on behalf of the respondents that at any rate the plaintiffs are entitled to immediate possession in respect of 8 *gandas* odd share of Khosepur, which has been separately mentioned in the plaint. The history of this share is that 1 anna 12 *gandas* odd share of this village belonging to the estate of Raghubans Narayan Singh was sold for arrears of cess and purchased by the plaintiffs. Birita Kuer, one of widows, and Asturan Kuer who had succeeded to the other widow Deo Murat Kuer, instituted a suit for recovery of that share. This suit ended in a compromise and the plaintiffs re-conveyed half of the share sold, namely, 16 *gandas* odd to Birita Kuer and Asturan Kuer jointly under a sale deed, dated July 14, 1921, (Ex. 1-J). The plaintiff-respondents contend that under the terms of this deed, which conveyed only a life estate to Birita and Asturan, they are entitled to get possession of half of the vended property, namely, 8 *gandas* odd which was the share of Asturan Kuer in the vended property. The learned Subordinate Judge seems to have accepted this contention as he considered the point to have been conceded on behalf of the defendant-appellants. The defendants, however, appealed against the whole decree and they do not concede that under the terms of the deed as it stands, the plaintiffs are entitled to get these 8 *gandas* on the death of Asturan Kuer. I am not in a position to say what was the statement made by the Advocate on the basis of which the learned Subordinate Judge thought that the point was conceded. No note of it has been taken. As a matter of fact that written statement did make no concession and asked the entire suit to be dismissed. I have gone through the deed and in my opinion the contention of the plaintiffs has no foundation. The deed created a joint estate in favour of the two ladies Birita Kuer and Asturan Kuer, and it cannot be construed to mean that on the death of each one of them her share, which in fact is not defined in the deed, would revert to the vendor. The plain meaning of the deed seems to be that it was for their joint lives, and in case of the death of one, the other will continue to hold it till her death. This seems to me to be the correct interpretation on account of the fact that what was sold was the right, title and interest of the ladies in the estate of Raghubans Narayan Singh. Nothing is sold in execution of a certificate sale except the right, title and interest of the judgment-debtor. The ladies being the judgment-debtors, what was sold was their right, title and interest and the same was reconveyed to them by this deed with the effect that they regained what was lost to them on account of the certificate sale. I am, therefore, of opinion, that the plaintiffs are not entitled to a decree for possession even in respect of this 8 *gandas* odd share.

The next point urged in the appeal is that the plaintiffs are entitled to no relief, not even to a declaration, in respect of 3 annas 11 *gandas* 2 *kowris* and 2 *karants* of village Khosepur, *tauzi* No. 11374-6. It appears that this village belonged to Brij Lal Singh, (father of Raghubans Narayan Singh) and his brothers. Brij Lal Singh, Jagarnath Singh and Brij Bihari Singh (grandfather of the plaintiffs) had 4 annas 13 *gandas* 1 *kowri* and 1 *karant* making up a total of 14 annas. Another brother Jain Singh had the remaining 2 annas. It appears that the family had

to fight a case about the boundary of Khosepur and the entire expense of the litigation was borne by Raghubans Narayan Singh and the three sons of Brij Bihari Singh; two of them being the fathers of the plaintiffs Nos. 1 and 2, respectively, and they had to pay mesne profits also. In consideration of this, under some arrangement Jain Singh and Jagarnath Singh gave up their respective shares in the village in favour of Raghubans Narayan and the sons of Brij Bihari Singh, and thus Raghubans Narayan Singh got 8 annas of the village and the other 8 annas became the property of the three sons of Brij Bihari Singh. In consequence of this arrangement, on the death of Raghubans Narayan Singh, the heirs of Jain Singh, who held 2 annas share of the village, executed a sale-deed of that share in favour of the two widows of Raghubans Narayan Singh and the fathers of plaintiffs Nos. 1 and 2 (Ex. 1) The share of Jagarnath Singh also remained in possession of Raghubans Narayan Singh and the sons of Brij Bihari and after the death of the former his share came in possession of his two widows. All these facts are clearly mentioned in paras. 12 and 13 of the plaint, showing that 8 annas of the village was the property of Raghubans Narayan Singh, and therefore on his death, each of the widows got 4 annas of it. These facts are not specifically denied in the written statement of the defendants. It is, however, said that by the sale-deed (Ex. 1), dated June 15, 1893, which the heirs of Jain Singh executed in favour of the two widows, the consideration of which was some money due to Raghubans Narayan Singh from Jain Singh, the widows got an absolute right in half of the share covered by the deed as the money belonged to them absolutely. Regarding the half share of Jagarnath, which was in possession of Raghubans Narayan Singh, it was urged on behalf of defendants that the widows came in possession of it by adverse possession and therefore got absolute right in it also. The fact that 8 annas of the village belonged to Raghubans Narayan Singh was not seriously disputed by the appellant before us, and I see no reason to differ from the finding of the learned Subordinate Judge in this respect. Mr. S. M. Mullick, however, urged that out of the four annas, which came to be possessed by Deo Murat Kuler, 3 annas 11 *gandas* odd was sold up and ceased to be the estate of Raghubans Narayan Singh. It was purchased by Asturan Kuer in her own rights and she was an absolute owner of it. Mr. Mullick relied upon two sale-deeds one from Sagar Mal, dated March 4, 1910 (Ex. B) which is for 3 annas 1 *ganda* odd and the other from Ajodhya Prasad in favour of Ramgobind Pathak and Asturan Kuer, dated April 19, 1906 (Ex. C). Ramgovind was apparently *benamidar* for the other widow Birita Kuer.

I shall take up the second deed first. It seems that Ajodhya Prasad had purchased 1 anna share in execution of a certificate against Ram Prasad Narayan Singh and Kishundeo Narayan Singh for a sum of Rs. 40 and sold it for Rs. 68 to Asturan Kuer and Ram Govind. The fact seems to me to be that the property was sold in execution of a certificate against persons who had no interest in the property. Surajdeo was the son of Jain Singh who had already transferred his interest to the two widows and to the plaintiffs' fathers. Therefore Ajodhya Prasad having realised his position sold the properties to those to whom they really belonged, Birita taking it in the name of Ram Govind and Deo Murat in the name of her daughter Asturan. The sale-deed is of no effect, and when this was pointed out to Mr. Sushil Madhab Mullick he did not press his case in respect of this 10 *gandas* share. He, however, pressed it in respect of the remaining 3 annas 1 *ganda* odd share, claimed under a sale-deed executed by Sagar Mal who had purchased it in execution sale under the following circumstances.

It appears that one Bishunpur Akha, etc., in *Pargana* Saresa in the District of Darbhanga, which belonged to the estate of Raghubans Narayan Singh and his co-sharers, was sold for arrears of revenue and was purchased by one Sagar Mal. The two widows along with other co-sharers of the village including Harihar Prasad Singh, father of plaintiff No. 1, and Kishori Saran Prasad Singh plaintiff No. 2 instituted a suit for setting aside that sale. The suit was decreed by the first Court, but was dismissed with costs by the High Court on the ground that the illegality on which the sale was questioned was not mentioned in the grounds of appeal before the Commissioner. Sagar Mal got a decree for costs and mesne profits. In execution of that decree he got sold and purchased 6 annas 2 *gandas* odd share belonging to the two widows, the share of each widow being 3 annas 1 *ganda* odd, and then Sagar

Mal sold half of the share, namely 3 annas odd under Ex. B, dated March 4, 1910 to Asturan Kuer. Sagar Mal himself seems to have purchased the property on April 22, 1902. It is contended on behalf of the appellant that by virtue of the sale in execution of the decree against the two widows the six annas odd share ceased to be a part of the estate of the deceased Raghubans Narayan Singh and that Asturan Kuer who purchased it got an absolute right in it. Mr. Mullick has contended that even if it be assumed, of which there is no evidence, that the purchase by Asturan Kuer was *benami* for Deo Murat Kuer herself, she had an absolute right in that property which passed on her death to her daughter Asturan Kuer. This leads us to the consideration of the nature of the decree in execution of which the property was sold and purchased by Sagar Mal and the right which was acquired in it by Asturan Kuer or by Deo Murat Kuer if Asturan Kuer was a *benamidar* for her. That there was a decree of Sagar Mal is admitted by the plaintiff in his plaint. From the plaint and the judgment of the High Court in the revenue sale case, which are exhibits in the suit, it is clear that the two widows along with the father of one plaintiff and another plaintiff himself and other co sharers of the village had instituted a suit for setting aside a revenue sale of the family property and getting back its possession and that the suit though decreed by the trial Court was dismissed with costs by the High Court. The plaintiffs in their plaint say that Sagar Mal had a money decree in execution of which he purchased this property. There is nothing to show that there was any decree of Sagar Mal against the two widows other than the decree in connection with the setting aside of the revenue sale. No doubt, the defendant has not been able to produce a copy of the sale certificate or of the execution proceeding as the record has been destroyed; but oral evidence has been given to show that Sagar Mal had a decree of about Rs. 14,000 against the two widows. The defendant's witness No. 7 Sheodeni Pathak deposes as follows:—

"Raghubans Narain and the plaintiffs' ancestors had properties in *Pargana* Saraisa It was sold for arrears of revenue and Sagar Mall and Unkar Mull purchased it. There was a suit by Harihar Prasad and the widows which they lost in High Court Sagar Mal and Unkar Mull got a decree for Rs. 12,000 as costs and mesne profits on restitution. There was no other suit between the widows and Sagar Mal. Sagar Mal caused Khosepur to be sold and purchased it himself. He returned the shares to the respective *maliks*. Asturan Kuer also purchased Each purchased according to his respective share. Ajodhya Prasad also purchased share for arrears of embankment cess Asturan Kuer and Ram Gobind Pathak purchased the share half and half".

I leave aside the purchase of Ajodhya Prasad, which I have already dealt with. It is clear from the evidence of this witness on which there has been no cross-examination that the only decree of Sagar Mal against the two widows was for costs and mesne profits in respect of the property which was sold for the arrears of revenue and that it was in execution of that decree that Sagar Mal purchased 6 annas odd of Khosepur belonging to the two widows and then he reconveyed it to them according to their respective shares, the share of Deo Murat Kuer having been conveyed to Asturan Kuer. That the suit was a *bona fide* suit to get back a portion of the estate of Raghubans Narayan Singh, which was lost by virtue of the revenue sale, cannot be disputed. One of the plaintiffs of this suit and the father of another plaintiff were also the plaintiffs in that suit. The suit was fought up to the High Court. It is also clear that in execution of the decree for costs and mesne profits in respect of that property Sagar Mal caused Khosepur to be sold. Mr. Manohar Lal contended that there was nothing to show that what was sold was the estate of Raghubans Narayan Singh and not only the life interest of the two widows. In my opinion, what was sold in execution of that decree depends upon the nature of the decree itself Two questions therefore arise. One is, was the estate of Raghubans Narayan Singh in Khosepur sold in execution of the decree, or in other words, was the decree against the two widows a decree against them personally or a decree against them as representing the estate of Raghubans Narayan Singh, and the second is did it become again a part of the estate of Raghubans Narayan Singh when Asturan Kuer or Deo Murat Kuer purchased it ?

It is settled law that in carrying out litigation regarding the estate of her husband, a widow represents the estate and the decree obtained against her is binding upon the reversioners, provided that the litigation is honest and is fairly conducted. Mayne (9th Edition, p. 950) referring to the position of a judgment obtained against a widow, says:—

"The rule of *res judicata* as indicated in s. 11 of the Civil Procedure Code is not strictly applicable to such cases, but the principle itself has been

held to apply so as to bind reversioners by decision in litigation fairly and honestly conducted, given for or against Hindu females who represent the estate in such litigation The question in each case will be whether the estate was properly represented by her. She might have been labouring under a personal disability or an estoppel But unless a decision itself was given on a ground personal to herself it will not any the least be binding on the reversioners".

In the case before us the widows along with their other co-sharers brought the suit to regain a portion of their husband's estate which was lost on account of the revenue sale. It appears from the judgment of the High Court that she had a good ground to have the sale set aside but lost the suit on account of technical defect. In my opinion, the decree obtained by Sagar Mal for costs and mesne profits was a decree which could have been realised from the estate of Raghubars Narayan Singh.

In *Ramkishore Chuckerbutty* v. *Kallykanto Chuckerbutty* (7), where a Hindu widow had instituted a suit to recover some property of her husband, which was dismissed with costs, it was held that as the widow did not seek to recover any interest personal to her and that she contracted the judgment-debt in the effort to recover her husband's estate to which her husband's heir would have succeeded the decree for costs was binding upon the estate of her husband and the decree-holders were on her death entitled to execute the decree against the legal representatives of her husband.

In *Braja Nath Pal* v. *Jogeswar Bagchi* (8) where a Hindu widow sought to set aside a sale of her husband's property, and the plaint, for want of jurisdiction in the Court where the suit was instituted, was returned for presentation to proper Court, and costs were awarded against the widow, it was held that the costs could be realised from the estate of the husband, and, when the decree was executed and property sold, the sale was not only of the limited interest of the widow but of the entire estate.

In *Lalji Sahaya Singh* v. *Kurki Jha* (9) where the widow had taken possession of property as a part of her husband's estate and she was ejected therefrom, it was held that the decree for mesne profits was on the widow's death binding on the reversioner. A similar view was taken in *Dinomoni Chaudhrain* v. *Elahidad Khan* (10).

(7) 6 C 479.
(8) 1 Ind. Cas. 62; 9 C L J 346.
(9) 2 Ind. Cas. 654; 14 C L J 90.
(10) 7 C W N 678.

In *Rasal Singh* v. *Balwant Singh* (11) the Judicial Committee of the Privy Council held that a decree against the widow in a suit in which she sought to set aside the adoption by her of a son on the ground that she had no authority from her husband was binding on the reversioner notwithstanding the personal estoppel which bound the widow.

Mr. Manohar Lal, on the other hand, relied upon the case of *Nafar Chandra Pal* v. *Kamini Kumar Lahiri* (12) where a widow did not give up possession of a *darpatni* after it was sold and a decree for mesne profits was passed against her. It was held that it was a personal decree for her tortious act, and not as representing the estate of her husband. This case, however, is not applicable to the present one. Here, the widow, when the sale was set aside by the trial Court, got back possession of the property under a decree which was set aside by the High Court. The property of which she took possession was her husband's property. It cannot be said that in regaining under a decree of the Court possession of her husband's property which was lost, she was committing any personal tortious act. Mr. Manohar Lal also relied upon the case of *Roy Mukhan Lal* v. *Stewart* (13). That case also, in my opinion, has no application. There the question was whether a debt incurred by a widow for litigation to recover the property of her husband was on the widow's death binding upon the reversioners of the husband. It was held that it was not. In the case before us the widow carried on litigation apparently, without incurring any debt, from the income of the estate. She was made liable for costs and mesne profits. Under the circumstances I think she could not be personally liable for the mesne profits.

The next question for consideration is the effect of the sale of the property by Sagar Mal. If it was really purchased by Asturan Kuer herself, no question arises. The property became her *stridhan*. Assuming, however, that the property was purchased not by Asturan Kuer but by Deo Murat Kuer herself and she took it in the name of her daughter, the question is whether it became the personal property of Deo

(11) 48 Ind. Cas. 553; 40 A 593; 28 C L J 519; 24 M L T 364; 9 L W 52; 23 C W N 326; (1919) M W N 155; 36 M L J 597; 21 Bom. L R 541; 45 I A 168 (P C.)
(12) 16 Ind. Cas. 205; 18 C W N 542.
(13) 18 WR 121.

Murat Kuer. It is settled law that the widow has got an absolute right over the income of the estate and if she acquires any property, from the saving of that income, it is optional with her either to keep the property separate from the estate or mix it up with it. The proposition seems to have been fully discussed by their Lordships of the Judicial Committee in the case of *Ishri Dutt Kuer* v. *Hansbutti Koerain* (14) and this proposition is not disputed. In this case if she purchased the property she did so in the name of her daughter thereby clearly indicating that she was going to keep it as a separate property. It cannot be argued that the widow Deo Murat Kuer got the property fraudulently sold and purchased it herself to make it her own personal property. The decree was a *bona fide* one and re-sale by Sagar Mal was about eight years after the auction sale at which he had purchased. Perhaps Sagar Mal did not think it worth his while to keep the property. Apart from this, in this particular case it seems that a very large part of the consideration money payable to Sagar Mal was paid by mortgaging this very property. Asturan Kuer purchased the property from Sagar Mal on March 4, 1910, and mortgaged the share on March 20, 1910 Ex. B (1). In *Sriram Jankiji Birajman Mandir* v. *Jagdamba Prasad* (15) a widow in possession of her husband's estate acquired certain property through the exercise of the right of pre-emption. The price was paid by raising money by the mortgage of the pre-empted property. It was held that in the absence of evidence of a contrary intention of the widow the property did not form part of her husband's estate. In *Nirmala Sundari Devi* v. *Deva Narayan Das Chowdhry* (16) a female life estate holder (mother) had purchased a property from the surplus income of the estate in the *benami* name of another. There it was held that the onus of proving that it was not treated by her as her separate property was upon him who alleged it to be so. In the case before us there is no evidence of such intention; rather the circumstances are against its being made a part of the estate. I am, therefore, of opinion that 3 annas 1 *ganda* was the personal property of Asturan Kuer as it had ceased to be the estate of Raghubans Narayan Singh on account of the sale at which Sagar Mal purchased it; and even if it was purchased by Deo Murat Kuer, she did not include it in the estate and kept it separate and that it was inherited by Asturan Kuer.

The result is that the appeal, mainly succeeds and is partly allowed. The plaintiffs' suit in respect of the possession of the property and mesne profits will be dismissed. They will get a declaration that the deed of sale which the lower Court held to be a gift, dated December 12, 1928, executed by *Babui* Asturan Kuer in favour of the defendant No. 2 will not be binding upon the reversionary heirs of Raghubans Narayan Singh, except in so far as it relates to 3 annas 1 *ganda* 2 *kowris* 2 *karants* of Khosepur out of 3 annas 11 *gandas* 2 *kowris* 2 *karants*, *tauzi* No. 11374-6. The plaintiffs' suit in respect of this share will be entirely dismissed. The cross-appeal which relates to mesne profits, is dismissed.

Coming to the question of costs, though the plaintiffs have succeeded in obtaining a decree of declaration, the defendant has successfully resisted their claim for possession. Under the circumstances the parties should bear their own costs in the lower Court. The appeal has, however, in the main succeeded and the appellant will get her costs in this Court, the respondents bearing their own costs.

Agarwala, J.—I agree.

N. *Appeal partly allowed.*

(14) 10 C 324; 10 I A 150; 13 C L R 418; 4 Sar. 459; 7 Ind Jur. 557 (P C.)

(15) 61 Ind. Cas 3; 43 A 374; 19 A L J 129; 3 U P L R (A) 33 (F B).

(16) 104 Ind. Cas. 284; 55 C 269; A I R 1927 Cal. 868

LAHORE HIGH COURT

Second Civil Appeal No. 856 of 1932

June 6, 1934

ABDUL RASHID, J.

MANSA RAM AND ANOTHER—DEFENDANTS —APPELLANTS

versus

NANAK CHAND AND OTHERS—PLAINTIFFS —RESPONDENTS

Partition Act (IV of 1893), s. 2—Claim by co-owner for partition of party wall—If can be resisted—Applicability of s. 2—Co-owners—Party wall.

A claim by a co-owner to partition of a party wall cannot ordinarily be resisted even where the claim causes inconvenience and difficulty of partition:

Held, that in the case of party wall it is impracticable to take any action under s. 2, Partition Act, 1893 *Hardand Das* v. *Sundar* (1) and *Gobind* v. *Narain Das* (2), followed.

S. C. A. from the decree of the District Judge, Ambala, dated January 20, 1932.

Mr. *Chiranjiv Lal Aggarwal*, for the Appellants.

Malak *Muhammad Hussain*, for the Respondents.

Judgment.—In order to understand the facts of this case clearly it is necessary to refer to the plan Ex. P. W. No. 2/1. The plaintiffs own the house shown in pink while the defendants own two houses one situated on the north and the other towards the south of the house of the plaintiffs. The case of the plaintiffs is that the walls marked G. A H. and L. B. M. are joint, that defendants are preventing them from converting these *kacha* walls into *pucca* walls and that the plaintiffs are, therefore, entitled to have them partitioned. They also pray that an injunction may be issued to the defendants from interfering with the use of the *parnalas* C, D and E, and the construction of a door at F. The defendants pleaded, *inter alia*, that the walls were not joint and that in any case they could not be partitioned. They also denied that the plaintiffs had acquired any right of easement with respect to the *parnalas* or that the plaintiffs were entitled to open a door at F. The trial Court decreed the plaintiffs' claim in full. The defendants appealed to the learned District Judge. Their appeal was dismissed with this exception that it was held that the plaintiffs had not acquired any right of easement regarding the *parnalas* marked C and D on the plan. The defendants have now preferred a second appeal to this Court, and the plaintiffs have filed cross-objections regarding the *parnalas* C and D.

It was contended on behalf of the defendants that the house in dispute did not belong to the plaintiffs and that the lower Appellate Court had erred in law in not giving any finding on this point. In my opinion this contention has no force. The trial Court had decided that the house shown in pink belonged to the plaintiffs. The defendants preferred an appeal to the District Judge and did not challenge the finding of the trial Court on this point. That explains why the lower Appellate Court did not deal with this point.

It was strenuously urged on behalf of the appellant that party walls cannot be conveniently divided and that, therefore, the suit of the plaintiffs for partition of the two walls G. A. H. and L. B. M. ought to have been dismissed. It is established that the plaintiffs' house as well as the house of the defendants on either side were originally built of mud. A few years ago the plaintiffs began rebuilding their house in brick. They have made their house *pucca* so far as the back, the front and the interior are concerned. The walls on the north and the south, however, were joint and the defendants have consistently refused to allow the plaintiffs to touch these walls. The plaintiffs have, therefore, been compelled to sue for the partition of these party walls. During the pendency of the appeal the plaintiffs offered to build the joint walls in brick at their own expense without any contribution by the defendants. They also stated that they were prepared to keep these walls joint in spite of their undergoing the entire expense of making them *pucca*. The defendants, however, refused this very reasonable offer made by the plaintiffs. It appears, therefore, that the defendants are deliberately obstructing the plaintiffs in making their house *pucca*.

It was held in *Hardand Das* v. *Sundar* (1), that a claim by a co-sharer to partition cannot ordinarily be resisted even where the claim causes inconvenience and difficulty of partition. In that case a party wall and a straircase were partitioned. In *Gobind* v. *Narain Das* (2), it was observed that where in a suit by one of the two joint owners for partition of a shop and for separate possession by plaintiff of his share, the defendant urged that the plaintiff could not enforce partition of the shop to his injury and that the shop was not capable of partition, it was held that it was practicable to make a partition of the shop and that the plaintiff was legally entitled to have a partition effected, and that the partition would not cause any injury in the legal sense to the defendant. In the peculiar circumstances of the present case, it is impracticable to take any action under s. 2, Partition Act, 1893, and it is, therefore, impossible to deny the plaintiffs the right to which they are undoubtedly entitled. Both the lower Courts have held that the door marked F abuts on a public street. This finding cannot be challenged in second appeal. For the foregoing reasons I dismiss this appeal with costs. The cross-objections have no force and are dismissed.

D. *Appeal dismissed.*

(1) 64 Ind. Cas. 949; 1922 U B 4; 4 U B R 57.
(2) 29 P R 1882.

PATNA HIGH COURT

Appeal No. 301 of 1933
Civil Revision No. 595 of 1933
and
Appeal No. 37 of 1934
September 12, 1934

COURTNEY-TERRELL, C. J. AND AGARWALA, J.

Musammat KABUTRI AND ANOTHER —APPELLANTS

versus

RAM PRASHAD SAHU AND OTHERS —RESPONDENTS

Practice—Courts should apply proper law and give proper relief—Litigant is not obliged to put down provision of law under which he seeks relief —Civil Procedure Code (Act V of 1908), s. 151—Objection to execution—Objection upheld—Order for delivery of possession not passed—Restoration of possession under s. 151—Necessity of —Execution—Sale—Guarantee of title, if given—Auction purchaser's remedy when wrong property is sold.

It is the business of the Court to know the law and it is only incumbent upon the litigant to come before the Court and state the facts in respect of which he seeks the remedy. He must ask for such remedies as he requires and there is no obligation on him to inform the Court under which Statute or Rule he is entitled to claim those remedies. If he does not state the Statute or the Rule or if he states a wrong Statute or wrong Rule, that in no way relieves the Court of the obligation of itself applying the appropriate rule or section.

A tenant *R* sold part of his lands to *B* and later on a part to *K*. Both the sales were accepted by the landlord. He then filed a suit for arrears of rent against *R*, *B* and *K* including also rent for a period prior to the sale. An *ex parte* decree was passed but not against any definite portion of the land. In execution he brought to sale lands sold to *B* and *K* as well and was given possession. *B* and *K* objected and the Court held that their interest was not affected by the sale but as they were said to be in possession no orders were passed:

Held, that the Court should have, under s. 151, Civil Procedure Code, restored possession to the objectors and directed that the possession should be re-delivered of their respective portions to the objectors as s. 151 emphasises the fact that nothing in the Code prevents the Court from passing such order as may be necessary to meet the ends of justice or to prevent the abuse of the processes of the Court.

An auction-sale carries no guarantee of title and no guarantee of any other kind and if the auction purchaser purchases rights which have been included in the sale improperly, he must restore posssession and must pursue such remedies as the law allows him against those persons who are to blame for it.

C. A. from appellate order of the District Judge Shahabad, dated September 16, 1933.

Messrs. *A. P. Dayal* and *D. C. Varma*, for the Appellants.

Mr. *D. N. Varma*, for the Respendents.

Courtney-Terrell, C. J.—These are two Miscellaneous Appeals and a Civil Revision which have arisen out of the following circumstances:

The plaintiff, *Rai Bahadur* Harihar Prasad Singh was the proprietor of *Mauza* Baragaon and in that *mauza* one Ramlakhan held 27 *bighas* and odd as a *raiyat*. In July 1926, Ramlakhan sold 3 *bighas* 8 *kathas* to one Bansropan Sahu who is one of the appellants before us (in Miscellaneous Appeal No. 37 of 1934). At a somewhat later date which does not seem to be precisely known, he sold 8 *bighas* 6 *dhurs* to the husband of one *Musammat* Kabutri who is appellant before us in Miscellaneous Appeal No. 301 of 1933. Both the sales were accepted by the landlord and the lands purchased by each purchaser were given a separate rental and a *khata* No., and Ramlakhan was left in cultivation of 16 *bighas* with a rent of approximately Rs. 100. On September 19, 1929, *Rai Bahadur* Harihar Prasad Singh sued for the arrears of rent due for the years 1333 to 1336 *Fasli* and it is agreed that in respect of the year 1333 the claim for rent was for a period prior to the time either of the two sales to the appellants before us was recognised. The plaint in the suit of which a translation has been put before us recites the facts of the respective purchases and states that the rent is in arrears and therefore asks for a decree in the following manner: (*i*) that the amount claimed in respect of rent be awarded against the properties and persons of the defendants, *viz.*, against all of them; (*ii*) in the event of the defendants refusing to have the *khatas* separated and if the arrangement should be considered in the suit to be illegal by the Court, that a decree might be passed in respect of the entire holding as specified in Sch. 'A' to the plaint (Sch. 'A' sets forth the area of the lands known as Lakhan Singh, *viz.*, the entire *khata* before the separation); and (*iii*) that if the defendants did not refuse that, a decree might be passed in respect of the remaining lands after excluding the lands transferred to the appellants in these appeals. The suit was not defended and the two transferees of the portions of the holding did not appear before the Court to dispute the separation of the *khata* or indeed to take any other attitude with the result that a decree was granted to this effect:

"This suit coming this day for final disposal before the Munsif of the First Court, Arrah, and in the presence of the Pleader for the plaintiff and in the absence of the defendants, it is ordered and decreed *ex parte* that a sum of Rs. 837-5-3 be paid

by defendant (*sic*) to the plaintiff together with interest at 6 per cent till realization and together with costs."

The plaintiff then applied for execution and as appears from the judgment of the learned District Judge, he applied for execution against Ramlakhan only and no notice was served upon the two transferees who seem to have had no knowledge whatever of the proceedings. The decree-holder put the entire area of the holding including that portion which had been transferred to the appellants to sale and it was bought by the opposite party No. 1, Ram Prashad who proceeded to take delivery of possession and got *dakhaldehani* on January 24, 1933. Then the two appellants, *viz.*, Bansropan who owned the 3 *bighas* 8 *kathas* and *Musammat* Kabutri who owned 8 *bighas* 9 *dhurs* came before the executing Court with an objection that the sale was not effective against them and they put in their objection in a somewhat unfortunate form. They claimed to be in possession of the lands said to have been purchased by them and said that they had not been made parties to the execution. Having put those allegations of fact before the Munsif, the first of which was manifestly erroneous, (for delivery of possession had been granted to the opposite party) they asked for relief from the Court. The Munsif held that their interest had not been affected by the sale at all and he accordingly purported to "allow their objections," but he does not seem to have made any order.

The matter then went on appeal by the opposite party to the learned District Judge. The learned District Judge considered the matter from what I venture to think a most unnecessarily technical point of view. He said that this being an objection under O. XXI, r. 100, Civil Procedure Code, and s. 47 of that Code, and the objectors having said that they were already in possession of the property (a statement which was on the face of it mistaken) there was no power to give a remedy because the Court could not give possession of that of which the claimants for possession said they were already possessed of; and he said that neither O. XXI, r. 100, nor s. 47, is applicable. This, in my opinion, was not the proper way to treat the case. It is quite immaterial whether an application is said to be under a special section or under a special rule. It is the business of the Court to know the law and it is only incum bent upon the litigant to come before the Court and state the facts in respect of which he seeks the remedy. He must ask for such remedies as he requires and there is no obligation on him to inform the Court under which Statute or Rule he is entitled to claim those remedies. If he does not state the Statute or the Rule or if he states a wrong Statute or wrong Rule, that in no way relieves the Court of the obligation of itself applying the appropriate rule or section. I have had occasion more than once to protest against the curious superstition that a proper recitation of the appropriate section or rule is necessary for obtaining a remedy.

There is one small matter that needs to be noticed in passing. The appeal by Bansropan Sahu is out of time as a matter of appeal. The matter first came before this Court as an application in revision and it was filed on January 11, 1934, whereas the date of the District Judge's judgment was September 16, 1933. It was then pointed out to the then applicant for revision that his proper course was to appeal and he lodged an appeal on a late date. But if the date of the lodging of his appeal be taken as the date of his application in revision, which is to give him the best of the possible circumstances, it is still out of time. Nevertheless the point is of no practical importance in this case. The decision, as taken up by the Munsif as far as the declaration of the law is concerned, is correct. The sale had no effect upon the rights of the two objectors and their property not having passed under the sale, but only the property of Ramlakhan, delivery of possession could not, if the decree had been properly carried out, have passed to the auction-purchaser. The Court should have acted under s. 151, Civil Procedure Code which emphasises the fact that nothing in the Code prevents the Court from passing such order as may be necessary to meet the ends of justice or to prevent the abuse of the processes of the Court, and the Court, therefore should have directed that the possession should be re-delivered of their respective portions to the objectors. That would have saved much trouble and would have prevented the technical view of the matter taken by the District Judge.

The order of this Court will be that we use the powers reserved to us under s. 151, Civil Procedure Code and we direct that if possession has not already been recovered by the objectors of those portions of the holding, which they had purchased

from Ramlakhan, they will be put into possession of those portions. It is unfortunate that the auction-purchaser should have to suffer this loss for he appears to be an innocent party; but an auction-sale carries no guarantee of title and no guarantee of any other kind and if the auction-purchaser purchases rights which have been included in the sale improperly, he must restore possession and must pursue such remedies as the law allows him against those persons who are to blame for it. The parties will bear their own costs of these proceedings.

Agarwala, J.—I agree.

N. *Appeal allowed.*

RANGOON HIGH COURT

Special Second Civil Appeal No. 184 of 1934
November 27, 1934
PAGE, C. J. AND MYA BU, J.
M. K. M. CHETTYAR FIRM—
APPELLANTS
versus
MAUNG THAUNG AND ANOTHER—
RESPONDENTS

Provincial Insolvency Act (V of 1920), s. 28 (6) (2)—Secured creditor can realize security by filing suit without obtaining leave of Court

A secured creditor of the insolvent is entitled notwithstanding s. 28 (2), Provincial Insolvency Act, to realise the security by filing a suit or otherwise in accordance with law without obtaining the leave of the Court in that behalf. *In the matter of L. W. Nasse* (1), dissented from.

[Case-law reviewed.]

S. S. C. A. from the judgment of the Assistant District Court, Mandalay, in C. A. No. 3 of 1934.

Mr. *Tambe*, for the Appellants.

Mr. *A. N. Basu*, for the Respondents.

Page, C. J.—This appeal must be allowed. The material facts are simple, and are not now in dispute. One Maung Thaung executed a mortgage of the land in suit to Maung Mya and Ma Kha. Thereafter Maung Mya and Ma Kha created a sub-mortgage of the property in favour of the appellants, the M. K. M. Chettyar Firm by disposing the mortgage deed executed by Maung Thaung with the appellants as security for a loan. Subsequently and before the present action was brought Maung Mya and Ma, Kha were adjudicated insolvents. On August 29, 1933, the appellants filed the present mortgage suit against Maung Mya Ma Kha, Maung Thaung and the Official Receiver of the estate of the insolvents. In the Sub-Divisional Court of Mandalay the appellants obtained a preliminary mortgage decree but on appeal to the Assistant District Court of Mandalay the decree was set aside and the suit dismissed. From the decree of the Assistant District Court the present appeal has been brought.

The sole issue to be determined in the present appeal is whether the appellant firm as mortgagees were entitled to realise their security by filing the present mortgage suit without obtaining the leave of the Court under s. 28, Provincial Insolvency Act (V of 1920). The learned Assistant District Judge held that it was incumbent upon the appellants to obtain the leave of the Court before filing the present suit, and as no such leave had been obtained the suit must fail. The question, therefore, is whether in so holding the learned Assistant District Judge correctly laid down the law. In my opinion he did not. Under s. 28 (2) it is provided that:

"on the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided and shall become divisible among the creditors and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceeding except with the leave of the Court on such terms as the Court may impose,"

and under sub-s. 6

"nothing in this section shall affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

In support of the decree of the Assistant District Court the learned Advocate for the respondent relied upon the decision of Ormiston, J., in *In the matter of L. W. Nasse* (1); and that authority no doubt supports the contention of the respondent. Ormiston, J, held upon the construction of the proviso to s. 17, Presidency Towns Insolvency Act (III of 1909) which is in the same terms as s. 26 (6), Provincial Insolvency Act that,

"the words of the proviso can be amply satisfied by confining its operation to cases where the mortgagee can realize his security without the institution of a suit."

With all respect I am of opinion that in so holding Ormiston, J., did not correctly state the law.

It is common ground that it is only in the special cases to which s. 69, Transfer

(1) 118 Ind. Cas. 615; A I R 1929 Rang. 229; 7 R 201; Ind. Rul. (1929) Rang. 263.

of Property Act applies that the mortgagee is entitled to realise his security without the intervention of the Court and if the construction that Ormiston, J., placed upon s. 28 (6) were to prevail, the result would be that except in such rare cases it would be incumbent upon the mortgagee, although admittedly a secured creditor, to obtain the leave of the Court before he proceeded to realise his security against the insolvent or his estate. In my opinion there is no justification for restricting the operation of s. 28 (6) in the way that found favour with Ormiston, J. In my opinion the language in which s. 28 (6) is couched is quite plain and the construction which I am disposed to put upon s. 28 (6), namely, that a secured creditor of the insolvent is entitled notwithstanding s. 28 (6) to realise the security by filing a suit or otherwise in accordance with law without obtaining the leave of the Court in that behalf is in consonance with the view that is held by the High Courts of Bombay, Madras, Calcutta and Patna. So far as I know the only discordant note is sounded in the judgment of Ormiston, J., in *In the matter of L. W. Nasse* (1): See *B. N. Lang* v. *Heptullabhai Ismailji* (2), *Bai Kashi* v. *Chunilal Hathising* (3) *Official Receiver, Coimbatore* v. *Palaniswami Chetti* (4), *Rajendrachandra Sarkar* v. *Bipinchandra Shah Bhaumik* (5), *Sant Prasad Singh* v. *Sheodut Singh* (6). Further it would appear that in *Kalachand Banerjee* v. *Jaganath Marwari* (7), the construction that I would place upon s. 28 (6) was accepted as correct by the Judicial Committee of the Privy Council. In that case in which s. 16 (5), Provincial Insolvency Act (III of 1907) which corresponds to the proviso to s. 17, Presidency Towns Insolvency Act, and s. 28 (6), Provincial Insolvency Act, 1920, was under consideration, Lord Salvesen delivering the judgment of the Board observed:

"that the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent is, of course plain, but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it and he and not the insolvent has the sole interest in the subject-matter of the suit."

In the present case the Official Receiver as the assignee of the estate of the insolvents was impleaded as a defendant in the suit, and in my opinion, it was not incumbent upon the appellants to obtain the leave of the Court before the suit was filed.

In England the practice and the procedure is the same: Bankruptcy Act, 1914 and 1926, s. 7 (2) *White* v. *Simmons* (8), *Ex parte Pannell*; *In re England* (9), *Waddell* v. *Toleman* (10), and *Ex parte Hirst*; *In re Wherly* (11).

For these reasons the appeal will be allowed, the decree of the Assistant District Court set aside, and the proceedings remanded to the Assistant District Court to decide the other questions raised in the appeal before that Court and to determine the appeal according to law. The appellants are entitled to the costs of the hearing before the Assistant District Court and their costs of the appeal as against the respondent Maung Thaung.

Mya Bu, J.—I agree.

D. *Appeal allowed.*

(2) 21 Ind. Cas 714; A I R 1914 Bom. 271; 38 B 359; 15 Bom. L R 939

(3) 122 Ind. Cas. 857; A I R 1930 Bom. 11; 31 Bom. L R 1199; Ind. Rul. (1930) Bom. 185.

(4) 88 Ind. Cas. 934; A I R 1925 Mad. 1051; 48 M 750; 49 M L J 293; (1925) M W N 672

(5) 149 Ind. Cas. 599; A I R 1934 Cal. 64; 60 C 1298; 37 C W N 973; 6 R C 569.

(6) 77 Ind. Cas. 589; A I R 1924 Pat. 259; 2 Pat. 724.

(7) 104 Ind. Cas. 442; A I R 1927 P C 108; 54 I A 190; 54 C 595.

(8) (1871) 6 Ch. A 550; 40 L J Ch. 689; 19 W R 939.

(9) (1877) 6 Ch. D 335; 26 W R 194; 37 L T 450.

(10) (1878) 9 Ch. D 212; 26 W R 802; 38 L T 910

(11) (1879) 11 Ch. D 278; 27 W R 788.

PATNA HIGH COURT

Civil Revision No. 560 of 1934

February 26, 1935

WORT, J.

HAZARI LAL LABH—PETITIONER

versus

ABDUS SAMAD AND OTHERS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 92—Purchase of property at something under its value—Whether evidence of fraud—Scope of O. XXI, in setting aside sales.

In order to set aside an auction sale it is necessary to bring the matter within O. XXI of the Code of Civil Procedure. The mere fact that the purchaser purchased the property at something under its value is not by any means evidence of fraud and would not justify the setting aside of the sale. Once the property has been knocked down at the auction, there is an end of the matter unless the sale can be set aside under the provisions of O. XXI.

C. R. from the orders of the Munsif, Darbhanga, dated July 9 and 10, 1934.

Messrs. *P. Jha* and *Rati Kant Chaudhary*, for the Petitioner.

Messrs. *Murari Prasad*, *Hasan Jan*, *Muhamad Hasan*, *R. Misser* and *B. P. Sinha*, for the Opposite Party.

Judgment.—There can be no dispute that the Munsif had no jurisdiction to set aside the sale. In order to set aside an auction sale, it is necessary to bring the matter within O. XXI of the Code of Civil Procedure; outside that order there is obviously no jurisdiction to act as the learned Judge in the Court below has acted in this case. He appears to have come to the conclusion that there was some sort of fraud, but a mere suspicion of any particular kind of fraud will not justify the Judge's action. There was no evidence in the case, and the mere fact that the purchaser purchased the property at something under its value is not by any means evidence of fraud and would not justify the setting aside of the sale. Once the property had been knocked down at the auction, there is an end of the matter unless the sale can be set aside under the provisions of the order to which I have referred.

The Rule must be made absolute, the orders of the Judge, dated July 9 and 10, 1934, will be set aside, and it must be held in the circumstances that the property was knocked down to the petitioner for Rs. 1,000, which sale, in the ordinary course of events, will be confirmed. The petitionor has brought the decree-holder into this Court. Although he succeeds and is entitled to recover his costs, he must pay the costs of the decree-holder which costs must be added to the costs he recovers from the decree-holder. Hearing fee two gold *mohurs* in each case.

N. *Rule made absolute.*

LAHORE HIGH COURT

Miscellaneous Second Civil Appeal No. 921 of 1933

March 21, 1934

ABDUL RASHID, J.

GIAN CHAND AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

CHARANJI LAL—DECREE-HOLDER—RESPONDENT

Jurisdiction—Valuation—Objection as to valuation, if can be raised for first time in execution.

It is not open to the parties during the course of the execution proceedings to raise an objection for the first time regarding the under-valuation or over-valuation of a suit. A person who has himself given the valuation during execution proceedings cannot contend that he had under-valued his application for the filing of the award, which has to be regarded as a plaint in a regular suit. *Sundar Das* v. *Umda Jan* (1), *Rajalakshmi Dassee* v. *Katyayani Dassee* (2), *Sardar Khan* v. *Aisha Bibi* (3), *Abdur Rahman* v. *Charagh Din* (4) and *Muhammad Shah* v. *Abdullah Shah* (5), distinguished.

Misc. S. C. A. from an order of the District Judge, Sialkot, dated April 24, 1933.

Mr. *Shamair Chand*, for the Appellants.

Mr. *J. G. Sethi*, for the Respondent.

Judgment.—The facts relevant to the question of law involved in this appeal may be shortly stated. On October 5, 1931, Charanji Lal presented an application to the Senior Subordinate Judge, Sialkot, under para. 20, Sch. II, Civil Procedure Code, alleging that certain matters which were in dispute between him and two other persons, namely, Gian Chand and Diwan Chand had been referred to arbitration, and that an award had been made thereon, on August 3, 1931. He prayed that an order for the filing of the award in Court may be passed, and that a decree in the terms of the award be granted to him. In this application which was numbered and registered as a suit, it was stated that the value for the purposes of jurisdiction was Rs. 5,000. A notice was issued to the defendants who filed certain objections against the award. These objections were, however, subsequently withdrawn, and therefore, the Court passed a decree for Rs. 2,025 against the defendants, in accordance with the terms of the award, on July 4, 1932.

During the execution of this decree a warrant of attachment of movable property of both the judgment-debtors was issued, but it could not be executed. Gian Chand thereafter put in an application objecting that the execution could not proceed because the decree based on the award amounted to a decree for declaration only, that court-fee was required for such execution, and that the greater part of the decretal amount had already been paid. These objections were overruled by the Senior Subordinate Judge on August 31, 1932, and he directed that the execution shall proceed. Against this order Gian Chand and Diwan Chand preferred an appeal to the District Judge. Before the learned District Judge a preliminary objection was raised by the learned Counsel for the respondent (decree-holder) that as the valuation of the suit for the purposes or jurisdiction exceeded Rs. 5,000,

the appeal lay to the High Court and the District Judge had no jurisdiction to hear the appeal. The learned District Judge accepted this preliminary objection, and dismissed the appeal of the judgment-debtors. Against that order the judgment-debtors have preferred an appeal to this Court.

It was contended on behalf of the appellants that in his application under Sch. II, para. 20, Civil Procedure Code, the respondent had stated that the value of the suit for the purposes of jurisdiction was only Rs. 5,000, that this application had been registered as a suit, and stood on the same footing as a plaint in a regular suit. The defendants had not raised any objection regarding the valuation of the suit and the Court therefore passed a decree in accordance with the terms of the award on July 4, 1932. It was not open to the respondent during the course of the execution proceedings to contend that the value of the suit was more than Rs. 5,000, having himself valued the suit at that figure, he should not be allowed during the execution proceedings to raise a plea that the suit had been under-valued. It was further urged that the executing Court could not go behind the decree, and that if the value of the suit was not mentioned in the decree sheet, the plaint could be looked into to discover the value for the purposes of jurisdiction. Moreover, there being no legal proof on the record regarding the value of the property, it was not open to the executing Court to enter into this question during the execution proceedings.

On behalf of the respondent it was contended that it was not open to the parties to confer jurisdiction on an Appellate Court by under-valuing the suit and that the question of jurisdiction was governed by statute or by rule having the force of law. It was urged that for the purposes of appeal the market value of the property dealt with by the award must be taken to be the value of the suit for the purposes of jurisdiction. Reliance was placed on *Sundar Das* v. *Umda Jan* (1), *Rajalakshmi Dassee* v. *Katyayani Dasee*, (2), *Sardar Khan* v. *Aisha Bibi* (3), *Abdur Rahman* v. *Charagh Din* (4) and *Muhammad Shah* v. *Abdullah Shah* (5), in this respect. None of these rulings, however, seems to me to be applicable to the facts of the present case. In each one of the abovementioned cases objection regarding the valuation of the suit was either taken in the trial Court or in the Appellate Court. In none of these cases was the objection raised, for the first time during the course of the execution proceedings. It was conceded by the learned Counsel for the respondent that he had not been able to find any reported case wherein an objection relating to the under-valuation or over-valuation of a suit was given effect to during the course of the execution proceedings. In the absence of any authority to the contrary, I am of the opinion that it is not open to the parties during the course of the execution proceedings to raise an objection for the first time regarding the under-valuation or over-valuation of a suit. In the present case the respondent, Charanji Lal was himself responsible for the under-valuation, if any. It is not open to him, during the execution proceedings, to contend that he had under-valued his application for the filing of the award, which has to be regarded as a plaint in a regular suit.

For the foregoing reasons, I am of the opinion that there is no force in the preliminary objection raised by the respondent in the Court of the learned District Judge. I, therefore, accept this appeal, set aside the order and decree of the learned District Judge, dated April 24, 1933, and remand the case to him under O. XLI, r. 23, Civil Procedure Code, and direct that he shall decide the appeal on the merits in accordance with law. The court-fee levied on the memorandum of appeal in this Court shall be refunded, and the other costs shall abide the event.

N. *Case remanded.*

(1) 82 Ind. Cas. 614; A I R 1925 Lah. 1; 5 Lah. 481; 6 I ah. L 355 (F B).

(2) 12 Ind. Cas. 464; 38 C 639.

(3) 88 Ind. Cas. 72; A I R 1925 Lah. 290; 6 Lah. 105 (F B).

(4) 19 P R 1908.

(5) 56 Ind. Cas. 918; A I R 1920 Lah. 112.

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1186 of 1932

February 22, 1935

GANGA NATH, J.

JADU DUBE—PLAINTIFF—APPELLANT

versus

DASRATH RAI AND ANOTHER—DEFENDANTS—RESPONDENTS

Agra Tenancy Act (III of 1926), ss. 138, 139—Rent payable by division of produce—Suit for arrears

of rent—Parties failing to take steps under ss. 138 and 139 for division—Maintainability of suit.

There is nothing in the provisions of ss. 138 and 139, Agra Tenancy Act, which may bar a suit for recovery of arrears of rent even if either of the parties fail to take necessary steps under ss. 138 and 139 for the division of the produce where the rent is taken by division or for estimate or appraisement of the standing crops. *Indarjit Partap Bahadur Sahi* v. *Shewak Rai* (1), referred to.

S. C. A. from the decision of the District Judge of Ghazipur, dated July 30, 1932.

Messrs. *K. Verma* and *V. D. Bhargava*, for the Appellant.

Mr. *A. P. Pandey*, for the Respondents.

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by him against the defendant-respondent to recover arrears of rent which was payable admittedly by division of produce. The trial Court decreed the suit but the learned District Judge, Ghazipur, dismissed the suit with a finding that the plaintiff had not taken necessary steps for the division of the produce at the time of the produce. Against this decision this appeal has been preferred. The only question for determination is whether the suit lies or not. There is no provision in the Agra Tenancy Act which forbids the filing of a suit if the necessary steps for the division of produce, such as are prescribed under ss. 138 and 139 of the Tenancy Act, are not taken in time. On the other hand, s. 132 of the Tenancy Act which applies to the recovery of arrears of rent lays down: "An arrear of rent shall be recoverable by suit, or by distraint or by notice through the *tehsildar* in accordance with the provisions of this Act or in any one or more such ways." Sections 138 and 139 provide for the procedure to be adopted in case either party applies for the division of the produce in kind, or for estimate or appraisement of the standing crops where rent is taken by estimate or appraisement. As already stated there is nothing in the provisions of ss. 138 and 139 which may bar a suit for recovery of arrears of rent even if either of the parties fail to take necessary steps under ss. 138 and 139 for the division of the produce where the rent is taken by division or for estimate or appraisement of the standing crops. This view is not without an authority. In *Indarjit Partap Bahadur Sahi* v. *Sewak Rai* (1) it was held that where rent was payable by division of the produce and the rent was in arrears, a suit for the money equivalent of such rent lay under s. 132, Tenancy Act of 1926, and that ss. 138 and 139 simply laid down the procedure for the deputation of an officer and there was nothing in them which could cut down the right of suit granted by s. 132.

The learned District Judge did not enter into the question as to how much rent was due by the defendant-respondent. It is therefore ordered that the appeal be allowed with costs. The case be remanded to the lower Court to admit it under its original number and to dispose it of in accordance with law on the evidence on the record. The court-fee will be refunded as usual.

Permission to file a Letters Patent Appeal is rejected.

N. *Appeal allowed.*

(1) 134 Ind. Cas. 457; A I R 1932 All. 152; Ind. Rul. (1931) All. 811; (1931) A L J 1094; L R 12 A 428 Rev.; 16 R D 66; 54 A 89.

OUDH CHIEF COURT

First Civil Appeal No. 42 of 1933

February 27, 1935

SRIVASTAVA AND ZIA-UL HASAN, JJ.

Pandit SEWA RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PARBHU DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 2, O XXIII, r. 3, O. XXXIV, r. 5—O. XXI, r. 2, if applies to payment made before final decree for sale—Suits on mortgages—Whether excluded from operation of O XXIII, r. 3—Payment made out of Court before final decree—Payment admitted by plaintiff—Payment, if to be ignored for not being made as required by O. XXXIV, r. 5—Procedure—Inquiry as to whether payment has in fact been made—Necessity of—Joint decree in favour of several mortgagees—One of them, if can give valid discharge against others.

Order XXI, r. 2, Civil Procedure Code, does not apply to a payment made before the final decree for sale. *Durga Devi* v *Nand Lal* (1) and *Tirloki Nath Dube* v. *Sadhu Ram Tewari* (2), relied on [p. 233, col. 1.]

The provisions of O. XXI, r. 2, and O. XXIII, r. 3, are complimentary of each other. There is nothing in the terms of O. XXIII, r. 3 to exclude suits based on mortgages from the operation of this rule. While on the one hand O XXXIV, r. 5 contemplates a payment into Court, on the other hand under O. XXIII, r. 3, the payment has to be recognised even though it has been made out of Court. If before a final decree is passed a payment is made out of Court and the payment is admitted by the plaintiff, it would be in the highest degree unreasonable to ignore that payment because of its not being made in Court as required by O XXXIV, r. 5. In such cases if the payment is admitted by both parties, the satisfaction based on such payment ought to be recorded under O. XXIII, r. 3 in spite of its not being made into Court. On the other hand, if the alleged payment out of Court is disputed, the payment having been made in clear disregard of the mandatory provisions

of O. XXXIV, r. 5, the Court is not bound to embark upon any inquiry into the question whether the alleged payment was in fact made or not. *Durga Devi* v. *Nand Lal* (1), *Tirloki Nath Dube* v. *Sadhu Ram Tewari* (2) and *Viswanath Ayyar* v. *Chimmukutti Amma* (6), relied on [p. 233, col. 2.]

In the case of a joint decree passed in favour of several mortgagees one of them cannot give a valid discharge against the other mortgagees. [p. 234, col. 1.]

F. C. A. against the order of the Sub-Judge, Hardoi, dated February 13, 1933.

Messrs. *M. Wasim, Khaliquzzaman* and *Ali Husain*, for the Appellants.

Messrs. *Hyder Husain* and *Akbar Husain*, for the Respondents.

Judgment.—This is an appeal by the plaintiffs against the order dated February 13, 1933, passed by the Subordinate Judge of Hardoi on an application made by them under O. XXXIV, r. 5 of the Code of Civil Procedure for a final decree for sale.

The facts of the case are that on March 2, 1932, the plaintiffs-appellants obtained a preliminary decree for sale on the basis of a mortgage-deed which had been executed in their favour by defendants Nos. 1 to 3 on January 29, 1920. On September 28, 1932, the plaintiffs made an application under O. XXXIV, r. 5, alleging that the date fixed for payment in the preliminary decree had expired and the defendants had not made any payment to the plaintiffs and praying that a final decree be passed for Rs. 6,601-4 together with interest thereon. November 15, 1932, was the date fixed for the hearing of this application. Three days before this date on November 12, 1932, an application was made by one Gulzari Lal, a general agent of plaintiff No. 1, to the effect that he had realised the entire decretal amount and nothing remained due from the defendants in respect of the decree and praying that the application which had been made by the plaintiffs for a final decree be dismissed. When the case came up for hearing before the Court on the date fixed both the plaintiffs made an application denying the payment alleged to have been received by Gulzari Lal in his application dated November 12, 1932, and alleging that the application had been made by him in collusion with the defendants. The Court thereupon ordered that notices be issued to the defendants as well as to Gulzari Lal to show cause against the application made that day by the plaintiffs. On February 11, 1933, when the matter came up for disposal before the Court, Counsel for both the parties stated that they did not want to adduce any oral evidence in the case. The learned Subordinate Judge held that Gulzari Lal was the agent only of plaintiff No. 1 and that he had neither authority nor could give a valid discharge of the decree on behalf of plaintiff No. 2. He was, however, of opinion that the satisfaction of the decree certified by Gulzari Lal by means of his application dated November 12, 1932, must be upheld as valid to the extent of half the amount of the decree so far as it concerned plaintiff No. 1. In result he made the decree for sale final only for half of the mortgage money and proportionate costs in favour of plaintiff No. 2 alone. Both the plaintiffs have come to this Court in appeal against the last mentioned order of Subordinate Judge.

The main contention on behalf of the appellants is that no payment having actually be made in Court it could not be recognised under O. XXXIV, r. 5 of the Code of Civil Procedure, and a final decree should therefore be passed for the entire amount due under the preliminary decree and not merely for half of that amount. Order XXXIV, r. 4, which provides for a preliminary decree in a suit for sale lays down that if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in cls. (*a*), (*b*) and (*c*) (*i*) of sub-r. (1) of r. 2, cls. (*c*) (*i*) of sub-r. (1) of r. 2 directs "that if the defendant pays into Court the amount so found or declared due". Order XXXIV, r. 5, provides for the final decree in a suit for sale and cl. (1) of it uses the words "makes payment into Court". Clause (3) of that rule lays down that "where payment in accordance with sub-r. (1) has not been made", the Court shall pass a final decree. Form No. 5-A in Appendix D of the Code of Civil Procedure which gives the prescribed form for a preliminary decree for sale also contains the words "pay into Court", and the preliminary decree for sale prepared in the present case is also in the same form. Thus there can be no doubt that these provisions of O. XXXIV of the Code of Civil Procedure relating to decrees for sale contemplate payment into Court of the amount payable under the preliminary decree. It should also be noted that the words "relating to payment into Court" did not find place in s. 89 of the Transfer of Property Act but were introduced for the first time when the provisions relating to decrees passed in mortgage-suits were included in the Code of Civil Procedur

of 1908. The learned Counsel for the respondents does not deny that under the provisions of O. XXXIV, r. 5 the payment has to be made into Court. He has, however, argued that the provisions of O. XXI, r. 2, and O. XXIII, r. 3 of the Code of Civil Procedure apply to such a case and that even if the payment does not comply with the terms of O. XXXIV, r. 5, yet the Court is bound to take notice of them, if the necessary conditions of O. XXI, r. 2 or O. XXIII, r. 3 are satisfied. We are of opinion that O. XXI, r. 2, has no application to the case. Order XXI opens with the heading "Execution of decrees and orders". All the rules contained in that Order are rules laying down the procedure relating to execution of decrees and orders. It is not disputed that proceedings for a final decree for sale are proceedings in the suit and not proceedings in execution. We have, therefore, no difficulty in holding that O. XXI, r. 2, did not apply to a payment made before the final decree for sale. The same view has been taken by the Lahore High Court in *Durga Devi* v. *Nand Lal*, 136 Ind. Cas. 732 (1) and by a learned Judge of this Court in *Tirloki Nath Dube* v. *Sadhu Ram Tewari* (2). The learned Counsel for the respondents on the other hand has relied on the decisions in *Piran Bibi* v. *Jitendra Mohun Mukerjee* (3), *Mangar Sahu* v. *Bhatoo Singh* (4) and *Ahmed Rehman* v. *A. L. A. R. Chettiar Firm* (5) in support of the contrary view. In all these cases the application of O. XXI, r. 2, to proceedings for a final decree for sale seems to have been assumed, but the specific question about the rule in question having no application because of the proceedings being proceedings in suit and not in execution, was not considered or discussed in any of those cases.

Next as regards the application of O. XXIII, r. 3. It deals with the adjustment wholly or in part of a suit by means of an agreement, compromise or satisfaction and provides that where it is proved to the satisfaction of the Court that a suit has been so adjusted the Court shall order such agreement, compromise or satisfaction to be recorded. The provisions of O. XXI, r. 2 and O. XXIII, r. 3, are complimentary of each other. While O. XXI, r. 2, deals with adjustments made after decree, O. XXIII, r. 3 deals with adjustments before decree. We are of opinion that there is nothing in the terms of O. XXIII, r 3 to exclude suits based on mortgages from the operation of this rule. But the application of that rule to the present case gives rise to an apparent inconsistency. While on the one hand O. XXXIV, r. 5 contemplates a payment into Court, on the other hand under O. XXIII, r. 3, the payment has to be recognised even though it has been made out of Court. One of the elementary canons of construction is to construe the various provisions of a statute so as to make them consistent. If before a final decree is passed a payment is made out of Court and the payment is admitted by the plaintiff, it would be in the highest degree unreasonable to ignore that payment because of its not being made in Court as required by O. XXXIV, r. 5. We are, therefore, inclined to hold that in such cases if the payment is admitted by both parties the satisfaction based on such payment ought to be recorded under O. XXIII, r. 3, in spite of its not being made into Court. On the other hand if the alleged payment out of Court is disputed, the payment having been made in clear disregard of the mandatory provisions of O. XXXIV, r. 5, the Court is not bound to embark upon an inquiry into the question whether the alleged payment was in fact made or not. The view taken by us appears to be the only reasonable and middle course between the two provisions which are not quite consistent with each other. A similar view appears to have been taken in the two cases referred to above, *Durga Devi* v. *Nand Lal*, 136 Ind. Cas. 732 (1) and *Tirloki Nath Dube* v. *Sadhu Ram Tewari* (2) and also by the Madras High Court in *Viswanath Ayyar* v. *Chimmukutti Amma* (6). In the present case the payment alleged to have been received out of Court by Gulzari Lal was denied by both the plaintiffs. In the circumstances we are of opinion that the Court was not required to enter upon an inquiry as regards the alleged payment and ought to have refused altogether to recognise it as the payment was not made into Court. In any case assuming that the Court was bound to make an inquiry under O. XXIII, r. 3, we must hold

(1) 136 Ind. Cas. 732; 33 P L R 138; A I R 1932 Lah 231; Ind. Rul. (1932) Lah. 268.
(2) 102 Ind Cas. 428; 1 Luck Cas. 63; A I R 1927 Oudh 275.
(3) 40 Ind. Cas. 845; 21 O W N 920; 25 C L J 553.
(4) 57 Ind. Cas. 473; 5 P L J 672; 1 P L T 416.
(5) 110 Ind. Cas 873; 6 R 285; A I R 1928 Rang. 194.
(6) 135 Ind. Cas 535; 55 M 320; 34 L W 635; A I R 1932 Mad. 115; Ind. Rul. (1932) Mad. 119; 62 M L J 272.

that the defendants have completely failed to establish the alleged payment. They have given absolutely no evidence in proof of the payment and rely solely on the application dated November 12, 1932, made by Gulzari Lal. No attempt was made even to prove this application which was challenged by the plaintiffs. Admittedly Gulzari Lal was the agent of only one of the plaintiffs. He alleged that as the family of the plaintiffs was joint so he, as general agent of one of the plaintiffs had realised the entire decretal amount. No evidence has been given about the plaintiffs being members of a joint family or about the plaintiff No. 1 being the manager thereof. It is well settled that in the case of a joint decree passed in favour of several mortgagees one of them cannot give a valid discharge against the other mortgagees. Thus *prima facie* Gulzari Lal as the agent of one of the mortgagees could not realise the money on behalf of both the plaintiffs. The whole story as regards the alleged payment contained in the application of Gulzari Lal is in the highest degree suspicious. So the burden lay heavily upon the defendants to establish the alleged payment. The mere admission of Gulzari Lal cannot in the circumstances be accepted as sufficient. We are, therefore, of opinion, that even if an inquiry under O. XXIII, rules, was necessary, the defendants having failed to adduce any evidence in support of the payment we must find that they have failed to establish it.

For the above reasons we are of opinion that the appeal must succeed. Cross-objections have also been filed on behalf of the defendants. In view of the opinion expressed by us above the cross-objections must fail. The result, therefore, is that we allow the appeal with costs and modify the order of the lower Court by directing that a final decree for sale in terms of O. XXXIV, r. 5 should be prepared for Rs. 6,601-4 instead of Rs. 3,310 as ordered by the lower Court. The cross-objections fail and are dismissed with costs.

N. *Appeal allowed.*

RANGOON HIGH COURT

Special Second Civil Appeal No. 157 of 1934

August 28, 1934

DUNKLEY, J.

MAUNG BA KYWE—APPELLANT

versus

MA NYEIN AND OTHERS—RESPONDENTS

Mortgage—Benami—*Mortgagee mentioning his children's names in mortgage-deed—No mention of his own name—Presumption—Costs—Appellant succeeding only on point which could have been rectified by lower Court itself—Costs, by whom to be paid.*

Where a person advances money on a mortgage but the names of his children are mentioned in the mortgage-deeds and his name is omitted therefrom, the presumption arises that he intended these mortgages as advancements for the benefit of his children who are respectively named in the deeds. [p. 235, col. 1.]

Where the only point on which the appellant succeeds is a point which could have been rectified by an application to the lower Court for amendment of the decree and but for this point, he actually fails, he must pay the respondent's cost of the appeal.

S. S. C. A. against the decree of the District Court, Lower Chindwin, dated February 23, 1934.

Mr. *A. N. Basu*, for the Appellant.

Mr. *K. C. Sanyal*, for the Respondents.

Judgment.—This is an appeal against the judgment and decree of the District Court of Lower Chindwin, passed on appeal from the judgment and decree of the Sub-Divisional Court of Monywa in Suit No. 11 of 1933. It was a suit brought by the plaintiff-appellant for a declaration of his title to a ¼th share in the estate of U Po Kin and Ma Ein Byaung, who were his grandparents, and for partition and delivery of possession of his share. Unfortunately the appeal to the District Court was greatly complicated by the wrong method in which the Sub-Divisional Court dealt with the suit. This Court not only went into the question of the appellant's right to a share, but also, before passing a preliminary decree, decided the detailed questions as to the properties, both movable and immovable, comprised in the estate of U Po Kin and Ma Ein Byaung, and then appointed a Commissioner merely for the purpose of ascertaining the mesne profits arising from the immovable properties.

The proper course for the Sub-Divisional Court to have adopted was to have passed a preliminary decree declaring the appellant's right which, as a matter of fact, was not contested and then to have referred the whole case to a Commissioner to decide what were the properties comprised within the estate and the values of the respective items thereof. When the case came on appeal before the District Court, a large number of separate items of property alleged to be comprised within the estate were the subject of contest, with the result that, although a preliminary decree only had been passed, the learned District Judge had to consider in detail the bulky evidence regarding the properties comprised in the estate—a task which at this

stage he should never have been required to undertake. Before being required to do this, he should have had before him the findings of the learned Sub-Divisional Judge on the report of a Commissioner, and the items in dispute would thereby have been brought within a sufficiently narrow compass to enable him to deal effectively with them. Even at that stage, had I been in the place of the learned District Judge, I think I should have declined to take into consideration the grounds of appeal referring to specific items of property and should have passed the decree which the Sub-Divisional Court ought to have passed, *viz.*, declaring the appellant's right, and referring the whole case to a Commissioner for report. When this case now comes before this Court on second appeal the appeal is prosecuted in respect of certain items of property of small value, questions which probably would never have reached this Court if the case had been properly dealt with in the beginning.

In regard to the immovable properties, the contest is now narrowed down to four items. These were accepted in mortgage in the names of various children of U Po Kin as mortgagees. The appellant claims that these transactions were *benami* transtions and that the money lent on these mortgages was provided by U Po Kin himself, and therefore the mortgaged properties form part of U Po Kin's estate. The items now in dispute are items Nos. 27, 28, 29 and 30 of Sch. "A" attached to the plaint. In my opinion, the matter is concluded against the appellant by the decision of this Court in the case of *Maung Kyaw Pe* v. *Maung Kyi* (1). It does not matter in the least whether U Po Kin provided the money lent to the mortgagors or not. Even if he did, since the names of his children are mentioned in the mortgage-deeds and his name is omitted therefrom, the presumption arises that he intended these mortgages as advancements for the benefit of his children who are respectively named in the deeds. No evidence worthy of the name has been called by the appellant to rebut this presumption.

With regard to the movable property, the contest is now confined to the question whether an item of one gold chain worth Rs. 30, which has been allowed by the learned District Judge, should really have been three gold chains worth Rs. 90. It is rather absurd that I should have to deal with a matter of this kind; but, however, as the learned District Judge himself has pointed out, the appellant in his own evidence contradicted himself in regard to this matter. At one stage he said that there were three gold chains left by his grand-parents, at another stage he said that there was only one. It is quite clear that he really knows nothing about the matter, and that he entered these items in the schedule merely on hearsay. The learned Sub-Divisional Judge cut the Gordian knot with regard to the movable properties by making an assessment of their total value and then giving the appellant a fourth share therein. This, of course, he was not entitled to do. If he decided to go into this question as to the movable and immovable properties comprised in the estate, it was essential that he should deal with each item separately and the evidence in respect thereto. That he did not do in regard to the movable properties, and it was unfortunately left to the learned District Judge on appeal to consider all this evidence. His decision that only one gold chain could be allowed is a reasonable decision with which I do not propose to interfere.

The third question that has been raised before me is that in the decree of the District Court the appellant's right to item No 21 of Sch. "B" attached to the plaint, a debt of Rs. 100 which has been recovered by the respondents, has not been allowed. The appellant was allowed a sum of Rs. 25 on this account by the Sub-Divisional Court and this item was not disputed on appeal to the District Court. Consequently, it must be allowed, and it is clear that it has been omitted from Sch. "C" of the schedules attached to the decree of the District Court by mistake. This is a mistake which could have been corrected at once by an application to the District Court for amendment of the decree, and there was no necessity to come up to this Court on appeal in regard to this matter. I notice, moreover, that there are two other errors occurring in the decree of the District Court which require correction. The properties mentioned in Schs. "B" and "C" attached to the decree are described in the decree as immovable properties. They are, of course, movable properties, and the decree of the District Court must be corrected in this sense, as it should also be corrected by adding this recovered debt of Rs. 100 to Sch. "C."

In the result the appellant actually fails

(1) 110 Ind. Cas. 646; A I R 1928 Rang. 220; 6 R 203.

in this appeal, for as I have said that point on which he succeeds is a point which could have been rectified by an application to the District Court for amendment of the decree. Consequently he must pay the respondents' costs of the appeal to this Court, Advocate's fee in this Court three gold *mohurs*.

D. *Order accordingly.*

OUDH CHIEF COURT

Civil Application No. 121 of 1934
March 4, 1935.
NANAVUTTY AND THOMAS, JJ.
MUSADDI LAL—APPLICANT
versus
DAL CHAND AND ANOTHER—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), ss. 151, 152, 153, O I, r. 8—Powers under—Discretion—Suit in representative capacity by one creditor—Other creditors brought on record as plaintiffs by officer of Court mistaking order of Court—Dismissal of suit with costs—Amendment of decree and plaint for removal of names of other creditors from array of plaintiffs—Whether should be allowed.

The language of ss. 152 and 153, Civil Procedure Code, is wide enough to cover the correction of mistakes and errors in any proceeding in a suit. Extensive powers may be exercised under the provisions of ss 151, 152 and 153 of the Code, and the question whether these extensive powers ought to be exercised in any given case is a matter purely within the discretion of the Court with reference to the facts of each particular case. [p. 238, col. 1.]

The plaintiff in a suit applied for permission to sue on behalf of all creditors of the defendant. All that was required of the Court under O. I, r. 8, Civil Procedure Code, was to have a notice of the institution of the suit sent at the expense of the plaintiff to all such persons whom the plaintiff wanted to implead either by personal service or where from the number of persons or any other cause such service was not reasonably possible, by public advertisement as the Court in each case might direct. But although no order was passed by the Court making them plaintiffs, the *peshkar* of the Court amended the plaint by bringing them on record. The suit was ultimately dismissed with costs and the defendants applied in execution for recovery of their costs not only from the plaintiff but also from the other creditors who had been wrongly impleaded as plaintiffs:

Held, that Court neither intended nor had the jurisdiction to saddle the other creditors with the costs of the suit and that this was a fit case in which the High Court should exercise the powers vested in them under ss 151, 152 and 153, Civil Procedure Code and their names should be removed from the array of the plaintiffs in the plaint and the decree. [p. 238, col. 2]

C. App. for revision of an order of the Additional District Judge, Lucknow, dated September 6, 1934.

Messrs. *Radha Krishna* and *P. D. Rustogi*, for the Applicant.

Messrs. *R. K. Bose*, *Muhammad Nazir-ud-din* and *Govind Behari Lal*, for the Opposite Party.

Judgment.—This is an application for revision under s 115 of the Code of Civil Procedure against an order dated September 6, 1934, passed by Mr. Muhammad Abdul Haq, Additional District Judge of Lucknow, dismissing the application of the applicant Musaddi Lal for amendment of the judgment and decree dated March 16, 1933.

The facts out of which this application for revision arises are briefly as follows:

One Dal Chand was adjudged an insolvent on October 30, 1928. Among his scheduled creditors were The Kathiwar Ahmedabad Banking Corporation, Ltd., (in liquidation), and some other creditors. The creditor Bank mentioned above, filed a suit in the Court of the Subordinate Judge of Malihabad against Dal Chand and Radha Shiam for a declaration that the transfer of certain property made by the insolvent Dal Chand in favour of Radhe Shiam was void in law. On March 14, 1932, the creditor Bank, (in liquidation), through its Official Liquidator Mr. Sarabai Dalal, applied to the Court of the Subordinate Judge under O. I, r. 8, Civil Procedure Code, for permission to sue on behalf of and for the benefit of the other scheduled creditors, who were mentioned in the petition as Ram Narain, Musaddi Lal, *R. S.* Phool Chand Rai, and Narain Das. Notices were served on these four persons but only Ram Narain appeared in Court and declined the offer of the plaintiff Bank to sue for his benefit. On August 9, 1932, the Subordinate Judge passed the following order:

"The plaintiff applies for permission to sue on behalf of all creditors of the defendant No. 2 (Dal Chand). Out of the four creditors besides the plaintiff, one Narain Das refuses his consent to the suit. The other three creditors are served and they do not turn up. I presume their consent."

"ORDER."

"I permit the plaintiff to continue the suit for the rest of the three creditors, that is, Ram Narain, Musaddi Lal and *Rai Sahib* Phool Chand Rai."

No order was passed by the learned Subordinate Judge in his own hand-writing making Ram Narain, Musaddi Lal and *R. S.* Phool Chand Rai plaintiffs in the suit, but the *Peshkar* of the Court somehow misinterpreted the Court's order of August 9, 1932, and thought that the names of the three secured creditors of the defendant Dal Chand were to be brought on the record as plaintiffs, and he accordingly amended the plaint and got the Subordinate Judge to initial the amendment. No

such amendment was necessary under O. I, r. 8 of the Code of Civil Procedure, and these persons, Ram Narain Musaddi Lal and *R. S.* Phool Chand Rai could not be made plaintiffs against their will and without their consent. No notice was sent to these persons informing them that they were to be made plaintiffs in the suit brought by the Kathiawar and Ahmedabad Banking Corporation, Ltd., against Dal Cand, and Radhe Shiam.

The suit of the plaintiff Bank was ultimately dismissed with costs by the Subordinate Judge by his order, dated March 16, 1933. The heading of the suit as given in the judgment is "The Kathiawar and Ahmedabad Banking Corporation, Ltd., through its Official Liquidator, plaintiff *v.* Dal Chand & Radhe Shiam defendants," and throughout the judgment the learned Subordinate Judge considered that in the suit in which he was writing judgment, there was only one plaintiff, that is, the Official Liquidator of the creditor Bank. Everywhere in the judgment he uses the singular word "plaintiff" and not the plural "plaintiffs". In the decree, however, the decree-writer of the Court finding that the plaint showed four plaintiffs, prepared the decree in conformity with the plaint.

Subsequently when the defendants applied in execution for recovery of their costs not only from the creditor Bank but also from *Babu* Ram Narain, Musaddi Lal and *R. S.* Phool Chand Rai, who had been wrongly impleaded as plaintiffs, then the applicant Musaddi Lal realised that he was saddled with costs in a suit which he had never filed, and to the prosecution of which he had never given his consent. He therefore applied under the provisions of ss. 151, 152 and 153 of the Code of Civil Procedure for amendment of the decree dated March 16, 1933. The learned Additional District Judge of Lucknow declined to amend the judgment and decree holding that there was no clerical or arithmetical mistake in the judgment and decree, and that the Subordinate Judge had deliberately passed an order impleading the applicant Musaddi Lal as a plaintiff, and although that order may have been wrong, the applicant could only get it corrected by filing a regular appeal against, or for a review of that order. He therefore rejected the application of Musaddi Lal on September 6, 1934. Dissatisfied with the order of the learned Additional District Judge the applicant has filed the present application for revision under s. 115 of the Code of Civil Procedure.

In our opinion this application must be granted. Section 153 of the Code of Civil Procedure lays down that a Court may, at any time, and on such terms as to costs or otherwise, as it may think fit, amend any defect or error in any proceedings in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding. It is clear from the facts of the case cited above that there was in the present case no order passed by the learned Subordinate Judge in his own hand-writing impleading the applicant Musaddi Lal as a plaintiff. In fact no such order could have been legally passed by the Court. All that was required of the Court under O. I, r. 8, Civil Procedure Code, was to have a notice of the institution of the suit sent at the expense of the plaintiff to all such persons whom the plaintiff wanted to implead either by personal service or where from the number of person or any other cause such service was not reasonably possible by public advertisement as the Court in each case might direct.

The applicant Musaddi Lal no doubt received notice that the Kathiawar and Ahmedabad Banking Corporation, Ltd., which was itself in liquidation, had filed a suit against the insolvent Dal Chand. Musaddi Lal did not think it necessary to appear in Court nor was he bound to do so. The costs of a suit brought by a plaintiff in his representative capacity cannot be ordered to be paid by any other person alleged to be interested in the suit on whose behalf the suit might have been brought and indeed the learned Subordinate Judge in dismissing the plaintiff's suit with costs made it clear that he was only referring to the plaintiff Bank, namely, the Kathiawar and Ahmedabad Banking Corporation, Ltd., (in liquidation), which was the sole plaintiff in the present suit although it was purported to have been filed in a representative capacity on behalf of all the scheduled creditors of the insolvent Dal Chand.

As pointed out by Sir Dinshaw Mulla in his standard Commentary on the Code of Civil Procedure, 10th Edn., pp. 465 and 466, the heading of a suit brought in a representative capacity under O. I, r. 8,

Civil Procedure Code, is to be as follows

"A B on behalf of himself and all other creditors of X Y..... ....Plaintiff

v.

C. D.... ....Defendant."

Had the learned Subordinate Judge in the present case adopted this heading in his judgment in the preparation of the decree no mistake would have arisen, and the applicant Musaddi Lal would not have been saddled with costs in respect of a suit which he never filed and to which he was no party. The object of instituting a representative suit under O. I, r. 8, Civil Procedure Code, is to create the bar of *res judicata* by reason of Explanation (6) to s. 11 of the Code of Civil Procedure [See *Kumaravelu Chettiar* v. *Ramaswami Ayyar* (1)]. But in any case the persons whom the plaintiff represents cannot be saddled with the costs of the suit if the plaintiff should fail to win his case. The learned Counsel for the opposite party referred to a Bench decision of the Allahabad High Court reported in *Saidogir* v. *Deo Dat Misir* (2), as also to another Bench decision of the same High Court reported as *Aziz Ullah* v. *Court of Wards, Shahjehanpur* (3).

In our opinion the facts of these cases are entirely different from those of the present case. The language of ss. 152 and 153, Civil Procedure Code, is wide enough to cover the correction of mistakes and errors in any proceeding in a suit. It has been held that extensive powers may be exercised under the provisions of ss. 151 and 152 and 153 of the Code and the question whether these extensive powers ought to be exercised in any given case is a matter purely within the discretion of the Court with reference to the facts of each particular case.

As was pointed out by a learned Judge of the Bombay High Court in *Bika Bai* v. *Hariba Raghuji* (4), in giving leave to the plaintiff under O. I, r. 8, Civil Procedure Code, for suing in a representative capacity, the Court should exercise caution before it makes persons liable for large sums who are not actually parties to a suit nor have personally authorised it, and that in drawing up an order for costs in a repesentative action it should be stated whether the representing party alone or all other members of the representative party were to bear the costs of the suit assuming there was juris liction in the particular case to make such an order.

In our opinion upon the facts of this particular case the learned Subordinate Judge neither intended nor had jurisdiction to saddle the applicant Musaddi Lal with the costs of the suit filed by the creditor Bank against the defendants. We consider that this is eminently a fit case in which we should exercise the powers vested in us under the provisions of ss. 151, 152 and 153 of the Code of Civil Procedure.

We, therefore, allow this application for revision with costs, set aside the order of the learned Additional District Judge, dated September 6, 1934, and grant the application for amendment of the decree dated March 16, 1933. The plaint filed by the Kathiawar and Ahmedabad Banking Corporation, Ltd., should also be amended and the names of Ram Narain, Musaddi Lal and *Rai Sahib* Phool Chand Rai wrongly entered therein should be removed from the array of plaintiffs. Their names should also be removed from the decree dated March 16, 1933. The judgment of March 16, however, in our opinion needs no amendment since the learned Subordinate Judge has throughout his judgment made reference only to the plaintiff Bank.

No orders are necessary on Civil Miscellaneous Applications Nos. 70 and 72 of 1935 as we have in disposing of this application for revision virtually granted the relief sought by it. The stay order dated January 22, 1935, is hereby vacated.

N. *Application allowed.*

(1) 143 Ind. Cas. 665; 60 I A 278; Ind. Rul. (1933) P C 176; 57 C L J 528; 37 C W N 853; (1933) M W N 758; 65 M L J 87; 38 L W 15; (1933) A L J 762; A I R 1933 P C 183; 35 Bom L R 827; 56 M 657 (P C.).

(2) 29 Ind. Cas. 50; 37 A 328; 13 A L J 449.

(3) 139 Ind. Cas 491; 4 A 800; (1932) A L J 784; A I R 1932 All. 587; Ind. Rul. (1932) All. 567

(4) 42 Ind. Cas. 9; 42 B 556; 19 Bom. L R 650.

LAHORE HIGH COURT

First Civil Appeal No. 1025 of 1927

March 7, 1934

BHIDE AND RANGI LAL, JJ.

SITA RAM—PLAINTIFF—APPELLANT

versus

Musammat MAHMUDI BEGAM AND ANOTHER—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 115, s 20—Contract for building construction—Before completion contract given to another—Original contractor suing for value of work done—Limitation—

Payment as a matter of grace and not towards admitted debt—Limitation, if saved.

A contract for the construction of a building was given to the plaintiff but before the completion of the work the contract was given to another person. The plaintiff sued for the value of the work already done :

Held, that Art. 115 of the Limitation Act applied and the period of three years began from the date of the breach of contract. *Mahomed Ghasita* v. *Siraj ud-din* (1), referred to.

Limitation is not saved by a payment made as a matter of grace and not towards any admitted debt

F. C. A. from the decree of the First Class Sub-Judge, Delhi, dated January 3, 1927.

Messrs. *J. N. Aggarwal* and *Nawal Kishore*, for the Appellant.

Messrs. *M. C. Mahajan* and *Ajit Parshad*, for the Respondents.

Bhide, J.—The plaintiff in this case had undertaken a contract on February 23, 1920, to build a bungalow for the defendants. The bungalow was to be finished within five months. But the work was progressing very slowly and the market rates for materials also having risen in the meantime, a fresh contract was entered into by the parties on May 21, 1920, the plaintiff thereby agreed to complete the building by December 31, 1920. Even thereafter, however, the progress of the work was found to be very unsatisfactory and the plaintiff was, therefore, asked by the defendants to stop the work about June, or July 1920 and the rest of the work was carried out through another contractor.

The present suit was instituted by the plaintiff on December 23, 1924, for recovery of Rs. 17,961-8-0 as the value of the work done by him and the price of the materials left by him on the spot when he was asked to stop the work together with interest at 1 per cent. per mensem. It may be noted here that no damages were claimed on account of breach of contract by the defendants. The plaintiff apparently realized that he could make no grievance in respect of his having been asked to stop the work.

The defendants denied the plaintiff's claim *in toto*, pleading *inter alia* that the plaintiff had already been overpaid and that his suit was barred by time. The learned Subordinate Judge who tried the suit has found in favour of the defendants on both these points and dismissed the suit. From this decision plaintiff has appealed.

The first important question in this case is that of limitation. The suit as framed seems to be clearly governed by Art. 115 of the First Schedule of the Indian Limitation Act (See *Muhammad Ghasita* v. *Siraj-ud-Din* (1), and the period of limitation was three years from the date of the breach of the contract. The plaintiff himself realized that his suit was *prima facie* barred by time and in para. 6 of the plaint he, therefore, relied on certain subsequent payments towards the debt alleged to have been made by the defendants which according to him saved limitation. These payments were stated to be as follows: "(*i*) Rs. 25 in November 1922, in cash; (*ii*) Rs. 25 in December 1922 by a cheque, (*iii*) Rs. 25 in August 1924 in cash, (*iv*) Rs. 25 in November and December 1924, in cash."

These payments with the exception of (2) have not been proved and the only point which requires decision in connection with the question of limitation is whether the payment of Rs. 25 made by a cheque in December 1922, can serve to bring the suit within limitation. According to s. 20 of the Indian Limitation Act, this payment cannot help the plaintiff unless it was made in part payment of the principal of the debt as alleged by him. The burden of proof lay on the plaintiff and after carefully considering the evidence on the record it seems to my mind perfectly clear that he has failed to discharge it. The cheque for Rs. 25 on which reliance has been placed has not been produced and there is no documentary evidence of any kind on the record to show that the cheque was in fact paid towards the principal of the debt now claimed by the plaintiff. Mumtaz Hasan Khan defendant has stated in the witness-box that he took some 'Bajri' and paint from the plaintiff and the cheque was given in payment of these articles. It was urged that this statement could not be believed as the plaintiff is not a dealer in these articles but the plaintiff is a contractor and I do not see that there is anything inherently improbable in his having supplied these articles from his stock. In any case the burden of proof was as stated already on the plaintiff and it was for him to establish that the payment was made towards the debt, which forms the subject-matter of this suit. The plaintiff is now claiming a sum of over rupees seventeen thousand and it seems *prima facie* difficult to believe that this petty payment of Rs. 25 could have been offered or accepted as

(1) 66 Ind. Cas. 490; A I R 1922 Lah. 198; 2 Lah. 376.

part payment of this debt if it were due. The plaintiff's explanation on this point was that he received Rs. 25 in 1922 as the defendant (Mumtaz Hasan Khan) suggested that he should carry on his expenses with the same and he would settle with him later and that he accepted Rs. 25 and Rs. 35 from him in 1924, *i. e.*, two years later with the same suggestion (*vide* p. 34 of the printed record). The explanation is, on the face, of it absurd.

The plaintiff is apparently undertaking works consisting thousands of rupees and it can scarcely be believed that such petty sums could have been offered to the plaintiff to enable him to carry on his expenses or that he would have been content to accept them as part payment of the debt now claimed by him. The learned Counsel for the plaintiff drew our attention to a letter written by defendant Mumtaz Hasan Khan to Khan Bahadur Pirzada Muhammad Hussain Khan marked as Ex. P. 6 which is printed at p. 84 of the paper-book and urged that the plaintiff had acknowledged his liability in this letter. But this letter instead of being an "acknowledgment" appears to me to be a clear repudiation of liability by the defendant Mumtaz Hasan Khan. Mumtaz Hasan Khan stated plainly in his letter that the plaintiff had not only been paid to the last farthing but that something was due from him. If he offered to pay him a little more it was only as a matter of grace and for the sake of the recommendation of Khan Bahadur Pirzada Muhammad Hussain Khan. I do not see how this letter can possibly be looked upon as an acknowledgment of any liability. The learned Counsel for the plaintiff drew our attention to *Mani Ram* v. *Roop Chand* (2), in which an admission as to the existence of a mutual open and current account was held to be sufficient for the purposes of s. 19 of the Indian Limitation Act but here there was no admission of the existence of any account or debt. As stated already, Mumtaz Hasan Khan said in the clearest possible language in this letter that nothing whatever was due to the plaintiff. This letter was written on February 3, 1922, *i. e.*, some ten months before the payment of Rs. 25 by cheque which is not relied on. There is nothing on the record to connect that payment with this letter but the utmost that can perhaps be said in favour of the plaintiff is that that may have been made to Mumtaz Hasan Khan in pursuance of his promise to pay a little more. But even if he did so the payment was evidently made as a matter of grace and not towards any admitted debt. Moreover, the plaintiff had to prove that it was a part payment of the debt and that any balance was expressly or impliedly admitted by the defendants to be still due, but there is no evidence on the record on this point also.

In my judgment the plaintiff has entirely failed to prove the requirements of s. 20 of the Indian Limitation Act in connection with the payment of Rs. 25 by cheque in December 1922 on which alone reliance was placed before us and in the circumstances his suit was rightly held to be barred by time. The learned Subordinate Judge has found on merits also that the plaintiff had failed to establish his belated claim but as the suit appears to be clearly time-barred, it would be useless to enter into any discussion of the merits of the plaintiff's claim. I would, therefore, dismiss this appeal with costs.

Rangi Lal, J.—I agree.

D. *Appeal dismissed.*

(2) 33 C 1047; 2 N L R 130; 50 I A 165; 4 C L J 94; 8 Bom. L R 501; 10 C W N 874; 16 M L J 300; 1 M L T 199; 3 A L J 525. (P. C).

OUDH CHIEF COURT

Second Civil Appeal No. 294 of 1933
March 6, 1935
ZIA-UL-HASAN, J.

NARPAT SINGH—DEFENDANT—APPELLANT
versus
JAGOO SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 102—Suit of nature cognizable by Small Cause Court—Defence, nature of, if makes any difference as to nature of suit—Suit for damages for cutting of and appropriation of fruit of, trees—Defence that land on which trees stood did not belong to plaintiffs—S. 102, if applies—Second appeal, if lies.

Section 102 of the Code of Civil Procedure contemplates a suit of the nature cognizable by Courts of Small Causes irrespective of what defence is put up in the case.

A suit for damages in regard to the cutting of two *seeshum* trees and appropriation of the fruit of mango trees is of a nature cognizable by a Court of Small Causes. The defence that the land on which the trees stood did not belong to the plaintiffs makes no difference so far as the nature of the suit is concerned. Section 102, Civil Procedure Code, applies to it and no second appeal is competent. *Allah Bux* v. *Nurul Hasan* (1), relied on, *Mirza Dilbar Husain* v. *Sadruddin Chowdhury* (2), distinguished.

S. C. A. against an order of the Sub-Judge of Fyzabad, dated July 20, 1933.

Mr. *H. D. Chandra*, for the Appellant.

Messrs. *Ali Hasan* and *Balbhaddar Sahai*, for the Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for damages in regard to the cutting of two *sheesham* trees and appropriation of the fruit of mango trees.

A preliminary objection is taken on behalf of the respondents that the suit being of a nature cognizable by a Court of Small Causes, no second appeal lies under s. 102 of the Code of Civil Procedure.

The preliminary objection is in my opinion sound. It cannot be denied that the suit was of a nature cognizable by a Court of Small Causes. It is contended on behalf of the appellant that as the suit involved a question of title to immovable property, the Small Cause Court had no jurisdiction to try it and, that therefore, s. 102 of the Code of Civil Procedure, does not apply to it. No doubt the appellant's contention was that the land on which the trees in question stood did not belong to the plaintiffs-respondents but so far as the nature of the suit is concerned, I do not think the defence makes any difference. The case of *Allah Bux* v. *Nural Hasan* (1), was very similar to the present case. In it the claim was for price of a fallen tree and as a question of title was involved, the plaint was returned for presentation to the ordinary Civil Court under s. 23 of the Provincial Small Cause Courts Act. It was held that the nature of the suit continued to be a Small Cause Court one in spite of the transfer of the case to the ordinary Civil Court and that, therefore, a second appeal was barred under s. 102 of the Code of Civil Procedure.

The learned Counsel for the appellant also sought to invoke the aid of Art. 35 (*ii*) of the Second Schedule of the Small Cause Courts Act and it was argued that as the facts alleged in the plaint showed as if the appellant was guilty of a criminal offence, the suit was not cognizable by a Small Cause Court. A similar plea was taken in the Calcutta case of *Mirza Dilbar Husain* v. *Sadruddin Chowdhury* (2), but it was held that the claim in that case, which was also for price of trees alleged to have been wrongfully cut away by the defendants and in which also arose a question of title to the land under the trees, was cognizable by the Small Cause Court and that, therefore, no second appeal lay under s. 102 of the Code of Civil Procedure.

It appears to me that s. 102 of the Code of Civil Procedure contemplates a suit of the nature cognizable by Courts of Small Causes irrespective of what defence is put up in the case. As noted above, it cannot be denied that so far as the relief claimed in the suit is concerned, the suit was of a nature cognizable by a Court of Small Causes and as such s. 102 of the Code of Civil Procedure applies to it.

The preliminary objection is allowed and the appeal dismissed with costs.

N. *Appeal dismissed.*

(1) 134 Ind. Cas. 251; (1931) A L J 967; Ind. Rul. 1931) All. 827.

(2) 77 Ind. Cas. 77; 27 C W N 469; A I R 1923 Cal. 568.

LAHORE HIGH COURT

Criminal Revision No. 1017 of 1934

July 23,1934

ADDISON, J.

EMPEROR—PROSECUTOR

versus

TAYAB AND OTHERS—ACCUSED—RESPONDENTS

Criminal trial — Sentence — Substantial but light sentence—Interference—Propriety— Practice (Lahore High Court).

Where the sentence though light is substantial, it is not the practice of the Lahore High Court to interfere with it.

Cr. R. reported by the Sessions Judge, Rawalpindi, dated July 16, 1934.

Facts.—The above-mentioned nine accused, on conviction by Sheikh Abdul Ali, exercising the powers of a Magistrate of the First Class, in the Rawalpindi district, were sentenced, by order dated May 31, 1934, under s. 412, Penal Code, to two years' rigorous imprisonment each; and a revision application has been put in for enhancement of the sentences.

The proceedings are forwarded for revision on the following grounds: The main grounds for enhancement are that the evidence on the file would have justified the finding that the nine accused were actually guilty of commiting a dacoity and should have been convicted of the major instead of the minor charge. However although I myself have a strong suspicion that the accused were in fact the actual dacoits, I do not think that the evidence on the file was sufficiently strong

to warrant their convictions under s. 395, as I have held in dealing with the appeals of these persons, and thus I do not think that this can be put forward as a ground for enhancement of the punishment. However the view of the law is clearly that s. 412 deals with a much more serious offence than s. 411 and the sentence of two years, which has been imposed, is not even equal to the maximum sentence under s. 411, and I thus think the sentences are much too lenient.

I accordingly forward the revision to the High Court with the recommendation that the sentences, on each of the accused be increased to four years' rigorous imprisonment.

Order.—The sentence, though on the light side, is substantial and in such cases it is not the practice of this Court to interfere. I therefore reject the revision petition and direct that the records be returned.

N. *Revision rejected.*

LAHORE HIGH COURT

Second Civil Appeal No. 2074 of 1931
February 27, 1934
ABDUL RASHID, J.

MUHAMMAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ALLAH DITTA AND OTHERS—DEFENDANTS AND PLAINTIFFS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 77, 100—Scope of s. 77—Suit against defendants as trespassers—Court finding them to be tenants-at-will—Suit becomes cognizable in Revenue Court only—Duty of Civil Court to return plaint for presentation before Collector—Passing of decree without observing provisions for ejectment—Decree, if can be registered as decree of Revenue Court.

All suits by a landlord to eject a tenant can only be instituted and heard and determined by a Revenue Court under s. 77 (3) (c) of the Punjab Tenancy Act. Although the defendants are described as trespassers in the plaint, when the Court comes to the conclusion that defendants were holding the land as tenants-at-will, and, therefore, could not claim that they were in adverse possession of the land as against the proprietors, the suit becomes one in which it is necessary to decide a matter which under s. 77 can only be heard and decided by a Revenue Court, and the Civil Court should then return the plaint for presentation to the Collector. *Nawab* v. *Azura* (2) and *Murid Hussain* v. *Fazal Ilahi* (3), relied on.

A definite procedure is prescribed for the ejectment of tenants under ss. 41, 42 and 43 of the Punjab Tenancy Act. If a decree is passed in favour of a plaintiff without observing the provisions regarding the ejectment of a tenant, it must be held that the tenant was prejudiced by the mistake as to jurisdiction and it would be inequitable in these circumstances to register the decree of the Civil Court as a decree of the Revenue Court.

S. C. A. from the decree of the District Judge, Jhelum, dated August 31, 1931.

Mr. *Devi Dayal*, for the Appellants.
Mr. *Mohsin Shah*, for the Respondents.

Judgment.—This appeal arises out of a suit for possession of certain land instituted by the plaintiffs-appellants against the defendants-respondents on August 8, 1929. The allegations in the plaint were that *Musammat* Mehran, widow of Shah Wali, was the occupancy tenant of the land in dispute, under s. 6 of the Tenancy Act, and that on her dying childless, the occupancy rights terminated and the land reverted to the plaintiffs and defendants Nos. 3 to 129, who were proprietors. The land was mutated in the name of the plaintiffs and defendants Nos. 3 to 129, and thereupon, defendants Nos. 1 and 2 brought a declaratory suit to establish their occupancy rights on the strength of a gift alleged to have been made by *Musammat* Mehran in their favour in 1918. That suit was dismissed, and the plaintiffs prayed in their plaint in the present suit that as defendants Nos. 1 and 2 had refused to transfer possession to them they must be treated as trespassers and a decree for possession of the land in dispute should be passed in their favour. Defendants Nos. 1 and 2, who are the only contesting defendants, stated *inter alia* that they were the proprietors of the land and that they had been in adverse possession for over 30 years. On January 27, 1931, the defendants presented an application stating that as they had been shown as tenants-at-will regarding the land in dispute the Civil Courts had no jurisdiction to entertain the suit. The trial Court decided that the plaintiffs were the proprietors of the land in dispute, and that the claim of the defendants as regards proprietorship was unsustainable. It also held that the latest *jamabandi* showed that defendants Nos. 1 and 2 were paying rent in cash, and were recorded as tenants-at-will. In view of this fact the trial Court came to the conclusion that the defendants never possessed the land adversely to the plaintiffs, and that the suit was, therefore, not barred by limitation. The trial Court further found that as the plaintiffs had brought this suit against the defendants who were described as trespassers, the Civil Courts had jurisdiction to entertain the suit. The defendants preferred an appeal

to the learned District Judge who held that according to the findings of the trial Court the defendants must be regarded as tenants-at-will; and that as the tenants-at-will could not be dispossessed by a Civil Court, the suit was one cognizable by a Revenue Court. On this preliminary point he accepted the appeal, and setting aside the decree of the trial Court returned the plaint for presentation to the proper Court. Against this order the plaintiffs have preferred this second appeal to this Court.

It was contended on behalf of the appellants that as the defendants were described as trespassers in the plaint and as they claimed to be the proprietors of the land, the suit was one between proprietors and trespassers and that the provisions of s. 77 of the Punjab Tenancy Act, were inapplicable and the Civil Courts had jurisdiction to entertain the suit. Reliance was placed on *Ghulam* v. *Jowala Singh* (1), where it was observed that if the defendant according to the allegations in the plaint is not a tenant of the plaintiff but a mere trespasser and claims to succeed to the land in dispute as the alleged collateral of the deceased occupancy tenant, the suit is not one which can be heard and determined only by a Revenue Court. It was further contended that in any case the District Judge should have adopted the procedure prescribed by s. 100 of the Punjab Tenancy Act, and ought to have submitted the records to the High Court so that the decree of the trial Court could be registered as a decree of the Revenue Court.

On behalf of the respondents it was submitted that proviso 1 to Sub-s. (3) of s. 77 of the Punjab Tenancy Act, was applicable to the facts of the present case. The trial Court when dealing with the question of limitation had held that the latest *jamabandi* showed that defendants Nos. 1 and 2 paid rent in cash and had been recorded as tenants-at-will of the plaintiffs. It was urged that in these circumstances the defendants must be regarded as tenants-at-will of the plaintiffs, and that it could not be said that they ever held the land adversely. It was maintained that as soon as the trial Court had arrived as this conclusion, it became necessary for it to decide a matter which under s. 77, could only be determined by a Revenue Court, and that at that time the Civil Court should have endorsed upon the plaint, the nature of the matter for decision and the particulars required by O. VII, r. 10 of the Civil Procedure Code, and ought to have returned the plaint for presentation to the Collector.

All suits by a landlord to eject a tenant can only be instituted and heard and determined by a Revenue Court under s. 77 (3) (*e*) of the Punjab Tenancy Act. The defendants no doubt originally pleaded that they were proprietors of the land in dispute but on the January 27, 1933, they adopted the alternative plea that they were recorded as tenants-at-will in the revenue records, and that the Civil Court had no jurisdiction to entertain the suit of the plaintiffs. As soon as the trial Court came to the conclusion that the defendants were holding the land as tenants-at-will, and therefore could not claim that they were in adverse possession of the land as against the proprietors, the suit became one in which it was necessary to decide a matter which under s. 77, could only be heard and decided by a Revenue Court. It was held in *Nawab* v. *Arura* (2), that where in a suit for possession on the allegation that the defendant was a trespasser, it becomes necessary, on the plea of the defendant that he was an occupancy tenant, to adjudicate as to the status of the defendants as occupancy tenant the jurisdiction of the Civil Court was ousted and the suit became one cognizable by a Revenue Court only. It was held by a Division Bench of this Court in *Murid Hussain* v. *Fazal Ilahi* (3) that when after having entertained the suit the Court reached a point in the trial at which it holds that the plaintiff is a tenant and is suing as such, the proviso to s. 77 takes effect, and makes it incumbent on the Court to return the plaint for presentation to the Collector. Similarly if the Court finds that the defendant is a tenant-at-will of the plaintiff, it must follow the procedure laid down in proviso (1) to s. 77 (3) of the Punjab Tenancy Act. I am, therefore, of the opinion that the learned District Judge has arrived at a correct conclusion, and that on the finding of the trial Court on Issue No. 3 the suit is one which involves a point which can be heard and decided by a Revenue Court only.

The provisions of s. 100 of the Punjab Tenancy Act, are not applicable to the present case. A definite procedure is prescribed for the ejectment of tenants

(1) 48 Ind. Cas. 363; A I R 1918 Lah. 36; 103 P R 1918; 179 P W R 1918; 130 P L R 1918.

(2) 94 Ind. Cas. 514; A I R 1926 Lah. 418.

(3) 69 Ind. Cas. 645; A I R 1922 Lah 173.

under ss. 41, 42 and 43 of the Punjab Tenancy Act. If a decree is passed in favour of a plaintiff without observing the provisions regarding the ejectment of a tenant, it must be held that the tenant was prejudiced by the mistake as to jurisdiction and it would be inequitable in these circumstances to register the decree of the Civil Court as a decree of the Revenue Court.

For the foregoing reasons I dismiss the appeal, but in view of all the circumstances of the case, I leave the parties to bear their own costs throughout.

N. *Appeal dismissed.*

PATNA HIGH COURT

Appeal from Original Decree No. 44 of 1931

February 1, 1935

FAZL ALI AND ROWLAND, JJ.

SITAL RAUT AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ADALAT RAUT AND OTHERS—PLAINTIFFS—RESPONDENTS

Specific Relief Act (I of 1877), s. 42—Suit for declaration that plaintiff is daughter's son of deceased—Plaintiff not pressing for relief that deeds executed by deceased's widows were not binding on him—Whether fatal to suit—Pleadings—Declaration under s. 42—Discretion of trial Court—When can be interfered with—Limitation Act (IX of 1908), s. 6, Sch. I, Arts. 125, 120—Suit for declaration after death of widows whose alienation is challenged—Limitation—Minority of plaintiff—Suit within three years of majority — Plaintiff, if entitled to benefit of s. 6.

Where the plaintiff is the person who will succeed to the estate of his maternal grandfather *S* and it cannot be seriously argued that the passing of the bulk of the estate into the hands of persons who had no right to it did not involve any danger to the estate, his suit should not be thrown out on the technical ground that the plaintiff while asking for a declaration about his being the son for the daughter of *S* did not press for the further relief that the deed of gift executed by the widows of *S* should be declared to be not binding on him. *Janakiammal* v. *Narayanasami Aiyar* (4), and *Saudagar Singh* v. *Pardip Narain Singh* (5), applied. [p. 246, col. 2.]

Nor can the suit be thrown out merely on the ground that the plaintiff had not stated in so many words in the plaint that the persons in possession, the descendants of the alienees, had either denied or were interested in denying his title. [p. 246, col. 1.]

The matter of granting a declaration claimed under s. 42 of the Specific Relief Act is one within the descretion of the Court. So once the trial Court has, in the exercise of the discretion vested in it under s. 42 of the Specific Relief Act, granted the declaration to the plaintiff under that section, the Appellate Court should not, as a rule, reverse the decree, unless it finds that the discretion has been improperly exercised. *Jaipal Kunwar* v. *Indar Bahadur Singh* (3) relied on. [p. 247, cols. 1 & 2.]

A suit for a declaration filed after the death of the widows whose alienation is challenged does not fall under Art. 125, Limitation Act, but is governed by Art. 120 under which Article read with s. 6, the plaintiff will be entitled to bring his suit within three years of his attaining majority. *Bhagwanta* v. *Sukhi* (6), and *Govinda Pillai* v. *Thayammal* (7), relied on. [p. 247 col. 2.]

A. from a decision of the Subordinate Judge of Champaran, dated December 23, 1930.

Messrs. *P. Dayal* and *K. P. Upadhaya*, for the Appellants.

Messrs. *S. C. Mazumdar* and *G. C. Das*, for the Respondents.

Fazl Ali, J.—The circumstances giving rise to this appeal are briefly these:

One Surujman Raut died leaving two widows *Musammat* Deorati and *Musammat* Markathi and in the year 1898 they executed two deeds of gift, one in favour of *Musammat* Dhanwati, a daughter of Surujman Raut by his first wife Deorati in respect of 5 *bighas* 7 *kathas* of land; and the other in favour of Udit Raut, an agnate of Surujman in respect of the remaining property left by Surujman. The 1st defendant in this action is *Musammat* Dhanwati, the daughter of Surujman. Defendants Nos. 2 to 4 are the descendants of a brother of Udit Raut and are admittedly in possession of the properties which had been transferred to Udit under one of the deeds of gift. It is common ground that *Musammat* Dhanwati married three persons one after another, their names being Lobhi, Budhan and Ramballi. The plaintiff's case in the plaint is that he is the son of *Musammat* Dhanwati by her second husband Budhan, that on the death of the two widows of Surujman *Musammat* Dhawati became entitled to those properties also which the former had transferred to Udit; that the failure on the part of *Musammat* Dhanwati to recover possession of the properties from Udit or defendants Nos. 2 to 4 amounted to an alienation and that he was entitled to recover possession of those properties from defendants Nos. 2 to 4. The plaint concludes with a prayer for the following reliefs among others:—

(1) That it may be determined by the Court that the property mentioned in Sch. I forms part of the estate of Surujman Raut, grandfather of the plaintiff; and that after the death of *Musammat* Markathi and *Musammat* Deorati, grandmothers of the plaintiff, defendants Nos. 2 to 4 had no right thereto and that defendant No. 1 had no right to allow defendants Nos. 2 to 4 to retain possession thereof.

(2) That on the adjudication of the above

facts, possession may be awarded to the plaintiffs over the property of defendant No. 1 by dispossessing defendants Nos. 2 to 4.

Defendant No. 1 supported the plaintiff but defendants Nos. 2 to 4 contended that he was not the son of *Musammat* Dhanwati; that he had no cause of action to bring the suit, that the suit was not maintainable and that it was barred by limitation.

At the trial the lawyers appearing for the parties made certain admissions; the Pleader for the plaintiff admitting that the plaintiff was not entitled to any of the reliefs prayed for except the declaration that he was the daughter's son of Surujman Raut and the Pleader for the defendants admitting that the right of defendants Nos. 2 to 4 under the deed of gift executed by the widows of Surujman in favour of Udit Raut legally came to an end with the death of the widows in 1906 and the position of defendants Nos. 2 to 4 since that time became that of trespassers who were liable to ejectment by the next reversioner on the death of defendant No. 1.

The learned Subordinate Judge held that the plaintiff was the son of *Musammat* Dhanwati and gave a declaration to that effect, overruling the defendants' objection that the plaintiff was not entitled to maintain a suit for such declaration.

Defendants Nos. 2 to 4 have now preferred this appeal to this Court from the decree of the Subordinate Judge and it is contended on their behalf—

(1) that the suit for a mere declaration is not maintainable;

(2) that the suit is barred by limitation, and

(3) that the Subordinate Judge has erred in holding that the plaintiff is the son of *Musammat* Dhanwati.

In contending that the suit is not maintainable, the learned Advocate for the appellant referred to s. 42 of the Specific Relief Act which runs as follows:

"Any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not, in such suit, ask for any further relief."

It is contended on behalf of the appellants that the present suit is not maintainable as in the plaint, there is neither any statement to the effect that the defendants had at any time denied the fact that the plaintiff was the son of *Musammat* Dhanwati nor has it been said in so many words that the defendants were interested in denying his title. Now, it is true that the plaint does not show that the defendants had ever denied the plaintiff's title, but there can be no doubt from the facts of the case which are set out in the plaint that defendants Nos. 2 to 4 were interested in denying the plaintiff's title and this is also apparent from the written statement of the defendants and from the attitude taken up by them during the trial. The learned Advocate for the appellant relies upon the observation made by this Court in *Nirmal Kumar* v. *Surjan Dusadh* (1), that in a declaratory suit a declaration claimed by the plaintiff will not be granted as a rule, unless it is shown that a cloud had been thrown on the title of the plaintiff before the suit was instituted. It is to be remembered that the plaintiff's case is that the bulk of Surujman's estate which should have been in the possession of his mother (who according to him is the rightful heir of Surujman) has passed into the hands of trespassers and it appears to me that on these allegations the plaintiff's suit was clearly maintainable. In *Mohesh Chandra Misra* v. *Nistarini Dassya* (2), a suit had been brought for a declaration that an *ex parte* decree and a sale in execution of that decree were fraudulent and it was argued on behalf of the defendants that there being no present danger to be averted by the declaration asked for and as no cloud had been thrown on the plaintiff's title before the institution of the suit, the suit was not maintainable. The learned Judges of the Calcutta High Court, however, rejected the contention, observing that it could not be suggested in the circumstances of the case that the defendant was not interested in denying the title of the plaintiff or that the plaintiffs had no business to bring him into Court. I am also not prepared to lay down any such rigid rule as I am asked to lay down by the learned Advocate for the appellant that in determining whether the defendant is interested in denying the plaintiff's title, the Court can, in no circumstances, take into consideration the pleading of the defendant. It is enough to point out that in *Jaipal Kunwar* v. *Indar Bahadur Singh* (3). their Lordships of the Privy Council did take into consideration the written statement of the defendant and while stating

(1) 123 Ind Cas. 630; A I R 1929 Pat 433; Ind. Rul. (1930) Pat 358; 9 Pat 425.

(2) 77 Ind. Cas. 576; 27 C W N 449; A I R 1923 Cal. 382.

(3) 26 A 238; 31 I A 67; 14 M L J 149; 7 O C 239; 8 C W N 465; 6 Bom L R 495; 8 Sar 625 (P. C.).

their reasons for refraining from interfering with the decision of the Courts in India observed:

"When the appellants came to file their written statement, and thereby to define their position and put their own interpretation upon what had gone before, there was no ambiguity left. It was made clear that they relied upon an alleged title in the first appellant inconsistent with any present or future rights of the respondent or any other reversionary heir."

In my opinion, therefore, the suit could not have been thrown out merely on the ground that the plaintiff had not stated in so many words in the plaint that defendants Nos. 2 to 4 had either denied or were interested in denying his title.

A more serious contention which was advanced on behalf of the appellant was based upon what may be conceded to be a settled rule in this country that the Courts will not, at the instance of a presumptive reversioner, grant declarations which may be unavailing or premature, and reliance is placed in this connection upon the decision of the Privy Council in *Janakiammal* v. *Narayanasami Aiyar* (4). In that case the plaintiff had brought a suit as a presumptive reversionary heir against a widow in possession of her husband's estate with the avowed object of protecting the property and made charges against the widow of waste, misappropriation and other wrong dealings with the property, but as none of those charges were established, the Privy Council held that he was not entitled to a declaration of his right as a reversionary heir even though his title had been disputed in the suit. Lord Shaw who delivered the judgment in that case observed:

"It follows from this state of the law that it is impossible to predicate at this moment who is the reversionary heir to the deceased proprietor. If the Court of law proceeded to make any declaration of right upon that subject, such a declaration would be subject to being rendered valueless by the development of events. It would not, after events had developed, be even of authority in regulating or declaring the rights of the present respondents as against any other claimant to the character of reversionary heir. A *priori*, accordingly a declaration of right granted at the present stage would appear to be stamped with something in the nature of futility," and later his Lordship observed:

"In their Lordships' opinion the plaintiff respondent was not entitled to such a declaration. Had waste of, or danger to, the estate been established, the title of the plaintiff to bring those matters before the Court in his representative capacity as a possible reversionary heir would have been allowed, and a decree following upon the finding of fact of such waste or danger would have followed. But the whole of that part of the case has failed. And in their Lordships' opinion the case must accordingly be treated as if the suit had been directed simpliciter to a declaration of the plaintiff's individual right."

This decision must be read with another decision of the Judicial Committee in *Saudagar Singh* v. *Pardip Narain Singh* (5), and in my opinion the principles laid down in neither of these cases seem to disentitle the plaintiff from getting the declaration which has been given in this particular case. In the present case there can be no doubt that the plaintiff is the person who would succeed to the estate of Surujman Raut on his mother's death and it cannot be seriously argued that the passing of the bulk of the estate into the hands of persons who had no right to it did not involve any danger to the estate. Indeed the learned Advocate for the appellant concedes that the plaintiff would have been entitled to a declaratory decree, if he had also asked for the further relief that the deed of gift executed by the two widows of Surujman Raut was not binding upon him. This relief was in fact substantially asked for by the plaintiff in his plaint and Issue No. 6 was framed by the trial Court to the following effect:—

Issue No. 6:—

"Is the deed of gift, dated March 1, 1898, executed by *Musammat* Deorati and Markathi genuine and valid and is it operative, after their death and binding on the plaintiff?"

It appears, however, that the learned Pleader for the plaintiff for some reason which is not apparent from the record admitted that the plaintiff was not entitled to any of the reliefs except the declaration that he was the daughter's son of Surujman Raut. I, find, however, that notwithstanding this admission the learned Subordinate Judge proceeded to deal with Issue No. 6, and decided it in favour of the plaintiff, though in discussing the issue he once more referred to the admission of the plaintiff's Pleader that he was not entitled to any relief except the declaration as to his being the son of *Musammat* Dhanwati and also referred to the admission of the defendants' Pleader that the defendants Nos. 2 to 4 had, after the death of the two widows of Surujman, become trespassers and were liable to ejectment by the next reversioners of defendant No. 1. It is contended by the learned Advocate for the respondents that it was in view of the latter admission made

(4) 37 Ind. Cas. 161; 39 M 634; 20 M L T 168; 31 M L J 225; 14 A L J 997; (1916) 2 M W N 188; 20 C W N 1323; 18 Bom L R 856; 24 C L J 309; 4 L W 530; 43 I A 207 (P. C.).

(5) 43 Ind. Cas. 484; 45 C 510; 4 P L W 52; 34 M L J 67; 23 M L T 31; 16 A L J 61; 7 L W 146; 27 C L J 186; 22 C W N 436; (1918) M W N 323; 20 Bom L R 509; 45 I A 21 (P. C.).

by the defendants' Pleader that the plaintiff's Pleader did not consider it necessary to press for any relief other than the one that has been granted by the learned Subordinate Judge. However that may be, in the peculiar circumstances of the case and particularly in view of the admission made by the Pleader for the defendants, it appears to me that the suit should not be thrown out on the technical ground that the plaintiff while asking for a declaration about his being the son of *Musammat* Dhanwati, did not press for the further relief that the deed of gift executed by the two widows of Surujman should be declared to be not binding upon him. There can be no doubt that if the plaintiff is the son of *Musammat* Dhanwati and if the property in question was that of Surujman Raut, the deed of gift executed by the two widows of Surujman would not be binding on the plaintiff. The learned Advocate for the appellant tried to argue that having regard to certain acts stated in the two deeds of gift, the properties which were the subject-matter of these deeds would appear to be not the exclusive properties of Surujman but also of Udit and Jata as members of the same joint family. However, plausible this case may be, it was not put forward by the defendants Nos. 2 to 4 in their written statement in which they did not traverse the allegation made by the plaintiff in his plaint that the properties which were the subject-matter of the gift were Surujman's properties, but on the other hand founded their title on the deed of gift in favour of Udit Raut, stating that the widows of Surujman were competent to execute it and the deed in question was valid and had conferred an absolute right to the properties in dispute upon defendants No. 2 to 4. In my opinion it cannot be said in the circumstances of the case that the declaration sought by the plaintiff was futile. It was also not premature, because according to the plaintiff the property was already in possession of persons who had no right to it and if the plaintiff had delayed the institution of the suit, the evidence which was available to him might have been lost and in any case if he instituted the suit after the death of *Musammat* Dhanwati, his mother as is suggested by the learned Advocate for the appellant he could not avail himself of the evidence of *Musammat* Dhanwati in proving that he is her son. It must also be remembered that the matter of granting a declaration claimed under s. 42 of the Specific Relief Act, is one within the discretion of the Court. So once the trial Court has in the exercise of the diseretion vested in it under s. 42 of the Specific Relief Act granted the declaration to the plaintiff under that section, the Appellate Court should not, as a rule, reverse the decree, unless it finds that the discretion has been improperly exercised. This principle was emphasised by the Judicial Committee in *Jaipal Kunwar* v. *Indar Bahadur Singh* (3), where their Lordships expressly stated that they were always slow to reverse the decision of the Courts below made in the deliberate exercise of a discretion entrusted to them by law. It appears to me, therefore, that the plaintiffs were entitled to maintain the suit and that this Court should not interfere with the decree passed by the Court below granting them the declaration which they had asked for.

The second question which was raised in this appeal was one of limitation and in this connection the learned Advocate for the appellant was at pains to point out that the suit could not escape the bar of limitation, because the plaintiff was not in existence at the time when the cause of action for the suit arose, that is to say, when the two widows of Surujman executed the deed of gift. It appears to me, however, that the question of limitation does not arise on the facts of the case. The learned Advocate for the appellant sought to apply Art. 125 of the Limitation to the present case but it does not clearly apply, because this suit has been instituted by the plaintiff after the death of *Musammat* Deorati and Markathi whose alienation is challenged in the suit. As was pointed out in *Bhagwanta* v. *Sukhi* (6), and as was also conceded by the learned Pleader for the appellants in the Court below, the Article which is properly applicable to the present case in Art. 120 of the Limitation Act. Now, in this particular case the right to sue could not have accrued to the plaintiff before his birth and, therefore, under Art. 120, read with s. 6 of the Limitation Act the plaintiff was clearly entitled to bring the suit within three years of his attaining majority. This view seems to be supported by *Bhagwanta* v. *Sukhi* (6) and *Govinda Pillai* v. *Thayammal* (7), in which it has been pointed out that a person who is a minor on the date of the alienation by a widow or is born subsequently during the life of the widow is entitled to the benefit of s. 6 of the Limitation Act. Besides in

(6) 22 A 33; A W N 1899, 159.
(7) 28 M 57; 14 M L J 209.

a number of cases it has been held that the starting point of limitation under Art. 120, is the date on which the circumstances entitling the plaintiff to have his interest guarded first came to his knowledge. In the plaint it is stated that the plaintiff came to know, when he attained majority, that defendants Nos. 2 to 4 were in possession of the bulk of the estate of Surujman Raut and in any case it is evident that he could not have come to know those facts before his birth. It is clear, therefore, that he was entitled to bring the suit within three years of his attaining majority. As to when he attained majority I find that the evidence given by the plaintiff as to his age and the date of his birth is almost one-sided and I have no doubt that the plaintiff's version on this point must be accepted. As the learned Subordinate Judge points out while the plaintiff has stated that he was born in the month of *Magh* 1336 *Fasli Sambat* the defendants have not suggested any other date of his birth in their evidence.

The only point which remains to be considered is the question of fact, namely, whether the plaintiff is or is not the son of *Musammat* Dhanwati. In order to prove his case the plaintiff has examined not only *Musammat* Dhanwati herself, but also a number of witnesses belonging to the village to which his father Budhan admittedly belonged and their evidence apparently found favour with the learned Subordinate Judge. As a rule this Court is slow to interfere with the decision of the trial Court when it is based upon the oral evidence of witnesses who appeared before it to give their evidence, but in this particular case we have been taken through the entire evidence on the record and we are inclined to agree with the Subordinate Judge's view that the evidence adduced on behalf of the plaintiff is much superior to that adduced on behalf of the defendants. In the first place one cannot overlook the fact that the plaintiff's case is supported by *Musammat* Dhanwati herself. *Musammat* Dhanwati's evidence has been criticised on the ground that she has made one or two statements on minor points which seem to be inaccurate and that her statement in cross-examination that she has two young sons living with her is not supported by any other evidence. The alleged inaccuracies, however, are so trivial that it will not serve any useful purpose to discuss them and the matter of the existence of two sons is irrelevant to the present enquiry. It may also be observed that although *Musammat* Dhanwati's deposition was recorded on December 19, defendant No. 2 who gave his evidence on December 20, did not contradict Dhanwati on the question of her living with two other sons. It is argued that if the plaintiff had been the son of Dhanwati he would have accompanied her when she went to live with Ramballi whom she married after the death of Budhan. This argument though it deserves consideration does not appear to me to be decisive. The plaintiff was at least eight or nine years old by that time and Rambaran who appears to have been an agnate of Budhan and who is said to have taken him back to his father's village may not have liked the boy to live with his mother after she had re-married. Besides, the evidence discloses the fact that Dhanwati soon returned to Piparpatti and began to live with the plaintiff.

I may here refer to two admissions made by D. W. No. 4 Jang Bahadur Raut who is a resident of Piparpatti where Budhan lived and where the plaintiff still lives and who is the only witness among those examined by the defendants who was competent to make a statement about Budhan and the plaintiff. This witness has stated in his cross-examination that the plaintiff was born after Budhan had married defendant No. 1. If this statement is true, it makes the case of the defendant that the plaintiff is the son of Budhan by his former wife Murti, highly improbable even if we accept the statement made by this witness which is entirely opposed to the statement made by the other witnesses that Budhan married Dhanwati during the lifetime of Murti. As a matter of fact it was admitted by D. W. No. 1 that Budhan married Dhanwati one year after Murti's death. The other statement made by this witness which seems to me to support strongly the case of the plaintiff is that the plaintiff was 18 or 19 years of age at the time when the document Ex. B was executed by Ramnarain Bajpai, the first witness for the plaintiff. This document was executed in the year 1925 and if the plaintiff was 18 or 19 years old at that time he must have been born sometime about 1907. Now a reference to Ex. A which is a plaint filed by *Musammat* Dhanwati in 1907 shows that it was signed by Budhan on her behalf as her husband. This would go to show that the plaintiff was born at the time when Dhanwati was the wife of Budhan. It appears to me, therefore, that the finding of the Subordinate Judge that the plaintiff is the son

of Dhanwati must be upheld and the appeal must, therefore, be dismissed with costs.

Rowland, J.—I agree.

N. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Civil Revision Application No. 502 of 1934
December 20, 1934
BENNET, J.
RAM SARAN DAS—PLAINTIFF —APPLICANT
versus
MALLU AND OTHERS—DEFENDANTS —OPPOSITE PARTIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XVII, r. 2—Finding as to sufficient cause—Necessity of, under O. IX, r. 13—Case fixed for final hearing—Pleader applying for adjournment and then stating 'no instructions'—Dismissal—Application by way of restoration under O. XVII, r. 2—Whether lies—Remedy of defendant.

Under O. IX, r. 13, Civil Procedure Code, it is necessary that the Court should find that defendants were prevented by any sufficient cause from appearing when the suit was called on for hearing.

Where on the date fixed for final hearing of a suit, the pleader for defendants asked for an adjournment which was refused and he then stated he had no instructions and the case was heard and decided:

Held, that as the pleader was engaged in making an application it must be held that the defendants did appear on the date in question and hence no application by way of restoration under O. XVII, r. 2 lay and that the only remedy which defendants had against the decree was by way of appeal.

C. R. App. against the order of the Munsif, Moradabad, dated August 11, 1934.

Mr. *S. N. Seth*, for the Applicant.

Mr. *M. L. Chaturvedi*, for the Opposite Parties.

Judgment.—This is an application in revision by a plaintiff against an order of a learned Munsif restoring a suit which was dismissed *ex-parte*. The defendants made an affidavit alleging various grounds, but the Munsif has merely recorded:

"The defendants' Counsel had then stated that he had no instructions from his client. Ground is consequently sufficient."

The Munsif has not recorded any reason why the defendants' Counsel had no instructions or why the defendants were absent. Under O. IX, r. 13, it is necessary that the Munsif should find that defendants were prevented by any sufficient cause from appearing when the suit was called on for hearing.

Another point was taken in ground No. 1 of the revision that the Court below had no jurisdiction to set aside an *ex parte* decree and the remedy open to the defendants was only an appeal against the decree as it stood. The defendants entered an appearance in the suit and filed a written statement. Therefore the case did not come *prima facie* under O. IX, r. 6. The date in question on which defendants were held to have failed to appear was the date which was fixed for final hearing in the suit. It was therefore, a date which came under O. XVII, r. 2 as a date to which the hearing of the suit had been adjourned. It is shown from the order-sheet that on that date the pleader for defendants asked for an adjournment which was refused and he then stated that he had no instructions. In the Explanation to r. 2 of O. XVII it is stated that no party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making application. The pleader for defendants was engaged in making an application and therefore I must hold that the defendants did appear on the date in question. All that happened was that they did not produce their evidence and the case was heard and decided. No application by way of restoration under O. XVIII, r. 2, which applies the provisions of O. IX, therefore lies as the defendants must be held to have actually appeared. The order therefore of the lower Court allowing restoration must be set aside. The only remedy which the defendants had against the decree was by way of appeal.

For these reasons I set aside the order of the lower Court and allow this civil revision with costs.

N. *Revision allowed.*

BOMBAY HIGH COURT

Second Civil Appeal No. 1201 of 1929
February 15, 1934
N. J. WADIA, J.
KRISHNARAO RAGHUNATH YARDI —APPELLANT
versus
GHAMON GHAMA *Valad* CHIMA —RESPONDENT

Evidence Act (I of 1872), s. 116—Landlord and tenant—Estoppel—Tenant, if should be put in actual possession for operation of estoppel—Tenant, when can deny landlord's title—Tenant in possession under kabuliyat*—Suit for rent—Landlord's title, if can be denied on ground of* benami*—Civil Procedure Code (Act V of 1908), s. 11, O. XXI, rr. 103, 98, 99, 101—Suit under—Scope of—Fraud—Charge of—Substitution of fraud different from one alleged—Whether can be allowed—*Res judicata*—Title to particular lands not directly and substantially in issue in former suit—Subsequent suit, if barred.*

For the purposes of s. 116 of the Evidence Act, it is not necessary that the tenant should have been actually put into possession by the landlord. It is sufficient if, being already in possession, he passes a rent-note to the landlord acknowledging that a new tenancy has arisen. *Shankar Nana Patil* v. *Jagannath Muthuralal* (3) and *Nagindas Sankalchand* v. *Bapalal Purshottam* (4), relied on. [p. 252, col. 1.]

A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. A tenant who wishes to dispute his landlord's title must not only see that the tenancy has come to an end, but that the possession which was in him as a tenant has been surrendered. A tenant who holds over and remains in possession cannot be allowed to use that possession as a lever to support a case in which he denies the landlord's title. *Bilas Kunwar* v. *Desraj Ranjit Singh* (10) and *Ekoba* v. *Dayaram* (11), relied on. [p. 254, col. 1.]

A person executing a *kabuliyat* and obtaining possession of lands as tenant under the *kabuliyat* is estopped from denying the title or seisin of the grantor in a suit for rent on the ground that he is only the *benamidar* of some other person. *Prabhat Chandra Chatterji* v. *Bijoy Chand Mahatap* (16), followed. [p 255, col. 2.]

The scope of a suit under O. XXI, r. 103 of the Civil Procedure Code, filed to contest an order made under either r. 98, or r. 99 or r. 101, is not the determination of the mere question of possession of the parties concerned but the establishment of the *right* or *title* by which the plaintiff claims the present possession of the property. *Unni Moidin* v. *Pocker* (5), relied on. [p. 253, col. 1.]

A charge of fraud must be substantially proved as laid, and when one kind of fraud has been charged, another kind of fraud cannot, on failure of proof, be substituted for it. A party cannot set up a fraud to which he has himself been a party in order to defeat the opposite party's claim. *Abdool Hoosein Zenail Abadin* v. *Turner* (1) and *Sidlingappa* v. *Hirasi* (2), referred to. [p. 252, col. 1.]

Where the plaintiff who was in possession of lands in virtue of sale-deeds in favour of his predecessor in-title, filed a suit in respect of the lands and it was held therein that the sale-deeds were bogus and that the real owners were other persons, and he subsequently brought a suit for possession of other lands which he alleged to have leased to the defendants who contended that the plaintiff's title to the lands was extinguished by the decision in the former suit:

Held, that the plaintiff's title to these lands was not directly and substantially in issue in the former suit and that his claim as real owner was not barred by *res judicata*. [p. 253, col. 2.]

Held, also that the tenants-defendants were estopped from denying the plaintiff's title as landlord. [*ibid.*]

[Case-law discussed.]

S. C. A. from a decision of the First Class Sub-Judge, Nasik, in Appeal No. 107 of 1928.

Messrs. *H. C. Coyajee*, *S. Y. Abhyankar* and *S. R. Parulekar*, for the Appellant.

Mr. *A. G. Desai*, for the Respondent.

Judgment.—These appeals which have been heard together arise out of two Suits Nos. 84 and 85 of 1925 filed by the appellant against the respondents to recover possession of certain lands leased to them by him. The lands belonged originally to two brothers Gopal and Martand, sons of one Girmaji Yardi and distant cousins of the appellant. Suit No. 84 related to the lands which had originally belonged to Martand, and Suit No. 85 to those which had belonged to Gopal. The history of the lands in the two suits is different, and it is therefore necessary to state the facts with regard to each separately.

Martand had mortgaged his entire separated half share to his brother Gopal on October 27, 1896, by a possessory mortgage. Within a month after this, on November 18, 1896, he sold his rights in the lands to the appellant's brother Ganesh Raghunath Yardi by a sale-deed (Ex. 84). In March 1901, Ganesh mortgaged the lands to respondent No. 1 and his brother Sadu and to Rakhma, the father of respondent No. 2, with possession, for Rs. 1,000. In 1910 he instituted Suit No. 378 of 1910 against the respondents to redeem the mortgage of March 1901. The appellant and his brother Govindrao were co-defendants in that suit. During the pendency of the suit Ganesh died and the appellant and his brother Govindrao were substituted as plaintiffs. On July 4, 1912, a decree was passed by which the plaintiffs in that suit (*i. e.*, the present appellant and his brother) had to pay Rs. 625 and costs to the mortgagees (*i. e.*, the present respondents) within six months, and the respondents were ordered to restore possession of the lands to the appellant and Govindrao. The decretal amount was paid off by the plaintiffs before the stipulated period and the defendants transferred possession by passing the rent-note (Ex. 25) to the plaintiff, *i. e.*, the present appellant on December 16, 1912. That rent-note forms the basis of Suit No. 84.

Gopal died some time before 1900 and the lands belonging to him were, after his death, mortgaged with possession by his mother Laxmibai and his widow Sitabai to two persons Bhawani *valad* Punjaji Pachora and Vithu *valad* Raoji Lonare on January 16, 1900. In November of the same year Laxmibai and Sitabai sold the whole of Gopal's share to the appellant's brother Ganesh by a sale-deed (Ex. 81). Ganesh filed Suit No. 377 of 1910 against the heirs of the original mortgagees for redemption. He died during the pendency of the suit, and the appellant and his brother, who had been on the record as defendants, were substituted as plaintiffs. The suit ended

in a compromise decree passed on June 5, 1912, by which the appellant and his brother Govindrao were ordered to pay to the mortgagees Rs. 1,275 and costs and future interest by yearly instalments of Rs. 150 each, and it was provided that the mortgagees were to remain in possession as tenants of the plaintiffs on a yearly rental of Rs. 150, and that the amount payable to them by the plaintiffs under the decree should be satisfied out of the amount of the rent. On September 2, 1913, the plaintiffs in that suit paid off the full amount due from them under the decree to the mortgagees, and the latter delivered possession of the lands to the plaintiffs.

On January 10, 1914, the plaintiff leased the lands for ten years to the present respondents by a rent-note (Ex. 22) which forms the basis of suit No. 85. Prior to this, however, in 1913, Laxmibai and Sitabai had brought Suit No. 430 of 1913 against the original mortgagees on a rent-note passed to them in 1910. There was a compromise decree on February 9, 1914, by which the two women were allowed to get possession, and on April 21, 1914, they are said to have obtained actual possession. On December 27, 1914, they leased these lands to a stranger for 11 months on a rent-note. The appellant, who had already leased the lands to the respondents on January 10, 1914, filed two miscellaneous applications (Nos. 56 and 57 of 1914) under O. XXI, r. 100, Civil Procedure Code, against Laxmibai and Sitabai, complaining that he had been in possession through his tenant respondent No. 1, and that the possession of his tenant had been disturbed. The Court on January 22, 1915, ordered possession to be restored to the appellant, and it was actually restored on June 24, 1915, and respondent No. 1 passed a receipt for the lands on behalf of the appellant. The respondents contested both the suits on the ground that the lands had belonged really to Laxmibai and Sitabai, the mother and widow of Gopal, and that the respondents had been cultivating them from these two women for 25 to 30 years. They admitted having passed the suit rent-notes, but alleged that they had done so as a result of the fraudulent representation of the appellant that he was taking the rent-notes in the names of the real owners Laxmibai and Sitabai. They further alleged that the rights, if any, acquired by the appellant under the rent-notes had become extinguished by the decision in Suit No. 1142 of 1919, and that that decision operated as *res judicata* so far as these suits were concerned. They also alleged that after the expiry of the period of these rent-notes they had passed rent-notes for the suit lands to the real owners Laxmibai and Sitabai.

The trial Court found that the respondents had failed to prove that the appellant had obtained the rent-notes from them by fraud. It also held that the appellant was not barred from suing on the rent-notes by the decision in suit No. 1142 of 1919, and the appeal arising out of it, that the suits were not barred as *res judicata*, and that the respondents were stopped under s. 116, Evidence Act, from denying the appellant's title. It therefore decreed the plaintiff's suits. In appeal the First Class Subordinate Judge of Nasik with appellate powers held that the respondents had not been let into possession of the lands by the appellant under the two rent-notes (Exs. 22 and 25), that these rent-notes had really been taken by the appellant for Laxmibi and Sitabai, that respondents were not estopped from denying the appellant's title and setting up that of Laxmibai and Sitabai, and that the appellant's title had been extinguished by the decree in Suit No. 1142 of 1919. He, therefore, reversed the decrees of the trial Court and dismissed the plaintiff's suits. The respondents failed completely to substantiate the allegation of fraud and misrepresentation made by them. That allegation is absolutely inconsistent with the conduct of respondent No. 1 in connection with the proceedings arising out of applications Nos. 56 and 57 of 1914 made by the appellant against Laxmibai and Sitabai. In those applications the appellant had claimed that he was the owner of the lands and in possession of them through his tenant. Respondent No. 1 Ghama was examined in connection with the applications on January 9, 1915, (Ex. 99) and stated that the lands were at the time in possession of the appellant and that he was cultivating them as the appellant's tenant. It is clear that if respondent No. 1 had passed the rent-notes to the appellant under the impression that he was passing them in favour of Laxmibi and Sitabai, he would never have supported the appellant in these applications against Laxmibai and Sitabai, nor would he have made the statements referred to above expressly admitting that the appellant was his landlord.

The trial Court found that no fraud had been proved, and that the respondents had

passed the rent-notes to the appellant under the *bona fide* belief that he was the owner. The Appellate Court agreed that the action of the plaintiff was not fraudulent in obtaining the rent-notes in his own name, but it found that a different kind of fraud had been committed. It held that the action of the plaintiff and defendants was fraudulent in executing the rent-note of January 10, 1914, in the name of the plaintiff, who was evidently a *benamidar* of the two ladies, even when they (*i. e.*, the plaintiff and defendants) knew that the real beneficial owners, *viz.*, the two ladies, had already got possession of the lands and had leased them to the representatives of the mortgagors. This was a kind of fraud which the defendants themselves had never alleged. According to the Appellate Court, the defendants-respondents were themselves parties to the fraud.

It has been held by the Privy Council in *Abdool Hoosein Zenail Abadin* v. *Turner* (1) that a charge of fraud must be substantially proved as laid, and that when one kind of fraud has been charged, another kind of fraud cannot, on failure of proof, be substituted for it. In the present case not merely was the fraud, which the Appellate Court has held proved, not alleged by the respondents in their pleadings, but it was one which, even if it had been alleged in their pleadings, they could have taken advantage of. They could not set up a fraud to which they had themselves been parties in order to defeat the plaintiff's claim: *Sidlingappa* v. *Hirasa* (2). There is, however, no evidence to support the Appellate Court's finding that there was any collusion between the appellant and the respondents to practise a fraud on Laximibai and Sitabai.

There is evidence to show that the respondents were let into possession of the lands in both the suits by the appellant. With regard to the lands which had belonged originally to Gopal, the respondents had not been in possession prior to the date of their lease, *i. e.*, January 10, 1914. The lands had been in the possession of the mortgagees, Bhawani *walad* Punjaji Puchora and Vithu V. Raoji Lonare, from January 1900. Laxmibai and Sitabai had obtained possession of the lands from them in suits Nos. 430 and 431 of 1913 and had leased them to a stranger. The respondents' connection with the lands began with the lease granted to them by the appellant. It appears that they had been put in possession by him. Their possession was disturbed by Laxmibai and Sitabai and the appellant had to apply to the Court under O. XXI. r. 100 in miscellaneous applications Nos. 56 and 57 of 1914. He obtained possession, the lands being actually handed over to respondent No. 1 as his tenant: Laxmibai and Sitabai filed suit No. 65 of 1915 against the appellant and respondent No. 1 to get the orders passed in miscellaneous applications Nos. 56 and 57 of 1914 set aside, but the suit was dismissed. During the course of these proceeding respondent No. 1 was examined as a witness and he stated on January 9, 1915, that the lands were at the time in the possession of the appellant, and that he, as a tenant of the appellant, was in possession of them on his behalf. There can be no room for doubt, therefore, that with regard to these lands the respondents were let into possession by the appellant, and the Appellate Court's finding on this point that

"the defendant thus got possession of the lansd in suit No. 85 of 1915 through Court on June 24, 1915, under the *kabaja pavati*, Ex. 31 and 32 in suit No. 95 of 1915, and not on January 10, 1914, under the rent-note,"

is difficult to understand. The possession was restored by the Court on June 24, 1915, because it found that the appellant's tenant had been in possession under the rent-note of January 10, 1914, and that possession had been wrongly disturbed.

With regard to the land of Martand's share the respondents had been in possession as mortgagees from Ganesh from 1901. In 1912, in suit No. 378 of 1910 they were ordered to hand over possession to the appellant on the latter paying to them a sum of Rs. 625 which was found due. This amount was paid and the respondents, instead of handing over actual possession, passed to the appellant the rent-note in suit (Ex. 25) taking the land on lease from him for ten years.

For the purposes of s. 116, Evidence Act, it is not necessary that the tenant should have been actually put into possession by the landlord. It is sufficient if, being already in possession, he passes a rent-note to the landlord acknowledging that a new tenancy has arisen. In *Shankar Nana Patil* v. *Jagannath Mathuralal* (3), it was held by a Division Bench of this Court that

(1) 14 I A 111; 11 B 620; 5 Sar. 25; 11 Ind. Jur. 352 (P.C.)

(2) 31 B 405; 9 Bom. L R 542.

(3) 111 Ind. Cas. 911; 30 Bom. L R 741; A I R 1928 Bom. 265.

once the relation of landlord and tenant was established between the parties, the tenant was estopped from denying the landlord's title under s. 116, Evidence Act. It was not necessary that the tenant should be put into possession by the landlord for the estoppel to arise. Where a tenant was already in possession before a new tenancy began, the pertinent question to ask under s. 116 was not whether the tenant had been let into possession by the landlord, but whether the new tenancy had arisen. This view was followed in *Nagindas Sankalchand* v. *Bapalal Purshottam* (4).

The conduct of the parties in connection with miscellaneous applications Nos. 56 and 57 of 1914, and in suit No. 65 of 1915 which arose out of them, renders it impossible to hold that the appellant could have taken the rent-notes as a *benamidar* for Laxmibai and Sitabai or that the respondents could have been under that impression. Both the appellant and the respondents strenuously contested the claim of Laxmibai and Sitabai in 1915, very soon after the respondents' tenancy had commenced, and asserted the appellant's ownership over the lands. In both the applications the appellant said that he was the owner of the lands and in possession of them as owner through his tenant. Respondent No. 1 made a similar statement. It has been argued by Mr. Desai for the respondents that the proceedings in these two applications and in suit No. 65 of 1915 were concerned only with the question of the present possession of the lands and did not relate to the question of title. This, however, is not correct. From the applications and the order passed on them, and from the plaint in suit No. 65 of 1915, it is clear that what the parties were fighting about was the question of the title to the lands and not merely the question of present possession. It was held in *Unni Moidin* v. *Pocker* (5), that the scope of a suit under O. XXI, r. 103, Civil Procedure Code, filed to contest an order made under either r. 98, or r. 99 or r. 101, is not the determination of the mere question of possession of the parties concerned but the establishment of the right or title by which the plaintiff claims the present possession of the property. It is true that these proceedings and the suit related only to the lands of Gopal's share and had nothing to do with the lands in suit No. 84: but the respondents were holding the lands in both the suits at the time from the appellant, and it cannot be believed that when they contested so strenuously the claims of Laxmibai and Sitabai to the one set of lands, and denied that she was the real owner, they could have accepted her claim with regard to the other set of lands. In both the suits, therefore, the defendants (*i. e.*, the respondents) must be held to have been let into possession by the appellant and to have passed the suit rent-notes to him knowing that they were being passed in the appellant's own name, and believing that he was the real owner.

The question then arises whether the respondent can deny the appellant's title, or whether they are prevented from doing so under s. 116, Evidence Act. It has been contended for the respondents that in Suit No. 1142 of 1919 it was held that the sale-deeds (Exs. 81 and 84) passed by Martand, Laxmibai and Sitabai to Ganesh in 1896 and 1900, on which the appellant's title is based, were bogus, and passed merely to save the property from creditors. The suit was decided in 1920 and in appeal the decision of the lower Court was confirmed in August 1923. It has been argued that as a result of the finding in that suit the appellant was held to be only a *benamidar* and had lost his title to the lands as against the two women, and that subsequent to the expiry of the leases now sued on, the respondents had attorned to the real owners and taken the suit lands on lease from them. The question of the appellant's title to these lands was, therefore, *res judicata* as between him and the two women, and as the respondents now claim through the two women, it was *res judicata* between the appellant and the respondents also. It is, therefore, contended that as the appellant's title had been extinguished by that decision the respondents were not estopped from denying it. Mr. Desai for the respondents has relied on the rulings in *Shravan Shahasing Patil* v. *Fattu* (6), *Purshottam Yeshwant* v. *Vishnu Garathe Dalvi* (7), and *Chandri* v. *Daji Bhau* (8), as showing that where on the expiration of a tenancy, the tenant continues in possession without executing a fresh rent-note to the landlord, or without paying rent, the possession by the

(4) 125 Ind. Cas. 695; 54 B 487; 32 Bom. L R 692; Ind. Rul, (1830) Bom. 359; A I R 1930 Bom. 395.

(5) 60 Ind. Cas. 109; 44 M 227; (1920) M W N 698; 12 L W 598; 39 M L J 626; 28 M L T 342.

(6) 98 Ind. Cas. 911; 28 Bom. L R 1357.

(7) 105 Ind. Cas. 859; 29 Bom. L R 1332.

(8) 24 B 504; 2 Bom. L R 491.

tenant becomes adverse to the landlord. But it is a well-established principle that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. In *Vasudev Daji* v. *Babaji Ranu* (9), it was held that if the existence of a tenancy be established by the fact of the tenant's payment of rent to his landlord or otherwise, the tenant cannot ordinarily dispute the title of his landlord in a suit brought against him for recovery of possession. He must first give up possession and then, if he has any title *aliunde*, that title may be tried in a suit of ejectment against the landlord. It was held in *Bilas Kunwar* v. *Desraj Ranjit Singh* (10), that a tenant who has been let into possession cannot deny his landlord's title, however, defective it may be so long as he has not openly restored possession by surrender to his landlord. In *Ekoba* v. *Dayaram* (11), in which the decision in *Bilas Kunwar* v. *Desraj Ranjit Singh* (10), was followed, Macleod, C. J., held that a tenant who wishes to dispute his landlord's title must not only see that the tenancy has come to an end, but that the possession which was in him as a tenant has been surrendered. A tenant who holds over and remains in possession cannot be allowed to use that possession as a lever to support a case in which he denies the landlord's title.

It is contended for the respondents, however, that s. 116, Evidence Act, does not prevent them from showing that subsequent to the commencement of the tenancy, the title of the landlord has been extinguished. In support of this contention reliance is placed on the ruling in *Nakchedi Bhagat* v. *Nakchedi Misir* (12), where it was held that the rule of law which prohibits a mortgagee or tenant from disputing his mortgagor's or landlord's title does not bar the mortgagee or tenant from showing that the title of his mortgagor or landlord under which he entered has determined.

According to the respondents the appellant's title to the suit lands was extinguished by the decision in Suit No. 1142 of 1919. To settle this point it is necessary to see what Suit No. 1142 of 1919 really decided. The suit had been filed by the appellant against one Anant Raoji Kavale to recover certain lands other than the suit lands which Kavale had purchased from Laxmibai and Sitabai to whom they had been sold by Ganesh's widow Sarasvatibai. Laxmibai and Sitabai were parties to the suit as defendants but did not contest it either at the trial or in appeal. It was held by both the Courts that the sale-deeds passed to Ganesh by Martand, Laxmibai and Sitabai, were bogus and intended only to save the property from creditors. There was no specific issue on the point, but it may be conceded that the nature of the sale-deeds was in issue in substance in that suit. That suit was not, however, concerned with the lands which are the subject-matter of the present suits. What the learned Judge in Suit No. 1142 of 1919 decided was that the sale-deeds to Ganesh in 1896 and 1900 were bogus and intended only to defraud creditors, and that the real ownership of the lands remained with Laxmibai and Sitabai. This finding, however, would not necessarily prove that the appellant's title to the lands involved in the present suits has been extinguished. The sale deeds were passed 20 to 24 years before suit No. 1142 of 1919. The appellant's title to these lands was not the subject-matter of that suit and it is possible that he may have acquired title to the suit lands subsequent to the years 1896 and 1900 by adverse possession or in other ways.

With regard to Gopal's land, in Suit No. 85 he had openly denied the title of Laxmibai and Sitabai in 1915 by his application under O. XXI, r. 100, Civil Procedure Code. His claim had been upheld, and under O. XXI, r. 103, Laxmibai and Sitabai had to establish their right within one year. They filed Suit No. 65 of 1915 to do so, but for some reason the suit was withdrawn and allowed to be dismissed. It is doubtful whether they could now establish their title to these lands against the appellant. Even with regard to the land in Suit No. 84, the appellant may be able to establish a valid title against them. His title to these lands was not in issue in Suit No. 1142 of 1919, and could not be and was not decided in that suit. The rulings in *Ananta Balacharya* v. *Damodar Makund* (13), and *Kedar Nath Singh* v. *Sheo Shankar* (14), which have

(9) 8 B H C R 175.
(10) 30 Ind. Cas. 299; 37 A 557; 19 C W N 1207; 29 M L J 335; 2 L W 830; 18 M L T 248; 13 A L J 991; 17 Bom. L R 1006, 22 C L J 516; (1915) M W N 757; 42 I A 202 (P C.)
(11) 55 Ind. Cas. 353; 22 Bom. L R 82.
(12) 18 A 329.
(13) 13 B 25.
(14) 76 Ind. Cas. 370; 45 A 515; 21 A L J 421; A I R 1933 All. 613.

been relied on for the respondents do not really help them. In *Ananta Balacharya* v. *Damodar Makund* (13), the question in issue in the later suit was whether a partition had taken place between two brothers, and it was held that the decision in an earlier suit between those brothers that a partition had taken place rendered the question in issue in the later suit *res judicata*. In *Kedar Nath Singh* v. *Sheo Shankar* (14), it was held that where a claim to a certain property was based entirely on a sale-deed and the question of the validity of the sale-deed had arisen directly in a previous suit between the same parties, relating to another property also included in the deed which could not be determined without a decision as to the validity of the sale-deed, the decision in the previous suit must be held to be binding as between the parties.

In the present suits the question of the appellant's title to these particular lands which might be based on other grounds besides the sale-deeds of 1896 and 1900, was not directly or substantially in issue in Suit No. 1142 of 1919. The trial Court thought it possible that the plaintiff may lay claim to the suit lands on the strength of adverse possession against Laxmibai and Sitabai and that this question was a moot point which may be agitated by the plaintiff if a claim were made against him by the two women that this question had been left untouched by the decision in Suit No. 1142 of 1919 and it could not, therefore, be said that the plaintiff's claims in respect of these lands were barred as *res judicata*. This view appears to me to be perfectly correct. The appellant's rights in respect of these lands as against Laxmibai and Sitabai have yet to be decided. His claims in the present suits to be the real owner of these lands is not barred as *res judicata* nor can it be said that his title to these lands has been extinguished. It has been proved that the respondents executed the suit rent-notes to the appellant, they acknowledged his title in 1915; they have admittedly paid rent to him, and they cannot, therefore, be allowed to dispute his title. Mr. Desai for the respondents has relied on the ruling in *Kuppu Konan* v. *Thirugnana Sammandam Pillai* (15), to show that where a deed is executed by a tenant in favour of a person *benami* for another, the real owner and not the *benamidar*, is the landlord whose title the tenant is estopped from denying under s. 116, Evidence Act. In a suit by such *benamidar* for rent, the tenant can deny his right to sue on the ground that he is not the person entitled. It may be noted that in the case cited the plaintiff had admitted that he was a *benamidar*.

In the present case the conduct of the parties in Miscellaneous Applications Nos. 56 and 57 of 1914 and Suit No. 65 of 1915 renders it impossible to hold that in the suit rent-notes the appellant was only a *benamidar* for Laxmibai and Sitabai or that the respondents had believed that he was a *benamidar*. On the contrary the evidence shows that they dealt with him as the real owner and asserted his title as such against Laxmibai and Sitabai. In *Prabhat Chandra Chatterji* v. *Bijoy Chand Mahatap* (16), it was held that where the defendant had executed a *kabuliyat* and obtained possession of certain lands as tenant on the strength of the *kabuliyat*, he was estopped from denying the title or seisin of his grantor in a suit for rent on the ground that he was merely a *benamidar* of some other person. On these grounds I allow the appeals and reverse the decisions of the lower Appellate Court and restore those of the trial Court. The appellant is entitled to his costs in this Court and in the lower Appellate Court from the respondents.

N. *Appeal allowed.*

(15) 31 M 461.

(16) 75 Ind. Cas. 89; 50 C 572; A I R 1924 Cal. 84.

LAHORE HIGH COURT

First Civil Appeal No. 2727 of 1928
June 2, 1934

BHIDE AND DIN MOHAMMAD, JJ.

SOHAN LAL—DEFENDANT—APPELLANT

versus

ISHAR SINGH AND OTHERS—DEFENDANT AND PLAINTIFFS—RESPONDENTS

Hindu Law — Alienation — Father—Proof of connection between immorality and antecedent debt—Necessity of—Antecedent debt, if should be independent of mortgage security—Debt small —Whether can burden the estate, if not for necessity—Custom (Punjab) —Alienation—Necessity—Distinction in Punjab Customary Law and Hindu Law—Applicability of custom —Family following agriculture for two or three generations—If necessary to substitute custom for personal law—Proof, necessity of.

Under Hindu Law the sons must prove that the debts were incurred by the father for immoral purposes. A connection between the debt and the alleged immorality must be established. *Ulfat Rai* v. *Tej Narain* (9), relied on.

All the antecedent debts included in the mortgage in dispute must be held to constitute valid

necessity. They need not be independent of mortgage security. *Labhu Mal* v. *Bishan Das* (10) held no good law in view of *Brij Narain* v. *Mangla Prasad* (11).

Where a debt is not for necessity though it forms only a small portion of consideration, the debt should not be allowed to burden the land in the absence of any proof as to necessity. *Bahadur Singh* v. *Des Raj* (12), relied on.

Both under Hindu law and the custom of agricultural tribes, alienation of ancestral immovable property is subject to restrictions, but the nature of the restrictions is somewhat different in the two cases.

To hold that a person is governed by agricultural custom solely on the ground that his family has followed agriculture or lived amongst an agricultural tribe for 2 or 3 generations would be to substitute conjecture for proof. There is at best a possibility of such a family adopting the rules of custom, but whether it has actually done so or not is a question of fact which must be decided on evidence and not on conjecture. According to the Punjab Laws Act the initial presumption is that Hindus and Muhammadans are governed by their personal laws and if a custom modifying such laws is alleged, it must be proved, *Daya Ram* v. *Sohal Singh* (6) and *Abdul Hussein Khan* v. *Sona Dero* (7), relied on.

F. O. A. from the decree of the First Class Sub-Judge, Ludhiana, dated September 17, 1928.

Messrs. *J. N. Aggarwal* and *S. L. Puri*, for the Appellant.

Messrs. *Faqir Chand* and *Bal Kishen Mehra*, for the Respondents.

Bhide, J.—This was a declaratory suit of the usual type by the sons of one Isar Singh, a Sikh *Jhiwar* of the Ludhiana District to contest a mortgage of about 85 *bighas* of ancestral land for a sum of Rs. 11,000. It was alleged by the plaintiff that Isar Singh was a man of immoral character and that the alienation was effected without valid necessity and consideration. The plaintiffs alleged that they being agriculturists were governed by custom, but also relied on Hindu Law in the alternative. The trial Court held that the plaintiffs had failed to prove that they were governed by custom and applying Hindu Law has found that there was necessity for the alienation only to the extent of Rs. 3,303-8-0, and has passed a decree to that effect. From this decision the alienee Sohan Lal has appealed and the plaintiffs have preferred cross-objections challenging the trial Court's finding that they are governed by Hindu Law and not by custom.

It will be convenient to deal with the question of custom first. The evidence produced by the plaintiffs on this question only establishes that their family has followed agriculture for the last 2 or 3 generations. These witnesses do not even definitely say that the plaintiffs are governed by custom as opposed to Hindu Law in the matter of alienation. It need hardly be pointed out in this connection that both under Hindu Law and the custom of agricultural tribes, alienation of ancestral immovable property is subject to restrictions, but the nature of the restrictions is somewhat different in the two cases. The learned Counsel for the plaintiffs urged that the fact that the family of the plaintiffs had followed agriculture for 2 or 3 generations was sufficient to raise a presumption that the family was governed by custom. It was further urged that the plaintiffs are Sikhs by religion and *kamins*. There are only three families of *Jhiwars* in the village and it was therefore argued that it may be presumed that they are governed by the same custom as the custom of the *Jats* amongst whom they live. In support of these contentiens the learned Counsel referred to a number of authorities such as *Fakir Muhammad* v. *Fazal Muhammad* (1), *Kasim* v. *Hashem* (2), *Muhammad Hayat Khan* v. *Sundhe Khan* (3) and *Bhola* v. *Razzak* (4), etc. In most of these cases there were concurrent findings of fact by the Courts below and all that they show is that the fact that a family had followed agriculture or lived amongst agricultural tribes for a long time was one of the factors taken into consideration in determining whether the family was governed by custom or personal law. The learned Counsel also referred to *Gujar* v. *Sham Das* (5), in which it was laid down that there is a presumption against an unrestricted power of alienating ancestral immovable property in the case of *Jats* of the Central Punjab. But this presumption was based not merely on the fact that the *Jats* followed agriculture, but on the evidence obtained in the course of an elaborate inquiry and also certain features of the agricultural village communities of the Central Punjab. In the present instance the *Jhiwars* do not form a village community and not a single instance has been cited in which they had departed from the rules of Hindu Law.

To hold that a person is governed by agricultural custom solely on the ground

(1) 16 P R 1906; 66 P L R 1906.
(2) 39 P R 1906; 98 P L R 1906.
(3) 55 P R 1908; 105 P W R 1908.
(4) 9 Ind. Cas. 682; 7 P R 1911; 75 P L R 1911; 81 P W R 1911.
(5) 107 P R 1887.

that his family has followed agriculture or lived amongst an agricultural tribe for 2 or 3 generations would be to substitute conjecture for proof. There is, at best, a possibility of such a family adopting the rules of custom; but whether it has actually done so or not is a question of fact which must be decided on evidence and not on conjecture. According to the Punjab Laws Act, the initial presumption is that Hindus and Muhammadans are governed by their personal laws and if a custom modifying such laws is alleged, it must be proved. It would not be out of place to draw attention here to a passage from the judgment of Robertson, J., in *Daya Ram* v. *Sohal Singh* (6), which explains the precise position in this respect clearly and which was cited with approval by their Lordships of the Privy Council in *Abdul Hussain Khan* v *Sona Dero* (7):

"In all cases it appears to me under this Act (*i. e.*, the Punjab Laws Act), it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further to prove what the particular custom is. There is no presumption created by the clause in favour of custom; on the contrary, it is only when the custom is established that it is to be the rule of decision. The legislature did not show itself enamoured of custom rather than law nor does it show any tendency to extend the 'principles' of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of Customary Law, nor any theory of custom or deductions from other customs, which is to be a rule of decision, but only 'any custom applicable to the parties concerned .....';and it therefore, appears to me clear that when either party to a suit sets up 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply; if he fails to do so, cl. (*b*), s. 5, Punjab Laws Act, applies and the rule of decision must be the personal law of the parties subject to the other provisions of the clause."

In the end I may also mention that it does not seem to be quite correct to say that the plaintiffs' family has been solely dependent on agriculture or that they are ordinary *kamins*. They own a large area of land. Their grandfather, Kahn Singh, is said to have been a *Kardar* or *Thanedar* of Basant Singh and Isar Singh, father of the plaintiffs, is also said to have been a liquor contractor. It was urged that the plaintiffs are Sikhs, but in the absence of any proof of any custom, Sikhs also must be held to be governed by Hindu Law: *cf. Bhagwan Koer* v. *Bose* (8). After carefully considering the evidence on the record and the arguments advanced by the learned Counsel for the plaintiffs, I feel no hesitation in agreeing with the conclusion of the learned Judge of the trial Court that the plaintiffs have failed to establish that they are governed by custom in the matter of alienation of ancestral property and they must, therefore, be presumed to be governed by Hindu Law.

On merits the plaintiffs have practically no case under Hindu Law. The alienation was effected mostly in lieu of antecedent debts of Isar Singh and as the plaintiffs are the sons of Isar Singh, such debts would constitute valid necessity for the alienation unless it was proved that the debts were illegal or immoral. The oral evidence produced by the plaintiffs to prove that Isar Singh is a drunkard and a man of immoral character is meagre, vague and altogether unconvincing and is contradicted by the defendant's witnesses who give him a good character. It was, moreover, incumbent on the plaintiffs to prove that the debts were incurred for immoral purposes: *vide*, *Ulfat Rai* v. *Tej Narain* (9), and there is no evidence forthcoming to prove any connection between the debt and the alleged immorality. The antecedent debts are mostly supported by previous mortgage-deeds and *bahi* accounts and there is no good reason to doubt their genuineness. It may be mentioned here that Isar Singh has a large family consisting of some 12 persons and he had to incur expenditure in connection with the marriages of five of his children. Only an item of Rs. 300 is not supported by any *bahi* account, but this was borrowed long ago.

It is, moreover, supported by the evidence of Shri Ram, and I do not think it would be justifiable to insist on better proof of this comparatively small and an old item. The learned Subordinate Judge has disallowed some of the antecedent mortgage debts on the ground that they were not independent of the mortgage security. He has relied in this respect on *Lakhu Mal* v. *Bishen Das* (10), but it was conceded before us that this ruling cannot be considered to be good law in view of a later decision of their Lordships of the

(6) 110 P R 1906; 31 P L R 1907.
(7) 43 Ind. Cas. 306; A I R 1917 P C 181; 45 I A 10; 45 C 450; 16 A L J 17; 4 P L W 27; 34 M L J 48; 22 C W N 353; 23 M L T 117; 27 C L J 240; 1 P L R 1918; 20 Bom. L R 528; 12 S L R 104 (P C).
(8) 31 C 11; 30 I A 249; 84 P R 1903 (P C).
(9) 106 Ind. Cas. 176; A I R 1928 Lah 83; 8 L 632.
(10) 66 Ind. Cas. 408; A I R 1922 Lah. 291; 3 L 74.

Privy Council reported as *Brij Narain* v. *Mangla Prasad* (11). The result is that all the antecedent debts included in the mortgage in dispute must be held to constitute valid necessity. The only other items out of the consideration which require discussion are: (*a*) Rs. 1,100 left with the mortgagee for sinking a well, and (*b*) Rs. 700 received in cash before the Sub-Registrar.

No well has yet been sunk, but the amount will be claimed as a charge only if and when the well is sunk. As regards item (*b*), however, there seems to be no satisfactory evidence as to necessity. The learned Counsel merely urged that it forms only a small portion of the consideration. But even so there is no reason why it should be allowed to burden the land in the absence of any proof as to necessity: *cf*; *Bahadur Singh* v. *Des Raj* (12). On the above findings I would accept the appeal and modifying the decree of the trial Court grant plaintiffs a declaration to the effect that the mortgage in dispute shall not affect their rights in respect of Rs. 700 out of the consideration. The decree will be, however, without prejudice to the rights of the mortgagee to enforce such rights as he may have under the mortgage against Isar Singh himself by sale of the ancestral property including his sons' shares: *cf*. *Bahadur Singh* v. *Des Raj* (12), referred to above.

The plaintiffs have succeeded only to a very small extent. I would, therefore, leave the parties to bear their costs throughout.

Din Muhammad, J.—I agree.

D. *Appeal accepted.*

(11) 77 Ind. Cas. 689; A I R 1924 P C 50; 51 I A 129; 46 A 95; 21 A L J 934; 46 M L J 23; 5 P L T 1; 28 C W N 253; (1924) M W N 68; 19 L W 72; 2 Pat. L R 41; 10 O & A L R 82; 33 M L T 457; 26 Bom. L R 500; 11 O L J 107; 1 O W N 48; 41 C L J 232 (P C.)

(12) 53 P R 1901; 62 P L R 1901.

NAGPUR JUDICIAL COMMISSIONER'S COURT

Criminal Revision Application No. 451 of 1934

January 17, 1935

POLLOCK, A. J. C.

POTRAM—APPLICANT—ACCUSED

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 162, 428 (1)—Evidence Act (I of 1872), s. 30—Statement to Police Officer in course of investigation—How used—S. 162, scope of—Statement of co-accused—When to be used against accused—Appellate Court's power to remand case for re-trial with condition to consider evidence already on record.

Section 162, Criminal Procedure Code, provides that no statement made by any person to a Police Officer in the course of an investigation shall be used for any purpose at the subsequent trial subject to the exception that such statements may be used to contradict witnesses for the prosecution. This section refers only to statements made by witnesses and not to statements by an accused person. Therefore statements made by a co-accused to the Police might be admissible against himself, but they would be inadmissible as against the accused by the ordinary rule that heresay evidence is excluded. This rule may briefly be stated as meaning that any statement made by a person who is alive and has not been called as a witness is inadmissible to prove the truth of that statement. Under s. 30 of the Evidence Act, the Court may take into consideration the confession of a co-accused. Where, however, the co-accused makes no confession but throws the blame entirely on the accused and tries to exculpate himself such statement cannot be taken against the accused. *Gola* v. *Emperor* (1), referred to.

The lower Appellate Court has no power to order a re-trial with the condition that the evidence already on record should be taken into consideration. If there is to be a re-trial, the accused is entitled to demand that there shall be a *de novo* trial. Under s. 428 (1) of the Criminal Procedure Code, if the Appellate Court thinks that additional evidence is necessary, it may, after recording its reasons, either take such evidence itself, or direct it to be taken by a Magistrate. If it thinks that further evidence is necessary it should proceed under that sub-section.

Cr. R. App. against an order of the Sessions Judge, Raipur, dated November 9, 1934.

Mr. *T. J. Kedar*, for the Applicant.

Mr. *V. Bose*, Government Advocate, for the Crown.

Order.—The applicant Potram, the Naib-Nazir of Mungeli Tahsili, was tried jointly with Bitan, the Farrash of the same Tahsili, for an offence under s. 409, Indian Penal Code. Potram was convicted and Bitan was acquitted by the Sub-Divisional Magistrate, Mungeli. Potram appealed to the Sessions Judge, Raipur, who ordered the re-trial of Potram on an amended charge with the direction that "the evidence already on record will be taken into consideration after eschewing the inadmissible portion." Potram has applied for revision of that order, asking this Court to dispose of the appeal itself or to direct the lower Appellate Court to dispose it of on the material before it.

Early on the morning of May 10, 1934, Bitan reported to the Tahsildar that the *malkhana* had been broken open. The Tahsildar sent for Potram, the Naib Nazir, and asked him to see what property had

been stolen. It was found that Rs. 18-2-0 in cash and certain silver ornaments valued at about Rs. 54 had been removed from one of the boxes. That box, which was unlocked, had also contained gold ornaments valued at Rs. 150, which had not been removed. The lock on the *malkhana* was found smashed into 3 pieces. A report was then made on that morning to the Police, who at once came to the conclusion that the lock could not have been broken while it was on the *malkhana* door, because that would have attracted the attention of the treasury guard, which was only 24 paces from the *malkhana*, and also because there was no sign of damage on the door. It has now been conceded before me that this conclusion must be accepted and that, therefore, the lock was opened with a key, taken away, broken elsewhere, and then replaced.

Suspicion fell on Potram and Bitan, and on the following morning, on information given by Bitan, the missing ornaments were recovered from the box of the *Shahnavis* or sub-treasury accountant in the Court-room of the Naib Tahsildar. This box was opened by a key taken from Potram. The missing cash was not recovered.

Certain evidence, which is legally inadmissible, was taken into consideration by the Sub-Divisional Magistrate. Lower Courts too frequently ignore the provisions of s. 162, of the Criminal Procedure Code, which provide that no statement made by any person to a Police Officer in the course of an investigation shall be used for any purpose at the subsequent trial subject to the exception that such statements may be used to contradict witnesses for the prosecution. It has been held by this Court in *Gola* v. *Emperor* (1), that this section refers only to statements made by witnesses and not to statements by an accused person. Therefore, statements made by Bitan to the Police might be admissible against himself, but they would be inadmissible as against Potram by the ordinary rule that hearsay evidence is excluded. This rule may briefly be stated as meaning that any statement made by a person who is alive and has not been called as a witness is inadmissible to prove the truth of that statement. Under s. 30 of the Evidence Act, the Court may take into consideration the confession of a co-accused, and, if Bitan had made any confession, that could have been taken into consideration against Potram. Bitan, however, made no confession but threw the blame entirely on Potram and tried to exculpate himself.

The learned Sessions Judge was, therefore, correct in holding that the statements made by the constables of the treasury guard to the investigating Head Constable, and the various statements made by Bitan to the Police and in Court were inadmissible against Potram. He has also pointed out correctly that the charge curiously omitted any reference to the cash which was not recovered but mentioned only the ornaments which were recovered. He has not stated whether the legally admissible evidence on record was sufficient to justify Potram's conviction, but I gather, from the fact that he ordered a re-trial, that he was of opinion that it was insufficient. It has been conceded before me that the learned Sessions Judge had no power to order a re-trial with the condition that the evidence already on record should be taken into consideration, and that if there is to be a re-trial, the accused is entitled to demand that there shall be a *de novo* trial. Under s. 428, (1) of the Criminal Procedure Code, if the Appellate Court thinks that additional evidence is necessary, it may, after recording its reasons, either take such evidence itself, or direct it to be taken by a Magistrate. If the learned Sessions Judge thought that further evidence was necessary, he should have proceeded under that sub-section. One of the reasons which apparently influenced him in ordering a re-trial, was a desire that Bitan should be examined as a witness. He has stated:

> "The appellant has certainly a right to demand that the prosecution should have examined Bitan as a witness and given Potram an opportunity to test his veracity by cross-examination."

The appellant does not appear to have demanded anything of the sort but merely to have urged that anything said by Bitan was inadmissible against him. It was open to the prosecution to proceed against the two accused separately, or against Potram alone and to examine Bitan as a witness in the case against Potram, and I see no reason why the prosecution should be allowed, at this stage, to examine as a witness, a man who could not legally have been examined as a witness when the trial took place.

As it has been conceded before me that the lock could not have been broken while on the *malkhana*, the evidence of the treasury guard becomes unnecessary. Potram's defence was that Bitan had a key that would open the *malkhana* and that

(1) 114 Ind. Cas. 273; 24 N L R 158; A I R 1929 Nag. 17; 30 Cr. L J 258.

this key was the key that opened the Sub-Registrar's Office. No attempt was made in the lower Courts to examine these keys and locks and to see whether Potram's explanation was a possible explanation. I have examined the broken lock of the *malkhana* and the key of the Sub-Registrar's Office, and it is possible that this key may have opened this lock, but this lock is too badly damaged for me to express a definite opinion. I think, therefore, that further evidence on this point is required.

The Sessions Judge's order directing a re-trial is set aside and I direct him to dispose of the appeal himself, after taking such additional evidence as may appear to be necessary to clear up the point about the opening of the *malkhana* lock. The evidence may be taken either by the Sessions Judge himself or by a Magistrate.

D. *Order set aside.*

LAHORE HIGH COURT

Criminal Revision Petition No. 354 of 1934
May 5, 1934
ADDISON, J.
MUHAMMAD—CONVICT—PETITIONER
versus
EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 162—Statement of accused—Applicability of s. 162—Evidence Act (I of 1872), s. 27—Statement of accused in the nature of a confession—Admissibility of—Conduct of accused, if can be taken into account against him.

Information received from a person accused of an offence is not a statement within the meaning of s. 162, (1), Criminal Procedure Code as he is not a person who, from the information given or otherwise appeared to be acquainted with the circumstances of the case whom the Police were entitled to examine under the provisions of ss. 160 and 162 of the Criminal Procedure Code. Though s. 162 applies to statements of persons examined as witnesses by the Police in the course of an investigation, it does not apply to the statement of an accused person. *Emperor* v. *Maung Tha Din* (1) and *Rannun* v. *Emperor* (2), relied on.

Although the statement made by the accused to the Police is not barred under the provisions of s. 162, Criminal Procedure Code, it would not be admissible under s. 27 of the Evidence Act if it is held to be of the nature of a confession if no material fact was discovered in consequence of the information received. But the conduct of the accused can certainly be taken into account.

Cr. R. P. from an order of the Sessions Judge, Shahpur, dated December 16, 1933.

Dr. *Muhammad Alam*, for the Petitioner.

Mr. *P. N. Bharadwaj*, for the Crown.

Order.—The petitioner, Muhammad, has been sentenced to one year's rigorous imprisonment under the provisions of s. 411, Penal Code, for dishonestly receiving a bullock knowing it to be stolen property.

The stolen bullock belonged to one Dhala. He came to know that his bullock was at a particular *dera* near village, Narulianwala. He therefore reported the matter to the Police who went there. The bullock was recovered from the *dera* of Ali, the father of Muhammad. Muhammad came there at that time and he told the Police that he had purchased it from Mutalli of village Mela. At the same time he produced a receipt Ex. P. B., in support of his contention. The Magistrate convicted both father and son, but on appeal the learned Sessions Judge acquitted the father Ali as he held that it was Muhammad who had come forward and said that he had purchased it from Mutalli and produced a receipt in support of what he said. This receipt does not cover the bullock in question and Mutalli and another person, named, Pahlwan, gave evidence that it was not sold to the petitioner while another person Jagat Ram deposed that Muhammad, sometime after the receipt had been executed, came to him and asked him to add some words which would include the bullock. This conduct on the part of Muhammad left no doubt in the mind of the learned Sessions Judge that the bullock had been placed at the *dera* of his father by Muhammad and that it was not proved that his father knew that it was stolen property. He therefore acquitted Ali.

On behalf of the petitioner it was argued that his statement to the Police that he had purchased the bullock from Mutalli of village Mela could not be proved as this statement was barred under the provisions of s. 162 (1), Criminal Procedure Code. In my judgment, however, this section has no application. It was held in *Emperor* v. *Maung Tha Din* (1), that information received from a person accused of an offence was not a statement within the meaning of s. 162 (1), Criminal Procedure Code, as he was not a person who, from the information given or otherwise, appeared to be acquainted with the circumstances of the case whom the Police were entitled to examine under the provisions of ss. 160 and 162, Criminal Procedure Code. Similarly, in *Rannun* v. *Emperor* (2), it was held that s. 162, Criminal Procedure Code, applied to the statements of persons examin-

(1) 96 Ind. Cas. 145; A I R 1926 Rang 116; 27 Cr L J 881; 4 R 72; 5 Bur L J 30.
(2) 94 Ind. Cas. 901; A I R 1926 Lah 88; 27 Cr L J 709; 7 Lah 84; 27 P L R 583.

ed as witnesses by the Police in the course of an investigation and not to the statement of an accused person.

Although, however, the statement made by Muhammad to the Police is not barred under the provisions of s. 162, Criminal Procedure Code, it would not be admissible under s. 27, Evidence Act, if it is held to be of the nature of a confession as to his being in possession of the bullock as no material fact was discovered in consequence of the information received. But in any case, the conduct of the petitioner can certainly be taken into account and the fact that he produced the receipt in question, which was found not to include the bullock and as to which there is evidence that he made an attempt to get it altered, can be taken into account to prove his guilty knowledge. This fact combined with the rest of the relevant evidence is sufficient to establish the petitioner's guilt and I dismiss this petition. He must surrender to his bail bond and serve out his sentence which is not excessive.

N. *Petition dismissed.*

CALCUTTA HIGH COURT

Criminal Revision No. 124 of 1934
June 19, 1934
GUHA AND MCNAIR, JJ.
KUNJALAL GHOSE—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY

Evidence Act (I of 1872), ss. 32 (3), 10—Charge under ss. 420 and 120-B, Penal Code (Act XLV of 1860)—Accused inducing Insurance Company to accept proposal by securing false medical report—Statement of doctor—Admissibility of, under ss. 32 (3) and 10.

The accused was charged under ss. 420 and 120-B, Penal Code, for committing fraud on a Insurance Company by inducing the said Company to accept the proposal for insurance on the life of one *M* securing a false medical report about the said *M* and by suppressing and misrepresenting facts about him and his family history, to the said Company.

Held, that conceding that the confession of the doctor that the report was made out according to the instructions of the accused was not admissible in evidence under s. 32 (3), Evidence Act, there could be no doubt that the statement was admissible under s. 10 of the Act, seeing that other evidence in the case disclosed reasonable grounds for believing that there was a conspiracy, and that the doctor was a conspirator.

Messrs. *S. C. Taluqdar* and *Ajit K. Dutt*, for the Petitioner.

Order.—The petitioner was convicted by the Deputy Magistrate at Chandpur in the District of Tippera, under ss. 420-120-B and s. 418, Penal Code, and sentenced to rigorous imprisonment for 18 months and to a fine of Rs. 500, in default, to further rigorous imprisonment for six months, under s. 420-120-B. There was a sentence of rigorous imprisonment for 18 months also, under s. 418; but the sentence so passed was to run concurrently with the other sentence passed under s. 420-120-B, Penal Code. The aforesaid conviction and sentence by the learned Magistrate were affirmed on appeal by the learned Sessions Judge of Dacca, to whose Court the appeal was transferred for hearing and disposal.

The charge against the petitioner was fraud committed on the Sun Life Assurance Company of Canada, by inducing the said Company to accept the proposal for insurance on the life of one Monorajan Mazumdar, for the sum of Rs. 15,000, securing a false medical report from Dr. Birendra Chandra Mazumdar of Dacca, about the said Monoranjan Mazumdar and by suppressing and misrepresenting facts about him and his family history, to the said Company with the knowledge that the accused was thereby likely to cause wrongful loss to the said Company whose interest in the transaction to which the cheating relates, the accused as an agent of the Company was bound to protect.

In view of the terms of the Rule issued by this Court, the nature of the evidence on the record had to be considered by us, for the purpose of determining whether the findings arrived at by the Court below were sustainable, and the conviction of the petitioner could be upheld.

One of the points raised before us related to the admissibility of a confessional statement made by Dr. Birendra Chandra Mazumdar, and it is necessary in this connection, to refer briefly to the materials on the record, bearing upon the question of admissibility of the statement, which proved the guilt of the petitioner in the matter of his securing a false medical report: a report which was made out by the doctor according to the instructions of the petitioner. It appears from the evidence that Mr. Mitchell (District Manager of the Sun Life Assurance Company), Babu Subarna Bose (Circle Inspector of Police), and Dr. Birendra Chandra Mazumdar went, during the investigation of the case, to Dr. Mazumdar's chamber at Dacca; a note book of the doctor was seized there; while there

Dr. Mazumdar told Mr. Mitchell that the petitioner had supplied necessary materials for his medical report. After this, Dr. Birendra Chandra Mazumdar was arrested and produced before the Sub-Divisional Officer of Dacca. It was contended before us, on the authority of a decision of the Bomaby High Court in the case of *Emperor* v. *Keshav* (1), that the confessional statement of the doctor that his report was made out according to the instructions of the petitioner was not admissible inasmuch as its maker had already rendered himself liable to criminal prosecution at the time when it was made. Conceding in favour of the petitioner that the confession of the doctor who died very soon after the statement was made by him, is not admissible in evidence under s. 32 (3), Evidence Act, there can be no doubt that the statement was admissible under s. 10 of the Act seeing that other evidence in the case disclosed reasonable grounds for believing that there was a conspiracy, and that the doctor was a conspirator. General evidence of the existence of a conspiracy of which the doctor was a member, having been given, affording reasonable ground to believe that two or more persons had conspired to commit an offence, evidence as to overt acts of things said or done by any conspirator in reference to a common design, was admissible under the law; and the confessional statement of Dr. Birendra Chandra Mazumdar was therefore admissible under the law, as evidence of the guilt of the petitioner. On that evidence, taking the same along with other evidence in the case, the Courts below have come to the definite conclusion that a false medical certificate was secured by the petitioner; the doctor granting the certificate, having done so, under instructions from the petitioner.

The questions requiring consideration next are whether the petitioner suppressed facts and made false representations to the Insurance Company as an agent, in order to have the insurance effected; whether the insured Monoranjan Mazumdar was a person known to the petitioner to be unfit to be insured. The evidence on this part of the case has been discussed by the Courts below, at length, and in detail. The argument advanced before us in support of this Rule was that the report submitted by the petitioner as a canvasser and an agent, was a *bona fide* one, on the belief that the life of the insured was that of a healthy man and that inasmuch as the family history of the insured was not required to be given, the fact that some of his relations died of tuberculosis was of no consequence. On this part of the case comment was made on the report furnished by the petitioner to the Insurance Company, and on the evidence of the witness Sures Chandra Chanda examined on the side of the prosecution. The evidence of this witness, who spoke to his having found the petitioner in the joint family dwelling house of the insured Monoranjan Mazumdar, on five or six occasions talking like a friend, has to be taken as a whole, and that evidence along with the report submitted by the petitioner led to the conclusion arrived at by the Courts below that the petitioner was on intimate terms with Monoranjan's family. The recommendation contained in the report was stated to be based on personal inquiry made by the petitioner; and it was further specifically mentioned in the report that the life of Monoranjan was an average life, that the petitioner never heard of Monoranjan's ever being ill. Monoranjan was recommended unqualifiedly by the petitioner for insurance at ordinary rates. On the materials on the record, which have been discussed in detail, by the Courts below, the conclusion was arrived at that the petitioner deliberately misused his knowledge regarding Monoranjan's family history, and his own state of health. The finding on evidence in the case, further was that the petitioner conspired with Monoranjan and Dr. Birendra Chandra Mazumdar, in making misrepresentations to the Sun Life Assurance Company.

On the definite findings arrived at on evidence in the case, which we see no reason to differ from, the conviction of the petitioner must be upheld. The sentence passed on the petitioner is not, in our judgment, severe, regard being had to the nature of the offence committed by him.

The conviction of the petitioner and the sentence passed on him are affirmed. The Rule is discharged. The petitioner must surrender to his bail bond, and serve out the remainder of the sentence passed on him.

D. *Rule discharged.*

(1) 25 Bom. L R 248.

LAHORE HIGH COURT

Criminal Appeal No. 292 of 1934
May 9, 1934
DIN MUHAMMAD, J.
KARTAR SINGH—CONVICT—APPELLANT
versus
EMPEROR—OPPOSITE PARTY

Criminal trial—Identification — Presence of Police constable—Objectionable nature of procedure — Investigation—Conduct of Police—Administration of criminal justice.

The presence of Police constables in the room where the identification is held is most objectionable.

The administration of criminal justice requires that every act done by the agency responsible for the investigation of crime must be fair, upright and free from taint of any sort. The Police should inspire full confidence in the public and conduct itself in such a regular manner as not to afford any genuine cause of complaint to those with whom it deals. It is then and then alone that justice can be properly dispensed.

Cr. A. from an order of the First Class Magistrate, Ferozepore, dated January 22, 1934.

Mr. *J. L. Kapur*, for the Appellant.

Mr. *S. A. Mahmood*, for the Opposite Party.

Judgment. — The appellant, Kartar Singh, along with Dulla and Jogindar Singh was tried by a Magistrate of the First Class, with s. 30 powers at Ferozepore, for an offence under ss. 395 and 397, Penal Code. Dulla was discharged and Jogindar Singh acquitted, but Kartar Singh has been convicted under s. 395 read with s. 397, Penal Code, and sentenced to seven years' rigorous imprisonment including three months' solitary confinement.

The facts are these: An armed dacoity was committed on the night of November 30, 1932, at *khao-pea* time in the house of Bhagat Singh of village Buri Mahar in the District of Ferozepore and property worth Rs. 4,000 stolen. After the usual investigation by the Police, two of the alleged dacoits, namely, Kehr Singh and Partap Singh, were captured and sent up under s. 394, Penal Code. They were convicted on the strength of the recoveries made from them and their appeal to the High Court was also rejected on January 24, 1924. Subsequently Dulla and Jogindar Singh were also arrested and placed before a Magistrate for trial. After sometime Kartar Singh, too, offered himself for arrest in the Court of the Additional District Magistrate at Ferozepore on July 17, 1933. At the time of his surrender, he presented an application through a lawyer that he apprehended that the identification proceedings at Fazilka would not be conducted regularly and therefore his identification should take place in the jail at Ferozepore. The Additional District Magistrate allowed this petition and passed an order to the effect that the identification parade be held in the Ferozepore jail. It does not appear that this order was rescinded, but the fact remains that it was not carried out and Kartar Singh was despatched to Fazilka the same evening under the order of the Additional District Magistrate where his identification took place in the judicial lock-up on July 20, 1933. It is admitted by the prosecution that at the time of this identification, two Head Constables of Police were present in the lock-up. At that parade Bhurat P. W. No. 5, Bhagat Singh, P. W. No. 7, his son Jogindar Singh, P. W. No. 6 and *Musammat* Chawali, P. W. No. 12, identified Kartar Singh as one of the dacoits. The learned Magistrate has relied on this evidence of identification and found him guilty of the offence with which he was charged as stated above. It may be remarked here that nothing incriminating has been recovered from him and the case against him hinges on the evidence of identification alone.

The learned Counsel for the appellant has laid great stress on the fact that the identification evidence cannot be depended upon in this case and is insufficient to support his conviction. He contends that this evidence was procured in a suspicious manner and as the identification took place about eight months after the occurrence, it was not possible for the witnesses to correctly identify the dacoits especially when they had not sufficient opportunity to come in contact with Kartar Singh as he was said to have been stationed outside the house. He has also urged that the statements of the four witnesses mentioned above are discrepant as regards the actual place occupied by the present appellant and consequently no weight can be attached to their testimony. He takes very strong exception to the presence of the two Head Constables of Police in the lock-up at the time of the identification and contends that this circumstance in itself is sufficient to vitiate the whole proceedings.

I agree with the learned Counsel for the appellant in the criticisms directed against the prosecution evidence as well as against the procedure observed at the time of the identification and have come to the conclusion that the evidence on the record is insufficient to support the conviction of the appellant. A refer-

ence to the statements of the four witnesses relied on by the prosecution lends a great deal of support to the arguments advanced for the appellant. Bhura, P. W. No. 5, admitted that the night was dark and the appellant was standing at the door of the house, being the fifth man. Jogindar Singh, P. W. No. 6 and his father Bhagat Singh, P. W. No. 7, have, on the other hand, stated that out of the dacoits four only entered the house while the fifth remained outside and they could only hear his voice, but could not see him. They have mentioned Kartar Singh as one of those who had entered the house and on this basis they have alleged to identify him. As against this, *Musammat* Chawali, P. W. No. 12, has stated that when she saw Kartar Singh and was able to identify him, he was standing near the outer door towards the back of the house opening into the lane. It appears to me to be difficult to reconcile these statements. If Kartar Singh was standing outside as stated by Bhura and *Musammat* Chawali, he could not have been seen by Bhagat Singh and Jogindar Singh as they have themselves averred that they merely heard the voice of the man who was standing at the door and did not see him. Even if these witnesses had an occasion to see the dacoits with the help of the light in the courtyard, I do not consider that a mere fleeting glimpse that they could take in such a moment of confusion and consternation would be so indelibly impressed on their minds or so pertinaciously retained in their memories as to enable them to correctly identify a stranger after the lapse of eight months. Moreover, the presence of the two Head Constables of Police in the room where the identification was held was really most objectionable.

The administration of criminal justice requires that every act done by the agency responsible for the investigation of crime must be fair, upright and free from taint of any sort. The Police should inspire full confidence in the public and conduct itself in such a regular manner as not to afford any genuine cause of complaint to those with whom it deals. It is then and then alone that justice can be properly dispensed. In this case, I am afraid, I am constrained to agree with the learned Counsel for the appellant that it was very easy for the Head Constables to place themselves in such a favourable position in the room where the identification was being held as to facilitate the process of identification by the witnesses; I also do not approve of the action taken by the Police in the matter of conducting identification at Fazilka in spite of the orders of the learned Additional District Magistrate that it should take place at Ferozepore and which he did not cancel at the time of ordering the remand.

In the circumstances mentioned above I am not satisfied that the guilt of the appellant has been clearly brought home to him and giving him the benefit of doubt, I acquit him.

N. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT

Second Civil Appeal No. 12-B of 1933

January 9, 1935

SUBHEDAR, A. J. C.

GOVIND RUPCHAND PATIL—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT

Evidence Act (I of 1872), s. 110—S. 110, if applicable to case where Government is party—Berar Land Revenue, Code 1896, s. 41 (1).

The provisions of s. 110 of the Evidence Act are equally applicable in a case to which the Government is a party and s. 41 (1) of the Berar Land Revenue Code is not meant to lay down a rule regarding the burden of proof at variance with the provisions of s. 110 of the Evidence Act, it is open for the defendant to rely on the provisions of s. 41 (1) of the Berar Land Revenue Code in proving his title to the land in dispute by showing, in the first instance, that it formed part of a public road within the last 60 years and it will then be for the plaintiff to show either that his title was founded on a lost grant or that he had acquired a title by adverse possession for over 60 years. *Hanmantray* v. *Secretary of State for India* (1), *Bhagwansingh* v. *Secretary of State* (2), and *Krishna Aiyar* v. *Secretary of State for India* (3), relied on.

S. C. A. against the decree of the Additional District Judge, Khamgaon, in Civil Appeal No. 67 of 1932, dated September 24, 1932, arising out of Civil Suit No. 428 of 1930, in the Court of the Sub-Judge, Second Class, Jalgaon, dated November 4, 1931.

Mr. *R. G. Rau*, for the Appellant.

Mr. *V. Bose*, The Government Advocate, for the Respondent.

Judgment.—The suit out of which this second appeal arises was filed by the plaintiff claiming a declaration against the Secretary of State for India in Council that the plot of land marked as A B G W Z L M N and O in the map, filed with the plaint, situate at *Mauza* Pimpalgaon Kale,

belonged to him and was in his possession and claiming an injunction restraining the defendant from demolishing the structure standing on the disputed site. The defendant denied that the plaintiff was the owner of the site in question and alleged that it formed part of a public road. On these pleadings the following issues were framed for trial:

(1) Whether the site in suit is the property of the plaintiff and was in his possession and of his vendor since many generations?

(2) Whether the plaintiff and his predecessors-in-title were in possession of the site in suit within 60 years prior to the date of the suit?

Both the Courts below dismissed the suit holding that the plaintiff had not discharged the initial burden of proving these issues affirmatively. With regard to the burden of proof the lower Appellate Court observed in para. 2 of its judgment as under:

"A word may be said here about the burden of proof which is the subject of the 3rd ground of appeal. According to s. 41 of the Berar Land Revenue Code, 1928, save as otherwise provided by any law for the time being in force, all lands, public roads, lanes and paths, etc., etc., and all rights therein, which are not the property of persons, are hereby declared to be the property of the Government. Therefore, the presumption being in favour of the Government, any person who disputes that ownership must establish his title and I agree with the lower Court that the burden of proof lay on the plaintiff."

The plaintiff has now come up on second appeal and it is argued on his behalf that both the Courts below were wrong in throwing upon the plaintiff the initial burden of establishing his title to the land. The fact that he was in possession for some years was in fact admitted in the present case. It was urged that s. 110 of the Indian Evidence Act applied to the present case and that under the circumstances it was for the defendant to prove that the plaintiff was not the owner of the land in dispute.

In my opinion, this contention is sound. In Second Appeal No. 250-B of 1931, dated July 31, 1934, the facts of which were practically identical with those of the present case, I held following *Abasbhai* v. *Secretary of State for India in Council* S. A. No. 171-B. of 1918 (1), that the provisions of s. 110 of the Indian Evidence Act would be equally applicable in a case to which the Government was a party and that s. 41 (1) of the Berar Land Revenue Code was not meant to lay down a rule regarding the burden of proof at variance with the provisions of s. 110 of the Indian Evidence Act. To the same effect are the decisions in *Hanmantray* v. *Secretary of State for India* (1), *Bhagwansingh* v. *Secretary of State* (2), and *Krishna Aiyar* v. *Secretary of State for India* (3).

I had of course made it clear in *Chinkaji* v. *Secretary of State for India in Council* S. A. No. 250-B of 1931, dated July 31, 1934 (1), and do make it clear here that it will be open for the defendant in the present case to rely on the provisions of s. 41 of the Berar Land Revenue Code in proving his title to the land in dispute by showing, in the first instance, that it formed part of a public road within last 60 years and it will then be for the plaintiff to show either that his title was founded on a lost grant or that he had acquired a title by adverse possession for over 60 years. As the case was disposed of from a wrong stand-point the decrees of the two Courts below are set aside and the case remanded to the Court of first instance for a fresh decision, with advertence to the above remarks. It will be open to the parties to supplement their pleadings and adduce further evidence, if they so desire. Costs incurred uptill now in all the three Courts shall follow the ultimate result.

D. *Order accordingly.*

(1) 25 B 287.
(2) 10 Bom L R 571.
(3) 4 Ind. Cas. 1070; 33 Mad. 173; 6 M L T 306; 20 M L J 71.

LAHORE HIGH COURT

Criminal Appeal No. 1 of 1934
April 27, 1934
AHGA HAIDAR, J.
GHULAM MUHAMMAD—CONVICT—APPELLANT
versus
EMPEROR—OPPOSITE PARTY

Criminal trial — Sentence — Murder of wife due to her flagrant immorality — Extenuating circumstance, if exists—Confession — Magistrate recording confession, otherwise valid, in his house—Legality of.

Where the accused had undergone protracted sufferings though the obstinacy, viciousness and flagrant immorality of the deceased, his wife, whom he pushed into the river, there is a mitigating circumstance entitling the accused to a lenient sentence.

Where a confession is otherwise valid, the mere fact of its having been recorded at the Magistrate's house does not vitiate it.

Cr. A. from an order of the Sessions Judge, Jhelum, dated November 17, 1933.

Judgment.—Ghulam Muhammad has been convicted by the Sessions Judge of Jhelum under s. 307, Penal Code, and has been sentenced to seven years' rigorous imprisonment. He has appealed to this Court through the jail authorities.

The case is an extremely sad one. The accused is a young soldier aged about 30 years. He has already put in about fourteen years of military service. It appears that the accused is a man of unblemished character and there are no indications on the record to show that he was a man of a violent or vindictive character. At the time when he married his wife *Musammat* Shah Bano, deceased, there were rumours of her unchastity; but, as the accused and the girl were connected together by family ties, it was thought that she would reform herself. This, however, did not happen and the girl *Musammat* Shah Bano had immoral relations with several men, one Habib Machhi, P. W. No. 19, being her favourite paramour. She lived now and again with her husband while he was on military duty at several cantonments in India and for the last time she was with him while he was at Delhi. On this occasion he took leave from his regiment and started for home with his wife by the Frontier Mail. This was on April 23, 1933. On this occasion he was accompanied by two soldiers, namely, Nur Husain and Fazal Din, both of whom were accompanied by their wives. There is ample evidence on the record that the accused got down at the Railway Station, Jhelum, with his wife. This was the last occasion when *Musammat* Shah Bano was seen alive and in the company of the accused. *Musammat* Saidan, P. W. No. 1, the mother of *Musammat* Shah Bano, received information that the accused and his wife had travelled with certain persons from Delhi to Jhelum and had got down at the Railway Station, Jhelum. She inquired from the Commanding Officer of the regiment to which the accused belonged and received a reply informing her that the accused had left on April 23, 1933, with his wife. The accused, too, did not meet *Musammat* Saidan. The lady became suspicious and sent a petition to the Superintendent of Police, Jhelum. Thereupon the Police took up the investigation and finally the accused was arrested. In the meantime the accused had brought a complaint against one Karam Ilahi, under s. 498, Penal Code. This was on May 26, 1933. This complaint was a futile attempt to conceal the real truth. The accused is alleged to have made some sort of confession before two Magistrates, but the Sessions Judge has very properly held those statements to be inadmissible. On June 14, 1933, the accused made a statement before *Sheikh* Said Zaman Khan, Magistrate. This officer took all the precautions which are required by law in order to make sure that the confession of the accused was voluntary.

In fact he went out of his way to suggest to the accused that if he had killed a faithless wife, after all he had not done anything very heinous and should save his own life. This suggestion was not strictly according to law as it is no part of the duty of a Magistrate to dissuade a man from making a confession, if he is desirous of doing so. It however, shows, that the Magistrate was careful enough to make it certain that the accused may not make a hasty confession through any extraneous influences. The confession was also recorded by the Magistrate at his house which is also against the rules, but this fact alone cannot vitiate it when it is otherwise valid. The confession, in my judgment, was a voluntary statement and made by the accused, It contained the whole history of the unhappy married life of the accused and how he tried hard to reform his erring wife without any success. The woman, apart from being an unfaithful wife, was also a thief. She took away the ornaments and clothes which had been entrusted to her by her husband to her lover, Habib Machhi. On another occasion when she was living with the accused, she abstracted a sum of Rs. 20 from a box with the intention of leaving him and joining her lover in her native village. The life of the accused has been a very miserable one when, according to him, the scandal became the common property of the village and even the children in the streets jeered at him and asked him to take away his wife. The closing portion of the confession gives us an account of the last moments of *Musammat* Shah Bano in the company of the accused. The couple went to the river Jhelum, to have a bath and when the accused had finished his own ablutions, he persuaded his wife to wash herself in the river. She accordingly entered the water. The accused then followed her and

catching hold of her, first immersed her in the water and then pushed her on to a spot where the water was beyond her height. The waters of the Jhelum then closed upon the unfortunate woman.

This was the last scene of the tragedy so far as the present record is concerned. *Musammat* Shah Bano has not been seen alive since then nor has her dead body been recovered. Before the Sessions Court the accused retracted the confession. The learned Sessions Judge has, however, taken the proper view in accepting this confession as genuine and voluntary. I agree with him. He has rightly convicted the accused not under s. 302, Penal Code, but under s. 307, Penal Code, for attemted murder. Having regard however to the protracted sufferings of the accused through the obstinacy, viciousness and flagrant immorality of the deceased, I would reduce the sentence to three years' rigorous imprisonment.

N. *Sentence reduced.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Criminal Revision Petition No. 336 of 1934

December 5, 1934

MIR AHMAD, A. J. C.

HABIBULLAH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Dangerous Drugs Act (II of 1930), ss. 22, 23, 14 —Constables not authorised to take steps which they had taken —Trial, if vitiated by this irregularity.

Where the constables are not authorized to take the steps which they have taken, under ss. 22, 23, Dangerous Drugs Act, the irregularity does not vitiate the trial. *Emperor* v. *Allah Dad Khan* (1), *Ali Ahmad Khan* v. *Emperor* (2), *Kutroo* v. *Emperor* (3), referred to.

Cr. R. P. from an order of the Additional Sessions Judge, Peshawar, dated August 15, 1934.

Mr. *S. Aurangzeb Khan*, for the Petitioner.

Sardar *Raja Singh*, for the Crown.

Order.—Habibulla has been convicted under s. 14, Dangerous Drugs Act, 1930, for being in possession of a small quantity of cocaine on the night between June 26, and 27, 1934, in the Thathi bazaar. He has been sentenced to one year's rigorous imprisonment and Rs. 100 fine or three months' further rigorous imprisonment in default.

Head Constable Muhammad Aslam, assisted by F. C. Alimadat and Hussain, was on duty in the Thathi bazaar on the night in question. They noticed Habibulla going to the *balakhana* of *Musammat* Amirjan, prostitute, after he had visited the shop of a *badmash*, who was suspected of trading in cocaine. The party asked the accused to stop, but he ran towards the stairs of the prostitute's house. They pursued him and while he was climbing the stairs, he threw two packets of cocaine one after the other. He was arrested and the cocaine was taken into possession by the Policemen. Later on it was sent to the Chemical Examiner who certified it to be cocaine. Two search witnesses were called. They signed the recovery list prepared on the spot. At the trial the Policemen gave the story given above. The search witnesses did not deny that they had signed the recovery list but one of them Mirgul tried to help the accused by introducing facts which went to his benefit. He said that the accused was drunk and that the packets were in the hands of the Policemen.

The accused pleaded that he was drunk and that he did not recollect as to what had happened. He could not show any reason why the Policemen should charge him wrongly. He produced two defence witnesses to prove that he was a man of good character. On his conviction by the City Magistrate, Peshawar, the accused appealed to the Sessions Court, where he did not succeed. He came up on revision. His Counsel invited my attention to ss. 22 and 23, Dangerous Drugs Act. A comparison of the two sections clearly shows that the Head Constable and the Constables were not authorized to enter the house of *Musammat* Amirjan and to detain and search the accused without a warrant. He urged that the irregularity vitiated the trial. The case was, therefore, taken to a full hearing.

The learned Crown Counsel has admitted that it was not proved on the record that the constables were authorized to take the steps which they had taken, but he pleaded that the irregularity did not vitiate the trial. He quoted three rulings of the Allahabad High Court, *e. g. Emperor* v. *Allah Dad* (1), *Ali Ahmed Khan* v. *Emperor* (2) and *Kutroo* v. *Emperor* (3). The case quoted by the learned Crown Counsel

(1) 19 Ind. Cas. 332; 35 A 358; 14 Cr L J 236; 11 A L J 442.

(2) 81 Ind. Cas. 615; A I R 1924 All. 214; 25 Cr. L J 967; 46 A 86; 21 A L J 834; 9 O & A L R 1056.

(3) 88 Ind. Cas. 280; A I R 1925 All 434; 26 Cr L J 1112; 47 A 575; 23 A L J 364; L R 6 A 124 Cr.

support the proposition advanced by him. The learned Counsel for the petitioner has not been able to show any authority to the contrary. The point on which the case was taken to a full hearing therefore fails. On facts I concur with the two Courts below that it is proved beyond doubt that the accused was in possession of a small quantity of cocaine. There is no reason why the Policemen should take up a case against him. The conviction is, therefore, maintained. As regards the sentence the evil habit of eating cocaine and frequenting brothels must be eradicated, and I think the accused richly deserves what he has received. The petition is dismissed.

D. *Petition dismissed.*

PATNA HIGH COURT

Appeal from Appellate Decree No. 812 of 1932

November 9, 1934

WORT, J.

BHAGWAT SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

KUMAR KAMAKHAYA NARAIN SINGH—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), s 47—Suit for possession of village covered by lease—Second suit for ejectment—Third suit—Prayer for demolition of bhandar *in village—Relief, if to be obtained in executing Court—Separate suit, if maintainable—Same cause of action—Son of defendant joined in suit—Whether makes seperate suit maintainable—Point not taken in second suit*—Res judicata, *if operates.*

The plaintiff brought a suit in 1920 for possession of a village which was the subject-matter of a *thica* lease and a judgment was obtained by the plaintiff and the decree for delivery of possession was put into execution. Again a suit was brought by the plaintiff of the former action for ejectment of some of the defendants from the *bakasht* land and a decree was again obtained. A third suit was filed by the plaintiff in respect of a plot of land in the same village on which a *bhandar* stood claiming that in spite of the delivery of possession through the Court he had not obtained actual possession of the land or part of the land which was the subject-matter of the lease:

Held, that it being not denied that the building was erected during the course of the lease, if the plaintiff had any right to have the building demolished before he got possession of the land at the hands of the defendant, then quite clearly he could make that claim in the former suit and that it was a cause of action or part of a cause of action which the plaintiff might have included in the first suit, and not having included it, he could not bring a separate suit with regard to it. As he had got a decree for possession of the property, any grievance he might have with regard to that matter must be made in the executing Court and not by way of a separate uit.

Held, also that the fact that another person had been joined to the third suit, a person who was not a party to the former actions, would not justify the suit unless it could be shown that the plaintiff had a separate cause of action against that person in which case the other defendant should not have been joined in the subsequent action. The fact of joining the son of the original trespasser alleging no particular cause of action against him is no answer to the point that any grievance that the plaintiff may have must be ventilated in the executing Court and not by way of a separate action.

Held, further that the mere fact that the point was not taken in the second suit did not give license to the plaintiff to continue to bring actions one after the other with regard to the property which was clearly a part of the property for which he got delivery of possession in the first suit. *Thakur Begeshwari Charan Singh* v. *Bindheswari Charan Singh* (1), not applied.

A. from a decision of the Subordinate Judge of Hazaribagh, dated March 31, 1932, affirming that of the Munsif of Chatra, dated June 8, 1931.

Mr. *Bankim Chandra De*, for the Appellants.

The Government Pleader, for the Respondent.

Judgment.—I think this appeal succeeds. The defendants are the appellants and they raise the question whether the relief which the plaintiff sought in the action out of which this appeal arises, should have been obtained in the executing Court and not by way of a separate suit.

It is necessary to state very shortly the facts in order to appreciate the question argued before me. In the year 1920 an action was brought by the plaintiff (who is the respondent before me) for possession of a village which was the subject-matter of a *thica* lease for five years from 1899 to 1904. The contention (it would appear) in that suit was that the defendant, after the expiration of the lease, had held over. A judgment was obtained by the plaintiff and the decree for delivery of possession was put into execution. Again a suit was brought by the plaintiff of the former action for ejectment of some of the defendants from the *bakasht* land and a decree was again obtained. Now, this third suit has been brought with regard to a plot of land admittedly in the same village, upon which a *bhandar* stood. The defendant in the trial Court and in the Appellate Court raised unsuccessfully the question raised in this Court, namely, that as the land in the three suits was a part of the village the possession of which was decreed in the first suit, having regard to the claim made by the plaintiff in this action and in the former action (that

is to say the second action) any relief which he wished to obtain should have been obtained in the executing Court and not by way of a separate suit.

In so far as the cause of action could be described as the same in this suit and in the first suit (or the second suit), the learned Government Pleader appearing on behalf of the plaintiff-respondent does not question the correctness of the proposition advanced by Mr. De on behalf of the appellants. It must be so as the section itself is explicit on the point. The only question, therefore, in dispute is whether the cause of action is substantially the same. That depends entirely upon what the plaintiff claimed in the suit. As will be seen from the judgment in appeal and from the plaint, the plaintiff's grievance admittedly was that in spite of the delivery of possession through the Court in the first suit the defendant remained in possession. Now, taking those facts simpliciter, there is no doubt that the principle enunciated by s. 47 of the Code of Civil Procedure applies. Now let me repeat myself on this point. The plaintiff claimed that in spite of the delivery of possession through the Court he had not obtained actual possession of the land or part of the land which was the subject-matter of the lease of 1899. Section 47 would presumably apply to this state of facts. In this Court the appellants meet the point by two answers, in the Courts below by one only. The answer which was given to the point in the Court below, and which is common to one of the arguments advanced in this Court, was that the claim in the suit out of which this appeal arises included a claim for the demolition of the building on the plot of land and, therefore, it was a different cause of action. The second answer is that there was another party to this section who was not a party to the former suit : this party was defendant No. 2 the son of defendant No. 1. The learned Judge in the Court below, as I have stated accepted the answer to the first point made before him on behalf of the appellants. In my judgment, it is impossible to support his judgment on that ground. It was not impossible to claim the demolition of the *bhandar* in the first action as must be obvious. It is not denied that the building was erected during the course of the lease ; and, therefore, if the plaintiff had any right to have the building demolished before he got possession of the land at the hands of the defendant, then quite clearly he could make that claim in the former suit. It is suggested by the learned Government Pleader as a further answer to the point made by Mr. De in this connection that if he had sought relief as to this matter in the executing Court, the executing Court would have met him by saying that "no such decree for the demolition of the building has been made." But in my judgment, that clearly discloses that it was a cause of action or part of a cause of action which the plaintiff might have included in the first suit, and, not having included it, he cannot bring a separate suit with regard to it.

But there is a further answer to the point, and that is that an action for demolition of the building can be brought on the assumption that the plaintiff has not got possession of the property and for this reason. If he has not got possession of the property, then the claim for demolition of the building obviously includes in this action a claim for possession of the property ; and, as he has got a decree for possession of the property, any grievances he may have with regard to that matter (as is admitted) must be made in the executing Court and not by way of a separate suit. Any addition of a claim for demolition of the building to a cause of action for possession of the property does not remove from the path of the plaintiff the answer that any claim for possession now must be made in the executing Court, which granted him the decree for possession and not by way of a separate suit.

The second answer given by the learned Government Pleader was that there was another party to this action. The fact that another person has been joined to this action, a person who was not a party to the former actions, does not meet the point made against the plaintiff by the defendant-appellant, unless it can be shown that the plaintiff has a separate cause of action against the person. And if he has got a separate cause of action against that person, quite clearly he should not have joined the first defendant to this action. But the third answer to it is that the cause of action alleged by the plaintiff is in that the defendant No. 2 has committed a separate trespass upon the land, but that in spite of delivery of possession by the Court in the first suit the plaintiff in fact has not got possession. In my judgment, quite clearly the fact of joining

the son of the original trespasser alleging no particular cause of action against him is no answer to the point that any grievance that the plaintiff may have must be ventilated in the executing Court and not by way of a separate action.

There is only one other point which it is necessary to consider and that is one made by the Court during the course of the argument. It was suggested to Mr. De that this question of whether the relief which the plaintiff claimed should be got at the hands of the executing Court and not way of a separate suit might have been raised in the second action, and that not being done, it must be considered as *res judicata*. The authority relied upon by Mr. De for that matter against that point is the decision in *Thakur Bageshwari Charan Singh* v. *Bindheswari Charan Singh* (1). It does not seem to me, however, to meet the point. The real answer to the point seems to me to be this. The mere fact that the point was not taken in the second suit does not give license to the plaintiff to continue to bring actions one after the other with regard to the property which was clearly a part of the property for which he got delivery of possession in the first suit, that is to say, suit of February 1920.

As I have stated, in my opinion, the appeal succeeds and should be allowed with costs throughout.

N. *Appeal allowed.*

(1) 142 Ind. Cas. 495; 12 Pat. 147; 13 P L T 509; A I R 1932 Pat. 337; Ind. Rul. (1933) Pat. 145.

LAHORE HIGH COURT

Criminal Revision Petition No. 1696 of 1933

April 27, 1934

ADDISON, J.

FAQIR CHAND AND ANOTHER—CONVICTS —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 486—Counterfeiting trade-mark—Offence, when committed—Test in such cases.

A person who employs a label which in general resembles the label used by another manufacturer, is guilty of counterfeiting a trade-mark under s. 486 of the Penal Code, irrespective of the circumstance that the registered trade-mark of the one is quite different from the trade-mark of the other. The test is not, whether a literate purchaser would be deceived if he had the two marks side by side, but whether an ordinary unwary purchaser would be deceived. *Emperor* v. *Ganpat Sitaram* (1) and *Herbert Whitworth, Ltd.* v. *Jamnadas Nem Chand Mehta* (2), followed.

Cr. R. P. from an order of the Additional Sessions Judge, Lahore, dated August 8, 1933.

Mr. *Jai Gopal Sethi*, for the Petitioners.

Messrs. *Jhanda Singh* and *Muhammad Alam*, for the Oppoiste Party.

Order.—The two petitioners Faqir Chand and Dwarka Das have been sentenced to pay fines of Rs. 50 each under the provisions of s. 486, Penal Code, for selling goods marked with a counterfeit trade-mark.

The Courts below have dealt with the subject exhaustively and the question is one of fact. The complaint was brought by the firm Nihal Chand-Ram Lal of Kasur. The name of the petitioners' firm is "The Industrial Trading Company of Kasur." One of the petitioners used to be a servant of the complainant firm and the other petitioner used to be a servant of the complainant in the connected criminal revision No. 1695 of 1933. Hairdyes used to come principally from Germany but owing to the war they ceased to do so and Indian firms commenced their manufacture. The get-up of the cartons in which the small bottles are placed is probably more or less the same as the get-up used by the German firms, but the firms which started manufacturing these dyes employed in addition figures in order to distinguish their manufactures. The complainant firm in this case has been manufacturing hairdyes since 1924 and it introduced an hairdye styled "Horse Brand Shining Black Hairdye" to the market in 1927. In addition to these words there is the figure of a horse. The firm claimed that it had a wide sale for this particular dye and this is supported by evidence. The complaint is that, about the middle of 1932, the petitioners commenced to turn out a hairdye styling it the "Arabic Horse Shining Black Hairdye." The design on it is also a horse but there is a rider on the horse and the colours are not the same. The complainant firm's case was that the resemblance was such as to mislead the public and the two Courts below have come to the conclusion that it would. The complainant has admitted that he cannot claim protection for the general get-up and has stated that he will be content if the design of the horse is changed. For example, it is in evidence that there is a hairdye in the market the get-up of the carton of which

is very much the same but in the case of it the figure is a "bear."

The law on the subject has been frequently laid down. In *Emperor* v. *Ganpat Sitaram* (1) it was held by a Division Bench that a person who employs a label which in general resembles the label used by another manufacturer is guilty of counterfeiting a trade-mark under s. 486, Penal Code; irrespective of the circumstance that the registered trade-mark of the one is quite different from the trade-mark of the other. Again in *Herbert Whitworth, Ltd.* v. *Jamnadas Nem Chand Mehta* (2), another Division Bench held that no trader has a right to use a trade-mark so nearly resembling that of another trader as to be calculated to mislead incautions purchasers. The use of such a trade-mark may be restricted by injunction, although no purchaser has actually been misled, for the very life of a trade-mark depends upon the promptitude with which it is vindicated. The Judge has to make up his mind as to whether on the facts before him he thinks it probable that purchasers would be deceived by the similarity of the marks and general get-up of the two sets of goods and it is not a matter for witnesses to say. The Calcutta High Court has taken the same view in *Aswini Kumar Pal* v. *Emperor* (3), where it was said that the test is not, whether a literate purchaser would be deceived if he had the two marks side by side but whether an ordinary unwary purchaser would be deceived. It was observed in that judgment that no one could possibly mistake the two sets, if he were on the alert and knew the original well, but that was not the proper test: it must be considered from the point of view of the ordinary unwary purchaser.

In the present case a person asking for "*Ghora marka* hairdye" might easily be given the brand of the petitioners though it is written on it that it is "*Arbi Ghora marka* hairdye." The similarity of the get-up would help in this deception and that can be taken into consideration even although the complainant firm cannot claim a trade-mark in the general get-up. It is open to the petitioners to change the designation from a horse to something else and that is all that the complainant firm desires.

In my judgment the case was properly decided and I dismiss this criminal revision.

N. *Revision dismissed.*

(1) 24 Ind. Cas. 834; A I R 1914 Bom. 128; 15 Cr. L J 522; 16 Bom. L R 78.

(2) 110 Ind. Cas. 312; A I R 1928 Bom. 227; 30 Bom. L R 514; 52 B 228.

(3) 128 Ind. Cas. 334; A I R 1930 Cal. 728; (1930) Cr. Cas. 1136; 32 Cr. L J 137.

MADRAS HIGH COURT

Second Civil Appeal No. 339 of 1929

September 18, 1934

BEASLEY, C. J. AND KING, J.

NARAYANI AMMA AND OTHERS—APPELLANTS

versus

NARAYANAN NAMBOODRIPAD AND OTHERS—RESPONDENTS

Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900), s. 6—Landlord's right to set off rent against value of improvements due to sub-lessee.

Where property has been sub-leased by the lessee and the sub-lessee has made improvements, the landlord is entitled, in a suit for eviction, to set off any sum due to him for rent in respect of the holding against the sum found due to the sub-lessee by way of compensation for value of improvements, even though nothing is due to the lessee from the sub-lessee in respect of rent.

In a suit by a landlord for eviction, the landlord is entitled to set off any money due to him for rent in respect of the tenancy against sums due by way of compensation for value of improvements to a sub-lessee to whom the lessee sub-leased the properties.

S. C. A. against the decree of the Court of the Subordinate Judge of Ottapalan in Appeal Suit No. 11 of 1927, preferred against the decree of the Court of the District Munsif of Walluvanad in Original Suit No. 180 of 1924.

Mr. *S. Venkatachala Sastri*, for the Appellants.

Mr. *N. R. Sesha Ayyar*, for the Respondents.

Beasley, C. J.—The appellants here were defendants Nos. 3, 5, 6, 8 and 12 to 26 in the suit. Defendants Nos. 3 to 26 are members of a *tarwad* to whom the first defendant sub-leased the suit lands. The plaintiff sued to recover possession of the suit lands.

The point for consideration is one which arises out of s. 6 of the Malabar Compensation for Tenants' Improvements Act (I of 1900). The appellants, being sub-tenants and the plaintiff having succeeded in his suit for ejectment, claimed compensation for improvements under s. 5 of the same Act. The question here is whether the first respondent, the plaintiff in the suit, is entitled to set off any money due to him for rent in respect

of the tenancy against the sum found due to the tenants for compensation. It is contended for the appellants that they are the sub-tenants of the first defendant and have paid rent to him and that there is, therefore, nothing due in respect of rent from them to the first respondent. In the lower Appellate Court it was held that on a construction of s. 6 the appellants' contention must fail and accordingly the landlord's (first respondent's) claim for a set off in respect of rent due to him, there being admittedly rent due to him from the first defendant, must be allowed. In our view, the lower Appellate Court was right. Section 6 (1) provides that in an ejectment suit against a tenant—and in s. 3 (1) of the Act "tenant" is defined to include a sub-lessee and the appellants are, therefore, tenants within the meaning of s. 6 (1)—if the plaintiff succeeds, as he did here, the defendant, which obviously means the tenant against whom an order of ejectment is made, can put forward a claim for compensation for improvements and that when this has been established and the amount of the compensation is ascertained, a decree must then be passed declaring the amount so found due and ordering that on payment by the plaintiff into Court of that amount the defendant is to put the plaintiff in possession of the land with the improvements thereon. There is no reason for saying that defendant does not mean defendants also. Sub-s. (2) provides for a set off by the landlord of "any sum of money due by the defendant to the plaintiff for rent or otherwise in respect of the tenancy". What gives rise to the set off, therefore, is the compensation awarded to the defendant. If no compensation is awarded, there is no right of set off. The appellants either come within the provisions of s. 6 or they do not. It seems to us clear that, if they do come within the provisions, as they manifestly do, they come within the provisions of the section for all purposes and that it is immaterial whether the rent due to the plaintiff is due to him by his immediate lessee or by sub-lessees. The fact that the sub-lessee has paid his rent to the lessee is a matter to be settled between them and is not one which, in our view, can alter the right of the landlord to his set off in respect of unpaid rent. In our opinion, therefore, the lower Appellate Court's decision upon this point must be affirmed and this second appeal dismissed with costs.

With regard to the first respondent's Memorandum of Objections with regard to the lower Appellate Court's order for costs, we agree with the reasons given by the lower Appellate Court for ordering that both parties to the appeal are to bear their own costs in the trial Court except in regard to commission *batta* which is to be shared in equal moieties. The Memorandum of Objections is also dismissed with costs.

A. *Appeal dismissed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Revision Petition No. 210 of 1934

December 1, 1934

MIDDLETON, J. C.

GHULAM HAIDAR—PETITIONER

versus

SAID AHMAD ALI AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Auction-purchaser, if a necessary party to suit under O. XXI, r. 63.

The auction-purchaser is a necessary party to a suit under O. XXI, r. 63, Civil Procedure Code, and if there is no suit in which he was a party until more than a year after the dismissal of objection to attachment, the order dismissing the objection is conclusive in favour of the auction-purchaser. *Chuni Lal* v. *Abdul Ali* (1), referred to.

C. Rev. P. from an order of the Second Additional Judge, Peshawar, dated October 13, 1933.

Mr. *Hukam Chand*, for the Petitioner.

Mr. *Beliram*, *R. B.* for the Respondents.

Order.—*Musammat* Jiwani, a widow, sued her son Haji Muhammad and others who claimed to be mortgagees under him, for possession of a house in Peshawar City, alleging that it was her ancestral property which she had inherited from her father, and that her son had mortgaged it during her prolonged absence from Peshawar and without her knowledge. The plaint accompanied by a petition to sue *in forma pauperis* was presented in December 1929 and the mortgage had been effected in December 1920. The petition to sue *in forma pauperis* was at first dismissed, but after revision was ultimately allowed on April 11, 1931. Between December 1929 and April 1931, one Ramjidas had obtained a money decree against Haji Muhammad and had attached the house in suit in execution thereof

and it had been purchased in Court sale by Ghulam Haidar, the sale taking place in April 1930 and being confirmed two months later.

In February 1932, Haji Said Ahmad Ali applied for substitution as plaintiff on the ground that *Musammat* Jiwani had died and that he was her successor under a will. In January 1933 Ghulam Haidar, the auction-purchaser, was added as a defendant in view of the auction sale in his favour. The suit was dismissed in the trial Court, but the decision was reversed in appeal and Haji Said Ahmad Ali was granted a decree for possession of the house. Ghulam Haidar now comes up in revision. It appears that when the house was attached in execution of the decree of Ramjidas, *Musammat* Jiwani entered an objection which was dismissed on February 24, 1930. Counsel for the petitioner urges that she was then bound to bring a declaratory suit under O. XXI, r. 63, Civil Procedure Code, and that as she failed to do so within the period of limitation (one year), the order dismissing her objection is conclusive in favour of the auction-purchaser.

In answer to this contention it has been urged on behalf of the respondent that Ghulam Haidar was brought upon the record in accordance with the provisions of O. XXII, r. 10, Civil Procedure Code, and that his substitution as a party did not initiate a new proceeding and the suit was merely continued by him: *Chuni Lal* v. *Abdul Ali* (1). It is further urged that the suit contemplated by O. XXI, r. 63, may be one in which consequential relief is claimed as well as a declaration, and that, therefore, a suit for possession is one which meets the requirements of that rule. It is urged that where such a suit was pending at the time *Musammat* Jiwani's objection was dismissed, it was unnecessary to bring another suit within a year. This argument on behalf of the respondents might be accepted had the auction-purchaser been a party to the suit, but he was not a party to the suit prior to the order dismissing the objection and he was not made a party thereto within a year of that order. There can be no doubt that the auction-purchaser is a necessary party to a suit under O. XXI, r. 63, and there having been no suit in which he was a party until more than a year after the dismissal of *Musammat* Jiwani's objection the contention of learned Counsel for the petitioner must succeed.

As a last resort Counsel for the respondent urges that this contention has only been raised in revision, but though it is not mentioned in the judgment of the lower Appellate Court, yet that of the trial Court distinctly shows that it was raised though it was not made a basis for decision. I must grant this petition and I hereby set aside the order of the lower Appellate Court and dismiss the plaintiff-respondent's suit with costs throughout.

D. *Petition granted.*

(1) 23 A 331.

155—35 & 36

LAHORE HIGH COURT

Criminal Revision Petition No. 29 of 1934

March 6, 1934

JAI LAL, J.

GOPI CHAND—CONVICT—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Cantonments Act (II of 1924), s. 187—Officer ordinarily authorized to communicate sanction writing to applicant and conveying sanction—Applicant is entitled to act on it.

Where the petitioner makes an application to the Cantonment Authority for sanction and a person ordinarily authorized to communicate the sanction, writes and conveys sanction on an official form of the Cantonment Board, the petitioner is entitled to act on such sanction, it being not his business to enquire if the sanction conveyed by him had been granted by the Board.

Cr. R. P. from an order of the District Magistrate, Rawalpindi, dated November 24, 1933.

Mr. *Fakir Chand*, for the Petitioner.

Mr. *A. R. Khosla* and Sardar *Mahtab Singh*, for the Crown.

Order.—The petitioner, Gopi Chand, made an application to the Cantonment Authority of Rawalpindi for sanction to make permanent a temporary platform in front of his three houses and with the application which purported to be made under s. 187, Cantonments Act, he submitted a plan. It seems that the platform was originally an encroachment on the street and in the plan which accompanied the application the measurements of the old platform were mentioned and it was not proposed to extend the new platform beyond these measurements. The Cantonment Overseer inspected the spot on receipt of the application by the Cantonment Authority and reported that there was no existing platform and therefore the application was for the construction of a new platform which

constituted an encroachment on Cantonment land. A reply was consequently sent to the petitioner to apply for the lease of the land according to the rules to which his attention was invited.

The matter subsequently went before the Executive Officer of the Cantonment, and it appears that he inspected the spot accompanied by the Cantonment Engineer and Overseer, and noted that the proposal of the petitioner was merely to rebuild an existing platform and also that a platform already existed. Subsequently, a letter in writing, Ex. P. F., was sent to the petitioner, on April 7, 1931, which is as follows:

"Reference your application for contruction of platform in front of houses Nos. 1105 to 1107 B. I. Bazar. Platform may be built on existing *kacha* platform, but if extension is required, application and lease will be required."

This letter is signed by Major Marshall, Executive Officer. On receipt of this reply the petitioner constructed the platform, but in the meantime the other officials of the Cantonment objected to the construction on the ground that it constituted a new encroachment on cantonment land. It was not the ground of objection, and it is not the case of the Cantonment Authority before me, that the petitioner constructed the platform in contravention of the plan submitted by him and the order conveyed to him by the Executive Officer on April 7, 1931. The case on the other hand was and is that in fact no platform previously existed on this land and an entirely new encroachment was made by the petitioner on Cantonment land by the construction of the platform. The attention of the Executive Officer was invited to this matter and he wrote back on April 10, as follows:

"There was obviously an old platform in this place. No extension had been permitted. The G. L. R. should be corrected (that is to say the General Land Register)."

Two years ater this when the Executive Officer had left the Cantonment a notice was served, under s. 187, on the petitioner requiring him to demolish the platform as having been constructed without the sanction of the Cantonment Authority and on his failure to comply with this notice he was prosecuted and fined Rs. 100. He appealed to the District Magistrate, but without success. He has consequently come up to this Court on revision.

I am now informed that subsequently to the dismissal of the appeal by the District Magistrate, the Cantonment Authority has permitted the petitioner to retain the platform and apparently some document is proposed to be executed or has been executed to this effect. It is contended on behalf of the petitioner that the notice of the Cantonment Authority or rather the prosecution of the petitioner is illegal as a prosecution can be started only within six months of the commission of the offence, but in the present case the prosecution was launched within six months of the notice issued by the Cantonment Authority and there is no force in the contention of the learned Counsel that the offence was committed more than two years previous to the institution of the present proceedings. The prosecution in this case is not for the alleged original encroachment, but for the disobedience of the notice.

The petition, however, must succeed on the ground that the petitioner constructed the platform after receipt of sanction of the Cantonment Authority by means of the letter dated April 7, 1931, from the Executive Officer of the Cantonment. The Executive Officer by virtue of s. 13, Cantonment Act, is the Secretary of the Cantonment Board, and it is admitted before me that all orders of the Cantonment Authority are communicated under his signature, and this would normally be the case. It is, however, contended on behalf of the Cantonment Authority that there was no resolution of such authority sanctioning the construction of the platform in this case. That however was entirely a matter for the Executive Officer to see and the petitioner had no concern with it. It was not his business to enquire from the Executive Officer whether the sanction conveyed by him had been granted by the Cantonment Authority. He was entitled to assume that the Executive Officer was acting in accordance with the authority conferred on him by the Cantonment Board, Counsel further contends that ordinarily a resolution of the Cantonment Board is communicated to the applicants in such cases. It might be the ordinary practice, but no provision of the law has been cited which requires that sanction of the Cantonment Authority in such cases should be communicated to the applicants in the form of a resolution. If a person who is ordinarily authorized to communicate the sanction of the Cantonment Authority, writes and conveys sanction to an applicant to the Cantonment Authority and on an official form of the Cantonment

Board, as in this case, the applicant is entitled to act on such sanction.

I accept this petition and setting aside the conviction of the petitioner direct that the fine, if paid by him, be refunded.

N. *Petition accepted.*

LAHORE HIGH COURT

Criminal Appeal No. 1594 of 1933
May 2, 1934

ADDISON AND AGHA HAIDAR, JJ.

CHAND SINGH—CONVICT—APPELLANT
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 300, 302—Accused armed with deadly weapon thrushing it into the chest of deceased causing instantaneous death—Intention to murder, inference of.

If a man, who is armed with a deadly weapon like a *sela*, thrusts that weapon into the chest of his victim and causes instantaneous death, he can have only one intention, namely, intention to murder.

Cr. A. from an order of the Additional Sessions Judge, Ferozepore, dated November 27, 1933.

Mr. *R. P. Khosla*, for the Appellant.

Mr. *Des Raj Sawhney*, for the Respondent.

Agha Haidar, J.—Chand Singh has been convicted of an offence under s. 302, Penal Code, and has been sentenced to suffer the extreme penalty of law. He has appealed to this Court through Counsel and the record of the case is also before us under the provisions of s. 374, Criminal Procedure Code. There is a pedigree table at p. 25 of the printed record in the judgment of the Sessions Judge, I have slightly amplified it. This pedigree table, with the additions which I have made, is sub-joined for facility of reference*.

One Phuman Singh, P. W. No. 12, had mortgaged with possession 5½ *ghumaons* of land with Hardit Singh and Nikka Singh for a sum of Rs. 910. Shortly before the occurrence, Phuman Singh transferred the equity of redemption to Kahan Singh for Rs. 1,200. Hardit Singh and Nikka Singh, who had been in possession of the mortgaged land and had been enjoying its produce for a long series of years, were not pleased with the transaction since it would inevitably result in their being dispossessed by the purchaser of the equity of redemption on payment of the money due to them. For this reason the friends and partisans of Nikka Singh and Hardit Singh came to look upon Kahan Singh and his family as their enemies. On the day of the occurrence, according to the evidence for the prosecution, there was a sort of preliminary skirmish in which five persons belonging to the party of Nikka Singh and Hardit Singh abused and threatened Jagat Singh. No further injury was done and the incident closed for the time being. It happened that *Musammat* Santi, the daughter of Gurdit Singh, was to be married in the afternoon of the day on which the earlier incident took place. It is somewhat difficult to say exactly what was the interval between the two affairs, but speaking generally they could not have been separated from each other by any long interval. The case for the prosecution is that after the marriage ceremony had come to end, five persons, including the appellant, Chand Singh, went to the house of Hardit Singh, and after having armed themselves with sundry weapons returned to the scene of the occurrence. Chand Singh had a *sela* and so had Pala Singh, absconder. With the other three we are not concerned. Chand Singh gave a blow to Jagat Singh which hit him on his left forearm. Thereupon Sewa Singh, who was related to Jagat Singh by marriage, intervened and stood forward to protect Jagat Singh. He received one blow from Pala Singh and two blows from Chand Singh. One of these blows penetrated the heart with the result that Sewa Singh died almost instantaneously. It may be noted that the other two blows penetrated the lungs.

Sajjan Singh went to Munshi Singh, P. W. No. 11, who is the *lambardar* of the village, and reported the matter to him. Munshi Singh came to the scene of the occurrence and saw the dead body. Sajjan Singh then went to the Police Station to lodge the first information report. In this report, curiously enough, when giving the names of the five assailants of the deceased, Sewa Singh described one of them as the son of Harnam Singh and did not give his proper name. Chand Singh accused is one of the three sons of Harnam Singh. There are however at least five eye-witnesses of the occurrence and one of them is Sajjan Singh. All these witnesses are unanimous in stating that Chand Singh inflicted the fatal blow upon the deceased Sewa Singh. Pala Singh is an absconder and we are not concerned with him. It has been argued by the learned Counsel for the appellant that

*The pedigree table is not given, it being unnecessary for purposes of this report.—[*Ed.*]

the circumstances that Sajjan Singh did not mention Chand Singh by name, in the first information report is such as to cast a great deal of suspicion upon the story for the prosecution. It is true that Sajjan Singh in some mysterious manner could not give the name of Chand Singh while the first information report was being taken down by the Police Officer, but it may be noted here that he mentioned the name of Chand Singh to Munshi Singh when he went to inform him of the occurrence. The evidence of the remaining eye-witnesses of the occurrence, is, in my judgment, overwhelming and nothing has been brought out in cross-examination to throw any doubt upon their veracity. I do not see any reason to suppose that all these witnesses had conspired together to shield the actual assailant of Sewa Singh in order to implicate an innocent man. The evidence of Jagat Singh is very important. There cannot be any manner of doubt, having regard to the injury which he received, that he was present at the time of the occurrence. He is quite definite in his evidence that it was Chand Singh who gave a blow to him and inflicted two blows upon Sewa Singh who tried to protect himself from the hands of his assailants.

The learned Counsel Mr. Ram Parshad Khosla, who appeared in this Court for the appellant, argued that there was no intention on the part of Chand Singh, applicant, to commit the murder. The circumstances of the present case however amply prove such an intention. If a man, who is armed with a deadly weapon like a *sela*, thrusts that weapon into the chest of his victim and causes instantaneous death, he can have only one intention, namely, intention to murder. This argument, therefore, having regard to the nature of the assault, is not convincing. In my judgment the case for the prosecution, having regard to the evidence on the record, is fully proved and the Sessions Judge has arrived at the right conclusion. I would, therefore, dismiss the appeal and affirm the conviction and sentence which has been passed upon the appellant and direct that the latter be carried out according to law.

Addison, J.—I agree.

D. *Appeal dismissed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Criminal Appeal No. 474 of 1934

December 10, 1934

MIDDLETON, J. C. AND MIR AHMAD, A. J. C.

MASTI KHAN—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Criminal trial—Dying declaration, when sufficient to support conviction—Penal Code (Act XLV of 1860), s. 34—Whether applies where there is sudden fight between parties.

A dying declaration alone is sufficient to found a conviction if, after applying the accepted tests, it is held to be true and genuine. It is not necessary that it should be corroborated otherwise. [p. 278, col. 1.]

Where there is a sudden fight between the parties s. 34, Penal Code, does not apply to the case.

Cr. A. from an order of the Sessions Judge, Derajat Division, dated November 5, 1934.

Mr. *Abdul Wahab Khan*, for the Appellant.

Mr. *S. Raja Singh*, for the Crown.

Judgment.—On September 9, 1934, at 11-15 A. M. one Badshah Mir made a report at the Frontier Constabulary Post Torwari that Azam Khan, Moin Khan, Dostali Khan and Masti Khan of Darsmand had stabbed Majan of the same village to death. The reporter stated that the deceased was his *turbur* and asked that a *chigha* party should be taken out to arrest the accused. The information was telephoned to the Doaba Police Station and a First Information Report was registered there at 11-30 A. M. Half an hour before the report was recorded, Masti Khan accused also appeared at the station and gave his own version of the affair.

The Sub-Inspector proceeded to the spot. He reached there at 1-30 A. M. The first thing he did was to take down the dying declaration of deceased Majan who is also known as Muhammad Jan. In this statement the deceased said that he was coming back after having ploughed his land, when on the way near Ghundi, he saw Moin, Azam Khan, Dostali and Masti in ambush. Masti ordered the others to catch him and thereupon all four attacked him. Azam Khan caught hold of him and the other three stabbed him with daggers. Majan alleged that he also dealt them stone blows. He stated that he had seen Gul, Ibtibar Shah and Badshah Mir of his village in the vicinity. They came to him on seeing the occurrence, but arrived after the accused had left. As regards the motive, he alleged that 13-14 years ago

he had murdered Majagul, cousin of the four accused and was wounded himself also. Azam Khan and Masti Khan had taken part in the fracas. They were all sent up to the Sessions Court, where Muhammad Jan was acquitted and Azam sentenced to five years' rigorous imprisonment.

The Sub-Inspector arrested Masti Khan at the Police Station when he received the information relayed from Torwari Post. He arrested Azam the same evening and Moin the next morning in the village. Dostali absconded. Masti (45), Azam (60) and Moin (35) were therefore challaned and committed under s. 302-34, Penal Code, to the Sessions Court. Proceedings under s. 512, Criminal Procedure Code, were taken against Dostali. At the trial the medical evidence disclosed that Majan had received three stab wounds in the abdomen, one incised wound on the left middle finger, one incised wound in the interspace of ring and middle fingers, and one incised wound in front of right little finger. He died on September 11, 1934, at 2 A. M. The peritoneum, and small and large intestines were injured and so was the stomach. Liver was cut, the injuries resulted in death. Masti Khan was also examined. He was found to have a contused wound on the left temporal region of the head, size 1-1/3″ by 1/3″ and scalp deep.

Gul, Badshah Mir, Ihtibar Shah and Nurulla appeared as eye-witnesses to prove that the accused lay in wait for the deceased and wounded him. Gul and Badshah Mir are brothers and are collaterals of the accused and the deceased. The witnesses and the deceased are descended from Turbaz, while the accused are the descendants of his brother Muhammad Khan. Ihtibar Shah cultivates the land of Yakub Khan, a cousin of Sarwar Khan. He has been appearing for Sarwar Khan and his brother Sardar as a witness in cases. Sarwar Khan appeared as a witness and admitted that he was a cousin of Muhammad Jan the deceased. Nurulla is the son of Muhammad Jan. It is important to note that Badshah Mir admits that the fight was in progress when he arrived on the scene. The accused were striking the deceased at the time. On the other hand, Gul and Ihtibar Shah, his companions, state that they saw the three accused now before the Court and Dostali coming out of a clump of trees and attacking the deceased. Roshan Din proved the first report made at Torwari and Shah Sarwar, Sub-Inspector, proved the dying declaration of the deceased. Muhammad Ayaz Khan, *Naib Tahsildar*, recorded a second dying declaration which he proved at the trial. It is practically to the same effect as the first.

Masti Khan, accused, stated that the cattle of the deceased had damaged his crop, that he was taking them to the pound, that Usman and his father Muhammad Jan resisted him in doing so, and that Muhammad Jan gave him a hatchet blow on the head. Muhammad Jan had also a dagger and Usman had a knife. Dostali, the brother of Masti Khan, was trying to avoid Majan and in doing so defended himself with a sickle which he possessed. Accused has stated that he became senseless and on coming to senses, went to the Police Station and lodged a first information report. He said that Akram and Nasimgul were his defence witnesses. Azam Khan pleaded an *alibi* and said that he was an old man and could not have held the deceased, while the other three accused were stabbing him, as described in the dying declaration. Moin Khan also pleaded an *alibi*. Akram was produced in defence. He supported the story given by Masti Khan. Curiously, Majan was quite fit when the witness went to him and said that he did not want his assistance. The witness did not make a statement to the Police. The wife of Ayaz Khan is the sister of Masti Khan, and Ayaz Khan is a distant cousin of the witness. Atlas, the next witness for the defence, is the brother of Akram. He admits that Said Akbar is his maternal uncle and the sister of Said Akbar is the mother of Masti and Moin Khan. He also did not make a statement to the Police. Nasimgul was not produced. Other witnesses were produced to prove the *alibis* of the remaining accused.

The first assessor was of opinion that there was a sudden fight, the cause of which was not clear. He was ready to believe that perhaps the cause given by Masti Khan was true. He held the view that in the sudden quarrel Masti and Moin had stabbed the deceased and were guilty of culpable homicide not amounting to murder. Azam was not guilty in his opinion. The second assessor held Masti and Moin guilty of murder and the fourth agreed with him. The third assessor was of the view that the absconder alone

was responsible for the offence and that the accused before the Court were innocent.

The learned Sessions Judge rejected the evidence of Gul, Ihtibar Shah and Badshah Mir on the ground that in the first dying declaration the deceased had said that they reached him after the accused had left for the tribal territory. Nurulla he rejected because he was not referred to in the dying declaration at all. He observed that the dying declaration itself should not be accepted as correct unless and until it is corroborated by some other evidence with regard to each accused. He found that the wound on the head of Masti Khan and his admission that he was present and had a quarrel with the deceased were sufficient corroboration of the dying declaration so far as that particular accused was concerned. With respect to the other accused, he did not consider the motive and the dying declaration enough to justify a conviction. He therefore acquitted Azam and Moin, convicted Masti Khan under ss. 302-34, Penal Code, and sentenced him to death. Masti Khan has appealed and the sentence of death is before us for confirmation.

On going through the dying declaration recorded by the Sub-Inspector, we find that the learned trial Judge has misinformed himself about its contents. The deceased is quite explicit that Badshah Mir, Gul and Ihtibar Shah came to his side on seeing the occurrence. His allegation that they reached him after the accused had left for the hills does not necessarily imply that they did not see the attack while they were coming to his rescue. We are, therefore of opinion, that the evidence of Gul, Ihtibar Shah and Badshah Mir has been rejected for an incorrect reason. So far as Nurulla is concerned, we have got an indication that perhaps he was also present on the spot. In the report which was made at Torwari, Badshah Mir said that Majan son of Nurulla was stabbed by the accused. Majan is in fact the son of Chauntar. It is obvious that Nurulla's name was mentioned at the Post, but was not taken down in connection with what was stated about him. On the other hand the fact remains that the deceased did not mention in the first dying declaration that Nurulla was his companion. We are of the opinion, therefore, that at least Ihtibar Shah, Badshah Mir and Gul did arrive on the scene when the deceased was being attacked.

We may also refer to the remarks of the learned trial Judge with regard to the dying declaration. We do not agree with him that a conviction cannot be based on a dying declaration alone, and that it is necessary to find some corroboration for it in order to do so. A dying declaration has been held by this Court to be sufficient on which to found a conviction if, after applying the accepted tests, it is held to be true and genuine. It is not necessary that like an approver's statement, it should be corroborated otherwise, and the learned trial Judge was, therefore, wrong in applying the principles governing confessions and statements of approvers to the statement of the dying man who describes the way in which he has come by his wounds.

Turning to the case in hand, we are of opinion that the motive given by the deceased for the attack on him does not appear to be correct. The murder with which Muhammad Jan, the deceased was charged, happened in 1915. It is incredible that the party of the accused should be inactive for a period of 19 years and suddenly take it into their heads to avenge their relation. It is not denied by Gul that Khaita Gul and Khialgul, the first cousins of the person who were killed in the fight and for whose murder Muhammad Jan was charged, are still alive and that some other relatives of the same individual nearer to him than Masti Khan and Azam Khan are also living in the same village. It is, therefore, unlikely that the latter should take up the cudgels on their behalf. On the whole, therefore, we are inclined to agree with the first assessor that something must have happened at the moment which resulted in a sudden fight. We may note in this connection that the evidence also does not help much in tracing the cause which led to the tragic quarrel. Badshah Mir arrived on the scene when the deceased was being attacked, and we are inclined to think that Ihtibar Shah and Gul are exaggerating when they say that they saw the accused in ambush.

Having found a possibility that there was a sudden fight between the parties, it needs no argument to show that s. 34, Penal Code, does not apply to the case. The medical evidence is clear that only one man had caused the injuries on the deceased and we have now to find out as to who amongst the persons charged is responsible for them. Masti Khan was

undoubtedly present. He has a wound on his head, which he says was caused with a hatchet. The deceased definitely stated in his dying declaration that he had thrown stones at his assailants, and we are inclined to think that the injury was caused by a stone. But this does not necessarily imply that he stabbed the deceased. We have it in the prosecution evidence that the culprits went towards the tribal territory. And yet before the news of the offence was relayed from Torwari to Doaba Police Station, which is five miles from the spot, Masti Khan had already appeared at that place and pleaded his innocence.

As regards the other two accused, we know that the Sub-Inspector arrested them in the village, Azam on the same day and Moin the next morning. These two accused had no wounds on their persons and they have pleaded *alibis* for which they have produced evidence. Azam is an old man of 60 and it was said in the dying declaration that he only held the deceased while the others attacked him, a role which is popularly given to persons who are included falsely. It follows from the discussion, therefore, that these three individuals did not go to the tribal territory and their subsequent conduct is such as to raise a doubt with regard to their culpability. It is not likely that they would have behaved in this manner, if in fact they had previously attacked the deceased and done him to death. The benefit of this doubt must go to them. The acquittal of Azam and Moin is, therefore, justified on these grounds, and Masti Khan's appeal is accepted and his conviction and sentence are set aside. He should be set at liberty at once.

D. *Order accordingly.*

LAHORE HIGH COURT

Letters Patent Appeal No. 123 of 1929

February 20, 1934

TEK CHAND AND COLDSTREAM, JJ.

DHUM CHAND—DEFENDANT—APPELLANT

versus

KISHAN CHAND AND OTHERS—PLAINTIFF AND DEFENDANT—RESPONDENTS

Bengal Land (Redemption and Foreclosure) Regulation (XVII of 1806), ss. 7, 8—Notice under s. 8—Requirements of.

If a notice under s. 8 of the Bengal Land (Redemption and Foreclosure) Regulation contains a reference to s. 7 of the Regulation, or enumerates the various methods described in it for avoiding foreclosure, the notice will be valid. The unnecessary adoption of an incomplete description of the mode of redemption allowed by s. 7 cannot affect that validity of the notice. *Tara Chand* v. *Chiman* (1) and *Zora* v. *Chandu* (2), dissented from, *Wasawa Singh* v. *Rura* (5) and *Gobind Mal* v. *Ram Chand* (6), relied on.

L. P. A. against judgment of Dalip Singh, J., dated May 27, 1929.

Mr. *Shamair Chand*, for the Appellant.

Mr. *S. L. Puri*, for the Respondents.

Coldstream, J.—The suit out of which this Letters Patent Appeal arises was instituted by the plaintiffs against the defendants to redeem a mortgage by way of conditional sale effected by the plaintiff's predecessor-in-interest in 1889. The suit was contested by the defendant who represented the original mortgagee on the ground that notice of forecolsure had been duly issued in 1896 under Regulation XVII of 1806, and the mortgage had not been redeemed within the years allowed by the Regulation. The plaintiffs met this plea with the objections that the petition for foreclosure under the Regulation had been presented by only one of the mortgagees and not by all and that the previous demand required by the Regulation had not been proved. No objection regarding the form of notice was taken. These objections were overruled by the trial Judge who dismissed the suit.

The plaintiffs appealed to the District Judge who agreed with the trial Court regarding the objections mentioned above. The plaintiffs, however, raised a third objection namely that the notice served upon them under s. 8 of the Regulation Act of 1806 had not mentioned that the mortgagor was at liberty to redeem the mortgage by tendering the amount due to the mortgagee. Although the notice had stated that the mortgagor could avoid foreclosure by redeeming the mortgage in the manner described in s. 7 of the Regulation, the learned District Judge found force in the plaintiff's contention and in view of the judgments of Chevis, J. in *Tara Chand* v. *Chiman* (1), and *Zora* v. *Chandu* (2), he accepted the appeal and remanded the case to the trial Court under O. XLI, r. 23, Civil Procedure Code, to determine the amount due upon the mortgage.

The defendants appealed to this Court and the appeal came before a Judge in Chambers who dismissed it remarking that the point in dispute was covered by the two decisions cited and that though he

(1) 12 Ind. Cas. 530; 3 P L R 1912; 263 P W R 1911.

(2) 68 Ind. Cas. 883; A I R 1923 Lah. 71.

might himself have come to a different conclusion he was not prepared to hold that these decisions were wrong. Against this judgment, the defendants have preferred the present appeal and on their behalf it is contended by Mr. Shamair Chand that the two rulings upon which reliance was placed are contrary to the weight of judicial authority. He has referred to us *Fakira* v. *Piyare Lal* (3), where it was held by Harris, J. that a notice was not defective because it did not state the amount of interest due. The notice in that case did not specify the manner in which foreclosure might be avoided but did make a reference to s. 7 of the Regulation and this reference was considered to be a sufficient compliance with the provisions of s. 8. He has also referred us to *Sardari* v. *Chiranji Lal* (4), in which Maude, J., remarked that:

"no doubt the Courts have been very strict in requiring that the provisions of the Regulation shall be strictly complied with but I am not aware of any decision to the effect that the actual wording of the Regulation must be reproduced in the notice *verbatim*."

It is not clear whether the notice in that case did or did not refer to s. 7 of the Regulation. In *Wasawa Singh* v. *Rura* (5), it was observed by a Division Bench of the Chief Court that:

"it would be sufficient to reproduce the actual words of s. 8 of the Regulation or it would probably be sufficient to set out the full purport of the section,"

In *Gobind Mal* v. *Ram Chand* (6), Harrison and Agha Haidar, JJ., after a review of the authorities noticed that the rulings went to show that the mortgagee has the option either of giving the actual contents of s. 8 and specifying the three methods in which foreclosure may be avoided, or of quoting the actual section and referring the mortgagor to its contents. These authorities appear clearly to establish the proposition that if the notice either contains a reference to s. 7 of the Regulation or enumerates the various methods described in it for avoiding foreclosure the notice will be valid. In reply to Mr. Shamair Chand's arguments, however, Mr. S. L. Puri while conceding the correctness of this proposition still contends that the judgments by Chevis, J., which has not been expressly dissented from are correct and asks us to hold that the present notice is vitiated by the fact that after referring to s. 7 it also proceeds to enumerate the methods of redemption for avoiding foreclosure open to the mortgagor described in that section but enumerates them incompletely. He has further drawn our attention to numerous rulings to the effect that the technicalities of the Regulation whose provisions regarding procedure are imperative and intended to protect the mortgagor against fraud, must be very strictly observed. This proposition cannot, of course, be disputed. The question here, however, is whether the present notice is in strict conformity with the requirements of s. 8, and I do not think it necessary to refer to the judgment quoted by Mr. Puri. Nor need I refer to the authorities to which he has drawn our attention which lay down that notices not properly signed by the Judge or not bearing the seal of the Court are defective. The section itself requires the notice to be sealed and signed.

In my view the requirements of the law were fully complied with by the reference to s. 7 in the notice. That such reference is all that is necessary has been frequently decided and the unnecessary addition of the incomplete description of the mode of redemption allowed by s. 7 cannot affect the validity of the notice. I can think of no principle of law which justifies any other view. Certainly there can be no question here of good faith of the notice for not only is there a reference in the body of it to s. 7, but it contains an additional note requesting the mortgagee or himself to refer for information and guidance to that section.

I would accordingly accept this appeal, set aside the judgment of the Appellate Court below and restore that of the trial Court dismissing the suit. Having regard to all the circumstances, I would allow the parties to bear their own costs throughout.

Tek Chand, J.—I agree.

N. *Appeal accepted.*

(3) 57 P L R 1901; 21 P R 1901.
(4) 9 P L R 1901; 28 P R 1901.
(5) 24 P R 1895.
(6) 100 Ind. Cas. 329; 28 P L R 153; 9 Lah. 602; 9 Lah. L J 14; A I R 1927 Lah. 141.

MADRAS HIGH COURT

Civil Appeal No. 140 of 1932
August 22, 1934

VARADACHARIAR AND BURN, JJ.

A. M. DAWOOD SAHIB—CLAIMANT—APPELLANT

versus

THE COLLECTOR OF CHINGLEPUT DISTRICT—RESPONDENT

Land Acquisition Act (I of 1894), ss. 23, 27—Land

acquisition proceedings — Contract between Municipality and claimant — Enquiry into, legality of— Costs of Collector, when claimant can be made liable for.

In proceedings under the Land Acquisition Act, the Land Acquisition Officer and the Court dealing with the matter on a reference from him have only to decide the market value of the property, subject to the considerations mentioned in s 23 and the following sections. Neither he nor the Court has got the power to enforce a contract which the claimant and a Municipality might have entered into in respect of the lands acquired. *Fort Press Company Ltd.* v. *Municipal Corporation of the City of Bombay* (1), distinguished.

In land acquisition proceedings the claimant should not be called upon to pay the Collector's costs unless his claim was extravagant or the claimant was negligent in putting his case before the Collector.

C. A. against the order of the Court of the Subordinate Judge, Chingleput, dated September 21, 1931, and made in C. R. O. P. No. 37 of 1929.

Mr. V. Krishnan, for the Appellant.

The Government Pleader, for the Respondent.

Varadachariar, J.—This is an appeal by the claimant who is not satisfied with the amount awarded to him by the learned District Judge as compensation for a piece of land and building acquired from him, in Poonamallee. The learned District Judge has incidentally dealt with the question whether or not there was a contract between the claimant and the District Board of Chingleput, whereby the price was fixed at Rs. 10,500. This question was introduced into the discussion of the amount of compensation payable, because of the reliance placed by the claimant on the decision of the Privy Council in *Fort Press Company, Limited* v. *Municipal Corporation of the City of Bombay* (1). But as the learned Judge himself points out, the action there was between private parties themselves and their Lordships of the Judicial Committee make it clear that their decision will only be binding as between the parties and will not affect the jurisdiction of the Collector to adopt such course as he may think proper under the Act. From the statement of facts in that case it is worth noting that there the action was for a declaration that if the Collector awarded more than the sum agreed to between the parties, the excess would belong to the plaintiffs and if he awarded less, the plaintiffs were bound to pay the full agreed sum. From the provisions of s. 23 of the Act it is fairly clear that the Land Acquisition Officer and the Court dealing with the matter on a reference from him have only to decide the market value of the property, subject to the considerations mentioned in that and the following sections. Neither the Land Acquisition Officer nor the Court has got the power to enforce the contract as such in the absence of the contracting parties. The District Board of Chingleput is no party to these proceedings, whatever their ultimate interest in the acquisition may be. In these circumstances, we think it proper to say that the question of concluded contract as between the claimant and the District Board should not have been decided in these proceedings at all and we, therefore, leave that question open.

Restricting ourselves, therefore, to the question of the fixing of the compensation in accordance with the terms of the Act, we have not been shown any reason for not accepting the decision of the learned Judge. He has allowed proper amounts on the several heads of claim, and in view of the fact referred to by him, namely, that the original valuation by the District Board Engineer proceeded upon a misapprehension that the claimant had an absolute title whereas in fact he had only a leasehold title, we do not think the learned Judge erred in adopting a lower value. The appeal, therefore, fails and is dismissed with costs.

The decree of the lower Court has directed the claimant to pay Rs. 168-5-11 to the respondent for his costs on the amount disallowed. We do not think this direction is justified. Under s. 27 of the Act, the claimant should not be called upon to pay the Collector's costs unless the Court is of opinion that his claim was extravagant or the claimant was negligent in putting his case before the Collector. The fact that we are not disposed to deal with the question of concluded contract cannot justify the assumption that his claim was unfounded. The fact that there was correspondence in which Rs. 10,500 was mentioned is not denied, though whether it will amount to a concluded contract or not is another matter. In this view we direct the omission of so much of the lower Court's decree as directs the claimant to pay the respondent his costs on the amount disallowed.

A. *Decree varied.*

(1) 68 Ind. Cas. 280; 46 B 767; 43 M L J 419; 16 L W 654; 24 Bom. L R 1228; A I R 1922 P C 365; (1922) M W N 798; 36 C L J 539; 27 C W N 418; 31 M L T 225; 49 I A 331 (P C).

LAHORE HIGH COURT

Second Civil Appeal No. 927 of 1930
October 29, 1934
JAI LAL AND SKEMP, JJ.

MUZAFFAR ALI—PLAINTIFF—APPELLANT
versus
GHAZANFAR ALI—DEFENDANT—RESPONDENT

Punjab Land Revenue Act (XVII of 1887, s. 116—Question regarding ownership of garden and kotha *—If a question of title*

The question whether the garden and the *kothas* in the garden are the joint property of two brothers or the sole property of one of them, is a question of title within the meaning of s. 116, Punjab Land Revenue Act. *Devi Dayal* v. *Ahmad Khan* (1), distinguished.

S. C. A. from the decree of the District Judge, Jhelum, dated March 15, 1930.

Messrs. *Shamair Chand* and *Qabul Chand*, for the Appellant.

Sodhi *Charan Das*, for the Respondent.

Skemp, J.—The sole question in this second appeal is whether the suit is cognizable by a Civil or by a Revenue Court. The parties are two brothers whose father died in 1927. In 1928 the defendant applied for partition. The only dispute between the brothers was about a garden (*baghicha*) and *kothas* in the garden. One brother claimed that he alone had planted the *baghicha* and built *kothas* therein at his own expense. The other brother claimed that this was done during the lifetime of their father and that he was entitled to a half share. The Revenue Officer went into the matter and held that the garden was planted and the *kothas* built by one of the brothers Ghazanfar Ali many years ago and that since then he had been in exclusive possession. He, therefore, held that in partition the defendant's possession should not be disturbed.

The plaintiff then came to a Civil Court and in para. 1 of the plaint he pleaded that his father had planted the *baghicha* and built the houses. At the end of the plaint he said that this property was not the sole property of the defendant. The defendant repeated his claim that he had planted the garden and built the houses at his own expense. Section 116, Revenue Act, specifies two kinds of disputes between the parties: (*a*) question as to title, and (*b*) questions as to the property to be divided, or the mode of making the partition.

It seems to me that the question in this case is one of title as to who owned the garden and the *kothas* therein. Admittedly the site under garden is common property, but defendant's claim is that he made it at his own expense. The plaintiff's claim is that it was jointly inherited by the brothers from their father. This then is a question of title. When this matter came before him, the Revenue Officer might have directed the parties to get the question determined by a competent Court or he might have himself proceeded to determine the question as if he were such a Court. He did not adopt this course and it is the plaintiff who by his own motion has come to the Civil Courts. The lower Courts professed to follow *Devi Dayal* v. *Ahmad Khan* (1), on which the respondent's Counsel also relies. There a question was referred to a Division Bench whether a certain suit was a "land suit," and before the Division Bench the question was raised whether the suit was cognizable by a Civil or a Revenue Court. It was finally held by the Single Judge dealing with the matter that it was cognizable by a Revenue Court. In that case, however, the plaintiff sued for a declaration that by planting the garden which was in suit, he had become the owner of the land and was entitled to be allotted that land on partition. It is this latter claim which distinguishes that case and makes it possible to hold that it was a question as to the mode of partition and therefore, cognizable by the Revenue Court. There are indeed expressions in that ruling which favour the respondent, but, in my judgment, it is clear that what is in reality in dispute is the plain question whether the garden and houses are joint property or the sole property of the defendant, *i. e.*, a question of title.

I would accordingly accept this appeal and return the suit to the trial Court through the learned District Judge for disposal on the merits in accordance with law. The costs hitherto incurred are to be costs in the cause.

Jai Lal, J.—I agree.

D. *Appeal accepted.*

(1) 4 P R 1908; 91 P L R 1908.

LAHORE HIGH COURT

Criminal Revision No. 66 of 1934

March 1, 1934

SHADI LAL, C. J.

Musammat BARKAT—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 309—Attempt to commit suicide — Sentence — Discretion of Court— Criminal Procedure Code (Act V of 1898), s. 562— Release on probation of good conduct—Sentence of imprisonment, if can be imposed.

The law confers upon the Court a very wide discretion in the matter of punishment, and it is not necessary to inflict a sentence of imprisonment upon a person who on account of family discord, destitution, loss of a dear relation, or other cause of a like nature, overcomes the instinct of self-preservation and decides to take his life. In such a case, the unfortunate person deserves indulgence, and should be either released on probation of good conduct or sentenced to a fine if he is not too poor to pay the fine. These observations apply with greater force to the case of a woman who attempts to commit suicide in similar circumstances. It is not possible to lay down any hard and fast rule on the subject but the Court must, in each case, consider the motive which has prompted a person to destroy his or her life.

The language of s. 562, Criminal Procedure Code makes it clear that a sentence of imprisonment imposed on a person while he is released on probation of good conduct, is wholly illegal and must, therefore, be quashed.

Cr. R. from an order of the District Magistrate, Campbellpur, dated January 13, 1934.

Facts.—On September 3, 1933, *Musammat* Barkat, wife of Dina, caste sweeper, of Sadar Bazar, Campbellpur, accompanied by her two minor daughters went to a well known as "Raja Ghulam Muhammad Wala" to fetch water. On reaching the well *Musammat* Barkat put down the pitcher and jumped into the well. She was seen doing so by Jaffar P. W., who was grazing his cattle nearby. He hastened to the spot, and subsequently hearing the cries of the minor girls several other persons turned up. *Musammat* Barkat was then rescued from the well and the matter was reported to the Police who challaned the accused *Musammat* Barkat under s. 309, Penal Code. She confessed her guilt before the trial Court.

The accused on conviction by *Sheikh* Muhammad Iqbal Khan, *Tahsildar*, Attock *Tahsil*, exercising the powers of a Magistrate of the Second Class in the Attock District was sentenced by order dated October 7, 1933, under s. 309, Penal Code, to six months' simple imprisonment. The Magistrate further added;

"She shall, however, be immediately released on entering into a bond for Rs. 500 with another surety worth the same amount to appear and receive sentence when called upon during a period of six months and she shall in the meantime keep the peace and be of good behaviour."

The order of the Magistrate is not in conformity with the provisions of s. 562, Criminal Procedure Code and is illegal since he has not only convicted the accused under s. 309, Penal Code but has also passed a sentence of six months' simple imprisonment and he has then added the order of releasing the accused. This view was taken in *Karim Bakhsh* v. *Emperor* (1) and *Ayyub* v. *Emperor* (2). The accused has executed the requisite bond.

Mr. *R. A. Jeremy*, for the Respondent.

Order.—On September 3, 1933, *Musammat* Barkat jumped into a well in order to destroy her life; and she has been rightly convicted under s. 309, Penal Code. The trial Court inflicted upon her a sentence of simple imprisonment for six months, and also released her under s. 562, Criminal Procedure Code, on probation of good conduct. The language of s. 562, however, makes it clear that the sentence of imprisonment imposed upon her, while she was released on probation of good conduct was wholly illegal and must, therefore, be quashed.

It appears that the unfortunate woman was driven to commit suicide by family discord or poverty and she should be an object of commiseration and not of punishment. The law confers upon the Court a very wide discretion in the matter of punishment and it is not necessary to inflict a sentence of imprisonment upon a person who on account of family discord, destitution, loss of a dear relation or other cause of a like nature overcomes the instinct of self-preservation and decides to take his life. In such a case the unfortunate person deserves indulgence, and should be either released on probation of good conduct or sentenced to a fine if he is not too poor to pay the fine. These observations apply with greater force to the case of a woman who attempts to commit suicide in similar circumstances. It is not possible to lay down any hard and fast rule on the subject but the Court must in each case consider the motive which has prompted a person to destroy his or her life.

N. *Order accordingly.*

(1) 112 Ind. Cas. 910; A I R 1930 Lah. 56; (1930) Cr. Cas 24; 30 Cr. L J 46; 10 Lah. 722.

(2) 112 Ind. Cas. 911; A I R 1928 All. 759; 30 Cr. L J 47; 10 A I Cr. R 443; 26 A L J 1391.

MADRAS HIGH COURT

Second Civil Appeal No. 2292 of 1927
September 18, 1934

BEASLEY, C. J. AND KING, J.

Parakkatavath Puthiapurayil ASSAN AND OTHERS—APPELLANTS

versus

Puthiapurayil Tharuvayi MOIDIN KUTTI, *Karnavan and manager of the Tarwad* AND OTHERS—RESPONDENTS

Execution of decree—Decree in benamidar's *name —Real owner's right to execute—Right of real owner's creditor to attach decree.*

Where a decree has been passed in favour of a person, it is not open to another person to apply for execution of that decree on the ground that he is the real owner of the decree and the nominal decree-holder is only a *benamidar* for him. *Palaniappa Chettiar* v. *Subramania Chettiar* (1), followed. *Manikkan* v. *Tatayya* (2) and *Nil Kantc Ghosal* v. *Ram Chand Roy* (3), distinguished.

But the fact that the real owner could not execute a decree passed in his *benamidar's* name does not mean that he has no property in the decree. Therefore a person who has obtained a decree against the real owner of another decree is entitled to attach the latter decree even though it stands in the name of the *benamidar*, and a decree declaring his right attached may be made.

S. C. A. against the decree of the District Court of North Malabar in A. S. No. 381 of 1925 preferred against the decree of the Court of the District Munsif of Cannanore in O. S. No. 321 of 192- (O. S. No. 70 of 1923, District Munsif Court, Tellicherry).

Mr. *P. Govinda Menon*, for the Appellant.

The Advocate-General, Messrs. *M. C. Sridharan*, *V. P. Karunakara Nambiar* and *C. S. Krishnamurti*, for the Respondents.

King, J.—The contesting parties in this appeal are plaintiff and defendant No. 4. Plaintiff filed a suit for money (O. S. No. 1 of 1923, Sub Court, Tellichery) against defendant No. 1 and others and obtained a decree in September, 1924. Defendant No. 4 is the holder of another decree (in O. S. No. 394 of 1921 District Munsif's Court, Kasargod). That suit (O. S. No. 394 of 1921) was originally filed by defendant No. 1 but on August 4, 1921, first defendant assigned his claim against the defendants in that suit to defendant No. 4. Defendant No. 4 was then impleaded as supplemental second plaintiff and on March 11, 1922, a compromise decree was passed in favour of defendant No. 4 alone. Now when plaintiff brought his suit against defendant No. 1 in 1923, he attached this decree in favour of defendant No. 4 before judgment, alleging that defendant No. 4 was really only a *benamidar* for defendant No. 1. Defendant No. 4 objected to this attachment and the attachment was raised. Plaintiff then in 1923, filed the present suit and obtained a declaration from the District Munsif of Cannanore that he was entitled to attach defendant No. 4's decree in execution of his own decree against defendant No. 1. This declaration was upheld in appeal by the District Judge of North Malabar and defendant No. 4 has now filed this Second Appeal. Both Courts below are agreed on the facts that the transfer from defendant No. 1 to defendant No. 4 was a nominal one and that defendant No. 4 is, therefore, merely a *benamidar* for defendant No. 1. The only question before us is whether plaintiff's suit was or was not maintainable.

The first ground of attack in appeal is that as the value of defendant No. 4's decree at the date of the institution of plaintiff's suit was more than Rs. 3,000, that suit would not lie in the Court of the District Munsif. The learned District Judge has dealt with that objection in para. 3 of his judgment and has shown that the conditions laid down in s. 11 of the Suits Valuation Act have not been satisfied in this case; and his decision on this point has not been seriously challenged before us.

Nor is it seriously disputed that in the narrow meaning of the term plaintiff's suit was undoubtedly maintainable as O. XXI, r. 63, of the Civil Procedure Code, expressly gives him the right to sue.

The real argument in appeal is this. Defendant No. 1 could never have been permitted to execute a decree granted in favour of defendant No. 4. Plaintiff can have no higher rights than defendant No. 1 could have. Plaintiff also, therefore, cannot execute defendant No. 4's decree. If he attaches it his only further course under the Code (see O. XXI, r. 53) is to execute it. But he cannot execute it for the reason just given. Any declaration, therefore, which he may get in this suit is futile, and on this ground the suit ought to have been dismissed without any enquiry into the facts.

We think there can be no doubt but that the first step in this argument is established. It has been held in *Palaniappa Chettiar* v. *Subramania Chettiar* (1), that where a decree has been transferred to

(1) 88 Ind. Cas. 409; 43 M 553; 48 M L J 419; 21 L W 515; A I R 1928 Mad. 701.

any particular person under an instrument in writing, no other person who claims that he is the real owner under the transfer can apply for execution of the decree and the principles underlying that decision apply with added force to the facts of the present case where defendant No. 4 is the original decree-holder himself and defendant No. 1 was a party to the suit in which he obtained the decree. *Manikkam* v. *Tatayya* (2), on which the learned Advocate for the respondent seeks to rely, has been definitely dissented from in *Palaniappa Chettiar* v. *Subramania Chettiar* (1), and *Nilkanta Ghosal* v. *Ramachand Roy* (3), also cited for the respondent is the judgment of another High Court and proceeds upon the assumption that there is no dispute between *benamidar* and real owner. We, therefore, agree that this decree could not have been executed by defendant.

But at its second step we think the argument breaks down, for the argument amounts to this, that plaintiff is entirely precluded from proceeding in execution against this decree. This can only be so if it be held that defendant No. 1 has no property in the decree. To say that defendant No. 1 cannot be permitted to execute a decree passed nominally in favour of defendant No. 4, and to say that defendant No 1 has no property in that decree are two very different propositions. The property in a decree is not merely the right to execute it much more essentially is it the right to the actual money which is realised by its execution, and if this particular decree were to be executed by defendant No. 4, we do not see how it could possibly be denied on the facts found that defendant No. 1 would be entitled to claim the money realised. It is this money at which, of course, the plaintiff aims, money which is really due to defendant No. 1, money which if realised is defendant No. 1's property held by defendant No. 4 in trust for him, and we see no valid reason why the plaintiff who holds a decree against defendant No. 1 should not have a declaration permitting him to attach a decree whose real owner is his judgment-debtor.

Whether this declaration is or is not a futile one is not a point with which we need now concern ourselves. No doubt if defendant No. 4 had already executed the decree, a declaration permitting its attachment might serve no useful purpose and plaintiff might be driven to alter the form of his prayer or take other proceedings, but we need not assume that difficulties actually exist in this case of whose existence we have not been informed. For the reasons given, we think that the decisions of the two Courts below were right, and that this appeal must be dismissed with costs of respondent No. 5. Civil Miscellaneous Appeal No. 336 of 1928 is dismissed. No costs.

A. *Appeal dismissed.*

(2) 21 M 383.
(3) 114 Ind. Cas. 495; 55 C L J 82; A I R 1923 Cal. 835.

LAHORE HIGH COURT

Civil Revision Petition No. 139 of 1933
March 21, 1934
ADDISON, J.

ALI MUHAMMAD—PLAINTIFF—PETITIONER
versus
ALI MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS

Practice—Suit against some only of the legal representatives of deceased debtor—Maintainability—Decree, if binding on other legal representatives not impleaded—Civil Procedure Code (V of 1908), s. 52.

There is no law that all the legal representatives of a deceased person must be impleaded. It is sufficient that the plaintiff sues those persons whom he considers to be the legal representatives after enquiry. If such persons are sued, the suit is a good one and the decree will be effective to the extent of the property of the deceased which has reached their hands and a suit of this nature cannot be defeated by reason of the fact that two other sons have not been impleaded though the sons who are not impleaded will not be bound by the decree.

C. R. P. from an order of the Sub-Judge, Montgomery, dated November 24, 1932.

Mr. *Anant Ram Khosla*, for the Petitioner.

Order.—One Dost Muhammad is alleged to have struck a balance for Rs. 300 in favour of the plaintiff Ali Muhammad and thereafter borrowed Rs. 20. As he died without re-paying these sums, the plaintiff brought the present suit for recovery of Rs. 320 against seven sons of Dost Muhammad. He asked that a decree might be given for the amount due to the extent of the estate of their father in their hands. The trial Court granted the plaintiff a decree. On appeal the Senior Subordinate Judge only decided a preliminary point, namely, that the suit was incompetent without two other sons of Dost Muhammad being impleaded as defendants. On this account he accepted the appeal, directed

that they should be brought on the record and sent the case back to the trial Court to be decided in accordance with law and to determine whether the suit was or was not barred by limitation by reason of the addition of the two other sons. Against this decision the plaintiff has preferred this revision petition.

There is no law that all the legal representatives of a deceased person must be impleaded. It is sufficient that the plaintiff sues those persons whom he considers to be the legal representatives after enquiry. If such persons are sued the suit is a good one and the decree will be effective to the extent of the property of the deceased which has reached their hands, and a suit of this nature cannot be defeated by reason of the fact that two other sons have not been impleaded though the sons who are not impleaded will not be bound by the decree.

For the reasons given, I accept this petition, set aside the appellate order of the Senior Subordinate Judge and remand the appeal to him to be decided on the merits. Costs in this Court will abide the event; other costs will be in the discretion of the Appellate Court.

N. *Petition accepted.*

LAHORE HIGH COURT

Letters Patent Appeal No. 58 of 1932
February 27, 1934

TEK CHAND AND COLDSTREAM, JJ.

PRABHU DAYAL—JUDGMENT-DEBTOR—APPELLANT

versus

DEWAT RAM AND OTHERS—DECREE-HOLDERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Principles of—Applicability of, to execution proceedings—Constructive res judicata.

Although s. 11 of the Code of Civil Procedure does not in terms apply to execution proceedings, yet the general principles underlying the rules of *res judicata* are applicable to execution proceedings. The applicability of the rule is not limited to matters, which were directly and substantially in issue and were heard and expressly decided in former execution proceedings, but the principle of "constructive *res judicata*", as embodied in Expl. IV to s. 11, also applies to such proceedings.

[Case-law discussed]

L. P. A. from an order of Harrison, J., dated October 15, 1932.

Mr. *Nawal Kishore*, for the Appellant.

Mr. *Shamair Chand*, for the Respondent.

Tek Chand, J.—The learned Judge in Chambers dismissed the judgment-debtor's appeal on the ground that the objection now raised by him against the execution of the decree might and ought to have been raised when the decree-holder had previously applied for execution and that his failure to do so debarred him from raising it at this stage. I have no doubt that the decision of the learned Judge is correct.

It is true that s 11, Civil Procedure Code, does not in terms apply to execution proceedings but it has long been settled that the general principles underlying the rule of *res judicata* are applicable to execution proceedings: see *Ram Kirpal* v. *Rup Kuari* (1) and *Lachhmi* v. *Bhulli* (2). It has also been held that the applicability of the rule is not limited to matters which were directly and substantially in issue and were heard and expressly decided in former execution proceedings but the principle of "constructive *res judicata*," as embodied in Expln. IV to s. 11 also applies to such proceedings. Therefore it is not open to a judgment-debtor to object to execution on a plea which could have been raised in former execution proceedings but was not so raised: see *Ved Kuar* v. *Balkishan Das* (3), *Dip Parkash* v. *Dwarka Prashad* (4), *Rajitagiripathy* v. *Bhavani Sankaram* (5), *Gadigappa Chanabasappa* v. *Shidappa Gurushidappa* (6), and *Daw Ohn Bwin* v. *U Bu* (7). The matter is really concluded by the decisions of their Lordships of the Privy Council in *Mungal Pershad Dichit* v. *Girja Kant Lahiri* (8), and *Raja of Ramnad* v. *Velusawmi Tevar* (9). In the latter case their Lordships clearly laid down that:

"It was not only competent to the present respondents to bring the plea forward on that occasion but it was incumbent on them to do so if they proposed to rely on it"

and as this had not been done, it was not competent for the "Subordinate Judge to

(1) 6 A 269; 11 I A 37; 4 Sar. P C J 489 (P C).
(2) 101 Ind. Cas. 819; 8 Lah. 381 at p 395; A I R 1927 Lah. 289 (F B).
(3) 141 Ind Cas. 577; 14 Lah. 401; Ind. Rul (1933) Lah. 150; 34 P L R 528; A I R 1933 Lah. 594.
(4) 90 Ind. Cas. 83; 48 A 201; L R 6 A 606 Civ.; 24 A L J 91; A I R 1926 All. 71.
(5) 80 Ind. Cas 103; 47 M 611; 19 L W 650; 47 M L J 9; (1924) M W N 527; A I R 1924 Mad. 673.
(6) 83 Ind. Cas. 155; 48 B 638; 26 Bom. L R 817; A I R 1924 Bom. 495.
(7) 127 Ind. Cas. 375; 8 R 302; A I R 1930 Rang. 213; Ind. Rul. (1930) Rang. 359.
(8) 8 C 51; 8 I A 123; 11 C L R 113; 1 Sar. P C J 219.
(9) 50 Ind. Cas. 880; 43 I A 45; 38 C L J 21; 19 A L J 168; 40 M L J 197; 13 L W 290; (1921) M W N 51; 25 C W N 581; 23 Bom. L R 701; 29 M L T 345 (P C).

admit the plea on subsequent proceedings."

It is conceded by the learned Counsel for the appellant that the appellant could have taken this objection at an earlier stage but he did not do so. The appeal is without force and is dismissed with costs.

Coldstream, J.—I agree.

N. *Appeal dismissed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Criminal Appeal No. 54 of 1934

March 5, 1934

MIDDLETON, J. C. AND SAADUDDIN, A. J. C.

ARSALA KHAN—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 302—Conviction and sentence for offence under s. 307 still in force—Subsequent trial and conviction under s. 302, if barred—Criminal Procedure Code (Act V of 1898), s. 403 (3)—General Clauses Act (X of 1897), s. 26—Does not act as a bar to trial or conviction but merely as bar to duplicate punishment.

An accused was tried and convicted on July 22, 1933, of attempted murder of one G and sentenced to imprisonment under s. 307, Penal Code. G died on the July 25. The accused was re-tried under the provisions of s. 403, cl. (3), Criminal Procedure Code, and sentenced to death under s. 302, Penal Code :

Held, that the previous conviction was no bar to subsequent trial and conviction. *Crown* v. *Sarbiland* (1), followed.

Section 26, General Clauses Act, does not act as a bar to trial or conviction but merely as a bar to duplicated punishment. Where the second trial results in a sentence of imprisonment or transportation, the provisions of s. 26, General Clauses Act, can be complied with merely by the direction that such imprisonment or transportation shall run concurrently with that imposed in the previous case ; in the case of a death sentence there can be no question of a concurrent sentence, for the sentence itself automatically cancels the previous sentence of imprisonment.

Cr. A. from an order of the Sessions Judge, Derajat, dated January 30, 1934.

Mian *Ziauddin*, for the Appellant.

Kazi *Mir Ahmad Khan*, K. S., for the Crown.

Judgment.—Arsala, aged 25, and Isa Khan, aged 23, of Shanwa Gudikhel, have been convicted and sentenced to death under s. 302-34, Penal Code, for having murdered Ghulam Muhammad, a boy of 11 years of age who was the half brother of Arsala's father. The sentences are before us for confirmation and the two convicts have instituted separate appeals against their convictions in which we have heard Counsel to-day. Ghulam Muhammad survived for a considerable period after the wounds which ultimately led to his death had been inflicted and the appellants were tried jointly and convicted on July 22, 1933, of attempted murder and sentenced to seven years' rigorous imprisonment each under s. 307, Penal Code. Thereafter the boy died on July 25, and after judicial inquiry and commitment, the present trial was held under the provisions of s. 403, cl. (3), Criminal Procedure Code. Learned Counsel for the appellants raises the preliminary objection that the second trial and in particular the sentences awarded, were illegal. He bases this argument upon cl. (5), s. 403, Criminal Procedure Code, which reads : "Nothing in this section shall affect the provisions of s. 26, General Clauses Act". That section provides :

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

Clause (3), s. 403, Criminal Procedure Code, is as follows :

"A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted."

Counsel urges that whilst the sentence for attempted murder was still in force, there could be no subsequent conviction and sentence for murder. He suggests that it was necessary that the previous conviction and sentence should have been set aside in revision before the present trial was commenced. The passages quoted can in no way be construed to debar the trial and conviction. The only question is whether the punishment awarded as a result of the conviction could be awarded without setting aside that awarded in the prior conviction. (The trial Court of course had no power to set aside the previous conviction or punishment.) The course suggested as correct by Counsel was suggested but not followed in *Crown* v. *Sarbiland* (1). In that case a man had been convicted under s. 324, Penal Code, and sentenced to imprisonment. Subsequent to the conviction the wounded man died and the District Magistrate reported the case recommending that the previous conviction be quashed as a preparatory measure to the institution of a trial for murder. The reference was

(1) 3 P R 1901 Cr.

returned with the following remarks :

"It was not necessary to make this reference, and I do not propose to pass the orders suggested. A trial for causing hurt, which clearly had occurred and a trial for causing death which has occurred in consequence of the injuries caused, but which has taken place after the trial and conviction for hurt, is not a trial on the same facts. The death, which has occurred since, is a new fact of crucial importance. But the Criminal Procedure Code, specifically provides for cases of this kind. Under s. 403 (3) this very contingency is mentioned and illustration (c) is almost exactly on all fours with the present case, 'hurt' being substituted for 'grievous hurt'. It is, therefore, open to the District Magistrate to order the re-opening of the case. And if the Magistrate, before whom it goes, considers that there is ground for a committal under s. 302 or s. 304, the previous convictions for simple hurt is no bar to such commitment and subsequent trial; and should the trial result in a conviction, the convict can be punished under s 304, or s 302, or whatever section may be appropriate in which the death of the deceased forms part of the offence."

The present case is precisely similar in essentials and we have no reason to differ from the views expressed by the learned Judge of the Punjab Chief Court. Counsel, however, urges that s. 26, General Clauses Act, refers to an act or omission constituting an offence, and urges that the consequences of the act or omission do not affect the provisions of that section. He appears to think that the two appellants were punished in the first instance and have again been sentenced for the mere act of firing irrespective of its consequences; he overlooks the concluding words of the section which forbid punishment twice for the same "offence;" offence includes both the physical act and its consequences; in the present case no offence of murder had been committed at the time the two convicts were first tried and convicted.

Again s. 26, does not act as a bar to trial or conviction but merely as a bar to duplicated punishment. We are of opinion that in cases of similar nature where the second trial results in a sentence of imprisonment or transportation, the provisions of s. 26 can be complied with merely by the direction that such imprisonment or transportation shall run concurrently with that imposed in the previous case; in the case of a death sentence, there can be no question of a concurrent sentence, for the sentence itself automatically cancels the previous sentence of imprisonment. It is true that the law discussed would operate as a bar to any punishment being inflicted in the present case to take effect after expiry of the punishment in the previous case; further than this we cannot accept Counsel's argument, and as there can be no suggestion that the death sentence is to be delayed, we must overrule it and record a finding that there was no irregularity in the trial, convictions or sentences. (The learned Judges considered the merits of the case and confirmed the sentence of death passed on Arsala and acquitted Isa.)

D. *Order accordingly.*

LAHORE HIGH COURT

First Civil Appeal No. 1420 of 1929

June 20, 1934

ADDISON AND SALE, JJ.

HAKIM SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

GAJJA SINGH AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS

Deed—Construction—Intention—Charge—Mortgage—Clog or equity of redemption—Agreement between parties creating subsequent charges—Necessity of.

Whether a certain document did or did not create a charge on certain mortgaged property for the amount of the debt, depends on the intention of the parties which must be gathered from a reading of the document itself. Where a bond provides that the mortgage deed in respect of the land executed by Sant Singh in favour of the said creditors is a separate bond, that this bond has been executed separately and the amount of the bond will be paid before mortgage deed, the bond does not create a charge. *Aditya Prasad* v *Ratan Lal* (2), relied on.

The weight of authority is against recognizing any clog on the equity of redemption in the absence of a clear agreement between the parties creating a subsequent charge on the mortgaged property.

Messrs. *J. L. Kapur* and *J. N. Aggarwal*, for the Appellants.

Messrs. *Nand Lal, Pran Nath, Mohammad Din Jan* and *Tirath Ram*, for the Respondents.

Judgment.—The lower Court has granted the plaintiffs, who claimed as mortgagees under a mortgage deed of February 1, 1924, a preliminary decree for possession of 216 *kanals* 11 *marlas* of land situated in village Munawan, *Tahsil* Kasur, by redemption on payment of Rs. 5,907-8-0. Against this decree Hakim Singh, Ghula Singh, Kapur Singh and Suba Singh, the previous mortgagees of the land in suit, have appealed. The material facts are that on November 7, 1911, Sant Singh, father of Arur Singh, mortgaged the land in suit to the defendants-appellants for Rs. 9,000. On January 13, 1912, Arur Singh, the son, challenged this mortgage and the Additional District Judge of Lahore on

February 22, 1915, granted him a declaration that the mortgage was valid against him to the extent of Rs. 5,907-8-0 only. On February 26, 1923, Sant Singh borrowed from the same defendants-appellants Rs. 6,800 and executed a bond, Ex. D-1, which is alleged to create a fresh charge on the mortgaged property and the exact interpretation of which is a question for consideration in this appeal. It has been found by the lower Court, and has not been contested in appeal, that on February 1, 1924, Sant Singh and Arur Singh mortgaged 92 *kanals* of the land in suit with the plaintiffs-respondents for Rs. 11,000 with a stipulation that the plaintiffs were to pay Rs. 9,000 to the defendants-appellants, but that if Sant Singh should pre-decease his son, Rs. 5,907-8-0 were to be paid to the defendants and the balance to Arur Singh. Shortly afterwards, Sant Singh died; and on November 5, 1928, the plaintiffs mortgagees claiming under the mortgage dated February 1, 1924, instituted this suit to redeem the whole land on payment of Rs. 5,907-8-0. Arur Singh, having been originally impleaded as a defendant, was on his own application made a co-plaintiff with the mortgagees.

On November 12, 1928, after the institution of this suit, Arur Singh executed in favour of the defendants-respondents a second bond for Rs. 942 which is exhibited as D-2. The suit was contested by the original mortgagees on two main pleas : (1) that Arur Singh had relinquished his rights under the declaratory decree of February 22, 1915, by the execution of the two bonds, D-1 and Ex. D-2 and (2) that these two bonds of February 26, 1923 Ex D-1 and of November 12, 1928, Ex. D-2, created fresh charges on the land which, it is contended, could not be redeemed without paying off these additional charges. The learned Senior Subordinate Judge found against the defendants on both these points, which have been re-agitated in appeal.

The first and most important point for our consideration is the question whether the bonds, Exs. D-1 and D-2, create fresh charges on the land in suit so as to clog the equity of redemption claimed by the plaintiffs-respondents. The second bond dated November 12, 1928, Ex. D-2 which was executed after institution of the suit and under appeal is printed at p. 29 of the printed paper book and requires no discussion. There is no mention therein of any additional charge on the mortgaged land. The only reference to any mortgage is in a post script in which Arur Singh states that :

"I have mortgaged this land to the creditors. I will pay the money and redeem the land."

The bond however, contains no reference to any particular land and the identity of the land referred to in the post script is a matter of speculation. In any case, there is no covenant that the consideration for the bond was to form an additional charge on the land referred to in the post script whatever it is and whereever it may be situated. The bond does, not, therefore, assist the defendants-appellants' case. Turning now to the earlier bond, Ex. D-1, dated February 26, 1923, which is printed on p. 37 of the paper book, the translation of the material paragraph which is alleged to create a charge on the land in suit is as follows :

"The mortgage deed in respect of the land executed by Sant Singh in favour of the said creditors is a separate bond This bond has been executed separately and the amount of the bond will be paid before mortgage deed".

In the lower Court, Counsel for the defendants relied on *Hardayal Lal* v. *Ganga Koeri* (1) which the lower Court distinguished on the ground that the documents in the Allahabad case contained a clear redemption clause, whereas there is no mention of redemption in the bond, Ex. D-1, the material portion of which the lower Court held to be a mere personal covenant regulating the time of repayment. Counsel for the appellants has mainly relied on a Privy Council ruling cited as *Aditya Prasad* v. *Ratan Lal* (2) which has been followed in *Jagannath Kunwar* v. *Jaipal* (3). In construing the document in question in *Aditya Prasad* v. *Ratan Lal* (2) their Lordships of the Privy Council decided that the question whether a certain document did or did not create a charge on certain mortgaged property, for the amount of the debt, depended on the intention of the parties which must be gathered from a reading of the document itself. In that case, the deed provided :

"I should first pay up this debt including principal and interest and thereafter I can redeem the mortgaged village, having paid up mortgage money. Without payment of this debt I cannot redeem this mortgage".

Their Lordships held in agreement with the Chief Court that the parties intended that the original village should remain in possession of the mortgagees until the

(1) 102 Ind. Cas. 202; A I R 1927 All. 743.

(2) 123 Ind Cas. 191; A I R 1930 P C 176; 57 I A 173; 5 Luck 365 (P C)

(3) 142 Ind. Cas. 410; A I R 1933 All. 257; 55 All. 359 (F B).

second debt was paid off and intended, therefore, that the property should be a security for the debt. Similarly, in *Jagannath Kunwar* v. *Jaipal* (3), it is apparent that the document then in suit forbade redemption of the mortgage until the subsequent loan was paid off. It was held that an agreement that the mortgagor should pay the amount due on the subsequently executed bond before he redeems the prior mortgage, was an agreement to create a charge on the property previously mortgaged. Clearly, neither of these rulings is in point in the present case. Neither the bond, Exs. D-1 nor D-2 contains any agreement forbidding redemption of the mortgage until the bond has been paid off. As already stated, the bond, Ex. D-2, does not help the defendants' case at all, while the bond, Ex. D-1, merely recites the fact that a separate mortgage deed has been executed in favour of the creditor and that the amount of this bond shall be paid before the mortgage-deed. There is no clause in any way affecting the equity of redemption or creating a charge on the property previously mortgaged. The weight of authority is against recognizing any clog on the equity of redemption in the absence of a clear agreement between the parties creating a subsequent charge on the mortgaged property In our view, there is nothing in either of these bonds which can be held to restrain or interfere in any way with the plaintiffs' equity of redemption.

The plea that Arur Singh had relinquished the rights obtained by him under the decree of February 22, 1915, is based on the same passage in the bond, Ex. D-1, which has already been quoted. As pointed out by the trial Court, the relinquishment of such a right must be expressed in clear and unambiguous language before it can be held proved. The stipulation in the bond Ex. D-1, on which the defendants relied is not a covenant by Arur Singh but a mere statement of fact on behalf of Sant Singh to the effect that he has executed a separate mortgage deed. Whatever may be the effect of the statement of fact on Sant Singh, it does not in the least affect Arur Singh and the amount of money, *viz*, Rs. 5,907-8-0, which has still to be paid by him before redemption. Nor is there anything in the second bond Ex. D-2, which was executed after the institution of the present suit indicating relinquishment of his rights by Arur Singh. We agree with the trial Court in holding that the relinquishment is not proved. For these reasons, we confirm the decree of the lower Court and dismiss the appeal. We make no order as to the costs of this appeal.

D. *Appeal dismissed.*

OUDH CHIEF COURT

First Civil Appeal No. 1 of 1933
October 30, 1934
NANAVUTTY AND THOMAS, JJ.

JAGAN NATH SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
MADHO SINGH AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), Sch. II, para. 1, cl. (2)—Application to refer dispute to arbitration—Whether should be in writing.

Application to refer a dispute to arbitration need not be in writing as the expression "application shall be in writing" in para 1, cl. (2) of the second Schedule of the Code of Civil Procedure is merely directory and not mandatory. *Mirza Mohamad Hasan Beg* v. *Mirza Shakir Beg* (1), *Mahabir* v. *Manohar Singh* (2) and *Waliullah* v. *Bhaggan* (3), followed

F. C. A. against an order of the Additional Sub-Judge, Unao, dated September 29, 1932.

Mr. *D. K. Seth*, for the Appellant.

Mr. *K. N. Tandon*, for the Respondents.

Judgment.—These are two cross-appeals from a judgment of the learned Additional Subordinate Judge of Unao in a suit for partition brought by Jagannath Singh and Sardar Singh.

At the hearing of this appeal the learned Counsel of both parties and the parties themselves expressed a desire that all the points involved in these appeal be referred to the arbitration of Mr. Ghulam Hasan Butt, an Advocate of this Court. Accordingly the statements of the Counsel of the parties were recorded and the case was referred to the arbitration of Mr. Ghulam Hasan. The arbitrator filed his award on September 21, 1934. The result of his award is to confirm the judgment and decree of the trial Court.

The defendants-appellants have filed objections to the award and they have raised two pleas in their objections. In the first place it is contended on their behalf that there was no valid reference to arbitration as required by the Code of Civil Procedure inasmuch as no application in writing was made by the parties to refer the dispute to arbitration (see para. 1, sub-s. 2 of the Second Schedule of the Code of Civil Procedure). In our opinion there is no force in this conten-

tion. In *Mirza Mohamad Hasan Beg* v. *Mirza Shakir Beg* (1) Mr. Justice Saiyid Wazir Hasan held that the expression "application shall be in writing" in para. 1, cl. (2) of the Second Schedule of the Code of Civil Procedure was merely directory and not mandatory.

Again in *Mahabir* v. *Manohar Singh* (2) Mr. Justice Kanhaiya Lal held that where the pleaders of both the parties to a pending suit stated that they agreed to a reference to arbitration, and the statements were recorded and an order of reference was accordingly made by the Court, though not upon a written application, the award based upon the reference was valid.

Similarly in *Waliullah* v. *Bhaggan* (3) a learned Judge of this Court held that an award could not be set aside merely because the reference to arbitration was not made in writing.

In Sir Dinshah Mulla's commentary on the Code of Civil Procedure (10th Edition, 1934, at page 1260) we find the learned commentator making the following observations on the phrase that the "application shall be in writing."

"The provision requiring the application to be in writing is directory only, and not imperative hence an award is not invalid merely because the application for the order of reference was not made in writing, (see *Shama Sundaram* v. *Abdul Latif* (4) and *Abdul Hamid* v. *Riaz-ud-din* (5). In a recent case before the Judicial Committee where the agreement was in writing but it was not signed by one of the parties, it was held that para. 1 of this Sehedule did not require that the writing should of necessity be signed, (see *Umed Singh* v. *Sobhag Mal* (6)"

We are, therefore, clearly of opinion that there is no force in the first ground taken in the objections of the defendants that there was no valid reference to arbitration as required by the Code of Civil Procedure.

In the second place it is contended on behalf of the defendants that the award is vague and indefinite. In our opinion the award is very clear and precise and is expressed in very terse language. There is nothing unclear and indefinite about it. The plaintiffs were granted a decree for partition of one share out of two and a half shares in the properties mentioned in lists 1 and 3 and in the properties entered at Nos. 5, 6, 8, 9 and 10 of list 2, attached to the plaint in the suit filed by the plaintiffs against the defendants. Obviously the balance of the properties entered in these lists would necessarily go to the defendants.

There is, therefore, no force in these objections and we accordingly dismiss them, confirm the award, and decree these two appeals in terms of the award, which will form part of the decrees of this Court.

N. *Appeal dismissed.*

(1) 78 Ind. Cas. 378; 11 O L J 142; 10 O & A L R 55; A I R 1924 Oudh 460.

(2) 79 Ind. Cas. 816; 46 A 208; 22 A L J 67; A I R 1924 All. 540.

(3) 80 Ind. Cas. 7; A I R 1925 Oudh 269; 10 O & A L R 761; 11 O L J 570; 1 O W N 394; 28 O C 74.

(4) 27 C 61.

(5) 30 A 32; 4 A L J 691; A W N 1907, 273.

(6) 32 Ind. Cas. 161; 43 I A 1; 20 C W N 137; 30 M L J 67; 14 A L J 97; 3 L W 146; 19 M L T 108; 23 C L J 130; (1916) 1 M W N 67; 18 Bom. L R 308; 43 C 290 (P C).

MADRAS HIGH COURT

Civil Appeal No. 91 of 1930

October 25, 1934

VARADACHARIAR AND BURN, JJ.

ATHIMANNIL MUHAMMAD—APPELLANT

versus

THE MALABAR DISTRICT BOARD—RESPONDENT

Madras Local Boards Act (XIV of 1920), s. 225 (3)—Suit for improper cancellation by President of contract with Board—Whether a suit 'in respect of an act done in pursuance of the Act'—Special rule of limitation, whether applies.

Where, during the absence of the President of a District Board, the Vice President accepted a tender made by the plaintiff for a lease of the right to buy tolls, and the President, finding that there was a higher tender, cancelled the acceptance of the plaintiff's tender and the plaintiff filed a suit against the Board for damages for improper cancellation of the contract:

Held, that the suit was one 'in respect of an act done or purporting to be done by the President in pursuance of the Act', within the meaning of s. 225 (3) of the Madras Local Boards Act and was time-barred as it was not instituted within 6 months of the accrual of the cause of action. The distinction between actions on contract and actions independent of contract which has been drawn in this connection, though convenient as a working rule, does not accurately represent the basis of the applicability of the rule. The real test is whether what is complained of is some act done in pursuance of the statute *Brodford Corporation* v. *Myers* (5), and other cases referred to.

C. A. against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, dated March 30, 1929, and passed in O. S. No. 3 of 1928.

Messrs. *P. S. Narayanaswamy Iyer* and *C. S. Swaminathan*, for the Appellant.

Mr. *P. Govinda Menon*, for the Respondent.

Judgment.—We have heard arguments, on this appeal, only on the ques-

tion raised by Issue No. 2, namely whether the suit is barred under s. 225 (3) of the Madras Local Boards Act, as it has admittedly been instituted more than six months after the accrual of the alleged cause of action. As we agree with the lower Court in its conclusion on this point, it is unnecessary to deal with the other issues arising in this case.

The plaintiff filed this suit, claiming damages from the District Board of South Malabar, on the ground that by order dated March 31, 1925, the President improperly cancelled a contract with the plaintiff whereby the plaintiff had been given the lease, for one year, of the tolls in certain places in the Malabar District. The material facts are, that pursuant to an invitation of tenders, the plaintiff made a tender on March 23, 1925, which was accepted by the Vice-President, during the President's absence, on March 24. The President seems to have left directions that the papers relating to the lease of tolls should be placed before him and he was, therefore, apparently of opinion that the acceptance by the Vice-President was not authorised. He also seems to have found that there was another contractor who offered a much larger amount in respect of the same toll gates. He naturally accepted the tender of the other man and as a necessary result cancelled the acceptance of the plaintiff's tender. Both these subjects are embodied in one order of the President (See Exs. III and V). The question for consideration under Issue No. 2 is whether or not the action is in respect of "any act done or purporting to be done in pursuance of execution or intended execution of the Act."

On behalf of the appellant, Mr. Narayanaswami Ayyar has contended that several cases have held that this provision does not apply to cases arising out of breach of contract but is limited to liabilities arising out of the execution of or the omission to execute statutory duties of such bodies. Reference may, in this connection, be made to *Mayandi* v. *Mc Quhae* (1), *The President, District Board, Malabar* v. *Kantikannan* (2), *Ranchordas Moorarji* v. *Municipal Commissioners for the City of Bombay* (3), *Municipal Council of Kumbakonam* v. *Veerapérumal Padayachi* (4) and *Brodford Corporation* v. *Myers* (5). This distinction between actions on contracts and actions independent of contracts may be convenient enough as a working rule, but we do not think it can be said to represent accurately the basis of the applicability of the rule. This was realised by Jenkins, C. J. even in the 25 Bomba case [*Ranchordas Moorarji* v *Municipal Commissioners for the City of Bombay* (3)] and is emphasised by Lord Shaw in 1915 in *Brodford Corporation* v. *Myers* (5). The real test is whether what is complained of is some act done in pursuance of the statute. In cases where there is no dispute as to the existence of a contract, all further rights and liabilities between the parties are governed by the ordinary law relating to contracts, and it is true enough, in such case, to say that the rights and liabilities of the parties in respect of the contract are matters of ordinary law and not matters governed by the statute. But where, as in the present case, we find that the cancellation of the acceptance of the plaintiff's offer is the necessary result of what the President thought, in accordance with the terms of the Act as he interpreted them, his duty to accept, *viz.*, the highest tender and he did this on the footing that the Vice President's acceptance of the plaintiff's tender is not a compliance with the Act,—we cannot say that the question does not relate to an act done under the statute. The right to levy tolls is a special privilege conferred by the statute upon local bodies and under the terms of s. 106 (1), Local Boards Act, authorised either to manage the collection of the tolls themselves or through their own agency or to lease them out. In either case what the President as representing the Board does in connection with the leasing out of the right to levy tolls is undoubtedly an act done in execution of his powers or duties under the Act.

The discussion in *Brodford Corporation* v. *Myers* (5) is itself sufficient to show the difficulties in the way of attempting anything like an exhaustive definition or clear-cut differentiation of the cases falling under the section and of cases not falling under the section. Lord Buckmaster, L. C., for instance, emphasises the distinction between an incidental power to trade and a direct duty to trade,

(1) 2 M 124.
(2) 17 M L J 390.
(3) 25 B 387; 3 Bom. L R 158.
(4) 28 Ind. Cas. 45; 28 M L J 147; (1915) M W N 143.
(5) (1916) A C 242; 85 L J K B 146; 114 L T 83; 80 J P 121; 14 L G R 130; 60 S J 74; 32 T L R 113.

even in cases where a statutory body is authorised to trade and the Lord Chancellor was of opinion that anything falling under the second head will be governed by the provisions of the Act. Both Lord Haldane and Lord Shaw emphasise the impossibility of framing anything like a general test. The question must depend upon the circumstances of each case, and for the reasons already given we hold that the present case is within the terms of s. 225 (1) of the Local Boards Act. In *Municipal Council, Kumbakonam* v. *Veeraperumal Padayachi* (4), Mr. Justice Napier takes care to point out that in the case then before the Court, the contract was not of such a character as must necessarily arise out of statutory powers given to the local body. The same cannot be said of the contract here. In *Bhag Chand Dagdusa Gujrathi* v. *Secretary of State for India* (6) the Privy Council, in dealing with a similar provision, s. 80, Civil Procedure Code, pointed out that if a particular action falls within the language of the statute, it is not for the Court to canvass the policy or even the expediency of interfering with a person's right of action, by such a restrictive provision. In the view that the present action is clearly within the terms of s. 225 Cls. (*i*) and (*iii*) of the Local Boards Act, the suit must fail on the ground that it has been instituted more than six months after the accrual of the alleged cause of action. The appeal is, therefore, dismissed with costs.

A. *Appeal dismissed.*

(6) 104 Ind. Cas 257; 51 B 725; 53 M L J 81: A I R 1927 P C 176; 25 A L J 641; 29 Bom. L R 1227; (1927) M W N 561; 46 C L J 76; 1 Luck. Cas. 291; 32 C W N 61; 26 L W 809; 54 I A 338 (P C).

OUDH CHIEF COURT

First Civil Appeal No. 5 of 1934
February 19, 1935
KING, C. J. AND ZIA-UL- HASAN, J.
ABDUL SUBHAN KHAN
—PLAINTIFF APPELLANT
versus
MASARAT ALI KHAN AND OTHERS
—DEFENDANTS—RESPONDENTS

Court Fees Act (VII of 1870), Sch. I, Art. 1, Sch. II, Art. 17—Cross-objections—Court-fee on, how to be paid—Principle to be followed.

The court-fee on cross-objections should be paid *ad valorem* according to the value of the subject-matter in dispute under Art 1, Sch. I of the Court Fees Act and not on the same principle as laid down for the case of appeals in Art. 17 of the Second Schedule. *Raja Harnam Singh* v. *Rani Bahu Rani* (1), followed, *Surendra Singh* v. *Gambhir Singh* (2), not followed

F. C. A. against the order of the Sub-Judge of Bara Banki, dated September 9, 1935.

Messrs. *Ghulam Hasan* and *Iftikhar Husain*, for the Applicant.

Judgment—The office has raised an objection regarding deficiency of court-fee.

The suit was for a mere declaration that a mortgage deed executed by the plaintiff in favour of Chaudhri Mohammad Ghayas-ud-Din Ashraf and Abu Saeed was void and not binding upon him. According to the plaintiff's contention he was a minor at the time when the deed was executed.

The trial Court decreed that the mortgage deed was void and not binding on the plaintiff and declared that the defendants Nos. 2 and 3 could recover Rs. 11,500 as principal sum from the plaintiff's property and that parties would bear their own costs.

The plaintiff filed an appeal in this Court in respect of his liability to pay Rs. 11,500 and Chaudhri Mohammad Ghayas-ud-Din Ashraf who was defendant No. 2 in the Court below filed a cross-objection against the decree of that Court declaring that the mortgage was not binding upon the plaintiff. The cross-objector also claimed Rs. 750 as costs which should have been awarded in his favour.

The office has reported that the cross-objection should be valued for the purpose of court-fee, at Rs. 11,500 and that *ad valorem* court-fee should be paid on this sum under Art. 1 of the First Schedule of the Court Fee Act, a further *ad valorem* court-fee should be paid on the interest, Rs. 4,140 which has been claimed, and a further *ad valorem* court-fee should be paid upon the amount of costs which according to the lower Court's decree amounted to Rs. 1,077.

For the cross-objector it has been contended that as the court fee payable upon the plaint and upon the memorandum of appeal in the suit was governed by Art. 17 of the Second Schedule, as the suit was for a mere declaration where no consequential relief is prayed, therefore, the court-fee payable on the cross-objection should be governed by the same provision of the court-Fees Act.

It certainly does seem anomalous that the cross-objector could have filed an appeal claiming precisely the same reliefs as he claims in his cross-objection upon a court-

fee of Rs. 15 under Art. 17, Sch. II, where as if he files a cross-objection he should pay an *ad valorem* court-fee on the value of the subject-matter in dispute. The anomaly has frequently been noticed in judicial decisions. Unfortunately for the cross-objector there is no special provision in the Court Fees Act governing the court-fee payable upon a cross-objection excepting only Art. 1 of Sch. I. There is no reference to cross-objections in Art. 17 of the Second Schedule. This certainly does give rise to anomalies as pointed out in previous judicial decisions but we think that we are bound to follow a very clear ruling of a Bench of this Court in *Raja Harnam Singh* v. *Rani Bahu Rani* (1). In that case it was held that the court-fee on cross-objections should be paid *ad valorem* according to the value of the subject-matter in dispute under Art. 1, Sch. I of the Court Fees Act and not on the same principle as laid down for the case of appeals in Art. 17 of the Second Schedule. We think that we are bound to follow this ruling unless we see good reason to differ from it.

The learned Advocate for the cross-objector has relied upon a recent decision by a learned Judge of the Allahabad High Court in *Surendra Singh* v. *Gambhir Singh* (2). That ruling is certainly in his favour but it is contrary to the general trend of judicial authority and it is a decision by a single Judge. There are many rulings which take the same view as the ruling of this Court which we have already cited. On this point therefore we find that the cross-objector must pay court-fee *ad valorem* on the value of the subject-matter in dispute.

The question then arises as to what is the value of the subject-matter in dispute. The interest of the cross-objector in the principal mortgage money was only Rs. 6,700; he is not interested in the rest of the mortgage money which is due to Abu Saeed who has not thought fit to file a cross-objection. The principal of the mortgage, therefore, in respect of which the cross-objector has filed his cross-objection is Rs. 6,700.

In addition to this, interest is claimed but the learned Advocate states that simple interest will only be claimed at the rate of 6 per cent. per annum. It is open to him to reduce the contractual amount of interest if he so wishes. The office must, therefore, calculate the amount of interest on Rs. 6,700 at the rate of 6 per cent per annum simple interest from May 4, 1929, to April 30, 1932. The court-fee will be *ad valorem* on this sum also.

As regards costs, the cross-objector has claimed Rs. 750 under this head and has already paid an *ad valorem* court-fee on this amount, so no further deficiency can be claimed on this score.

The court-fee will be paid *ad valorem* on the total sum calculated as ordered above. One month will be allowed for making good the deficiency.

N.

(1) 147 Ind. Cas. 186; 10 O W N 1202; A I R 1933 Oudh 528; 6 R O 250.

(2) 152 Ind Cas. 196; (1934) A L J 743; A I R 1934 All. 728; 7 R A 296.

LAHORE HIGH COURT

Second Civil Appeal No. 329 of 1931
October 30, 1934
JAI LAL AND SKEMP, JJ.

KALU SINGH-SUNDER SINGH—
PLAINTIFFS—APPELLANTS
versus
RAM LAL AND OTHERS—DEFENDANTS—
RESPONDENTS

Hindu Law—Joint family—Firm in the names of father and son—Presumption that father is member of the firm—Onus of proving the contrary.

The presumption, in case of a firm which is in the names of father and son, is that the father is a member of that firm and the burden of proving that he is not, lies on the person who asserts it.

S. C. A. from the decree of the District Judge, Amritsar, dated November 15, 1930.

Dr. *Nand Lal*, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

Skemp, J. The firm Kalu Singh-Sundar Singh sued the firm Buta Mal-Devi Dial for a sum due on accounts. Buta Mal and Devi Dial were father and son. Buta Mal died during the suit and a decree was granted by the trial Judge against Devi Dial and the other sons of Buta Mal named Ram Lal and Bir Bal as his legal representatives. The decree was personal against Devi Dial, and his two brothers were held liable to the extent of the property of their father.

Ram Lal and Bir Bal appealed and the learned District Judge found that Buta Mal was not a partner in the firm styled Buta Mal-Devi Dial. He, therefore, accepted the appeal of Ram Lal and Bir Bal and maintained the decree against Devi Dial alone.

The plaintiffs have appealed through Dr. Nand Lal. The question of law

agitated is whether the learned District Judge was not in error in the presumption he made from the name of the firm. He said:

"The mere fact the firm bears Buta Mal's name is no proof that Buta Mal himself had anything to do with it. Sons often introduce the name of their father out of respect in starting a business of their own, and there is no presumption whatsoever that the persons in whose name the firm is styled are actually partners in the business. I am unable to see that there is any good evidence of Buta Mal having taken any prominent share in the business of this firm."

It seems to me that the learned District Judge misdirected himself. If there was a firm Buta Mal-Devi Dial father and son, the initial presumption is that Buta Mal was a member of the firm and it was for Buta Mal or his representatives to disprove that presumption. The point whether or not he took a prominent share in the firm's business is irrelevant. A sleeping partner need take no active share at all.

The question, was there any firm of the name of Buta Mal Devi Dial and was Buta Mal a partner in that firm and liable for the debt in question, formed the first issue before the trial Court. The learned trial Judge gave good reasons for answering this issue in the affirmative. In particular he relied on the admission of Devi Dial made before issues that it was at the request of the plaintiffs that he had opened the accounts in the name of Buta Mal-Devi Dial. Formerly they had been in the name of a firm Devi Dial-Kundan Lal, Kundan Lal being the son of Devi Dial. In other words, the credit of Buta Mal was pledged at the plaintiffs' request. There is sufficient evidence that Buta Mal was aware of this. The District Judge has found as fact that Buta Mal used to visit the shop, and also that Buta Mal used to take goods from plaintiffs' shop.

Mr. Shamair Chand for the respondents urged that there was no firm Buta Mal-Devi Dial; but this was not clearly pleaded and the point was not taken in the grounds of appeal to the learned District Judge. In fact from the judgment of the District Judge it would appear that before him it was assumed that there used to be a firm called Buta Mal-Devi Dial.

I would accept this appeal and restore the decree of the trial Judge, which was not only against Devi Dial, but against Ram Lal and Bir Bal to the extent of their father's property in their hands. The respondents are to pay the appellants' costs throughout.

Jai Lal, J.—I agree.

D. *Appeal accepted.*

OUDH CHIEF COURT

Second Civil Appeal No. 268 of 1933
March 4, 1935
NANAVUTTY AND THOMAS, JJ.
Syed MANZOOR HUSAIN—PLAINTIFF—APPELLANT
versus
Syed DAWAR ALI AND OTHERS—DEFENDANTS—RESPONDENTS

Evidence Act (I of 1872), s. 115—Plaintiff deliberately accepting through his general agent liability to pay under-proprietary rent—Whether can seek for declaration that it is to be paid by others—U. P. Land Revenue Act (III of 1901), s. 79—Under-proprietary rent fixed by Assistant Settlement Officer—Oudh Rent Act (XXII of 1886), s. 107—Whether applies.

Where a person has, through his general agent, deliberately accepted before the Assistant Settlement Officer the liability to pay the under-proprietary rent of a holding, he cannot subsequently resile from that position and seek for a declaration to the effect that other persons are liable to pay the under-proprietary rent. And where the under-proprietary rent was fixed by the Assistant Settlement Officer under s 79 of the Land Revenue Act, and the provisions of s 107 of the Oudh Rent Act relating to remission of *muafi* or rent-free grants have no applicability whatsoever. [p. 297, col. 1.]

S. C. A. against the decree of the Subordinate Judge of Hardoi, dated July 17, 1933, upholding that of the Munsif of Bilgram, dated December 10, 1932.

Meesrs. *Hyder Husain* and *P. N. Chaudhry*, for the Appellant.

Messrs. *Ghulam Hasan* and *Syed Husain*, for the Respondents.

Judgment.—This is a plaintiffs appeal against an appellate judgment and decree of the Court of the Subordinate Judge of Hardoi, upholding the judgment and decree of the Court of the Munsif of Bilgram.

The facts out of which this appeal arises are briefly as follows:—

One Wazir Ali was owner of the entire *mahal* Garbi, in village Lalpur-Mirzapur, in the District of Hardoi, On June 5, 1896, Wazir Ali executed a deed of gift, (Ex. 2), in respect of the plots in suit, having an area of 21 *bighas* 18 *biswas* 16 *biswasnsis*, to his daughter-in-law *Musammat* Zohra Begam, the wife of his only son Abbas Husain. Wazir Ali died sometime later and was succeeded by his son Abbas Husain, who got possession of

the entire estate, including *mahal* Garbi. On January 20, 1902, Abbas Husain sold *mahal* Garbi (see the sale deed Ex. C-12), to *Musammat* Hayat Fatima, and on January 25, 1902, *Musammat* Hayat Fatima and Zohra Begam each executed an agreement in favour of the other, the effect of which was that the possession of Zohra Begam over the plots in suit was maintained and Hayat Fatima continued to be made liable to pay the Government Revenue in respect thereof. The agreement executed by Zohra Begam is Ex. 5, and that executed by Hayat Fatima is Ex. 6. The agreements also laid down that Zohra Begam would be liable for payment of the enhanced portion of the revenue in proportion to her share in the event of there being a revision of settlement and consequent enhancement of the land revenue payable in respect of the village. On April 20, 1927, Zohra Begam executed a deed of gift (Ex. 7), in respect of the plots in suit in favour of her son the plaintiff Syed Manzoor Husain. *Musammat* Hayat Fatima died sometime later, and her heirs are the four defendants, Syed Dawar Ali her son, *Musammat* Ruqaiya Begam, wife of another son, Syed Yawar Ali another son, and *Musammat* Ajaz Fatima her daughter. On March 16, 1931; the under-proprietary rent in respect of the plots in suit was fixed by the Revenue Court at the instance of Hayat Fatima's son at Rs. 23 which rent Syed Manzoor Husain was liable to pay. This rent was fixed by the Assistant Settlement Officer upon a compromise arrived at by the parties.

The present suit was filed by Syed Manzoor Husain on June 20, 1932, for a declaration that the defendants are bound to pay Rs. 23 the under-proprietary rent fixed in respect of the plots in suit. Upon the pleadings of the parties the Munsif framed the following issues :—

1. *a.* Has land revenue been assessed on the plots in dispute ?

1. *b.* If not, has the plaintiff got any cause of action :

2. Has this Court any jurisdiction to try this suit ?

3. Is the suit barred by *res judicata* ?

4. Whether the defendants are liable to pay the rent or revenue assessed on the plots in suit in accordance with the agreement between the parties ?

5. Is the agreement between the vendee *Musammat* Hayat Fatima and the donee Zohra Begam valid as being without consideration ?

6. *a.* Was there any compromise between the parties as alleged in para. 14 of the written statement ?

6. *b.* If so, is the plaintiff estopped by the compromise from disputing his liability under the compromise ?

7. To what relief is the plaintiff entitled ?

The finding of the trial Court on issue No. 1 *a.* was in the negative. The finding on issue No. 1 *b.* was that the plaintiff had got no cause of action. Issue No. 2 was decided in favour of the plaintiff. The finding on issue No. 3 was in the negative. The finding on issue No. 4 was in the negative and against the plaintiff. The finding on issue No. 5 was that the agreement was not void as being without consideration. The finding on issue No. 6 was that the plaintiff was estopped from disputing his liability under the compromise entered into by him for payment of under-proprietary rent in respect of the plots in suit. The learned Munsif accordingly dismissed the plaintiff's suit with costs.

In appeal the learned Subordinate Judge held that there was no reason to vary the decree of the lower Court and accordingly dismissed the appeal with costs.

Dissatisfied with the judgment of the lower Appellate Court the plaintiff has filed this Second Appeal.

We have heard the learned Counsel of both parties, and, in our opinion, the finding on issue No. 6 relating to the plea of estoppel must be given against the plaintiff, and that makes an end to his case. Exhibit C-1, which is the order of the Assistant Settlement Officer, clearly proves that parties had entered into a compromise before him, and that order has been passed upon that very same compromise. As pointed out by the learned Munsif, the fact that a compromise was entered into whereby the under-proprietary rent of the holding in dispute was fixed at Rs. 23 a year can hardly be questioned by any party. The defendants filed Ex. C-11 which is a copy of the power of attorney executed by the plaintiff in favour of his general agent, Abbas Husain, his own father. The original file of the Settlement Court proceedings had been summoned in the trial Court, and this matter was made so clear that in the lower Appellate Court that it was not challenged by plaintiff. On this point the

learned Subordinate Judge writes as follows :—

"Before me the *factum* of the compromise and the existence of authority in favour of Abbas for that compromise has been conceded, and the grounds relating thereto not pressed, but it has been urged that even in spite of the said compromise this suit is maintainable."

In our opinion, the plaintiff is estopped from denying his liability to pay the under-proprietary rent in respect of the land, in suit. Section 115 of the Indian Evidence Act lays down that

"when one person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceedings between him and such person or his representative to deny the truth of that thing."

The plaintiff Syed Manzoor Husain, through his father and general agent, deliberately accepted before the Assistant Settlement Officer the liability to pay the under-proprietary rent of the holding in suit. He cannot, therefore, now resile from that position, and seek for a declaration to the effect that the defendants are liable to pay Rs. 23 as under-proprietary rent when his own liability for the payment of that sum was admitted before the Assistant Settlement Officer by him through his general agent. The plaintiff as well as the lower Appellate Court has caused no small confusion in this matter by treating the under-proprietary rent which was fixed by the Assistant Settlement Officer in respect of the land in suit as land revenue. This under-proprietary rent was fixed by the Assistant Settlement Officer under s. 79 of the Land Revenue Act, and the provisions of s. 107 of the Oudh Rent Act relating to remission of *muafi* or rent free grants have no applicability whatsoever to the present case. But apart from this confusion of thought the matter is very clear and admits of no dispute and that is that the plaintiff having accepted the liability to pay the under-proprietary rent in the presence of the Assistant Settlement Officer and after entering into a compromise with the defendants cannot now turn round and saddle the defendants with the payment of the under-proprietary rent. The defendant Yawar Ali is the *lambardar* of the village, and as such, he cannot be made liable for the payment of the under-proprietary rent dues from the plaintiff.

In our opinion the finding of the learned Munsif on issue No. 6 must be upheld and the plaintiff must be held to be estopped from disputing his liability to pay the under-proprietary rent in terms of the compromise entered into by his father as a general agent.

We need not, therefore, discuss the other questions raised in this appeal. The result is that this appeal fails and is dismissed with costs.

N. *Appeal dismissed.*

CALCUTTA HIGH COURT

Civil Suit No. 1009 of 1933

August 2, 1934

CUNLIFFE, J.

MOUSELL & Co., LTD.—PLAINTIFF

versus

GHANSHYAMDAS JAMNADAS—DEFENDANT

Legal practitioner—Premature threat from Bench—Pleader's duty to protest then and there and apply for transfer—Compromise—Pleader settling case on such threat—Compromise to be set aside—Practice—Suitors should feel that Court does not decide as to veracity of witnesses before they are seen in witness box.

It is the duty of members of the Bar, if their clients are threatened prematurely from the Bench not to adopt an attitude which may be described as pusillanimous, but protest then and there that they resent such observations; and after consulting with their Attorney instructing them it may become necessary for them to apply for a transfer of the case to the list of another Judge

Where soon after the premature threatening of his clients by the Bench, the Pleader consented to settle the case :

Held, that the Counsel was intimidated and was not free to consider the whole aspect of the settlement from an unbiased point of view, and that the Court had an inherent power to set aside this settlement.

It is of cardinal importance that suitors in Courts of justice should enter and leave the Courts with a feeling that whatever may be the upshot of actions which are commenced and fought out, the Court at any rate does not make up its mind as to the truth or untruth of their witnesses before the witnesses have been seen in the witness box. [p. 299, col. 2.]

Mr. *B. C. Ghose*, for the Plaintiff.

Mr. *P. N. Sen*, for the Defendant.

Order.—This is a somewhat embarrassing petition which arises out of a suit for the sale between the parties of a consignment of imported saris. In actual fact there was a cross action on the part of the defendants who were to take delivery of the goods, but at the hearing of, what I may call the main action, after the plaintiffs had called their evidence, the learned Judge presiding over the trial thought fit to make certain observations. They concerned the defendant and consisted, broadly, of a threat to sanction the defendant's prosecution for perjury if he

gave evidence along certain lines. There are various descriptions of what happened during this incident. In the petition which is before me, which asks for the setting aside of the decree and for a new trial, this is how the incident was described:

Paragraph 9.—"That after the witnesses on behalf of the plaintiffs were cross-examined by my Counsel, the learned Judge without giving your petitioners an opportunity to state their case, threatened to send your petitioners to jail, as soon as your petitioners would step into the witness box, whereupon your petitioner's Counsel, Mr. P. N. Sen consented to a decree being passed for the full amount of the claim and costs."

In the affidavit which supports that petition what occurred is referred to as follows:

"With reference to the statements contained in para. 4 of the plaintiff's affidavit, I repeat that the learned Judge did not give me any opportunity to place my case; whilst the cross-examination of the plaintiff was going on, the learned Judge threatened to send the deponent to jail as soon as he got me into the witness box. As a matter of fact the learned Judge told Counsel for the deponent that his Lordship would himself be able to give sanction to prosecute under s. 476, Criminal Procedure Code, and asked the assistance of the Registrar of this Court to have the Penal Code and the Criminal Procedure Code ready."

Then the respondent's version of what occurred is in the affidavit of Mr. Fritz Grellsamer. He says this:

"After the cross-examination of myself and a broker witness, Counsel for the plaintiff Company closed their case and thereupon Mr. P. N Sen called a witness from the customs office to prove certain letters which were being proved when the Judge asked Mr. Sen as to whether he intended to call his client into the box. Mr. Sen said that he did upon which the learned Judge asked whether his client was going to deny the agreement spoken to by myself and the broker witness on behalf of the plaintiff to which Mr. Sen said that that was so Thereupon the learned Judge said that if on hearing the evidence given by Mr. Sen's client his Lordship came to the conclusion that he was not speaking the truth, his Lordship would not hesitate to take proceedings for the sanction of the prosecution of the witness. After that Mr. Sen was asked to proceed with the case and he did so to some extent."

It is not disputed that Mr. Sen did settle the case on behalf of his client. In my opinion the offer for settlement came from Mr. Sen and not from the other side. The description of the settlement is by no means accurately set out in the petitioner's affidavit. It was a partial not a full settlement; and although the petitioner now denies that he gave any authority to Mr. Sen to take this course or that his Attorney did either, in my view, both the Attorney and petitioner acquiesced in what Mr. Sen was doing. It is of course exceedingly difficult, on affidavit evidence only untested by cross-examination, to come to an exact conclusion as to what actually took place. In the circumstances described I think it will be safer in considering what the learned Judge said and the effect of his words upon Counsel for the defendants, the petitioners here, if I rely solely on the version given by the plaintiffs-respondents. These seems to be an honest affidavit. There is no attempt to deny that the outburst from the learned Judge did in fact take place nor is there a denial that the negotiation for settlement followed very closely upon the outburst in question.

It is argued on behalf of the petitioners that this settlement was no settlement in that the settlement was brought about without proper freedom on the part of the Counsel for the petitioners. Reference has been made to a well known English case and an equally well known case in this province which deals with the scope and limit of the authority of Counsel to settle cases in Court when there is some dispute about what occurred as the instructions given to them by their professional or lay clients but these cases do not seem to me to have an exact bearing upon the problem before me. The question is, should this settlement be set aside because, to use the words of a very learned Judge of this Court, (the late Sir Ashutosh Mukerjee) the consent here could not be deemed to be free and fair and might well be regarded as a constrained and involuntary acquiescence in the mode of trial which the Court had decided to adopt? I shall refer to that case again in a moment; but I mention it here because the language which the late learned Judge used in deciding that case is in my opinion singularly apposite to this case. Of course it is exceedingly unfortunate, and I said so during the hearing, that Mr. Sen himself is instructed to appear before me to-day to argue in support of this petition. It is quite obvious why it is undesirable that Counsel in such circumstances should appear once more, because it was hardly possible for Mr. Sen to put his client's case before the Court without giving evidence himself, and this he proceeded to do. I believe that in truth and in fact he was intimidated into taking the settlement course by what the learned Judge said—intimidated in the sense that he was apprehensive on behalf of his client; and I cannot help observing, and I do not wish to be harsh in any

way, that such an avowal is not in the ordinary course of things quite creditable to a member of the Bar.

The circumstances here were, however, very peculiar. There was little time to make up his mind. Counsel was appearing for a person who was, I think, without much education and without perhaps an exact appreciation of what was going on. It cannot, however, be too strenuously insisted on in similar circumstances that it is the duty of members of the Bar, if their clients are threatened prematurely from the Bench, not to adopt an attitude which may be described as pusillanimous, but protest then and there that they resent such observations; and possibly after consulting with their Attorney instructing them, it may become necessary for them to apply for a transfer of the case to the list of another Judge. In my opinion the settlement here was not a free settlement.

The only decision which has been cited to me that has any bearing on the particular facts of this case is that of *Radha Kissen* v. *Luchmichand Jhawar* (1). That was a case which was tried by the late Chief Justice of this Court sitting as a puisne Judge on the Original Side of this Court. It was a suit under s. 14, Arbitration Act, and when Counsel was arguing before the learned Judge, the head-note sets out that he held that the suit did not lie and declined to entertain the hearing of the application except on the basis that he treated both the trial and the application as a petition under the Act. Under the mistaken impression that Counsel on both sides had consented to this view, he proceeded to hear the matter on affidavits and then dismissed both the action and the motion with costs. Dealing with that aspect of the case the late Sir Ashutosh Mukerjee on appeal said:

"Even if the minute book has shown the factum of consent, it could not be treated as consent freely given by Counsel in the exercise of his discretion as an Advocate invested with a general control over the the conduct of the case of his client. The learned Judge states in his judgment that the consent (which he thought was given) was accorded only when he intimated that he would otherwise decline to entertain the motion. If Counsel had consented after the expression of such determination by the Court, the consent could not be deemed free and fair and might well be regarded a constrained and involuntary acquiescence in a mode of trial which the Court had decided to adopt."

(1) 56 Ind. Cas. 541; A.I.R. 1920 Cal. 150, 34 Cr. L J. 283; 24 C.W.N 454.

Now although this case, so far as the facts are concerned, is in no way analogous to that case, it does seem to me that this settlement would never have been proposed had the learned Judge not made the observations that he did. It was brought about in my opinion by a form of judicial coercion. Counsel for the defendants was not prepared to take the risk of putting his client into the box to support his pleaded case. The learned Judge without seeing his client had said that if he, the defendant, gave evidence to support his written statement he was prepared to go to the length of recommending the prosecution of the defendant for perjury. If I think that Counsel was intimidated and was not free to consider the whole aspect of the settlement from what I may call an unbiased point of view, I apprehend that I have an inherent power to set aside this settlement. I propose to do so. It is unfortunate that this application was not made to the learned Judge himself before he laid down his office, but it is of cardinal importance that suitors in Courts of Justice should enter and leave the Courts with a feeling that whatever may be the upshot of actions which are commenced and fought out, the Court at any rate does not make up its mind as to the truth or untruth of their witnesses before the witnesses have been seen in the witness box.

I consider that the setting aside of this decree based on the settlement is in the public interest, the highest interest which can be considered in a Court of Justice. I shall make no order as to costs in favour of the petitioner here. The respondents will have the costs of this petition in any event. I am not concerned with the question of costs already incurred which I think will be better dealt with by the Judge who tries the case at the new trial.

D. *Petition allowed.*

OUDH CHIEF COURT

Second Civil Appeal No. 189 of 1933
February 27, 1935
KING, C. J.

SHAMBHU DUTT AND ANOTHER—DEFENDANTS—APPELLANTS
versus
RAM BAKHSH AND OTHERS—PLAINTIFFS—RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Arts. 97, 116, 120—Suit for refund of money wrongly paid—Money paid to redeem mortgage—Suit for foreclosure

by person having mortgagee interest—Payment held to be wrongly made—Decree for foreclosure—Suit for refund—Article applicable—Limitation, when begins to run.

The plaintiffs who were the representatives in interest of the mortgagors advanced Rs 400 to defendants who succeeded to a share of the mortgagee rights, in order to redeem the mortgage. The money was received and defendants executed a deed of re-conveyance of the mortgaged property in consideration of the payment of the mortgage money made to them. *L* who had acquired an interest in the mortgagees' interest sued for foreclosure. The plaintiffs pleaded that they had already paid Rs. 400 to defendants and had redeemed the mortgage. This plea was not accepted and it was held that the payment had been wrongly made to the defendants. The decree for foreclosure was passed on September 27, 1928, and in consequence of this decree the plaintiffs had to pay a sum of Rs. 471-11-3 to *L* on February 22, 1929, for the purpose of redeeming the mortgage Plaintiffs filed a suit for recovering the sum of Rs 400 with interest, which had been wrongly paid to defendants :

Held, that Art. 97, Limitation Act applied and the period of three years ran from September 27, 1928, which was the date of the foreclosure decree. As soon as it had been decided by the foreclosure decree that the defendants wrongly received the money it would have been open to the plaintiffs to institute a suit to recover the money wrongly paid even before they had been compelled to make a second payment of the money to *L*. Article 116 did not apply as the suit was not framed as a suit for compensation for the breach of any covenant Nor did Art. 120 apply to the case. *Ma Hnit* v. *Gatina Bibi* (1) and *Hanuman Kamat* v *Hanuman Mandur*. (2), referred to. [p. 301, col 2; p. 302, col. 1.]

S. C. A. against the judgment and decree passed by the Additional Sub-Judge, Fyzabad dated March 22, 1933, upholding the decree passed by the Munsif, Akbarpur, dated July 22, 1932.

Mr. *B. P. Misra*, for the Appellants.

Mr. *P. N. Chaudhri*, for the Respondents.

Judgment. This is a defendant's appeal arising out of a suit for refund of a sum of money which was wrongly paid by the plaintiffs to the defendants. The defendants pleaded *inter alia* that the suit was barred by limitation and raised a question as to the Article of the Limitation Act which was applicable to a suit of this nature.

The facts of the case have been set forth in the judgment of the Court below and need not be repeated in full. The plaintiffs were representatives-in-interest of the mortgagors who had made a mortgage on July 23, 1914, in favour of Ram Adhin and Harpal. The defendants Nos. 1 and 2 are the son and the brother of Ram Adhin who succeeded to a share of his mortgagee rights. On February 7, 1925, the plaintiffs paid Rs. 400 to the defendants Nos. 1 and 2 for the purpose of redeeming the mortgage. The money was received and defendants Nos. 1 and 2 executed a deed of reconveyance of the mortgaged property in consideration of the payment of the mortgage money made to them. Lalta Prasad who had acquired an interest in the mortgagees' interests both of Harpal's share and of the share which passed to Ramanand, the brother of Ram Adhin brought a suit for foreclosure on the basis of the mortgage. The plaintiffs pleaded that they had already paid Rs 400, to the defendants and had redeemed the mortgage. This plea was not accepted and it was held that the payment had been wrongly made to the defendants. The decree for foreclosure was passed on September 27, 1928, and in consequence of this decree the plaintiffs had to pay a sum of Rs. 471-11-3 to Lalta Prasad on February 22, 1929, for the purpose of redeeming the mortgage. This suit was instituted on February 19, 1932, for recovering the sum of Rs. 400, together with interest, amounting to Rs. 543, in all, which had been wrongly paid to the defendants Nos. 1 and 2 on February 7, 1925.

The only plea which need be considered for the purpose of this second appeal is the plea of limitation. The trial Court held that the suit was governed by Art. 116, and the time began to run from September 27, 1928, when the decree for foreclosure was passed and it was held that payment had wrongly been made to the defendants. On this view the suit was held to be within time.

The lower Appellate Court held that neither Art. 116 nor Art. 97, were applicable to this suit and limitation was governed by Art. 120, and the time began to run from the date when the plaintiffs had to make the second payment, namely, the February 22, 1929. On this view also the suit was held to be within time.

It has been argued by the learned Advocate for the appellants that the proper Article applicable to the suit is Art. 97, and that the period should begin to run from September 27, 1928.

Article 97 applies to a suit for money paid upon an existing consideration which afterwards fails and the period prescribed is three years from the date of the failure. The appellant's contention is that when the money was paid to the defendants on February 7, 1925, the defendants executed a deed of reconveyance and re-delivered possession of the property, and, there-

fore, there was consideration at that time. But when it was held in the foreclosure decree that the defendants had no right to receive the mortgage money and payment had wrongly been made to them, then the consideration failed and it was open to the plaintiffs to institute a suit for refund of the money which had wrongly been paid to the defendants. As the foreclosure decree was passed more than three years before the date of the institution of the present suit, it should be held that the suit is barred by limitation. The lower Appellate Court held that Art. 97, was not applicable because the plaintiffs retained possession of the mortgaged property even after the foreclosure decree had been passed and, therefore, it could not be held that there was failure of consideration from the date of the foreclosure decree. It has been argued that the question of retaining possession is immaterial as the foreclosure decree gave the plaintiffs a cause of action for suing for a refund of the money wrongly paid to the defendants although the plaintiffs had not been dispossessed. In my opinion this contention is correct.

It has been argued for the respondents that Art. 116, is the proper Article to apply. Article 116, applies to a suit for compensation for the breach of a contract in writing registered and provides a period of 6 years from the time when the period of limitation would begin to run against a suit brought upon a similar contract not registered. The argument is that Ex. 4, is a registered deed of reconveyance by the appellants to the respondents and that contains an implied covenant of title and peaceful possession and when it was discovered on the decision of the suit for foreclosure that the appellants had no title to receive the money and to permit redemption of the mortgage then it should be held that there was a breach of the covenant and that the period should run from the date of the second payment, namely, February 22, 1929. On this view the suit would certainly be within time. I am unable to agree with the contention that Art. 116, is the proper Article to be applied to this suit. This suit was not framed as a suit for compensation for the breach of any covenant. It was a suit for the refund of money wrongly paid to the defendants. It might have been possible to frame the suit as one for compensation for the breach of an implied covenant in the registered deed of reconveyance but the suit was not framed on these lines and must, I think, be treated as a suit for the refund.

The appellants rely upon a decision of their Lordships of the Privy Council in *Ma Hnit* v. *Gatima Bibi* (1). In that case the appellant and her husband advanced Rs. 10,000 to the first respondent, a Muhammadan woman who purported to be acting as guardian for her nephew, a minor. She, as guardian, executed in favour of the lenders a mortgage upon two oil wells, professedly belonging to the minor, for the sum advanced and interest. In 1913 the oil wells were sold under a decree on that mortgage, but in 1918, a decree, made at the suit for the minor, set aside the sale and the mortgage, on the ground that the first respondent was not his guardian and had no authority. In 1919 the appellant brought a suit against the first respondent, the plaint submitting that as the money could not be recovered from the minor, the first respondent was liable, and stating that the cause of action arose at the date of the decree in 1918. It was held that Art. 97 applied to the suit and that the period of three years did not begin to run until the date of the decree setting aside the mortgage, and consequently the suit was not barred. The facts of that case are no doubt different from those of the case before me but it appears that the same principles are applicable. The suit was held to be a suit governed by Art. 97, on the ground that the existing consideration failed on the date of the decree setting aside the mortgage. It was not pleaded that the suit should be treated as a suit for compensation for breach of a contract although it might have been argued that the mortgagor gave an implied covenant of title.

In the present case I think it should be held that consideration failed from the date of the foreclosure decree when it was decided between the parties that the defendants were not entitled to receive the money. It has been argued that no suit for a refund would lie unless and until the plaintiffs had made their second payment to Lalta Prasad. I do not think this view is correct. As soon as it had been decided by the foreclosure decree that the defendants wrongly received the money, I think it would have been open to the plaintiffs to institute a suit to recover the

(1) 101 Ind. Cas. 414; 54 I A 145; 52 M L J 579; A I R 1927 P C 99; 29 Bom. L R 863; 4 O W N 517; 31 C W N 830; 5 R 283; (1927) M W N 489; 26 L W 429 (P C).

money wrongly paid even before they had been compelled to make a second payment of the money to Lalta Prasad. Another decision of their Lordships of the Privy Council has also been referred to on behalf of the appellants, namely, the case of *Hanuman Kamat* v. *Hanuman Mandur* (2). That was a case in which a member of a joint family had sold some joint family property. The co-parceners objected to the alienation and the purchaser was unable to obtain possession. It was held that the purchaser was entitled to recover the purchase money as soon as he found himself unable to obtain possession. The suit was treated as being governed by Art. 97. Here again the suit to recover the purchase money was treated as a suit for a refund for money paid upon the existing consideration which subsequently failed and not as a suit for compensation for breach of contract upon any implied covenant of title.

I think that the appellants' contention is correct and that Art. 97 is applicable and the period of three years should run from September 27, 1928, which is the date of the foreclosure decree. On this view the suit was barred by limitation. I accordingly allow the appeal and set aside the decree of the Court below and dismiss the plaintiffs' suit. As regards costs I think that in equity the plaintiffs should not be required to pay costs throughout as they certainly had a good and valid claim but for the bar of limitation. I, therefore, allow the costs of this appeal to the defendants but the parties shall bear their own costs in the Courts below.

N. *Appeal allowed.*

(2) 19 C 123.

MADRAS HIGH COURT

Civil Appeal No. 379 of 1929
September 27, 1934

STONE AND VARADACHARIAR, JJ.

MUDALA VENKATAREDDI NAIDU—APPELLANT

versus

DHORWADA VENKATA VARAHA NARASIMHARAO —RESPONDENT

Vendor and purchaser—Purchaser agreeing to pay vendor's creditor—Creditor's right to sue purchaser —Privity of contract.

Where a purchaser of mortgaged property agreed with his vendor to pay off the mortgage out of the sale price which was reserved with him for this purpose and he, (the purchaser) wrote to the mortgagee that he will pay the mortgage amount and requested him not to press the mortgagor.

Held, that the purchaser made himself personally liable to pay the mortgage amount and the mortgagee pas entitled to recover the amount personally from the purchaser. *Jamna Das* v. *Ram Autar Pande* (1), distinguished *Siva Subramania Mudaliar* v. *Gnanasamananda Pandara Sannadhi* (2), followed.

A. against the decree of the District Court of East Godavari at Rajahmundry, in O. S. No. 31 of 1927.

Mr. *P. Somasundaram*, for the Appellant.

Messrs. *G. Lakshmanna* and *G. Chandrasekhara Sastri*, for the Respondent.

Stone, J.—Second defendant is the appellant in this case. He is the purchaser of property that was mortgaged to the plaintiff from the mortgagor, and it was arranged at the time of the purchase that part of the purchase price, *viz.*, Rs. 2,900 should be retained in the hands of the 2nd defendant to pay to the mortgagee to discharge the mortgage amount then owing by the mortgagor to the mortgagee. In pursuance of that arrangement, the 2nd defendant, having this money which was due to the vendor in his hands, wrote on July 10, 1923, to the mortgagee saying that the property had been sold to him and a portion of the sale amount paid to the vendor, and as for the balance

"It is arranged as between us (*i. e.* the vendor and the vendee) that I should pay you the same towards your mortgage debt and obtain the return of the mortgage bond with payment endorsement noted thereon. Accordingly, I should have already brought your money, but delay occurred on account of some transactions and urgent business here. So, I shall within the end of this month, bring to Rajahmundry, the amount of principal and interest due under the said bond, pay you the money, and obtain back the said mortgage bond, from you. I have, therefore, informed you of the fact. In the meanwhile you need not ask (the mortgagor) Veerabadhraswami Garu for repayment."

Following upon that there are a number of letters wherein the 2nd defendant seeks to excuse his failure to carry out that promise and bring the money and pay to the mortgagee. On those facts the learned District Judge has come to the conclusion that the 2nd defendant has rendered himself personally liable to pay to the mortgagee that sum of money, *viz.*, Rs. 2,900. In our opinion the learned Judge is right in so doing. Mr. Bowstead in his work on Agency, 8th Edition, page 457, says:

"Where an agent is authorised to pay money on behalf of his principal to a third person, the authority becomes irrevocable as soon as the agent enters into a contract, or otherwise become bound

to pay or hold such money to or to the use of such third person".

It is true that the Privy Council in *Jamna Das* v. *Ram Autar Pande* (1) regarded it as clear that where the action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor, the mortgagee has no right to avail himself of that undertaking because he was no party to it. The purchaser in that case entered into no contract with him and the purchaser is not personally bound to pay the mortgage debt. But here the facts are different from the facts in that case because here it is not merely a question of the mortgagee seeking to make the purchaser liable under the contract between him and the mortgagor but it is a case where the mortgagee has been communicated with or has been told by the purchaser that he holds certain moneys for the mortgagee and has been asked not to press the mortgagor for payment of that amount. On these facts the purchaser occupies a different position to what he would have occupied had he not communicated the undertaking to the mortgagee. This is much nearer the case in *Siva Subramania Mudaliar* v. *Gnanasamananda Pandara Sannadhi* (2) where according to the head note it was held that a person who directs another to pay money to a third person is entitled to countermand that order before that person has entered into direct relations with the third person and agreed to pay it to him; but where the agent is directed or authorised by his principal to pay to a third person money existing or accruing in his hands to the use of the principal; and he expressly or impliedly contracts with such third person to pay to him, or to receive or hold the money on his behalf or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf. In these circumstances we think, therefore, that on this part of the case the appeal fails and should be dismissed with costs.

There remains the question of compound interest. The learned Judge has allowed interest at 12 per cent. compound interest That is in accordance with the terms of the contract, and although it may be that the interest could be regarded as penal, still some interest must be given and the quantum of that interest is a matter within the discretion of the Court; the Court in its discretion has considered that the contract rate is a proper rate of interest in this case. We see no reason to interfere with that discretion.

A. *Appeal dismissed.*

(1) 13 Ind. Cas. 304; 34 A 63; 16 C W N 97; 11 M L T 6; 9 A L J 37; (1912) M W N 32; 15 O L J 68. 14 Bom. L R 1; 21 M L J 1158; 39 I A 7 (P C).

(2) 10 Ind. Cas. 98; 21 M L J 359; 10 M L T 71.

OUDH CHIEF COURT

Second Civil Appeal No. 213 of 1933
March 11, 1935.

KING, C. J. AND NANAVUTTY, J.

Pandit KRISHNA BEHARI—PLAINTIFF—APPELLANT

versus

Musammat AHMADI AND ANOTHER—DEFENDANTS—RESPONDENTS

Gift—Deed containing specific provision that all debts due from donors or charged on gifted property should be paid by donee—Donee, if a universal donee within s. 128, *Transfer of Property Act (IV of* 1882)*—Non-specification of debts in deed—Whether material—Conditions, if contrary to Muhammadan Law—Muhammadan Law—Gift.*

Where a deed of gift itself contains a specific provision that all the debts which are due from the donors personally or which are charged upon the gifted property are to be paid by the donee and the donee in fact was expressly made liable for paying off all the debts of the donors and all the incumbrances upon the property, the donee must be held to be a universal donee. The fact that all the debts due from the donors were not specified in the deed of gift is immaterial. The conditions in the deed of gift making the universal donee liable to satisfy the debts of the donors are not void either for uncertainty or for being contrary to any rule of Muhammadan Law. *Abid Husain* v. *Ram Nidh* (1), referred to.

S. C. A. against the order of the Additional Sub-Judge, Unao, dated April 18, 1933.

Mr. *P. N. Chaudhri*, for the Appellant.

Judgment.—This is a plaintiff's appeal arising out of a suit for a declaration to the effect that certain property gifted by defendant No. 1 to defendant No. 2 under a deed of gift dated April 23, 1926, is liable to be attached and sold in execution of a decree in favour of the plaintiff against defendant No. 1.

On the April 21, 1926, defendant No. 1 *Musammat* Ahmadi executed a promissory note for Rs. 400 in favour of *Musammat* Sundar and on the next day, namely, April 22, 1926, she executed a second promissory note in favour of *Musammat* Sundar for Rs. 500. On April 23, 1926, that is only one day after the execution of

the second promissory note *Musammat* Ahmadi gifted her entire property movable and immovable to *Musammat* Saida defendant No. 2.

The promissory notes in suit were transferred by *Musammat* Sundar to the plaintiff who brought a suit upon the basis of them and obtained a decree against *Musammnt* Ahmadi on March 29, 1930. The plaintiff sought to execute his decree by attachment and sale of the property gifted by *Musammat* Ahmadi to *Musammat* Saida. *Musammat* Saida raised objections which were upheld by the executing Court. The plaintiff thereupon brought the present suit claiming a declaration to the effect mentioned above.

The trial Court dismissed the suit mainly upon the view that terms in the deed of gift to the effect that the donee should be liable for the payment of all the debts of the donor were void as being contrary to the rules of Muhammadan Law. The lower Appellate Court dismissed the plaintiff's appeal mainly on the ground that the terms in the deed of gift imposing the liability upon the donee of paying the donors debt was void for uncertainty, as there was no specification of the amount of the debts due from the donor.

The plaintiff comes to this Court in second appeal.

The plaintiffs contention is that the donee *Musammat* Saida is a universal donee and under s. 128 of the Transfer of Property Act, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

It appears to be correct that the donee must be held to be an universal donee. This appears from the terms of the deed of gift and from the declaration made by the donor at the time of registration. Apart from the law laid down in s. 128 of the Transfer of Property Act the deed of gift itself contains a specific provision that all the debts which are due from the donors personally or which are charged upon the gifted property are to be paid by the donee. The donee in fact was expressly made liable for paying off all the debts of the donors and all the incumbrances upon the property.

In the present case we are not concerned with any incumbrances, but it is admitted that *Musammat* Ahmadi, the donor, was indebted to the extent of the loans borrowed on the basis of the pro-notes in favour of *Musammat* Sundar at the time when she executed the deed of gift. It appears clear, therefore, that both under s. 128 and also under the express condition of the deed of gift, the donee was personally liable, to the extent of the gifted property, for payment of the sums due on the basis of these two pro-notes. We think that the fact that all the debts due from the donors were not specified in the deed of gift is immaterial. It is proved and admitted that the donor was indebted to the extent of the loans advanced on the basis of the pro-notes and to that extent at least the donee must be liable.

The trial Court took the view that the conditions in the deed of gift making the donee liable for the payment of the donors debt were void as being contrary to rules of Muhammadan Law. This view does not appear to be correct. The case of *Abid Husain* v. *Ram Nidh* (1) has been cited by the learned Advocate for the appellant. In that case it was held that where a Muhammadan by a deed of gift transfers the whole of his property, movable and immovable, in favour of his son and makes the son liable to pay all the debts due from him, the son is an universal donee within the meaning of s. 128 of the Transfer of Property Act, and as such, liable to satisfy all the debts of his father inasmuch as the provisions of s. 128 of the Transfer of Property Act are not in contravention of any rule of Muhammadan Law. In our view the conditions in the deed of gift making the universal donee liable to satisfy the debts of the donors are not void either for uncertainty or for being contrary to any rule of Muhammadan Law.

In our opinion, therefore, the plaintiff's claim must be decreed as the defendant No. 2 is an universal donee and is liable for the satisfaction of debts which are proved to have been due from the donors at the time when the deed of gift was executed. The donee's liability is of course confined to the extent of the property comprised in the deed of gift.

We, therefore, allow the appeal, set aside the decree of the Courts below and decree the plaintiff's suit with costs throughout.

N. *Appeal allowed.*

(1) 127 Ind. Cas. 865; 7 O W N 523; A I R 1930 Oudh 268; Ind. Rul. (1930) Oudh 481.

LAHORE HIGH COURT

Criminal Appeal No. 1523 of 1933

March 7, 1934

ABDUL QADIR, J.

KARTARA—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Evidence Act (I of 1872), ss. 30, 114 Illus. (b)—Approver—Recovery of ordinary clothes with no special marks of identification—Whether sufficient corroboration—Ornament which can be identified recovered—Corroboration, if sufficient.

The recovery of ordinary clothes which do not have any special marks capable of definite identification does not afford sufficient corroboration to the testimony of the approver and the accused should not be convicted on such meagre corroboration. But the recovery of an ornament which can be identified is sufficient corroboration.

Cr. A. from an order of the Sessions Judge, Ambala, dated November 3, 1933.

Mr. *Ghulam Mohy-ud-din*, for the Appellant.

Mr. *Asa Ram Aggarwal*, for the Crown.

Judgment.—On the night of February 22, 1933, a dacoity was committed at the house of *Musammat* Daropdi, at Ambala, in which jewellery and clothes were stolen. The matter was reported to the Police, but for a considerable time the culprits could not be traced. Later on, suspicion fell on a man named Zahurulhaq and he made some disclosures. He was tendered a pardon in May 1933, and became an approver witness. Six persons were then sent up for trial for an offence under s. 395, Penal Code. They were Kartara, Kartar Singh, Ali Mohammad, Rahmat Ullah, Din Muhammad *alias* Dina and Ibrahim. Of these Rahmat Ullah, Dina and Ibrahim have been given the benefit of doubt and acquitted; while Kartara, Ali Muhammad and Kartar Singh have been convicted and sentenced to seven years' rigorous imprisonment and a fine of Rs. 200 each. In default of payment of fine each one of them is to undergo rigorous imprisonment of one year more. The convicts have submitted three separate appeals. Kartara's appeal No. 1523 of 1933, has been argued before me by M. Ghulam Mohyuddin. The appeal of Ali Muhammad, which was filed by Mr. Man Singh, has been argued by Mr. M. D. Jan, while that of Kartar Singh which was filed by Mr. Man Singh, has been argued by Mr. Chona. This judgment will dispose of all the three connected appeals.

The story of the prosecution is that some time before this occurrence, Dina and Ibrahim had occasion to visit the house of *Musammat* Daropdi and came to know that she was a rich woman. They told Zahurulhaq that her house could be robbed with advantage. Zahurulhaq consulted Ali Muhammad, who showed readiness to join and offered to bring Kartara. Kartara also agreed when he came and advised the others to wait till dark nights set in. He promised to bring Kartar Singh with him. The offenders then came together and went to the house of *Musammat* Daropdi. On reaching the house of *Musammat* Daropdi, Kartara and Kartar Singh concealed themselves in the latrine of a mosque, which is about 50 or 60 feet from the house, while Zahurulhaq took Ali Mohammad towards the house and lifted him to his shoulders so that he got on to the roof a neighbouring house and went in and unchained the door of the house, to allow Kartara and Kartar Singh to enter it. Zahurulhaq and Rahmat Ullah kept watching outside the house, while Ali Mohammad, Kartara and Kartar Singh began to remove things from inside and came out with a bundle of clothes, ornaments and cash. The things were shown to the approver but were taken away by Kartara and Kartar Singh to Jandli, where they were to be distributed among them on the night following. The approver gives this story in Court and gives details of the articles which fell to the share of each of them. It is also in evidence that the approver produced some articles which he had received, and they were identified by *Musammat* Daropdi and other witnesses who knew her belongings.

Musammat Daropdi gives an account of the dacoity. She states that she awoke to ease herself and went out into the courtyard when she saw a fellow with a red turban coming up. She was going to chain the door of her room from inside but was prevented by him from doing so and she was told not to make any noise. Another fellow with a white turban followed the red turbaned man and one of them pressed her throat, while the other gagged her mouth. A third man took hold of her lantern. She and her two sons were taken into the inner room and she was asked to disclose where her property was. One of the men broke the almirah in the wall, while the other began to dig the ground and thus succeeded in taking away her belongings. Her son, Om Parkash, corroborates her story and says that his mother was injured by the dacoits and they were all threatened. The medical examination of *Musammat* Daropdi showed some scratches

on her cheeks and two contusions on her chest. A witness named Barkat Ullah was also produced to support the prosecution, but he is said to have been one of the persons, who had actually joined in the conspiracy which led to dacoity, and no weight has therefore been attached by the trial Court to his statement. The Court has believed the statement of the approver, Zahurulhaq, to be substantially true, but as a matter of precaution has not acted on it in the case of the three men who have been acquitted, because no recoveries of any part of the stolen property had been made from them and therefore the corroboration of the statement of the approver was lacking in their case. The Court below has convicted all the men from whom some property, which had been subsequently identified to be a part of the stolen property, has been recovered. The main argument of the Counsel representing each of the appellants is that the recoveries relied upon in the case are of articles which are very common and were not capable of a definite identification and that therefore the cases of the appellants cannot be really distinguished from those of their companions who have been acquitted. I will, therefore, examine the case of each appellant from this point of view.

The articles produced by Kartara, appellant, were as follows: (1) Silk *sua* (P-4), 2. *Dopatta* (P-11) 3. Striped shirt, P-9, 4. Handkerchief P-10, (5) *Saree* (P-7) 6. *Dopatta* (P-8) 7. *Saree* (P. 5) 8. Black *Ghagra* (P-6) and 9. *Patri* (P. 3).

These articles were produced by him before the Sub-Inspector. Subsequently on a search of his house a *Dhoti* (P-17) was recovered. There is no doubt that these articles are of a very common nature and in the case of all the articles but one, namely, the *patri*, P-3, no special marks of identification have been mentioned, except that persons who have been using those articles deposed that they were theirs and some tailors or cloth merchants have supported them. The *patri* (P-3) is of silver, and is an ornament worn on the feet, near the ankles. The goldsmith, who made this *patri* states that he made it for the complainant and that it has a design like a web, which he recognises as his own. The learned Counsel of Kartara argues that this property was claimed by his client as his own. I find that this argument was based on a remark to that effect made by the trial Court but it is shown by a reference to the statement made by Kartara before the Committing Magistrate and the subsequent statement made at his trial, that Kartara did not lay claim to the property. I see no reason, therefore to disbelieve the identification, of so many articles by the party of the prosecution, but I attach particular importance to the identification of the *patri*, as a part of the stolen property. The passing of a pair of *patris* to Kartara and Kartar Singh was mentioned by the approver and therefore the recovery of this article, among others, from the possession of Kartara, is a valuable corroboration of the testimony of the approver. I think this is sufficient to justify the conviction of Kartara.

The following articles have been recovered from the possession of Ali Muhammad: *Patris* (P-1 and P 2), (proved by the testimony of (P. W's. Nos. 16, 17, 22), *Dhotis* (P-12 and P-13) proved by the testimony of P. W. Nos. 5, 16 and 17. He claimed all these articles to be his own property and in connection with the *partis* (P. 1 and P-2), he produced a goldsmith as his defence witness to rebut the statement of the goldsmith who had been produced on behalf of the prosecution to prove that the *patris* recovered from him belonged to *Musammat* Daropdi. The trial Court, after weighing the evidence produced on this point on both sides, has come to the conclusion that the articles recovered from Ali Muhammad belonged to the family of *Musammat* Daropdi and I see no sufficient reason to differ from that conclusion regarding the *patris* P-1 and P-2, as I am not impressed very much by the evidence of Abdullah, D. W. No. 13. I think in the case of Ali Muhammad the story put forward by the approver is corroborated. It may be added that according to the evidence of Sham Bihari Lal, *Naib Tahsildar* P. W. No. 14, Ali Muhammad showed him the spots in and near the house of *Musammat* Daropdi with which according to the approver he was concerned. His Counsel explains that as the approver was in the hands of the Police a considerable time before Ali Muhammad pointed out any of the spots, the presumption is that the Police had come to know about those spots through the approver and therefore no significance attaches to the pointing of the same by Ali Muhammad. There is force in this plea and therefore this piece of evidence may be excluded from consideration, but on the same principle as

has been applied by me to the case of Kartara, I see no reason to distinguish the case of Ali Muhammad from that of Kartara, as two *patris* (P-1 and P-2) have been found with him. I donot attach much importance to the identification of the *dhotis* which have no peculiar mark on them. Thus his conviction also is quite correct.

Coming to the case of Kartar Singh, the only articles recovered from him are: Salwar (P-14), Shirt (P-15), *Kurta Malmal* (P-16).

Though Kartar Singh had got a number of gold ornaments as well as a pair of silver *patris*, according to the approver, none of those articles have been traced. He may possibly have disposed of them or got rid of them by the time he was arrested, but the fact remains that the corroboration of the approver's story sought in his case rests on the recovery of three ordinary clothes, which do not appear to me to have any special marks capable of definite identification. I do not think therefore that it can be safe to convict him of this offence on that meagre corroboration. I give him, therefore, the benefit of doubt and acquit him, because I do not see much to distinguish his case from that of the three others who have been acquitted by the trial Court. I see no reason to interfere in any way with the sentences passed against Kartara and Ali Muhammad and their appeals are dismissed while the appeal of Kartar Singh is accepted.

N. *Order accordingly.*

MADRAS HIGH COURT

City Civil Court Appeal No. 14 of 1931

March 28, 1934

BEASLEY, C. J. AND MADHAVAN NAIR, J.

DAVI SINGH—DEFENDANT—APPELLANT

versus

MANGATHAYAMMAL—PLAINTIFF—RESPONDENT

Fatal Accidents Act (XIII of 1855)—Fatal accident—Suit by heirs—Assessment of damages—Guiding principles,

Although the Fatal Accidents Act, 1855, gives a right of action to the legal representatives of a person killed by an accident, only such damages can be awarded as can be shown to have been suffered financially by those bringing the suit. Sentimental damages cannot be awarded nor can damages be awarded merely for the loss of a son, daughter, wife, or husband, unless actual financial damages have been suffered or there was at the time of the accident a prospective pecuniary advantage which was lost by reason of the fatal injury caused to the person in respect of whose death the suit is filed.

Where a boy aged 12 years who was earning Rs. 6 a month was killed by an accident and in a suit for damages filed by his old mother, Rs. 600 were awarded as damages by the trial Judge:

Held, that the award was not excessive. *Taff Vale Railway* v. *Jenkins* (1), referred to.

C. A. against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 686 of 1929.

Beasley, C. J.—The suit under appeal was one brought by the respondent who was the mother of a boy named Ponnusami aged about 12 who was in the employment of one of the bailiffs of this Court, Mr. Boyton. On April 27, 1928, at about noon this boy was knocked down and killed by a motor omnibus of which the appellant was the owner. The omnibus was coming from Saidapet down the Mount Road in the direction of George Town. This accident happened opposite to the building of Messrs. Fiat & Co., motor dealers. The boy appears to have been killed instantaneously and it was alleged by the respondent who filed the suit that the accident was the result of negligent driving of the driver of the motor omnibus. If that allegation was proved, then clearly the appellant would be liable to pay damages being responsible for the negligent act of his driver. Rupees 2,000 damages were claimed. The learned trial Judge found that the appellant's servant had driven the omnibus negligently and that as a result of that negligent driving the boy Ponnusami was killed. Finding in favour of the respondent on the question of liability, he assessed the damages at Rs. 600. On the question of negligence which is of course a pure question of fact only one eye-witness was called and that was a man named Matcher, a sergeant, who was at the time employed as door keeper by Messrs. Fiat & Co. and was standing by the door or at any rate in such a position as enabled him to see what happened. His evidence is that the accident happened on the right hand side of the middle of the road, that is to say, on the motor bus's wrong side of it, that the bus was going along at about 30 miles per hour and that originally in the middle of the road it suddenly swerved to its wrong side and having done so knocked over the little

boy, by means of its front wheels and ran over him and killed him. He also says that the bus driver did not sound the horn. There are no other eye-witnesses. A witness was called for the defence, however, and that was a Sub-Inspector of the City Police, Hopkins, who apparently was investigating the matter and who was present at the inquest. He says that at the inquest the witness Matcher who was also a witness at the inquest said that it was not the bus driver's fault. His evidence upon this point, in my opinion, should not be accepted and the learned trial Judge rightly rejected it. It is rather peculiar that he should have remembered the answers given by this one witness and none of the answers given by any of the other witnesses. In my opinion the evidence of Matcher is to be accepted. That establishes that not only was the omnibus travelling at a fast rate and the driver did not sound the horn as obviously he ought to have done travelling at that speed, but that the omnibus also swerved to its wrong side. The motor bus driver has not been called to explain how it was that he failed to blow the horn or state that he did do so or deny that he went on to his wrong side and why it was that he did not see the little boy in front of the car in sufficient time to pull up and avert the accident. In my opinion, the negligence was clearly proved.

Then the question of damages arises. I observe that the learned trial Judge has not addressed himself to the basis upon which damages in such cases as this have to be awarded. This was a fatal accident and obviously the suit has been brought under the Fatal Accidents Act (XIII of 1855) which, as in England, enables the legal representatives of deceased persons to maintain actions in respect of fatal injuries caused to those whom they legally represent thus making an exception to the rule of *actio personalis moritur cum persona*; but although a right of action is given to the legal representatives, widow, husbands, fathers and children, there is a recognised basis for the assessment of damages. Only such damages can be awarded as can be shown to have been actually suffered financially by those who bring the suit—sentimental damages, cannot be awarded nor can damages be awarded merely for the loss of a son, daughter, a wife or a husband unless actual financial damages have been suffered or as was decided in an English case where there was at the time of the accident a prospective pecuniary advantage to those who afterwards bring the suit which prospective pecuniary advantage is lost by reason of the fatal injury caused to the person in respect of whose death the suit is filed. In most cases the damages which are recoverable are the amount of money which has been expended for the medical and funeral expenses and where plaintiffs are able to show that they were wholly or partially dependent upon the earnings of the deceased person, damages on that basis. On the latter basis previously to 1912 there were no reported cases where suitors had recovered damages in respect of fatal injuries unless they had been able to show that the deceased person was actually earning an income some or all of which was devoted to the maintenance or help or support of the suitor. But in the case of *Taff Vale Railway* v. *Jenkins* (1) a considerable advance was made. There the facts were that a girl aged sixteen was living with her parents and used to go from the place where her parents lived to another place by train. In the latter place she was apprenticed to a firm of drapers and dressmakers and was learning the business of dress making. She was unfortunately killed in a railway accident in the train when either going to or coming back from the place of her work, and a suit was brought by her father for himself and her mother under Lord Campbell's Act (Fatal Accidents Act) for damages for the loss of the girl. There was evidence that she was an unusually intelligent girl, and though she was still an apprentice, she was shortly to emerge from her apprenticeship; and there was evidence that she had prospects of beginning before long to earn a remuneration which might quickly have become substantial. There was further evidence that she came to her parents' house at night and that from time to time she gave them some assistance in the house; and in the view of Viscount Haldane, L. C., there was certainly material on which the jury might think that she might have given some assistance in the shop which her mother kept which was a greengrocer's shop and the father was beginning to fail somewhat

(1) (1913) A C 1; 82 L J K B 49; 107 L T 564; 57 S J 27; 29 T L R 19.

in health; he was at all events, not os robust as in his younger days, and the jury might reasonably have taken the view that the amount of assistance which she would have given at home to the parents would have been considerable and also that she might have carried on her own business as a dressmaker and earned some money. Their Lordships refused to speculate with regard to the damages holding that that was the function of the jury and upheld the jury's assessment of the damages at £75. The present case of course is a stronger case because there is evidence that this little boy was actually earning some money. Rupees 6 a month is what his mother, the rsepondent here, states he was receiving. He was 12 years of age and although there is no evidence that he contributed any part of that very small monthly sum towards the support of his mother that is probably absent because it did not strike anybody that such evidence as that is of considerable importance in a case like this—it is not wrong to think that the learned trial Judge might reasonably have supposed that he was in the habit of contributing either the whole of that amount or some portion of it towards the support of his mother who was unemployed.

Then again, being 12 years of age and earning that amount of money at that age, it is reasonable to suppose that his wages would have increased as he became older. It is of course impossible to say for how many years he would have remained single and assisted his mother nor how long his mother who was aged sixty at the time of the trial would live. The learned trial Judge has awarded Rs. 600 damages, and in my view, the damages awarded were not excessive. Rupees 6 a month is Rs. 72 a year and as I have before stated those wages would be likely to increase later on. For these reasons, I am of opinion, that not only was the negligent allegation fully made out but that the damages awarded, namely Rs. 600, were quite reasonable.

Therefore, this appeal must be dismissed, and, as there is no appearance for the respondent, without costs.

Madhavan Nair, J.—I agree.

A. *Appeal dismissed.*

LAHORE HIGH COURT

Second Civil Appeal No. 1278 of 1930

March 9, 1934

JAI LAL, J.

SOHAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHAG SINGH AND OTHERS—DEFENDANTS—RESPONDENTS

Succession Act (XXXIX of 1925), s 213—Whether applies to wills made by Hindus of the Punjab—Legatee, if can sue without probate.

Section 213, Succession Act, does not apply to wills made by Hindus of the Punjab and relating to immovable property situate in the Punjab. The legatee can therefore claim rights under the will without probate.

S. C. A. from the decree of the District Judge, Gurdaspur, dated April 9, 1930.

Mr. *S. L. Puri*, for the Appellants.

Mr. *Parkash Chand*, for the Respondents.

Judgment.—The dispute in this second appeal relates to the occupancy rights of one Mohin Singh, who was sentenced to death on a charge of murder. Before the sentence was carried out he made a will in jail bequeathing the occupancy rights in dispute in favour of the appellants. The respondents, however, who are also distant relations of Mohin Singh, or claimed to be so, took possession of the occupancy rights. The learned District Judge has held that the will was executed by Mohin Singh and that if it be given effect to, the appellants would be entitled to succeed; but he was of opinion that s. 213, Succession Act, precluded him from giving effect to the will and consequently, setting aside the decree of the trial Court in favour of the appellants, has dismissed the suit. On this appeal the only question raised is whether under s. 213, Succession Act, it was necessary for the appellants to take out probate of the will or letters of administration with the will attached before establishing their right as legatees under the will. Now s. 213 provides that :

" No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed."

In cl. (2) of this section, however, it is provided that it shall not apply in the case of wills made by Muhammadans, and shall only apply in the case of wills made by any Hindu, Buddhist, Sikh or Jain where such wills are of the classes mentioned in cls. (*a*) and (*b*), s. 57. Clause (*a*), s. 57, relates to wills and codicils made by any Hindu, Buddhist, Sikh or

Jain, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay. The will in question was made in Gurdaspur and relates to property which is situated in Gurdaspur. It is obvious, therefore, that it is not covered by cl. (*a*), s. 57. Clause (*b*) of that section concerns wills and codicils made by persons belonging to the abovementioned religions made outside the territories and limits mentioned in cl. (*a*), but so far as they relate to immovable property situate within those territories or limits. Therefore, this second clause will cover wills executed by Hindus, Buddhists, Sikhs or Jains which have been executed in the Punjab but relate to immovable property situate within the territories or limits specified in cl. (1). Section 213, therefore, does not apply to wills made by Hindus of the Punjab and relating to immovable property situate in the Punjab. The view of the learned District Judge, therefore, that no right under the will in question could be claimed or established by the plaintiff as a legatee in any Court of Justice, is based on an erroneous interpretation of s. 213, Succession Act, and Mr. Parkash Chandar, Counsel for the respondents had ultimately to concede that this is so.

I accept this appeal, set aside the decree of the District Judge and restore that of the trial Judge with costs throughout.

N. *Appeal accepted.*

RANGOON HIGH COURT

First Civil Appeal No. 44 of 1934

August 15, 1934

PAGE, C. J. AND MYA BU, J.

ELIZABETH O'DONOGHUE—APPELLANT

versus

SUTHERLAND AND OTHERS—RESPONDENTS

Will—Construction—"I give my niece all my personal property and effects", meaning of—Words, if sufficient to constitute her residuary legatee of the personality of deceased—Bequest void under s. 118, Succession Act—Bequest, if would fall into residue—Succession Act (XXXIX of 1925), ss. 102, 103, 118.

The testatrix, after devising certain immovable property to Bishop *F* bequeathed also to the Bishop certain personal property of which she was possessed. The will then proceeded; "I give and bequeath to my niece Mrs. *B* of Insein two plots of land near the A. B. M. School, for her sole use and benefit. I also give to my niece Mrs. *B* all my personal property and effects";

Held, that the will must be construed as a whole. *Prima facie* the words "I give all my personal property and effects" were sufficient to constitute Mrs. *B* a residuary legatee of the personalty of the deceased within s 102, Succession Act, and hence *prima facie* under s. 103, Mrs. *B* was entitled to all the personal property belonging to the testatrix at the time of her death of which she had not made any other testamentary disposition which was capable of taking effect. The bequest to Bishop *F* was void under s. 118 of the Act. The bequest of personality to Bishop *F* would therefore fall into the residue of which Mrs. *B* was the legatee.

Held, also that there was nothing to be found within the four corners of the will, to justify the Court in arriving at a conclusion that the testatrix, who gave all her personal property to Mrs. *B* intended thereby that Mrs. *B* should only receive a specific legacy of personal property and effects exclusive of the personal property bequeathed to Bishop *F*, and that in no event should the personality which formed the subject-matter of the legacy to Bishop *F* fall into the residue. *Cambridge* v *Rous* (1), *Blight* v. *Hartnoll* (2) and *In re Bagot* (3), referred to.

F. C. A. from the judgment in Civil Regular No. 481 of 1933.

Mr. *Aiyangar*, for the Appellant.

Messrs. *Sutherland*, *Darwood* and *S. R. Das*, for the Respondents.

Page, C. J.—This Appeal must be allowed. The sole question that falls for determination is what is the true construction of the following words in the will of one Mrs. A. Nicholas: "I also give to my niece Mrs. Bess O'Donoghue all my personal property and effects"?

Now, the will must be construed as a whole, and the testatrix, who died within a few hours of executing her will on March 12, 1933, after devising certain immovable property to Bishop Falliere, Lord Bishop of Mandalay, bequeathed also to Bishop Falliere certain personal property of which she was possessed. The will then proceeds:

"I give and bequeath to my niece Mrs. Bess O'Donoghue of Insein two plots of land near the A.B.M. School, Myingyan, for her sole use and benefit. I also give to my niece Mrs. Bess O'Donoghue all my personal property and effects."

Prima facie the words "I give all my personal property and effects" are sufficient to constitute Mrs. O'Donoghue a residuary legatee of the personalty of the deceased within s. 102, Succession Act. It follows therefore *prima facie* that under s. 103, Mrs. O'Donoghue is entitled to all the personal property belonging to the testatrix at the time of her death of which she had not made any other testamentary disposition which was capable of taking effect.

Now, all the parties concerned in this will are agreed that the bequest to Bishop Falliere was void under s. 118 of the Act. The bequest of personality to Bishop

Falliere will therefore fall into the residue of which Mrs. O'Donoghue is the legatee. On behalf of the respondents, however, it is contended that upon a true construction of the will all that Mrs. O'Donoghue obtained under the bequest of "all my personal property and effects' were the wearing apparel and furniture of the deceased. In my opinion there is no ground or justification for so limiting these words. It is further contended that under the words "all my personal property and effects" Mrs. O'Donoghue did not become a residuary legatee of the personalty, but acquired a specific legacy, namely, of such personal property and effects as were not included in the bequest of personalty to Bishop Falliere. In my opinion, having regard to the settled law for the construction of wills, such a construction is unsustainable. As long ago as 1802 in *Cambridge* v. *Rous* (1), at p. 25*, Sir William Grant, M. R. laid down the law upon this subject in terms from which the Courts have never departed. His Lordship observed:

"it has been long settled that a residuary bequest of personal estate, (for it is otherwise as to real) carries, not only everything not disposed of, but everything that in the event turns out not to be disposed of; not in consequence of any direct or expressed intention: for it may be argued in all cases that particular legacies are separated from the residue, and that the testator does not mean that the residuary legatee should take what is given from him; no, for he does not contemplate the case, the residuary legatee is to take only what is left: but that does not prevent the right of the residuary legatee. A presumption arises for the residuary legatee against everyone except the particular legatee. The testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee. In case of lapse of real estate the heir at law takes; but in the case of personal property legat e is preferred eith-r to the next of kin or the executor".

In *Blight* v. *Hartnoll* (2), Mrs. Blight by her will bequeathed all her personal property to her sister Christiana Hartnoll with the exception of a certain debt and a leasehold wharf near Woolwich. It appears that Mrs. Blight had settled the wharf upon certain trusts, and in the events that happened, the appointment of the wharf under the settlement was held to be void. The question then arose as to whether the wharf fell into the residue created by the words "all my personal property" in the will. It was held that it did. Fry, J., in the course of his judgment observed:

"I take the rule to be plain that in general the residuary gift carries every lapsed legacy and every legacy which on any ground fails to take effect, but that is subject to this other rule that, if the testator has shown some intention with regard to the excepted property inconsistent with its ever falling again into the residue, effect must be given to that intention."

(1) (1802) 8 Ves. 12 at p. 25; 6 R R 199.
(2) (1883) 23 Ch. D 218; 52 L J Ch. 672; 48 L T 51; 31 W R 535.
*Page of (1802) 8 Ves.—[*Ed.*]

In *In re Bagot* (3), at p. 351*, Kekewich, J., stated that:

"One must bear this in mind, that there is a great difference between the view from which one approaches any specific gift and the view from which one approaches a residuary gift for the purposes of construction In order to ascertain what is given, or whether any particular thing is well given, by a specific gift, you must look to see whether that particular item is included The question is, whether it is included or not; but once given a residuary gift large enough in its lanuage to comprehend residue, the question is not what is included, but what is excluded; and you must find words sufficiently large, sufficiently definite, sufficiently distinct, to enable you to say that some item is excluded so that, to use the language of one of the authorities, what, hitherto has purported to be residuary gift, is reduced to the level of a specific gift, and ceases to be a residuary gift"

Lindley, L. J., in giving judgment dismissing the appeal in that case, pointed out that:

"to exclude a particular portion of the personal estate of a testator, not otherwise disposed of by his will from a bequest of his residuary personal estate it is necessary to find an intention not to include that portion even if it is his. If such an intention can be found, effect must of course be given to it, and an intestacy will then necessarily be the consequence."

And A. L. Smith, L. J., added:

"A general residuary gift of personalty in a will sweeps up, and is intended to sweep up, all personal property of which the testator may die possessed which from any cause may happen not to be otherwise effectually disposed of; and, in my judgment, all such property falls into the general residue, unless an intention is apparent in the will that it is not under any circumstances to do so"

Now, applying this rule of construction to the terms of the present will, it is common ground that the words under consideration are wide enough to constitute a residuary gift of the personalty. It follows, therefore, that this residuary gift will not be construed as a specific legacy of the personalty other than that which had been bequeathed to Bishop Falliere, unless upon a true construction of the terms of the will it is clear that it was the intention of the testatrix that the bequest of personalty to Bishop Falliere should not be merely for the benefit of Bishop Falliere, but that the subject-matter of the legacy to Bishop Falliere should be excluded in any event and whether the bequest to Bishop Falliere was valid or not, from the gift of "all my personal property and effects" to Mrs. O'Donoghue. If the Court is

(3) (1893) 3 Ch. D 343 at p 351; 62 L J Ch. 1006; 69 L T 399.
*Page of (1893) 3 Ch.—[*Ed.*]

not satisfied that such was the intention of the testarix, it will follow that the voic legacy of personalty to Bishop Falliere will fall into the residuary gift to Mrs. O'Donoghue.

There is nothing in my opinion, to be found within the four corners of the will, and I do not take into account for this purpose the oral or documentary evidence adduced at the trial, to justify the Court in arriving at a conclusion that the testatrix, who gave all her personal property to Mrs. O'Donoghue, intended thereby that Mrs. O'Donoghue should only receive a specific legacy of personal property and effects exclusive of the personal property bequeathed to Bishop Falliere, and that in no event should the personalty which formed the subject-matter of the legacy to Bishop Falliere fall into the residue. For these reasons, in my opinion, the appeal must be allowed, the decree from which the appeal is brought set aside, and letters of administration with the will annexed issued to the appellant Mr. O'Donoghue on the usual terms.

As regards costs we think that inasmuch as the respondents both at the trial and on appeal were all in the same interest, one set of costs should suffice, and we award to the respondents as their costs at the trial sixty gold *mohurs* and ten gold *mohurs* in the appeal. We award the appellant sixty gold *mohurs* as her costs of the trial and ten gold *mohurs* as costs in the appeal. All these costs will come out of the estate.

Mya Bu, J.—I agree.

D. *Appeal allowed.*

BOMBAY HIGH COURT

Original Civil Jurisdiction Appeal No. 15 of 1934

September 18, 1934

BEAUMONT, C. J. AND RANGNEKAR, J.

HEMRAJ SHIVLAL—DEFENDANT —APPELLANT

versus

FIRM JOHARMAL RAMKARAN —PLAINTIFFS—RESPONDENTS

Bombay Cotton Contracts Act (XIV of 1922)—Bye-laws under—Forward delivery contracts—Parties not members of East India Cotton Association—Contract, if governed by the Act.

The Bombay Cotton Contract Act, and the bye-laws made thereunder do not apply to any contract in cotton of forward delivery entered into in Bombay between parties who are not members of the East India Cotton Association, either expressly or impliedly, and consequently such contracts, even though entered by word of mouth, are valid.

Appeal against the judgment of Mr. Justice Mirza.

Messrs. *Lalji Gokaldas* and *B. J. Desai*, for the Appellant.

Messrs. *Jamshed Kanga* and *C. K. Daphtary*, for the Respondents.

Rangnekar, J.—This is an appeal from a judgment of Mirza, J., by which the learned Judge passed a decree against the appellant in a suit brought by the respondents to recover the balance due at the foot of an account in respect of various transactions in cotton, linseed, wheat, etc., subsisting between them. Various defences were taken in the lower Court but they are all now given up, and the only question which is raised on this appeal is whether certain forward transactions in cotton are valid and binding on the defendant and whether he is liable in respect of those transactions to the plaintiffs. The learned Judge held that he was. The issue in respect of these transactions is in these terms:

"Whether defendant is liable in respect of forward transactions in cotton inasmuch as they are not in accordance with the provision of the Bombay Cotton Act."

It is common ground that the plaintiffs and the defendant were not, at all material times, members of the East India Cotton Association and that the plaintiffs acted as *pacca adatias* for the defendant in respect of these transactions. The contracts in question were verbal. The argument on behalf of the defendant is that even if the parties are not members of the East India Cotton Association all contracts in cotton for forward delivery, if they are to be performed in Bombay must be entered into and carried out in accordance with the provisions of the Bombay Cotton Contracts Act, 1922. The simple question, as far as I can see, which arises in this appeal is whether the Bombay Cotton Contracts Act and the bye-laws made thereunder will govern a forward delivery contract entered into between parties neither of whom is a member of the East India Cotton Association. The same question arose before me when I was sitting on the original side in *Shantilal* v. *Keval Ram*, Original Civil Jurisdiction Suit No. 349 of 1929 decided on August 5, 1931. It was then conceded that there was nothing in the language of the Act nor in that of any of the bye-laws which expressly prohibited a contract of this nature between persons neither of whom was a member of the East India Cotton Association. This is also conceded

by Mr. Lalji for the appellant in this appeal.

It was argued in that suit that having regard to the provisions in the Act including the preamble and the provisions of s. 2 of the Act and bye-laws 136, 139, 80, 81 and 82, contracts to deal in cotton between persons who are not members of the Association were void. In particular it was emphasised that bye-law 139 required that all contracts as defined under the Act must necessarily pass through the clearing house which must lead to the conclusion that contracts between persons who are not members of the Association were void. The question there was whether the Act took away the power of a person to do business in cotton as he liked and did the Act prohibit cotton contracts between non-members and I held it did not. I also held that there was nothing in the bye-laws which prohibited any such contract. I there traced the history of the East India Cotton Association and considered the scheme of the Act and the various bye-laws and came to the conclusion that the bye-laws did not apply to any contract in cotton of forward delivery between parties who were not members of the East India Cotton Association either expressly or impliedly and that a contract in cotton to be carried out in Bombay between parties neither of whom was a member of the East India Cotton Association was not prohibited either expressly or impliedly. It is unnecessary to refer in detail to the reasons which I have set forth in my judgment in that suit. All I need state is that the view I then took was not challenged in appeal from the rest of the judgment and I still adhere to that view.

Mr. Lalji tried to distinguish the nature of the question then raised from that raised by him in this appeal. I am unable to see any distinction and the issue in that case —which the Advocate-General has just read over to us—leaves no doubt on the point and is identical with that which was raised before Mirza, J., in this case. Mr. Lalji says that any contract which is not in accordance with the bye-laws made under the Act by the East India Cotton Association is void. That of course, as far as it goes is correct. Then he says that the bye-laws deal with the formation and performance of the contract. He admits that there is no bye-law which prohibits the formation of a contract of this nature between non-members, but he says that as there are bye-laws relating to the performance of the contract and as all contracts in cotton which are to be carried out in Bombay must be carried out in accordance with these bye-laws it must follow that the Act and the bye-laws govern contracts between non-members. It is difficult to follow this somewhat curious argument, but if I am right in holding that the Act and the bye-laws do not govern contracts between parties neither of whom is a member of the East India Cotton Association; then it is difficult to see how the bye-laws as to peformance only in such a case would apply to such a contract. One has only to look at one or two important bye-laws to ascertain whether the view I am taking is right or not. It is clear from the terms of bye-law No. 80 that it can only apply to the members of the Association. It is equally clear from the terms of bye-law No. 82 that it applies to contracts between a member and a non-member. But there is not a single bye-law which deals with or lays down the procedure both as regards the formation and performance of the contract between parties, both of whom are not members of the East India Cotton Association. One other point is taken by Mr. Lalji that some of the transactions in the suit would be governed by the Bombay Cotton Contracts Act, IV of 1922. In the first place no issue was raised in the trial Court about this, and there is no clear evidence before us as to whether any transactions were entered into after this Act came into force. But as Mr. Lalji finally conceded that even as to any such contracts the argument would be the same the point need not be pursued further. I think, therefore, the learned Judge came to the right conclusion and this appeal must be dismissed with costs.

Beaumont, C. J.—I agree that the appeal must be dismissed with costs. In my view the matter can be disposed of on a very simple ground. These contracts in suit are verbal contracts for the purchase or sale of cotton in Bombay and the contention of Mr. Lalji for the appellant is that the contracts although made between persons neither of whom are members of the East India Cotton Association are void because it is not expressly provided that they are to be subject to the bye-laws of the Association. Now if the view of my learned brother is right—and I do not dissent from that view—that the bye-laws do not apply to contract between non-members, the appeal necessarily fails. But if that view is wrong and the bye-laws do

apply to the contracts in suit then it seems to me that these bye-laws become part of the general law applicable to the contracts and these contracts have to be carried out with due regard to those bye-laws. But it is not necessary to express that provision in the contracts as every contract must be carried out according to the law applicable to it and the omission to mention in it that the same is subject to the bye-laws would not in any way invalidate it. Therefore it seems to me that whether or not the bye-laws apply to contracts between non-members, Mr. Lalji's attack upon the contracts based on the omission of a provision that they are to be carried out in accordance with the bye-laws fails. There is no provision in the Bombay Cotton Contracts Act making such a provision in the contract essential. I think on that ground the appeal fails.

D. *Appeal dismissed.*

LAHORE HIGH COURT

Miscellaneous Second Civil Appeal No. 1042 of 1933
March 12, 1934
RANGI LAL, J.

TRIKHA RAM AND ANOTHER—DEFENDANTS—APPELLANTS
versus
DURGA PARSHAD—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), O. I, r. 13—Non-joinder of parties—Objection as to—When should be raised—Suit not brought in firm's name—All partners should be impleaded.

If the objection as to non-joinder is not made in time the defendant cannot take it afterwards either before or after judgment. *Kale Khan* v. *Sewa Ram* (1), relied on.

A suit was brought by *A* who described himself in the plaint as proprietor of the firm *A-B*. *B* was then dead and had left a widow but she was not made a party to the suit. The defendants raised no objection as to non-joinder and the issues between the parties were settled on March 12, 1932. The case was fixed for evidence on May 25, 1932. On that date the defendants raised an objection to the effect that *A* was not competent to sue alone without impleading the widow of *B* as a party. *A* thereupon, made a statement to the effect that on the death of *B* he became the sole owner of the firm *A-B*. It was held that the interest of *B*'s widow had not passed to *A* at the time of the institution of the suit and that he was, therefore, not competent to sue in his own name. The suit was, therefore, dismissed. On appeal the District Judge held that the objection as to non-joinder no having been raised before the issues were settled, it should be deemed to have been waived and should not have been allowed to be taken subsequently. The Judge also expressed the opinion that the suit was in substance on behalf of the firm *A-B* and that the heading of the plaint could be treated merely as a misdescription. The appeal was, therefore, accepted and the case was remanded for a decision on the merits:

Held, that the case fell within the purview of O. I, r. 13, Civil Procedure Code and that the objection which was not raised before the settlement of issues should not have been allowed to be raised subsequently.

If a suit is not brought in the name of a firm all the partners should be impleaded. *Hari Singh* v. *Karam Chand-Kanshi Ram* (4), referred to.

Mis. S. C. A. from the orders of the District Judge, Delhi, dated March 21, 1933.

Mr. *Kishen Dayal*, for the Appellants.

Mr. *Jaggan Nath Aggarwal*, for the Respondent.

Judgment.—This appeal arises out of a suit brought by one Durga Prashad who described himself in the plaint as the proprietor of the firm Durga Parshad Nathu Mal. Nathu Mal was then dead and had left a widow but she was not made a party to the suit. The defendants raised no objection as to non-joinder and the issues between the parties were settled on March 12, 1932. The case was fixed for evidence on May 25, 1932. On that date the defendants raised an objection to the effect that Durga Parshad was not competent to sue alone without impleading the widow of Nathu Mal as a party; Durga Parshad, thereupon, made a statement to the effect that on the death of Nathu Mal he became the sole owner of the firm Durga Parshad Nathu Mal. The following issue was then framed by the trial Court:—

"Was the plaintiff the sole owner of the firm Durga Parshad-Nathu Mal at the time of the institution of the suit and has he therefore a *locus standi* to sue in his own name?"

It was held that the interest of Nathu Mal's widow had not passed to Durga Parshad at the time of the institution of the suit and that he was, therefore, not competent to sue in his own name. The suit was, therefore, dismissed. On appeal the learned District Judge held that the objection as to non-joinder not having been raised before the issues were settled it should be deemed to have been waived, and should not have been allowed to be taken subsequently. The learned Judge also expressed the opinion that the suit was in substance on behalf of the firm Durga Parshad-Nathu Mal and that the heading of the plaint could be treated merely as a misdescription. The appeal was, therefore, accepted and the case was

remanded for a decision on the merits. The defendants have filed a second appeal to this Court.

Now, O. I, r. 13 of the Civil Procedure Code lays down that all objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived. It is admitted that in this case the ground of objection had not arisen subsequently because Nathu Mal had died before the institution of the suit. In *Kale Khan* v. *Sewa Ram* (1), a Full Bench of the Chief Court held that if the objection as to non-joinder is not made in time the defendant cannot take it afterwards either before or after judgment. The learned Counsel for the Appellants referred to *Vyankatesh Oil Mill Co.* v. *N. V. Velmahomed* (2) in support of his contention that the objection was not as to non-joinder but as to the very constitution of the suit. In that case the plaintiff brought a suit in the name of a firm which carried on business outside British India and a preliminary issue, to the effect whether the plaintiff was entitled to sue in the name of the firm, was decided in the negative whereupon he sought to amend the plaint by striking out his name and inserting the names of the individual partners. It was held that the suit was brought by an entity which had no legal existence in the eye of the Indian Law and therefore the amendment could not be treated as an amendment following upon a mere misdescription but must be treated as an application for the substitution as plaintiffs of the individual persons who composed the entity which the law did not recognise. It is clear that this case has no bearing on the present case where the objection was the widow of the Nathu Mal was a necessary party to the suit.

It is also urged that the trial Court having used its discretion and allowed the objection as to non-joinder being raised after the settlement of issues, the Appellate Court should not interfere with that discretion. Reference was made in this connection to *Sabhanadri Appa Rao* v. *Parthasarathi Appa Rao* (3), but the facts of that case were peculiar. Such waiver as there was in that case resulted from the guardian of a minor defendant having failed to raise the ground of non-joinder in his first written statement. Subsequently the minor attained majority and the Court allowed him to file a new written statement. It was held that the waiver if any was not for the benefit of the minor and he was not bound by it. It was also remarked that if the minor had not come of age during the pendency of the suit and the suit had ended against him he could, on becoming a major, impeach the judgment on the ground of his guardian's negligence. If the defect was brought to the notice of the Court in proper time it was within its competence to rectify it and put it beyond the power of the party to impugn the judgment later on. The present case clearly falls within the purview of O. I, r. 13, and I am of opinion that the objection which was not raised before the settlement of issues should not have been allowed to be raised subsequently.

This finding is sufficient to dispose of the appeal. I would, however, remark in passing that in view of the clear statement of the plaintiff on June 18, 1932, that he was the sole owner of the firm Durga Parshad-Nathu Mal at the time of the institution of the suit, it cannot be said that the suit was in substance one on behalf of the firm. I am further of opinion that if a suit is not brought in the name of a firm all the partners should be impleaded as laid down in *Hari Singh* v. *Karam Chand-Kanshi Ram* (4). I, however, dismiss the appeal on the finding that the objection as to non-joinder must be deemed to have been waived in this case. The respondent's costs will be paid by the appellants.

N. *Appeal dismissed.*

(1) 156 P R 1889.
(2) 109 Ind. Cas. 99; A I R 1928 Bom. 191.
(3) 137 Ind. Cas. 271; 62 M L J 154; 35 L W 279; (1932) M W N 494; Ind. Rul. (1932) Mad. 355; A I R 1932 Mad. 583.
(4) 100 Ind. Cas. 721; 28 P L R 155; 8 Lah. 1; A I R 1927 Lah. 115.

LAHORE HIGH COURT

Miscellaneous First Civil Appeal No. 1342 of 1932

March 19, 1934

HILTON, J.

FIRM SUNDAR DAS VIR BHAN—JUDGMENT-DEBTORS—APPELLANTS

versus

FIRM UMA DATT HANSRAJ—DECREE-HOLDER AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r.

53 (1), (b)—*Scope of—Attachment of decree obtained by judgment-debtor—Attachment, when ceases—Limitation Act (IX of 1908), Sch. I, Art. 174—Limitation of ninety days—Whether applies to certificate by decree-holder.*

Order XXI, r. 5 3 (1) (*b*) (*ii*), Civil Procedure Code does not mean that when the holder of the decree sought to be executed makes such an application, the attached decree ceases to be an attached decree; it only means that a period is provided by the rule up to which a stay of execution is to be arranged by the Court to which notice is sent to enable the holder of the decree sought to be executed to make application for execution of the attached decree. The rule relates not to the date of cessation of the attachment but only to the manner in which the attachment is to be effected.

W obtained a decree against *S*. *A* had a decree against *W* and in execution of that decree he got attached *W's* decree against *S*. The application of *A* to execute this attached decree was dismissed for default. *W* assigned his decree to *B*. *S* paid a sum of money out of Court to *A* on account of the decree which *W* had obtained against *S* and which *A* had attached. *B* the assignee applied to execute that decree against *S* who pleaded payment out of Court and satisfaction :

Held, that the attachment of the decree of *W* against *S* did not cease when proceedings in execution of that attached decree were dismissed for default in the Court which had received notice under O. XXI, r. 53, from the Court which had passed the decree in favour of *A* against *W*. *Prem* v. *Muhammad Habibullah* (1) and *Ram Krishna Iyer* v. *Marigoundan* (2), applied.

The limitation of ninety days provided by Art. 174 of the First Schedule of the Limitation Act is not applicable to a certification by a decree-holder. *Sri Prakash Singh* v. *Allahabad Bank, Ltd.* (3), referred to.

Mis. F. C. A. from an order of the Senior Subordinate Judge, Amritsar, dated June 17, 1932.

Mr. *Chiranjiv Lal Aggarwal*, for the Appellant.

Messrs. *Fakir Chand* and *Chandar Gupta*, for the Respondents.

Judgment.—On July 29, 1924, Uma Dat-Hans Raj obtained a decree against Sundar Das-Vir Bhan for Rs. 4,593-12-0 which, after an unsuccessful appeal by the judgment-debtors to the High Court, had grown to Rs. 5,244.

The firm Sewa Ram-Amar Nath had a decree against Uma Dat-Hans Raj and on April 6, 1927, in execution of that decree they got attached Uma Dat-Hans Raj's decree of July 29, 1924, against Sundar Das-Vir Bhan.

On July 19, 1928, the application of Sewa Ram-Amar Nath to execute this attached decree was dismissed in default.

On January 10, 1930, Uma Dat-Hans Raj assigned their decree of July 29, 1924, to Bishen Das for Rs. 1,000.

On September 6, 1930, Sundar Das-Vir Bhan paid Rs. 680 out of Court to Sewa Ram-Amar Nath on account of the decree of July 29, 1924, which Uma Dat-Hans Raj had obtained against Sundar Das-Vir Bhan and which Sewa Ram-Amar Nath had attached in execution of their decree against Uma Dat-Hans Raj.

On April 13, 1931, Bishen Das, the assignee of the decree of July 29, 1924, applied to execute that decree against Sundar Das-Vir Bhan who pleaded that they had satisfied the decree by the payment which they had made out of Court on September 6, 1930, to Sewa Ram-Amar Nath.

The executing Court decided on June 17, 1932, that as the execution application of Sewa Ram Amar-Nath had been dismissed in default on July 19, 1928, prior to the payment which was made on September 6, 1930, out of Court by Sundar Das-Vir Bhan to Sewa Ram-Amar Nath, that payment had been made at a time when the decree of July 29, 1924, was no longer under attachment and that it did not, therefore, constitute a satisfaction of that decree and that it did not preclude Bishen Das as assignee of that decree from proceeding in execution against Sundar Das-Vir Bhan. Against this order, an appeal has been preferred here by Sundar Das-Vir Bhan and has been contested on behalf of Bishen Das.

In my opinion the appeal must succeed for the following reasons :—

The authority of *Prem* v. *Muhammad Hahibullah*, 24 Ind. Cas. 795 (1), and *Rama Krishna Iyer* v. *Marigoundan* (2), makes it quite clear that the attachment of the decree of July 29, 1924, which was made on April 6, 1927, did not cease on July 29, 1928, when the proceedings in execution of that attached decree were dismissed in default in the Court which had received notice under O. XXI, r. 53, from the Court which had passed the decree in favour of Sewa Ram-Amar Nath against Uma Dat-Hans Raj. There is no reason for not applying to the present case the principles laid down in these authorities to the effect that the attachment still subsisted, having been made by the order of the Court which passed the decree in favour of Sewa Ram-Amar Nath and not by order of the Court which passed the decree of July 29, 1924, and that the dismissal in default by the latter Court of the proceed-

(1) 24 Ind. Cas. 795.
(2) 105 Ind. Cas. 696; A I R 1927 Mad. 1035; (1927) M W N 680.

ings pending before it could not, therefore, cause a cessation of the attachment.

It was argued, however, before me on behalf of the respondent Bishan Das that the attachment ceased under O. XXI, r. 53 (1) (*b*) (*ii*), Civil Procedure Code, at the time when Sewa Ram-Amar Nath applied to execute the decree of July 29, 1924. This view, however, is not justified by the wording of the said rule which only lays down that the Court which receives notice from another Court should be requested to stay the execution of its decree unless and until the holder of the decree sought to be executed applies to the Court receiving such notice to execute the attached decree. This does not mean that when the holder of the decree sought to be executed makes such an application, the attached decree ceases to be an attached decree: it only means that a period is provided by the rule up to which a stay of execution is to be arranged by the Court to which notice is sent to enable the holder of the decree sought to be executed to make application for execution of the attached decree. In other words, the rule in question related not to the date of cessation of the attachment but only to the manner in which the attachment is to be effected. No such argument as above was put forward in, the two authorities above-mentioned, although, had it been a valid argument, it could have been urged in the circumstances of both these cases.

It was further contended on behalf of the respondent that the payment made by Sundar Das-Vir Bhan out of Court on September 6, 1930, was never certified to the executing Court and that it cannot, therefore, be taken notice of for the purposes of the execution. As against this, it is clear from the record that the judgment-creditor admitted during the proceedings before the Court below that he had received this amount and it does not appear that the limitation of ninety days provided by Art. 174 of the First Schedule of the Indian Limitation Act is applicable to a certification by a decree-holder: see *Sri Prakash Singh* v. *Allahabad Bank, Ltd.* (3). In any case, this argument cannot be of any avail to the respondent for the simple reason that if the payment of September 6, 1930, did not have the effect of satisfying the decree of July 29, 1924, then it follows that the attachment of that decree did not cease on that date but continued in force after that date, because under O. XXI, r. 55, Civil Procedure Code, the attachment is deemed to be withdrawn only when the decree has been satisfied through the Court or when satisfaction has been certified to the Court. It would, therefore, follow that if there was satisfaction of the decree on September 6, 1930, there was no withdrawal of the attachment on that date and the attachment must still be subsisting, in which case it is Sewa Ram-Amar Nath who is the representative of Uma Dat-Hans Raj and entitled as such to execute the decree of July 29, 1924, in accordance with the provisions of O. XXI, r. 53 (3) and not the assignee Bishen Das whose assignment dates from January 10, 1930, whereas Sewa Ram-Amar Nath had become representative of Uma Dat-Hans Raj under the aforesaid rule on April 6, 1927.

For the above reasons, I find no force in the contentions which have been made before me on behalf of the respondent Bishen Das. I accept the appeal of Sundar Das-Vir Bhan and setting aside the order of the Senior Subordinate Judge of Amritsar, dated June 17, 1932. I dismiss the application of Bishen Das against Sundar Das-Vir Bhan and order him to pay their costs in this Court.

N. *Application dismissed.*

(3) 114 Ind. Cas. 581; A I R 1929 P C 19; 29 L W 161; 33 C W N 267; 31 Bom. L R 289; 6 O W N 29; 3 Luck 684; (1929) A L J 33; 56 M L J 233 (P C).

MADRAS HIGH COURT

Civil Revision Petition No. 1003 of 1933

October 3, 1934

PAKENHAM WALSH, J.

S. RAMASWAMI PILLAI—PETITIONER

versus

KRISHNAMAL—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 115, O. XXV, r. 1—Security for costs—Order on application for security—Revision, whether lies—Order for security against pauper plaintiff—Permissibility.

Where a defendant put in a petition for security for costs at the earliest possible opportunity but the Court, instead of disposing of the petition at once, adjourned the petition along with the case and finally dismissed the petition on the ground that as the suit itself was ready for trial and the defendant had already incurred the costs, no useful purpose could be served by directing the plaintiff, to furnish security for costs:

Held, that the procedure adopted was calculated to defeat the entire object of petitions of this

nature and as the Court acted with material irregularity in exercising its jurisdiction, the High Court had power to interfere and set aside the order of the lower Court *Ramcoomar Coondoo* v. *Chunder Onti Mukerji* (1), referred to.

There is no absolute rule of law that a pauper plaintiff cannot be asked to furnish security under O. XXV, r. 1, (3). If it is shown that a pauper plaintiff is a puppet in the hands of persons able to find security, it would not be improper to make an order for furnishing security for costs. *Seshayyangar* v. *Jaunilvadin* (2), *Srinivasa Sastrigal* v. *Subramania Aiyar* (3) *B. F. Saldanha* v. *Henry Hart* (4) and *Subbiah Thevar* v. *Balasubramania Pandia Thevar* (5), referred to.

Though an order requiring security for costs is entirely a matter of discretion with which the High Court would not interfere in revision, the High Court can interfere where the lower Court has acted with material irregularity in exercising its jurisdiction.

C. R. P. under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Tinnevelly, dated July 15, 1933, and made in I. A. No. 1267 of 1932 in O. S. No. 517 of 1932.

Mr. *Swaminatha Iyer*, for the Petitioner.

Mr. *N. A. Krishna Iyer*, for the Respondent.

Judgment. This is a revision petition against the order of the District Munsif of Tinnevelly on I. A. No. 1267 of 1932 in O. S. No. 517 of 1932 refusing to order the plaintiff in the suit to furnish security for costs. The plaintiff sued for a sum of Rs. 2,569-6-6 alleged to have been deposited by her husband with the defendant under the pass-book dated February 5, 1929. It is alleged that this sum has been gifted to the plaintiff by her husband. The plaintiff was given leave to sue *in forma pauperis*. The plaint appears to have been filed on October 29, 1932, and issues were framed on November 3, 1932, and on that very day the petitioner (defendant) put in an application under O. XXV, r. 1 (3), Civil Procedure Code, for furnishing security. It was returned on November 4, 1932, and represented on November 5, 1932. I append below the B. Diary with regard to this, which is important. It will be seen that the case was adjourned on several dates and that on February 2, 1933, the Court called for the judgment in O. S. No. 11 of 1930 on the file of the Court of the District Munsif of Tuticorin and the judgment and decree in A. S. No. 17 of 1931 filed against that judgment. The petition was then adjourned to February 17, 1933. On February 17, 1933, it was adjournd to March 8, 1933, and on that day it was adjourned with the suit to April 7, 1933. On April 7, 1933, the suit was adjourned to June 13, 1933, and on that day, it was adjourned to June 24, 1933, as both sides were not ready. On June 24, 1933, it was adjourned to July 15, 1933, and on that day the District Munsif passed the following order :

"The suit itself is ready for trial, defendant has already incurred the costs No useful purpose could be served by directing plaintiff to furnish security for costs at this stage Petition dismissed. No costs."

It will be seen that the defendant put in this petition for security at the earliest possible opportunity and he has been diligent throughout in his prosecution. But the Court adopted an entirely wrong procedure after March 8, 1933, in adjourning the petition with the suit and this went on until July 15, 1933, the date of the order when it proceeded to dismiss the petition on the ground that the suit itself was ready for trial that the defendant had already incurred the costs, and that no useful purpose could be served by directing plaintiff to furnish security at that stage. This procedure was really calculated to defeat the whole object of the petition and the reason which the District Munsif gave for dismissing it, if correct, is due to the situation which was entirely of the Court's making. In *Ramcoomar Coondoo* v. *Chunder Onti Mukerji* (1) their Lordships of the Privy Council observed :

"It is ordinary practice, if the plaintiff is suing for another, to require security for costs, and to stay the proceedings until it is given."

Although the District Munsif had sufficient material from which he could have formed a judgment as to the merits of the petition, he did not in fact dispose of the petition on merits at all. He dismissed it, as I observed above, on account of the alleged situation which, if correct, was entirely the Court's own making. There is no absolute rule that a pauper plaintiff cannot be asked to furnish security under O. XXV, r. 1 (3). In *Seshayyangar* v. *Jainulavadin* (2) (a decision of the Bench) it was laid down

"If it were shown that the paupers were mere creatures in the hands of persons well able to find security, the order would not be improper."

See also *Srinivasa Sastrigal* v. *Subramania Ayyar* (3), *B. F. Saldanha* v. *Henry Hart* (4), *Subbiah Thevar* v. *Balasubramania*

(1) 2 C 233.
(2) 3 M 66 at p. 67.
(3) 17 M L J 583.
(4) 58 Ind. Cas. 794; 43 M 902; (1920) M W N 534; 12 L W 333.

Pandia Thevar (5). It is necessary, therefore, in considering whether this petition should have been allowed, to look at the circumstances under which the suit was filed. The defendant in the present suit had brought a suit against the plaintiff's husband to recover a sum of Rs. 1,575 odd. The defendant's husband in that case said that he had on the very day of the alleged deposit in the present case, namely, February 5, 1929, paid a sum of Rs. 1,000 to the defendant out of a sum which he had realised in the execution of two decrees. He also produced a receipt for this sum. It was found that the receipt was not genuine, and the fund out of which the alleged payment was made non-existent. This finding was confirmed on appeal. Admittedly, the suit sum said to have been deposited that day from the same fund has been made over as a gift by the plaintiff's husband to the plaintiff and the allegation in the petition praying for security is that she is a mere puppet in the hands of her husband and that as the husband does not wish to pay the Government stamp duty nor to be mulcted with costs in case he fails, he has put forward the plaintiff to sue *in forma pauperis*. These facts are fully set out in the petition asking for security. The plaintiff in her counter-affidavit admitted that she had no property of any kind and that she had no means of furnishing security. As regards the specific facts set out in the petition about O. S. No. 11 of 1930 and A. S. No. 17 of 1931, the plaintiff simply says that the facts contained in paras. 5 to 8 are not true; she does not specifically challenge any particular fact therein stated. In my opinion, these circumstances are sufficient to show that she is bringing this suit for her husband and not *bona fide* on her own behalf.

The only question that then remains is whether this Court can interfere with the order as having been passed without jurisdiction or in irregular exercise of its jurisdiction. There is no doubt that, generally, an order requiring security under this section is entirely a matter of discretion with which the High Court would not interfere. But the present case is very peculiar because the learned District Munsif, instead of disposing of the application at once on its merits, adopted the wholly unjustifiable course of adjourning it together with the case, thereby defeating the very object of the petition and finally dealt with it not on its merits but, as I said before, dismissed it for something which, if true, is not the fault of the petitioner but is entirely due to the position created by the action of the Court itself. I consider this an irregularity in the exercise of his jurisdiction. It has been suggested that the petition should be sent back for disposal on the merits. But all the facts are before me. They are matters of documentary record and from the petition and the counter-affidavit and from the Court having sent for the records in O. S. No. 11 and A. S. No. 17, it is clear that the lower Court itself knew of the evidence and, therefore, it will not be advisable if it be asked to pass an order on it and this course would cause further delay. Under these circumstances I will dispose of the matter myself. I think that the plaintiff should have been asked to furnish security for costs of the suit. The order of the lower Court is set aside and the plaintiff is hereby ordered to furnish security for costs in the sum of Rs. 200 to the satisfaction of the lower Court within one month from the date of receipt of this order. Otherwise her suit will stand dismissed with costs. The petition is allowed with costs in both Courts.

A. *Petition allowed.*

(5) (1931) M W N 1157 at p. 1160.

LAHORE HIGH COURT

First Civil Appeal No. 1608 of 1933

April 19, 1934

ABDUL RASHID, J.

QADAR BAKSH—PLAINTIFF—APPELLANT

versus

GHULAM MOHAMMAD—DEFENDANT—RESPONDENT

Patents and Designs Act (II of 1911), ss. 43, 53—Registration of design—Design should be new and original and not of a pre-existing common type—Suit for damages for infringement—Defence that design was not new or original—Legality of.

No registration under s. 43 of the Patents and Designs Act is effective, unless the design or configuration sought to be protected is new and original and not of a pre-existing common type. Consequently in a suit for damages for infringement of the plaintiff's design, the defendant can raise the plea that the registered design of the plaintiff was not new and original *Ram Sahai* v. *Angnor* (1), followed.

F. C. A. from the decree of the District Judge, Lahore, dated July 17, 1933.

Mr. *Jagan Nath Talwar*, for the Appellant.

Mr. *Ram Lal Anand, II*, for the Respondent.

Judgment.—On November 21, 1932, the plaintiff-appellant, a tassel maker of Lahore, instituted a suit against the defendant for recovery of Rs. 100 as damages for contravention and infringement of his design under s. 53, Patents and Designs Act, 1911. The learned District Judge held that the plaintiff's design was neither new nor original, and that it had been established by the evidence produced by the defendant that this design had been published and manufactured in India for several years before the plaintiff registered his design. On these findings the suit of the plaintiff was dismissed with costs. The plaintiff has preferred an appeal to this Court.

The learned Counsel for the appellant contended that once a design had been registered, it was not open to the defendant to urge that there was nothing new or original in the plaintiff's design. It was suggested that it was open to the defendant to present a petition for the cancellation of the registration of the design to the High Court on the ground that the design had been published in British India prior to the date of registration or that the design was not a new or original design. It was maintained that in the absence of such a petition by the defendant he could not be allowed to raise in defence a plea that the design was neither new nor original. In my opinion this contention has no force. Reference may be made in this connection to a Division Bench ruling of the Allahabad High Court reported in *Ram Sahai* v *Angnor* (1), wherein it was laid down that:

"No registration under s. 43, Patents and Designs Act, is effective unless the design or configuration sought to be protected is new and original and not of a pre-existing common type."

In that case also the owner of the registered design was the plaintiff, and the defendant was allowed to raise the plea that the registered design was not new and original.

It was next urged by the learned Counsel for the appellant that the defendant had not succeeded in establishing that the design in question had been manufactured in British India before the registration. The defendant has produced five witnesses on this point, and I agree with the learned District Judge that there is no reason why implicit reliance should not be placed on the statements of Mohammad Ashraf, D. W. No. 2, Mohammad Din D. W. No. 3, and Allah Ditta, D. W. No. 5. In view of this evidence I hold it established that the tassels of the design manufactured by the plaintiff were being sold in Lahore by other dealers for several years before the design in favour of the plaintiff was registered.

No other point was raised by the learned Counsel for the appellant and I, therefore, dismiss this appeal with costs.

N. *Appeal dismissed.*

(1) 77 Ind. Cas. 517; A I R 1922 All. 496.

LAHORE HIGH COURT

Civil Revision Petition No. 14 of 1932

May 5, 1934

ABDUL RASHID, J.

PRABHU—DECREE-HOLDER—PETITIONER

versus

BANWARI—JUDGMENT-DEBTOR—OPPOSITE PARTY

Punjab Tenancy Act (XVI of 1887), ss. 77 (3), 5, 6, 8—Dispute as to validity of attachment of occupancy rights of judgment-debtor — Jurisdiction of civil Court to determine nature of occupancy rights.

Where the dispute between the parties is one in execution proceedings and is as to whether occupancy rights of the judgment-debtor fall under s. 5 or s. 6 or 8, Punjab Tenancy Act and are attachable or not, it is not covered by s. 77 (3) of the Act and is, therefore, cognizable by a civil Court.

C. R. P. from an order of the Senior Sub-Judge, Ambala, dated April 24, 1931.

Mr. *Ghulam Rasul* for Mr. *S. C. Chatterji*, for the Petitioner.

Order.—This petition for revision has arisen out of execution proceedings. A decree for Rs. 364-4-0 was passed in favour of the petitioner, and he attached occupancy rights in a certain piece of land belonging to the judgment-debtor. The judgment-debtor presented an application on June 9, 1930, stating that he was not an occupancy tenant under s. 5, Punjab Tenancy Act, and that as his occupancy rights fell under the other sections of that Act, they could not be attached and sold in execution of the decree. Reliance was placed on his behalf on s. 56. The executing Court held that, as the judgment-debtor had not proved himself to be an occupancy tenant under s. 6 or 8, Punjab Tenancy Act, it must be held that he was an occupancy tenant under s. 5 and that therefore the occupancy rights in question were liable to be sold in execution of the decree of the petitioner. Against this order the judgment-debtor preferred

an appeal to the learned Senior Subordinate Judge. The lower Appellate Court held that the dispute or matter directly in issue in these execution proceedings was determinable by a Revenue Court only. He therefore accepted the appeal of the judgment-debtor and directed the decree-holder to institute

"a sort of inter-pleader suit in a Revenue Court for a declaration of the nature of the tenancy."

Against this order the decree-holder has presented the present petition for revision. The learned Senior Subordinate Judge has observed that only a Revenue Court can determine whether certain occupancy rights fall under s. 5, Punjab Tenancy Act, or whether they must be held to fall under s. 6 or 8. Reliance was placed on s. 77 (3), Punjab Tenancy Act, in this connection. Section 77 (3) lays down that

"the following suits shall be instituted in and heard and determined by Revenue Courts, and no other Courts shall take cognizance of any dispute or matter with respect to which any suit might be instituted."

Thereafter the nature of the suits which can be taken cognizance of by Revenue Courts only is indicated in sub-cls. (*a*) to (*p*), cl. (3), s. 77. The learned Senior Subordinate Judge has not indicated within the purview of which of the sub-clauses the present dispute between the parties falls. The opening words of cl. (3), s. 77 can only come into operation if the matter in dispute falls within the purview of any of the sub-cls. (*a*) to (*p*). I am of the opinion that the dispute between the parties is not one which is covered by the provisions of s. 77 (3). For the foregoing reasons I accept this petition for revision, set aside the judgment of the Senior Subordinate Judge, dated April 24, 1931, and remand the case to him under s. 151, Civil Procedure Code, for re-decision of the appeal preferred to him by the judgment-debtor in accordance with law. The respondent was served, but no appearance has been put in by or on his behalf. The respondent shall pay the costs of the petitioner in this Court.

N. *Petition accepted.*

CALCUTTA HIGH COURT

Civil Appeal No. 1829 of 1931

May 7, 1934

NASIM ALI, J.

GOLAM MUSTAPHA—DEFENDANT—APPELLANT

versus

HANUMANDAS MUNDRA—PLAINTIFFS—RESPONDENTS

Appeal—Credibility of witness depending on his demeanour—Appellate Court, when can come to different conclusion from that of trial Court—Bengal Tenancy Act (VIII of 1885), ss. 87, 25—Abandonment, question of—If one of fact—Inference from facts as to existence of abandonment, whether a question of law—S. 87, if exhaustive — Breach of implied condition — Whether a ground for ejecting occupancy raiyat.

When a Court has got to deal with a pure question of credibility of witnesses, great weight ought necessarily to be given to the judgment of the Judge, who saw the witnesses But there may be other circumstances and facts, quite apart from manner and demeanour, which may show whether a statement can be believed or not. These circumstances and facts may justify the Appellate Court in differing from the trial Court even on a question of fact, turning on the question of credibility of witnesses whom the Appellate Court has not seen. [p. 322, col. 2.]

The question as to whether there has been abandonment of the land by the *raiyat*, is largely and principally a question of fact depending upon a number of circumstances to be proved in each case. But the inference from the facts found, as to whether there was abandonment or not is a question of law. *Aswini Kumar* v. *Har Kumar* (5), followed. [p. 323, col. 1.]

Section 87, Bengal Tenancy Act, is not exhaustive and there might be abandonment apart from the provisions of that section. Even if there be no abandonment within the meaning of s. 87, an inference of abandonment apart from the provisions of that section would be legitimate, if it is proved that the entire holding has been transferred and that the transferees have been put in possession of the whole holding. *Dayamayi* v. *Ananda Mohan Roy* (6), explained *Baikuntha Chandra Nag* v. *Chandra Nath Bandhopadhya* (8) and *Abdul Majid Bhuiya* v. *Ali Mia* (9), relied on. *Ram Lal Mandar* v. *Kuldip Narayan Tewari* (10), referred to.

It is, however, open to doubt whether, in view of the express provisions laid down in s. 25, Bengal Tenancy Act, the breach of an implied condition would be a ground for ejecting an occupancy *raiyat*.

C. A. from appellate decree of the Second Sub-Judge, Midnapore, dated February 24, 1931.

Mr. *Ramaprasad Mukherji*, for the Appellant.

Mr. *Kshiteendranath Basu*, for the Respondents.

Judgment.—This is an appeal by the defendant in a suit for recovery of possession of an occupancy holding on the allegation that it has been abandoned by the recorded tenant. The case for the

plaintiff as alleged in the plaint is that defendant No. 3 was the original occupancy *raiyat* in respect of the land in suit, that defendants Nos. 1 and 2 are now in possession of this entire holding on the basis of purchase, and that defendant No. 3 is not in possession of any portion of the holding. It is on these allegations that the plaintiff wanted *khas* possession of the land. Defendant No. 1, who contested the suit, resisted the plaintiff's claim on the ground that the original tenant, that is defendant No. 3, was still in possession of a portion of the land, that there was not a transfer of the entire holding, inasmuch as the purchase of defendant No. 2 was only a *benami* purchase and was for the benefit of defendant No. 3. Defendant Nos. 2 and 3 did not appear and contest the plaintiff's claim. The trial Court held that defendant No. 3 was in possession of a portion of the holding and that defendant No. 3 never repudiated his liability to pay rent. The trial Court was further of opinion that the sale, at which defendant No. 2 purchased, was a collusive affair. In this view of the matter, the trial Court dismissed the plaintiff's claim for *khas* possession. On appeal, the lower Appellate Court has held that the entire holding has been transferred and that defendant No. 3 is not in possession of any portion of the holding. On these findings the lower Appellate Court came to the conclusion that the entire holding had been abandoned by the original tenant. In the result, the lower Appellate Court has decreed the plaintiff's suit. Hence the present appeal by defendant No. 1.

The first contention of Mr. Mukerji, appearing on behalf of the appellant, is that the finding of the lower Appellate Court about defendant No. 3's possession is not a proper finding, inasmuch as, reversing the finding of the trial Court, the learned Judge has overlooked the principle, that when the question arises as to whether one witness should be believed rather than another and that question turns on the demeanour of witnesses in the witness-box, it requires circumstances of exceptional character to justify a Court of appeal in coming to a different conclusion. It is urged by the learned Advocate that the trial Court, in view of the demeanour of the plaintiff's *gomasta* in the witness box, disbelieved him and believed the evidence of defendant No. 1, as the latter appeared to him to have deposed in a very straightforward manner. It is contended that the lower Appellate Court, however, in believing the plaintiff's *gomasta* and in disbelieving defendant No. 1 has not at all taken into consideration the impression which these witnesses made on the trial Court by their demeanour in the witness-box. There can be no doubt that when a Court has got to deal with a pure question of credibility of witnesses, great weight ought necessarily to be given to the judgment of the Judge, who saw the witnesses. But there may be other circumstances and facts, quite apart from manner and demeanour, which may show whether a statement can be believed or not. These circumstances and facts may justify the Appellate Court in differing from the trial Court even on a question of fact turning on the question of credibility of witnesses whom the Appellate Court has not seen: see *Coghlan* v. *Cumberland* (1). It appears that the lower Appellate Court disbelieved the evidence of defendant No. 1 about the residence of defendant No. 3 on a portion of the holding, mainly relying upon the Record of Rights, which shows that there is no homestead land in the holding. The lower Appellate Court also relied upon another circumstance, namely, that, in the written statement, the story about the residence of defendant No. 3 on a portion of the holding was not specifically mentioned. There is, therefore, no substance in this contention.

It is next urged by the learned Advocate in support of the appeal that the facts found by the lower Appellate Court do not amount to abandonment and consequently the plaintiff is not entitled to *khas* possession. It may be pointed out, at the outset, that there is no finding in this case that there has been repudiation by defendant No. 3. It has not found also that there has been any abandonment within the meaning of s. 87, Bengal Tenancy Act. The lower Appellate Court has decreed the suit only on the ground that the holding has been abandoned by the original *raiyat*. Now the question is whether this finding can be challenged in second appeal. There can be no doubt that the question, as to whether there has been abandonment of the land by the *raiyat*, is largely and principally a question of fact depending upon a number of circumstances to be proved in each case: see *Manohar Lal* v. *Ananta Moyee Dassee* (2), and *Moharunidi* v. *Asmat* (3). It is

(1) (1898) 1 Ch. 704; 67 L J Ch. 402; 78 L T 540.

(2) 20 Ind. Cas. 198; 17 C W N 862.

(3) 91 Ind. Cas. 493; A I R 1926 Cal. 751.

no doubt true that Mitter, J., observed in the case of *Aminaddin Sheikh* v. *Chandranath Sen* (4), that the question of abandonment is a question of fact and that the finding about abandonment is binding in second appeal. But, in the case of *Aswini Kumar* v. *Har Kumar* (5), a Division Bench of this Court has observed that the inference from the facts found, as to whether there was abandonment or not, is a question of law. In view of the decision of this Court, I am not prepared to dismiss this appeal on the ground that it is concluded by finding of fact.

The next question for determination then is whether the facts found by the lower Appellate Court amount to an abandonment in law. In the case of *Dayamayi* v. *Ananda Mohan Roy* (6), the propositions laid down by the Full Bench are in these terms:

"Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding; but where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within the meaning of s. 87, Bengal Tenancy Act or (*b*) a relinquishment of the holding, or (c) a repudiation of the tenancy."

It has been found that, in this case, there has been a transfer of the entire holding. Consequently, the landlord is ordinarily entitled to enter on the land. Mr. Mukerji, on the authority of the decision in the case of *Romesh Chandra Mitra* v. *Daiba Charan Das* (7), however, contends that the use of the word "ordinarily" in the proposition laid down by the Full Bench indicates that:

"the circumstances mentioned in each branch are being regarded as evidence of, or as importing reference to some higher, more precise or more ultimate test."

His further contention is that this ultimate test must be the same in both the branches of the proposition. It is clear from the second part of the proposition that the ultimate test is (*a*) an abandonment within the meaning of s. 87, Bengal Tenancy Act, (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy. But the question as to whether that is also the ultimate test in the first branch of the proposition is not free from difficulty. The first branch of the proposition laid down by the Full Bench does not expressly state what the ultimate test is. Prior to *Dayamayi* v. *Ananda Mohan Roy* (6), it was settled, on good authority, that s. 87, Bengal Tenancy Act, did not prescribe the only mode in which the holding could be abandoned. It is not very clear whether the decision in *Dayamayi* v. *Ananda Mohan Rao* (6), affects these decisions prior to the decision of that case. In the absence of any clear indication in the judgment of the Full Bench, I am not prepared to say that the view, which was taken by this Court prior to the decision of the Full Bench, namely, that there might be abandonment apart from s. 87, Bengal Tenancy Act, must be taken now as wrong. I am fortified in this view of the matter by two recent decisions of this Court, *viz.*, *Baikuntha Chandra Nag* v. *Chandra Nath Bandhopadhya* (8) and *Abdul Majid Bhaiya* v. *Ali Mia* (9). In the last mentioned case, Suhrawardy, J., refrained from using the word "abandonment" and used the word "relinquishment". In that case the holding in question contained some undivided parcels of land and therefore could not be considered as a holding as contemplated by the Bengal Tenancy Act before the amendment of 1928. Consequently, the question was whether the landlord is entitled to re-enter when the whole of this tenancy was transferred, though it was not a holding within the meaning of s. 87, Bengal Tenancy Act. The learned Judges held that the landlord was entitled to re-enter. It was observed in that case that s. 87, Bengal Tenancy Act, was not exhaustive and that there might be abandonment apart from the provisions of that section. The decision was based on two grounds, namely, (1) that the right of the landlord to re-enter, when his land remained unoccupied or is in the occupation of a trespasser (the transferee of a non-transferable tenancy is a trespasser), is a right which is conferred upon the landlord under the general law, and (2) that the transfer of a non-transferable occupancy holding is the breach of an implied condition of a tenancy, namely, that the tenant would have no right to transfer and consequently on

(4) 114 Ind. Cas. 153; A I R 1929 Cal. 120; 48 C L J 390.

(5) 114 Ind. Cas. 482; A I R 1928 Cal. 891; 32 C W N 1111.

(6) 27 Ind. Cas. 61; A I R 1915 Cal. 212; 42 C 172; 18 C W N 971; 20 C L J 52.

(7) 78 Ind. Cas. 497; A I R 1924 Cal. 900; 28 C W N 602; 39 C L J 356.

(8) 123 Ind. Cas. 649; A I R 1930 Cal. 190; 33 C W N 1023; Ind. Rul. (1930) Cal. 345.

(9) 132 Ind. Cas. 898; A I R 1931 Cal. 657; 58 C 869; 35 C W N 217; Ind. Rul. (1931) Cal. 610.

account of this breach of the implied condition the landlord is entitled to eject. It is, however, open to doubt whether, in view of the express provisions laid down in s. 25, Bengal Tenancy Act, the breach of an implied condition would be a ground for ejecting an occupancy *raiyat*. Ejectment for breach of an implied condition has always been limited to cases where there had been estoppel by record or where had been an attempt by the tenant to assert a title paramount to the landlord either in himself or in a third person. [See *Romesh Chandra Mitra* v. *Daiba Charan Das* (7)]. In fact, if that was the intention of the legislature that, apart from the provisions of s. 25, Bengal Tenancy Act, the landlord would have the right to eject an occupancy *raiyat* for breach of an implied condition, the legislature would have said so expressly.

As pointed out above, in view of the above decisions of the Division Bench of this Court, I am not prepared to say that the ultimate test in the first branch of the proposition laid down by the Full Bench is restricted only to an abandonment within the meaning of s. 87, Bengal Tenancy Act.

It is no doubt arguable that, in view of the ultimate test indicated in the second branch of the proposition laid down by the Full Bench, it is no longer open to contend that the ultimate test would be different, so far as the first branch of the proposition is concerned. But, as already observed, in view of the recent decisions of this Court, I am not prepared to hold that there cannot be an abandonment apart from the provisions of s. 87, Bengal Tenancy Act. What then are the facts, which must be proved to show that there had been an abandonment apart from the provisions of s. 87? In the case of *Ram Lal Mandar* v. *Kuldip Narayan Tewari* (10), Dawson Miller, C. J., observed as follows:

"I agree that, apart from s. 87, Bengal Tenancy Act, there may be an abandonment of a holding but I consider that in such a case it must be proved either that the tenant has transferred his whole interest in the property and ceased to take any further interest therein, as for example, by a sale of the whole property or that he has abandoned the right to re-take possession in future or has either left the village without any intention of returning or done some other act which would clearly indicate that he no longer retained the *spes recuperandi*."

Again in the case of *Prosonna Kumar De* v. *Ananda Chandra Bhattacharjee*, 93 Ind. Cas. 86 (11), a Division Bench of this Court has made the following observation:

"It is not necessary to prove as a fact that the holding has been abandoned but it is a direct inference from the fact that the entire holding was sold and possession given to the predecessor."

In other words, even if there be no abandonment within the meaning of s. 87, an inference of abandoment apart from the provisions of that section would be legitimate, if it is proved that the entire holding has been transferred and that the transferees have been put in possession of the whole holding. This view can be supported on the principle that, after the entire holding has been transferred and the transferee has been put into possession, it becomes the *khas* land of the *zemindar* and the *zemindar* is, therefore, entitled to re-enter. See *Pran Krishna Saha* v. *Mukta Sundari Dassya*, 21 Ind. Cas. 544 (12).

Now, from the facts found by the lower Appellate Court, it is clear that the original defendant No. 3 is no longer in possession of any portion of the holding and that the entire holding has been transferred. In these circumstances, the lower Appellate Court was right in holding that the holding had been abandoned by the original *raiyat* before the institution of the suit.

The result, therefore, is that the appeal is dismissed with costs.

D. *Appeal dismissed.*

(10) 75 Ind. Cas. 841; A I R 1924 Pat. 440; 3 Pat. 126; 5 P L T 407.

(11) 93 Ind. Cas. 86.

(12) 21 Ind. Cas. 544; 18 C L J 193.

LAHORE HIGH COURT

First Civil Appeal No. 1999 of 1931

January 30, 1934

ADDISON AND MONROE, JJ.

PURAN DAS—PETITIONER—APPELLANT

versus

SHIROMANI GURDWARA PARBANDHAK COMMITTEE AND OTHERS—OBJECTORS—RESPONDENTS

Sikh Gurdwaras Act (VIII of 1925), ss. 18 (1) (e), 5—Presumption under, when arises—Religious Endowment—Shrine—Surplus income, if belongs to pujari—Petition under s. 5, if can be maintained by benamidar—Benami.

Where the oral evidence on the question as to whether the money came from the *Gurdwara* is unconvincing and unreliable and there is evidence that the family of the *mahant* has ancestral land, a share of which was given to the *mahant* and the *mahant* could have been given gifts of money and these would certainly not be the property of the *Gurdwara* of which he was the *mahant*, it is clear that he had other sources of income and there is no evidence worth considering that the money was supplied

from *Gurdwara* income, there is no presumption under s. 18 (1) (*e*) of the Sikh Gurdwara Act.

In order to bring themselves within the presumption arising from s. 18 (1) (*e*) of the Sikh Gurdwaras Act, the *Gurdwara* have to prove that the acquisition of the right, title or interest in question was made with funds proved to have belonged to the *Gurdwara*.

In cases where there is no deed of endowment of lands, or where it is ambiguous, usage is relevant evidence to determine whether lands and the offerings were after their acquisition endowed entirely for the temple or were only burdened with the actual expenses thereof, the surplus being held by the *pujari* for his own benefit. *Kumaraswami Asari* v. *Lakshmana Goundan* (4), applied.

An action can be maintained in the name of the *benamidar* in respect of property, though the beneficial owner was not a party to it, the latter being fully affected by the rule of *res judicata*. In fact the question whether the property is held *benami* by any one arises only between the real owner and a *benamidar* and though consideration moved from the real owner, he can still give a complete title to the *benamidar* and the *benamidar* is entitled to possession as against every one, except the real owner.

Messrs. *Achhru Ram* and *Mohan Sunder Das*, for the Appellant.

Messrs. *Charan Singh* and *Bhagat Singh*, for the Respondents.

Addison, J.—Puran Das, minor son of Narain Das, formerly *mahant* of the Janam Asthan Gurdwara at Nankana Sahib put in a petition under s. 5 of the Sikh Gurdwaras Act through his mother *Musammat* Lachmi claiming that he was the owner of a house situated in Ram Gali at Lahore by purchase of a site thereof on April 19, 1917, by a registered deed from one Shankar Das for Rs. 2,700 and by subsequent erection of a building thereon at the petitioner's expense. The property had been included in the usual consolidated list as being the property of the institution. The case for the objector *Gurdwara* was that the property was purchased and built by *Mahant* Narain Das out of the *Gurdwara* funds and that, therefore, there was a presumption under s. 18 (1) (*e*) of the Sikh Gurdwaras Act, that the property belonged to the *Gurdwara*. It was stated before the Tribunal on behalf of *Mahant* Narain Das that he did not claim this property as his and that it belonged to his son. The only issue framed was, whether the property in dispute is the property of the Gurdwara Janam Asthan? The President said in his judgment:

"It is obvious that the main and in fact the sole question in the case is, whether the purchase of the house on April 19, 1917, was or was not a *benami* transaction and whether the real vendee was the petitioner Puran Das or his father *Mahant* Narain Das. If the transaction was *benami* and if *Mahant* Narain Das was the real vendee, then the petition of Puran Das must clearly be dismissed on the ground that he is not the real owner of the right claimed by him in his petition. If, on the other hand, the transaction was not a *benami* transaction and the real vendee was Puran Das, then Puran Das is entitled to a declaration in his favour as prayed by him against the *Gurdwara*. In either case it is immaterial and unnecessary to inquire from what source Narain Das, if he was the real purchaser, obtained the funds for the purchase and subsequent erection of the building. Whether he used *Gurdwara* funds or funds of his own private pocket, the result of the case will be the same, as in either event the petitioner would fail on the ground that the transaction was *benami*."

The learned President then went on to find that the objector *Gurdwara* had not been able to give direct evidence that Narain Das supplied the sum of Rs. 2,700 with which the site was purchased, but on the strength of a document, Ex. O. 1, he held it proved that he supplied the funds for the construction of the building. He further said that it was improbable, having regard to the circumstances of the case, that the *Mahant* would have furnished the funds for constructing the house, if he were not also the purchaser of the site. Finally he held, for the reasons given, that *Mahant* Narain Das, having provided the money, must be held to be the true owner and that the purchase was only *benami* in the name of his minor son Puran Das. He gave no finding on the question, whether the funds were the *Mahant's* private funds or *Gurdwara* funds. One member of the Tribunal, Sardar Kharak Singh, held that the property was purchased and built with *Gurdwara* funds. The third member, *Lala* Dwarka Prasad, held that the objector *Gurdwara* had failed to prove that the property was purchased and built with *Gurdwara* funds, but he agreed with the learned President in dismissing the petition of the minor Puran Das on the ground that he had no right to the property as he was only a *benamidar*. The decision of the Tribunal, therefore, was that the petition of Puran Das be dismissed. He has appealed against this decision.

In my judgment the Tribunal was wrong in dismissing the petition on the ground that Puran Das could not maintain it as he was only a *benamidar*. This question came before their Lordships of the Privy Council in *Gur Narayan* v. *Sheolal Singh* (1). They held that an action could be maintained in the name of the *benamidar* in respect of property, though the beneficial

(1) 49 Ind. Cas. 1; 46 C 566; 17 A L J 66; 36 M L J 68; 9 L W 335; 23 C W N 521; 1 U P L R (P C) 1; 12 Bur. L T 122; 46 I A 1 (P C).

owner was not a party to it, the latter being fully affected by the rule of *res judicata*. In fact the question whether the property is held *benami* by any one arises only between the real owner and a *benamidar*, and though consideration moved from the real owner, he can still give a complete title to the *benamidar* and the *benamidar* is entitled to possession as against every one, except the real owner. The Tribunal, therefore, was not right in holding that Puran Das had no right, title or interest in the property on their finding that he was a *benamidar*. He had title against all the world, except the real owner, and it therefore, remained for the *Gurdwara* objector to prove the issue framed for trial, the onus of which was placed on them, namely, whether the property in dispute is the property of the Gurdwara Janam Asthan?

In my opinion the *Gurdwara* has failed to prove that the property belongs to it. And in order to bring themselves within the presumption arising from s. 18 (1) (*e*) of the Sikh Gurdwaras Act they have to prove that the acquisition of the right, title or interest in question was made with funds proved to have belonged to the *Gurdwara*. Ex. O. 1 does appear to establish that the money spent for constructing the building was spent by *Mahant* Narain Das. It is not necessary to discuss at length the possession of a *mahant* in respect of the surplus income of his institution. It was held in *Prem Singh* v. *Labh Singh* (2) that the *mahant* of a religious institution is not bound to submit accounts for the information or approval of the worshippers at the shrine unless it is proved by evidence that it is the custom and practice of the institution for him to do so. Their Lordships of the Privy Council in *Vidya Varuthi Thirtha* v. *Balusami Aiyar* (3) held that the endowments of a Hindu *mutt* are not conveyed in trust, nor is the head of the *mutt* a trustee with regard to them, save as to any specific property proved to be vested in the head for a specific and definite object. A Division Bench of the Madras High Court in *Kumaraswamy Asari* v. *Lakshmana Goundan* (4) held that in cases where there is no deed of endowment of lands, as in this case, or where it is ambiguous, usage is relevant evidence to determine whether lands and the offerings were after their acquisition endowed entirely for the temple or were only burdened with the actual expenses thereof, the surplus being held by the *pujari* or his own benefit. It was further held that a trust, whether express or implied, by which a portion of the income from the trust property is directed for the purposes of a public temple and the surplus for the beneficial use of its *pujari* was not illegal. There is no evidence in the present case as to the usage of the institution in respect of the surplus income of the *Gurdwara* property. I agree with *Lala* Dwarka Parshad, one of the members of the Tribunal, that the best evidence on point, whether the property was purchased and built with *Gurdwara* funds, would have been the account books of the *Gurdwara*, which the objector *Gurdwara* did not produce. At one stage apparently they intended to produce these accounts (see their list of documents printed at pp. 34-35). When the *mahant* was driven out by the Akalis, all these books came into their hands and some explanation should have been given why they were not produced. It ought to have been clear from them whether the income came from *Gurdwara* funds or not. In their absence it must be presumed that the money did not come from the surplus income of the *Gurdwara*.

The oral evidence is unconvincing and unreliable on this question, but one thing is proved, namely that *mahant* Narain Das only went to this *Gurdwara* in 1914. Before that he had been living with his family in Bhai Pheru and and there is evidence that the family has ancestral land, a share of which went to the *mahant*. Apart from that the *mahant* could have been given gifts of money and these would certainly not be the property of the *Gurdwara* of which he was the *mahant*. It is clear that he had other sources of income, and there is no evidence worth considering that the money was supplied from *Gurdwara* income. There is thus no presumption under s. 18 (1) (*e*) of the Act and it must be held that the Janam Asthan Gurdwara has not proved that the property in dispute belonged to it. This they had to do in order to succeed in the present case.

For the reasons given I would accept the appeal with costs throughout and grant the petitioner Puran Das a decree

(2) 89 P R 1901.

(3) 65 Ind Cas. 161; 44 M 831; (1921) M W N 449; 41 M L J 346; 3 U P L R (P C) 62; 15 L W 78; 30 M L T 66; 3 P L T 245; 48 I A 302; 26 C W N 537; 24 Bom. L R 629; 20 A L J 497; A I R 1922 P C 123 (P C).

(4) 128 Ind. Cas. 504; 53 M 608; A I R 1930 Mad. 549; 31 L W 499; 59 M L J 974.

as against the Gurdwara that he is the owner of the property in dispute.

Monroe, J.—I agree.

N. *Appeal accepted.*

MADRAS HIGH COURT

Civil Revision Petition No. 672 of 1931

October 19, 1934

VENKATASUBBA RAO, J.

SRI LA SRI SUBRAMANIA DESIKA GNANASAMBANDA PANDARA SANNADHI AND ANOTHER—PETITIONERS

versus

RANGASWAMI CHETTIAR—RESPONDENT

Limitation Act (IX of 1908), Sch I, Art. 182 (5)—Civil Procedure Code (Act V of 1908), s 48, O. XXI, r. 17 (1)—Execution of decree—Applications against deceased judgment-debtor or wrong legal representative, whether save limitation—Impleading true representative after 12 years from decree—Limitation—Effect of amendment.

Where owing to a *bona fide* error an execution petition names the deceased judgment-debtor as the person against whom execution is sought, it is sufficient to save limitation. *Samia Pillai* v. *Chockalinga Chettiar* (1), *Bepin Behari Mitter* v. *Bibi Zohra* (2), *Sheogobind Ram* v *Kishunbasi Kuer* (4) and *Maula Bakhsh* v *Mohammad Ikram* (5), followed.

An execution petition presented *bona fide* against a wrong legal representative of a deceased judgment-debtor is still an application to take a step-in-aid of execution sufficient to save limitation. *Balkishendas* v. *Bedmati Koer* (8), *Ramaswami Chetti* v *Oppillammani Chetti* (9), *Begam Bibi* v. *Bulaki Shah & Sons* (10) and *Hari Mahadev Vedakar* v. *Vishnu Balakrishna Risbud* (11), referred to

An amendment to an execution petition made under sub-cl. (1) of O XXI, r 17, Civil Procedure Code, with the sanction of the Court relates back to the original presentation of the petition.

Where an application for execution was made against a wrong legal representative within 12 years of the decree but it was amended after the expiry of 12 years from the date of the decree, by bringing the name of the true legal representative on record:

Held, that the amendment recalled to the original presentation and the application was not barred under s. 48, Civil Procedure Code. *Vemuri Pitchayya* v. *Raja Yarlagadda Hukineedu* (12), *Manakkal Maheswaran Nambudripad* v *Thiruvavhiyot Valappa Menon* (14) *Venkatalakshmamma* v. *Garikipati Seshagiri Rao* (15) and *Sheogobind Ram* v. *Kishunbasi Kuer* (4), relied on *Sankaran Nair* v. *Ambu* (13), explained.

C. R. P. under s. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Tanjore, dated August 16, 1930, and made in E. A. No. 7 of 1930 in S. C. S. No. 62 of 1917.

Mr. *S. Nagaraja Iyer*, for the Petitioners.

Mr. *V. Sundaresa Iyer*, for the Respondent.

Judgment.—The execution proceedings in this case have had a curious and interesting history. The defendant died soon after the passing of the decree. Ignorant of this fact, the plaintiff filed the first four execution petitions against the dead judgment-debtor. The fifth petition he filed, bringing a wrong person on the record as the debtor's representative. The present petition is the sixth one, filed against the same wrong representative; but the plaintiff amended it after the expiry of the 12 year period prescribed by s. 48 of the Civil Procedure Code, by bringing the right representative on the record. The lower Court's finding, which is not contested, is that the plaintiff throughout acted *bona fide*.

On these facts, three questions arise:

(1) Are the first four petitions against the dead judgment-debtor steps in aid of execution within Art. 182 (5) of the Limitation Act?

(2) Is the fifth petition against the wrong representative a step in-aid of execution?

(3) Does the amendment of the sixth (*i. e.*, the present) petition beyond the period provided by the law, relate back to the date when it was originally presented?

The first point.—There is a preponderance of authority in favour of the view that, when owing to a *bona fide* error the execution petition names the deceased judgment-debtor as the person against whom execution is sought, it is sufficient to save limitation. In *Samia Pillai* v. *Chockalinga Chettiar* (1) a Bench of this Court came to that conclusion. In *Bepin Behari Mitter* v. *Bibi Zohra* (2), the learned Judges, dissenting from *Madho Prasad* v. *Kesho Prasad* (3) and following *Samia Pillai* v. *Chockalinga Chettiar* (1), held that an execution application filed *bona fide* against a dead person, though it cannot be acted upon, is nevertheless a step-in-aid of execution, which has the effect of saving the decree from being barred. The Patna High Court in *Sheogobind Ram* v. *Kishunbasi Kuar* (4), and the Lahore High Court in *Maula Bakhsh* v. *Mohamad Ikram* (5), took the same view. In two recent Madras cases

(1) 17 M 76.

(2) 35 C 1047

(3) 19 A 337: A W N 1897, 75.

(4) 133 Ind. Cas. 91; 14 Pat. 515; 13 P L T 383; A I R 1932 Pat. 222; Ind. Rul. (1932) Pat. 172.

(5) 154 Ind. Cas. 307; A I R 1934 Lah. 55; 7 R L 544.

although the point did not directly arise, *Samia Pillai* v. *Chockalinga Chettiar* (1), was cited with approval: *Parakkat Devaswam* v. *Venkatachallam Vadhyar* (6) and *Viriyala Jaganatha Rao* v. *Viriyala Narayenamurty* (7). But in an unreported decision in Civil Miscellaneous Appeal No. 185 of 1902 a Bench of this Court, without discussing the point or considering the authorities, took the opposite view and Wallace, J. in *Parakkat Devaswon* v. *Venkatachallam Vadhyar* (6), has rightly, in my opinion, refused to follow it. I, therefore, hold that the first four execution petitions, each of them filed within the time prescribed by the law, though they were not such as they themselves could be acted upon, had nevertheless the effect of saving the decree from becoming barred.

The second point.—Where a petition for execution was filed *bona fide* against a wrong legal representative of the judgment-debtor, it was held that in spite of the mistake, it would still be an application to take a step-in-aid of the execution: *Balkishendas* v. *Bedmati Koer* (8). The decision was referred to with approval in *Bepin Behari Mitter* v. *Bibi Zohra* (2), already mentioned. The same view was taken in *Ramaswami Chetti* v. *Oppillammani Chetti* (9), *Begam Bibi* v. *Bulaki Shah and Sons* (10) and *Hari Mahadev Vedakar* v *Vishnu Balakrishna Risbud* (11). I, therefore, hold that the fifth execution petition filed in time, although against a wrong representative, has the effect of keeping the decree alive.

The third point.—An amendment made under sub-s. (1) of O. XXI, r. 17, Civil Procedure Code, with the sanction of the Court, relates back to the original presentation of the petition: that is the effect of sub-cl. (2).

In *Vemuri Pitchayya* v. *Raja Yarlagadda Ankineedu* (12), an application for execution was presented within the 12 years allowed by s. 48 of the Code; but no schedule of immovable property belonging to the judgment-debtor was attached to it. The defect was later remedied under an order of Court but at a time when the 12 years had expired. The learned Judges held, dissenting from the view of the Calcutta High Court, that the amendment related back to the date of the original petition. *Sankaran Nair* v. *Ambu* (13), is not an authority to the contrary; the case merely decided that where the lower Court declined to pass a remedial order under O. XXI, r. 17 (1), there was no refusal of jurisdiction and the High Court was not bound to interfere in revision. The case more in point is *Manakkal Maheshwaran Nambudripad* v. *Thiruvazhiyot Valappa Menon* (14). There, in the original petition the name of the wrong representative was given. The Court allowed the amendment and the correct name was substituted more than 12 years after the passing of the decree. The amendment was held to relate back to the original presentation. In *Venkatalakshmamma* v. *Garikipati Seshagiri* (15), the plaintiff obtained a decree against one R. on February 29, 1912. The execution petition in question was filed on February 18, 1924, against the debtor who the judgment states, must be presumed to have died by then. On July 5, 1925 an application was made to permit the substitution, in the place of the deceased debtor, of his widow and the amendment was allowed. The execution petition was treated as being in time by the learned Judges (see pp. 637 and 647*). The view of the Patna High Court is in conformity with these decisions: *Sheogobind Ram* v. *Kishunbasi Kuer* (4). I, therefore, hold that the amendment takes effect from the date of the original presentation and that the execution petition in question is not barred by time.

The lower Court's order is accordingly confirmed and the Civil Revision Petition is dismissed with costs.

A. *Petition dismissed.*

(6) 92 Ind. Cas. 709; 50 M L J 153; 23 L W 22; A I R 1926 Mad. 321.

(7) 145 Ind. Cas. 714; A I R 1933 Mad. 696; (1933) M W N 819; 38 L W 435; 6 R M 121; 65 M L J 374.

(8) 20 C 388 at p. 396.

(9) 4 Ind. Cas. 1059; 33 M 6; 6 M L T 269; 19 M L J 671.

(10) 90 Ind. Cas. 1050; A I R 1926 Lah. 3-; 2 Lah Cas. 121.

(11) 134 Ind. Cas. 699; A I R 1931 Bom. 425; 33 Bom. L R 622; Ind. Rul. (1931) Bom, 507.

(12) 76 Ind. Cas. 750; 45 M L J 651; 18 L W 739; 33 M L T 125; A I R 1924 Mad. 367.

(13) 92 Ind. Cas. 109; 49 M L J 699; (1925) M W N 917; A I R 1926 Mad. 260.

(14) 107 Ind. Cas 303; 54 M L J 154; 39 M L T 371; A I R 1928 Mad. 24; 27 L W 796.

(15) 131 Ind. Cas. 610; 60 M L J 628; 33 L W 359; (1931) M W N 48; A I R 1931 Mad. 303; Ind. Rul (1931) Mad. 562.

*Pages of 60 M L J.—[*Ed.*]

LAHORE HIGH COURT

First Civil Appeal No. 289 of 1929
March 7, 1934

TEK CHAND AND DIN MUHAMMAD, JJ.

RODA SINGH AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

UJAGAR SINGH—DEFENDANT—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Inherent lacuna on the record on all important points—Appellate Court should remit case to the trial Court for further enquiry.

Where, on almost every important point, there is an inherent lacuna on the record and it is not possible to come to a satisfactory finding on the question in issue, the only proper course for the Court of Appeal is to remit the case to the trial Court for further enquiry under O.XLI, r. 27, Civil Procedure Code.

F. C. A. from a decree of the Senior Sub-Judge, Ferozepore, dated October 31, 1923.

Mr. *Faqir Chand* for Mr. *Badri Das*, for the Appellants.

Mr. *J. L. Kapur*, for the Respondent.

Tek Chand, J.—After hearing Counsel and carefully examining the record I find that the suits, which have given rise to this and connected appeals, Civil Appeals Nos. 290 and 291 of 1929, have been tried very perfunctorily and it is not possible to come to a proper decision on the materials on the record.

The admitted facts are that on August 22, 1917, Lachhman Singh, (father of Ujagar Singh, respondent in Civil Appeal No. 289, Saudagar Singh, respondent, in Civil Appeal No. 290, and Ranjit Singh, respondent in Civil Appeal No. 291), executed two bonds (Exs. P-2 and P-3) for Rs. 5,000 and Rs. 4,965 in favour of Roda Singh, plaintiff-appellant No. 1 and his brother Sundar Singh plaintiff-appellant No. 2, respectively. It was recited in Ex. P-2 that Rs. 5,000 was due by the executant, Lachhman Singh, and Sundar Singh plaintiff No. 2 jointly to one Mehtab Mal, having borrowed from the latter "to deposit the pre-emption money relating to the land in *Mauza* Lakhe Bhede," that Roda Singh had taken upon himself to pay the entire amount above-mentioned to Mehtab Mal, and therefore Lachhman Singh held himself bound to pay to Roda Singh Rs. 5,000 with interest at Re. 1-9-0 per cent. per mensem with yearly rests. Similarly in the other bond (Ex. P-3) it was stated that Rs. 4,965 was due by Lachhman Singh and Sundar Singh jointly to Mehtab Mal, having been borrowed from him to pre-empt land in the same village, that Sundar Singh had taken upon himself to pay the whole sum to Mehtab Mal, and that therefore, Lachhman Singh owed to Sundar Singh, Rs. 4,965 for which he executed this bond, agreeing to re-pay it with interest at Re. 1-9-0 per cent. per mensem, compound interest with yearly rests. On May 27, 1924, the amount due by Lachhman Singh on foot of the aforesaid bonds (Exs. P-2 and P-3) was Rs. 13,500, but instead of Lachhman Singh re-paying it, or himself acknowledging the liability, his three sons, Ujagar Singh, Saudagar Singh and Ranjit Singh executed three bonds for Rs. 4,500 each, in favour of Roda Singh and Sundar Singh jointly, the consideration being the amount due by Lachhman Singh on foot of the two bonds dated August 22, 1917, (Exs. P-2 and P-3). The amount of each bond was payable on *Nimani* 1982 (June 1925) with interest at Re. 1-9-0 per cent. per mensem with yearly rests.

On these bonds three suits were instituted by Roda Singh and Sundar Singh on May 28, 1928, for recovery of Rs. 5,674 each. The defendant in each case pleaded that the suit was barred by time, that the bond had been executed under undue influence and, in any case, it was without consideration. The learned Subordinate Judge held the suits to be within time and found that the plea of undue influence had not been established. He, however, dismissed the suits holding the bonds to be without consideration, as under the law payment of a barred debt due, not by the executant, but by a third party was not good consideration under s. 25, Contract Act. The plaintiffs appeal.

On examining the records, I confess I have not been able to ascertain the real facts, and unless this is done, it is not possible to decide whether or not the consideration for the bonds in dispute was valid. The circumstances in which the original bonds (Exs. P-2 and P-3), came to be executed by Lachhman Singh in 1917 and also those which led to the execution of the bonds in suit in 1924 are by no means clear. It is most unfortunate that the learned Subordinate Judge did not examine the parties properly before framing the issues and neither the plaintiffs nor the defendants nor Lachhman Singh gave evidence at the trial. In the bonds of 1917, the consideration was stated to be payment of the amount borrowed from Mehtab Mal by Lachhman Singh and Sunder Singh jointly for acquisition of certain land by pre-emption, and it was recited that Roda Singh and Sunder Singh

had undertaken to pay in its entirety the debt due to Mehtab Mal. Mehtab Mal was not summoned as a witness by either party and it is not clear whether this recital was true, either wholly or in part. Nor do we know whether any land was in fact acquired by pre-emption; whether Lachhman Singh had any share in it, whether his sons were joint with him in this transaction and whether it was in their possession jointly or severally (if at all) in 1924. We are equally in the dark as to whether the two plaintiffs, actually carried out their understanding given in Exs. P-2 and P-3 to pay off Mehtab Mal. Further, it is by no means clear why the defendants should have quietly executed the bonds in 1924, each for one-third the amount due by the father, without the latter undertaking any liability, jointly or severally with his sons.

It will thus be seen that on almost every important point there is an inherent lacuna on the record and it is not possible to come to a satisfactory finding on the question in issue.

In these circumstances the only proper course seems to me that the case be remitted to the trial Court for further inquiry under O. XLI, r. 27, Civil Procedure Code. The two plaintiffs, the three defendants, Lachhman Singh and Mehtab Mal must be summoned (at the plaintiff's expense) to give evidence: (1) as to the history of the acquisition of the land in *Mouza* Lakhe Bhede, stated to have been acquired by pre-emption, the person or persons by whom it was brought, the party from whom the consideration proceeded and in whose actual possession it has been since 1917; (2) as to whether Mehtab Mal had advanced any money for the purpose, whether it was repaid to him, and if so, when and by whom; (3) the circumstances in which the bonds Exs. P-2 and P-3, and the bonds in suit were executed in 1917 and 1924, respectively, and (4) whether Lachhman Singh and the defendants lived jointly. If possible, extracts from the revenue papers relating to the land in question be placed on the record, and the *Patwari* or *Qanungo* examined to explain them. If the parties desire to produce any other evidence to elucidate the above points, they should be allowed to do so. The return must be submitted in four months.

Din Muhammad, J.—I agree.

N. *Case remanded.*

PRIVY COUNCIL

Appeal from the Nagpur Judicial Commissioner's Court

March 1, 1935

LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, SIR LANCELOT SANDERSON AND SIR SHADI LAL

ATMARAM ABHIMANJI—APPELLANT

versus

BAJIRAO JANRAO AND OTHERS—RESPONDENTS

*Hindu Law—Succession—*Samanodakas—*Relationship of* samanodakas, *whether extends beyond 14th degree—Tests—Interpretation—Conflict between text writers and commentators—Latter must be accepted.*

According to the Mitakshara school of the Hindu Law, *samanodaks* include only those agnates whose relationship to the deceased extends from the 8th to the 14th degree, and in the absence of any such agnate the estate devolves upon his *bandhus*. *Bajirao* v. *Atmaram*, 125 Ind. Cas. 686, reversed *Bai Devkare* v. *Amritram Jamiatram* (3), *Ram Baran Rai* v. *Kamla Prasad* (4), overruled *Rama Rao* v. *Kuttiya Goundan* (5), approved.

In the event of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted. *Collector of Madras* v. *Moottoo Ramalinga Sathupathy* (1) and *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (2), referred to.

Appeal from the judgment of Mr. Jackson, A. J. C. and Mr. Ghulam Mohiuddin, A. J. A. C., dated April 15, 1930, reported as 125 Ind. Cas. 686.

Mr *J. M. Parikh*, for the Appellants.

Sir Shadi Lal.—The question of law which arises in this appeal, is one of considerable importance and relates to the exact scope of the expression *samanodaka* as used in the Hindu Law of inheritance. The facts bearing upon the question do not admit of any dispute. The property, which is in dispute between the parties, belonged to one Manikrao who died in October 1916. The plaintiffs are descended in the male line from one Tulsingh, who was an ancestor of Manikrao in the 22nd degree. They claimed the estate on the ground that they were entitled to succeed to it as the agnates of the deceased in preference to the defendant, Atmaram, who was his father's sister's son. The trial Judge negatived their claim, but on appeal his judgment was reversed by the Court of the Judicial Commissioner, Central Provinces and Berar, who have held that the plaintiffs come within the purview of the term *samanodaka* and have priority over the defendant who, being only a *bandhu*, cannot succeed in the presence of an agnate, however, remotely the latter may be related to the deceased.

The heirs of a Hindu governed by the Mitakshara School are (1) *sapindas*, (2)

failing them, *samanodakas*, and (3) on the failure of both the above-mentioned classes, *bandhu*. The word *sapinda* includes blood relations to the 7th degree reckoned from, and including, the propositus; and it is obvious that the plaintiffs, who were related to the deceased Manikrao in the 22nd degree, are not his *sapindas*. They, however, claim to be *samanodakas*, and that class certainly includes all the agnates from the 8th to the 14th degree. But it is a debatable question whether agnates beyond the 14th degree come within the ambit of *samanodakas* for the purpose of succession. It is to be regretted that the plaintiffs, who are respondents in the appeal have not appeared to sustain their claim, but their Lordships have had the advantage of hearing the point fully and fairly argued by Mr. Parikh, and have themselves considered all that could reasonably be argued in support of the view taken by the Court of Appeal in India.

Now, the word *samanodakas*, literally translated, means persons connected by equal libations of water; but Vijnaneswara, the author of the Mitakshara, abandoned the ancient doctrine basing the right of inheritance upon the right to offer funeral oblations and founded it upon propinquity. After detailing the heirs coming within the class of *sapindas* he states, in Chap. II, s. 5, verse 6, the law relating to *samanodakas* in the terms:

"If there be none such, the succession devolves on *samanodakas*, and they must be understood to reach to seven degrees beyond *sapindas*, or else as far as the limits of knowledge as to birth and name extend. Accordingly Vrihad Manu says: "The relation of the *sapindas* ceases with the 7th person, and that of *samanodakas* extends to the 14th degree; or as some affirm, it reaches as far as the memory of birth and name extends. This is signified by *gotra*."

The conflict of opinion alluded to in the above passage is not mentioned either in the Manu Smriti or in the Yajnavalkya Smriti. In Chap. V, verse 60, Manu declares that *sapinda* relationship ceases with the 7th person and *samanodaka* relationship ends only when the origin and name are no longer known. That chapter, however, deals with social matters such as impurity on account of birth and death; and it is not clear whether the description of *samanodaka* adopted for prescribing rules in the domain of social observances was intended to define the word in its application to the law governing succession as stated in Chap. IX, verse 187. The word *samanodaka* is not mentioned in the Smriti of Yajnavalkya, who confers the right of inheritance upon *gotraja* (a person born in the same *gotra*, or a gentile), *sloka* 135, but *gotraja* was apparently intended to be used in the same sense as *samanodaka* in Manu Smriti. It was, however, recognized in course of time that the rule enunciated in the ancient texts, giving the right of inheritance to all agnates, however, remote and placing the cognates after them, was not in conformity with the feelings of the people; and Vijnaneswara, when writing his commentary Mitakshara on the Smriti of Yajnavalkya, probably found that a usage had grown up restricting the *samanodaka* relationship to the 14th degree. He accordingly refrained from endorsing the all-embracing rule of Yajnavalkya, and while mentioning it in the verse dealing with the subject, he gave prominence to the restricted scope of the word, and supported it by citing Brihad Manu. It must be remembered that the commentators, while professing to interpret the law as laid down in the Smritis, introduced changes in order to bring it into harmony with the usage followed by the people governed by the law; and that it is the opinion of the commentators which prevails in the provinces where their authority is recognized. As observed by this Board in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1), at p. 436*, the duty of a Judge

"is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the District with which he has to deal, and has there been sanctioned by usage For under the Hindu System of Law, clear proof of usage will outweigh the written text of the law."

Indeed, the Mitakshara

"subordinates in more than one place the language of texts to custom and approved usage, *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (2), at page 370†."

It is, therefore, clear that in the event of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted. Now, the words "as some affirm" used by Vrihad Manu in the extract quoted in the Mitakshara do not show that he himself was in favour of extending the meaning *samanodakas* to include agnates beyond the 14th degree. He merely cited the opinion which was expressed by other writers.

(1) 12 M I A 397; 1 B L R 1; 10 W R 17; 2 Sar. 361; 2 Suther 135 (P C).

(2) 13 M I A 373; 14 W R 1; 5 B L R 293; 2 Suth. P C J 330; 2 Sar. P C J 566 (P C).

*Page of 12 M. I.—[*Ed.*]

†Page of 13 M. I. A.—[*Ed.*]

His own view is, however, contained in part 1 of the extract which confines the *samanodaka* relationship to agnates from the 8th to the 14th degree; and, the author of the Mitakshara seems to have adopted the same view. There is certainly no indication that he gave his sanction to the rival view.

The rule confining the word to agnates up to the 14th degree has the merit of avoiding uncertainty and is also in perfect harmony with the sentiments of the people. The opposite view would lead to the incongruous result that an agnate related in the 100th degree or even remoter degree would be preferred to a cognate who may be nearly related to the deceased by the tie of blood, such as the son of his sister or of his father's sister. The judgments of the High Courts in India reveal a divergence of judicial opinion. The High Court of Bombay in *Bai Devkore* v. *Amritram Jamiatram* (3), interpreted the word *samanodaka* to include all agnates without any limit of degree. This rule was sanctioned by Nilkantha, the author of Vyavahara Mayukha, whose authority is recognized in Gujrat. It appears that the case came from Gujrat, and that the learned Judges were influenced by the opinion of Nilkantha. The judgment in that case was followed by the Allahabad High Court in *Ram Baran Rai* v. *Kamla Prasad* (4), which was governed by the Mitakshara School. That view has, however, been dissented from by the Madras High Court, who in their judgment in *Rama Rao* v. *Kuttiya Goundan* (5), have pronounced against the extension of the *samanodaka* relationship beyond the 14th degree. Their Lordships have considered also several cases which contain *dicta* on the subject, but those *dicta* were not necessary for determining the dispute between the parties. In the judgment of this Board in *Mewa Singh* v. *Basant Singh* (6), there are observations to the effect that those who claim to be the reversionary heirs must bring themselves within the necessary number of degrees, namely, fourteen. The suit was, however, dismissed on the ground that the plaintiffs had failed to prove that they were related to the person whose estate was claimed by them.

Upon an examination of the available texts of the Hindu Law, and the judicial decisions on the subject, their Lordships have reached the conclusion that according to the Mitakshara School of the Hindu Law, which governs this case, *samanodakas* include only those agnates whose relationship to the deceased extends from the 8th to the 14th degree, and in the absence of any such agnates the estate devolves upon his *bandhus*. The result is that the appeal should be allowed, the order of remand made by the Court of the Judicial Commissioner set aside, and the judgment and the decree of the Court of first instance restored. Their Lordships will humbly advise His Majesty accordingly. The respondents must pay the costs incurred by the appellant here as well as in the Court of Appeal in India.

N. *Appeal allowed.*

Solicitor for the Appellant :—Mr. *T. L. Wilson.*

(3) 10 B 372.
(4) 6 Ind. Cas. 698; 32 A 594; 7 A L J 802
(5) 34 Ind. Cas. 294; 40 M 654; A I R 1917 Mad. 872; 3 L W 331; 19 M L T 275; 30 M L J 514.
(6) 48 Ind. Cas. 540; A I R 1918 P C 49; 21 M L T 421; 28 C L J 520; 1 P W R 1919; 21 Bom. L R 232; 23 P L R 1919; 9 L W 416 (P C).

LAHORE HIGH COURT

Civil Revision Petition No. 433 of 1933
March 14, 1934
ABDUL QADIR, J.

DATAR SINGH—DECREE-HOLDER—PETITIONER
versus
KHAN CHAND AND ANOTHER—OBJECTORS AND JUDGMENT-DEBTORS—OPPOSITE PARTIES

Civil Procedure Code (Act V of 1908), O. XXI, r. 57—Default, meaning of—Failure to go on with application and proceed with sale—Whether constitutes default—Attachment, cessation of—Fresh application for execution—Competency of.

The word "default" used in O. XXI, r. 57, Civil Procedure Code, is not restricted to default of appearance, but means a failure to do what the decree-holder was bound to do, that is, to go on with his application and have the property sold and if a default took place, the attachment previous to that had come to an end on the decree-holder's application being struck off. In such cases any intermediate order passed by the Court becomes a nullity and the decree-holder can file a fresh application for execution. *Dildar Husain* v. *Sheo Narain* (1) and *Fateh Din-Allah Ditta* v. *Qutab Din* relied on.

C. R. P. from an order of the Senior Sub-Judge, Montgomery, dated March 17, 1933.

Mr. *Ram Chand Manchanda*, for the Petitioner.

Mr. *Achhru Ram*, for the Opposite Parties.

Judgment.—A decree for Rs. 7,605 was passed in favour of one Datar Singh, who proceeded to execute it against the property of his judgment-debtor, Narain Singh. It appears that Narain Singh owed debts to other people and among them was a firm known as Khan Chand-Lakhu Ram, who held some of the lands of the judgment-debtor under mortgage. The decree-holder applied for execution and attached the lands of Narain Singh, including the mortgaged land. Khan Chand-Lakhu Ram objected to the attachment. On June 11, 1932, the Counsel for the decree-holder made a statement admitting the objections of Khan Chand-Lakhu Ram as well as of some other objectors and agreeing to the sale of the land subject to the mortgages. The executing Court passed an order on the same date to the effect that all the lands belonging to Narain Singh may be sold subject to the mortgages. No action could be taken on this order for sometime because the records had gone to the office of the Collector, and after several adjournments the Counsel of the decree-holder made another statement on October 15, 1932, asking that the execution application be consigned to the record room, but that the lands attached may continue under attachment, and an order to that effect was passed by the Court. On October 21, 1932, Datar Singh put in a fresh application for execution and got the lands which were not under mortgage attached. Khan Chand-Lakhu Ram, objected again and pleaded that in the face of the statement of the Counsel of the decree-holder dated June 11, 1932, and the order of the Court thereon, the decree-holder could not execute his decree except according to the terms agreed upon at the time. The Senior Subordinate Judge, Montgomery, held that the objection was correct and that unless the order dated June 11, 1932, is set aside by a regular suit brought by the decree-holder, it is binding on him. It was, therefore, ordered that the land of the judgment-debtor be sold subject to the mortgage of the objectors. The decree-holder has filed a petition for revision of this order of the Senior Subordinate Judge, dated March 17, 1933, through Mr. Ram Chand Manchanda, whom I have heard. I have also heard Mr. Achhru Ram for the respondents.

The only point for decision is what is the effect of the admission dated June 11, 1932, and the order passed on it. The contention of Mr. R. C. Manchanda is that as the application for execution was dismissed on October 15, 1933, the proceedings in execution came to a close and any intermediate order passed, in the course of these proceedings, became a nullity and that a fresh application was competent and as the decree-holder had himself left out property that was under the mortgage of the objectors the latter could not raise any legitimate objection to the continuance of the fresh execution proceedings. In support of his argument he refers to a decision of a Division Bench of the Allahabad High Court, in *Dildar Husain* v. *Sheo Narain* (1), in which it was held that the word "default" used in O. XXI, r. 57, Civil Procedure Code, is not restricted to default of appearance, but means a failure to do what the decree-holder was bound to do, that is, to go on with his application and have the property sold and that if a default took place, the attachment previous to that had come to an end on the decree-holder's application being struck off. He goes on to say that the view expressed in the Allahabad case has been followed with approval in *Fateh Din-Allah Ditta* v. *Qutab Din* (2), a Division Bench authority of this Court. I think these authorities are in point and help the contention of the petitioner.

The proceedings in execution have been dismissed in default within the meaning of "default" as given in the authorities cited above. There is thus no order of the executing Court which is still effective against the decree-holder and he is free to file a fresh application for execution, without trying to get the *interim* order dated, June 11, 1932, set aside by a regular suit. Therefore, I accept this revision with costs and set aside the order of the Senior Subordinate Judge, dated March 17, 1933. The *interim* order of this Court staying execution proceedings started by the decree holder is hereby cancelled, and the execution of the decree will now proceed.

N. *Revision accepted.*

(1) 49 Ind. Cas. 113; A I R 1919 All. 194; 41 A. 157; 17 A L J 5".

(2) 67 Ind. Cas. 543; A I R 1922 Lah. 103; 3 Lah. 7.

BOMBAY HIGH COURT

Original Civil Jurisdiction Suit No. 1265 of 1928

July 5, 1934

B. J. WADIA, J.

MAHOMED HUSSEIN HAJI GULAM MAHOMED AJAM—PLAINTIFF

versus

AISHABAI AND OTHERS—DEFENDANTS

Executor — Muhammadan executor — Probate, if essential — Wilful default—Onus—Nature of proof—Investing money in unauthorised investment—Liability for loss—Executrices to be paid out of property of deceased monthly in lieu of services—Payment, if gratuitous or debt — Muhammadan Law—Gift—Essentials to constitute gift—Mere book-entries in respect of money which is subject-matter of gift, if enough—Bequest to heir, when valid—Consent of other heirs, nature of.

There is no statutory obligation on a Muhammadan executor to take out probate of the testator's will. A Muhammadan executor can establish his right in a Court without taking such probater *Mahomed Yusuf* v. *Hargovandas Jivan* (1) and *Shaik Moosa* v. *Shaik Essa* (2), relied on. [p. 335, col. 2.]

The burden of proof of wilful default in respect of something which the executors could have received, but for their wilful default or neglect, is in the first place, always on the party who alleges the default. It is for that party not merely to give proof of such default, but to prove clearly and affirmatively at least one act of wilful default to the satisfaction of the Court before the Court can make a reference for take accounts on that footing. It must also be shown that the estate has suffered loss or damage, and that such loss or damage is due to circumstances of wilful neglect or default on the part of the executrices. *In re Stevens*; *Cooke* v. *Stevens* (3), referred to. [p. 336, col. 1.]

Any executor who invests the moneys belonging to the estate in an unauthorised or hazardous investment is liable for the loss arising therefrom, however prudent such an investment of his own money he might think it to be. [p. 337, cols. 1 & 2.]

Where under the will each of the two executrices was to be paid out of the property of the deceased Rs. 400 per mensem in lieu of their services, as long as the property is administered, after the death of the deceased;

Held, that the payment was a sort of commission payable to the executrices by way of remuneration. It was a gratuitous bequest and not a debt. This, however, was not a gift out of the future income of the estate, for the testator had clearly provided that the remuneration must be paid out of his property, meaning out of the corpus of the estate, and was, therefore, not a gift *in futuro*. [p. 339, cols. 1 & 2.]

Under the Muhammadan Law there must not only be a declaration by the donor of his intention to make the gift, but the subject of the gift must be accepted by and on behalf of the donee, and delivery of possession must be given to the donee in the manner which the subject of the gift is capable of. A relinquishment of control over the subject is necessary to complete the gift. Mere book-entries in respect of money which is the subject-matter of gift is not enough to support a gift. There must be some evidence to show that the donor relinquished his control over these moneys and divested himself completely of his beneficial interest therein, so that he could not have operated upon these sums if he wanted to. *Hariram Serowagee* v. *Madan Gopal Bagla* (4) and *Musa Miya* v. *Kadar Bux* (5), relied on. [p. 338, col. 2.]

Under Muhammadan Law a bequest to heirs can only be rendered valid by consent of the other heirs. Such consent need not be express. It may be implied by the unequivocal conduct of the other heirs. [p. 339, col. 1.]

Messrs. *M. P. Amin*, *K. M. Munshi* and *Kantilal Parekh*, for the Plaintiff.

Messrs. *N. P. Engineer*, *M. A. Somjee*, *D. N. Bahadurji* and *V. F. Taraporewala*, for the Defendants.

Judgment.—This is a suit for the administration of the estate of one *Haji* Gulam Mahomed Ajam, who died in Bombay, on or about March 1, 1928, leaving him surviving as his only heirs, according to the Sunni Muhammadan Law by which he was governed, a widow, two sons and three daughters. He left a will in the *Gujarathi* writing, dated January 9, 1928, of which he appointed his widow and one of his daughters, being defendants Nos. 1 and 2, executrices. Defendants Nos. 1 and 2, however, have not obtained probate of the will. The plaintiff and defendant No. 3 are the sons and defendants Nos. 4 and 5 are the two other daughters, of the deceased. He died possessed of properties, movable and immovable, of large value in Bombay, Rangoon, and other places in India. Some of his properties were equitably mortgaged to Mr. F. E. Dinshaw during his lifetime, and other properties were mortgaged in favour of the Central Bank of India, Ltd.

The suit was filed on June 19, 1928. On November 26, 1928, plaintiff took out a notice of motion for appointment of a Receiver of the estate, and lengthy affidavits were filed on either side. The notice of motion was dismissed, and defendants Nos. 1 and 2 were allowed to continue in management of the estate as the executrices of the will of the deceased. Thereafter none of the defendants filed their written statements. Defendant No. 4 and her husband were residing at Mauritius. She came to Bombay with her husband some time about the end of 1929 and inspection of the books of account relating to the estate of the deceased was given to her.

It is alleged that full inspection has not been given, whereas defendants Nos. 1 and 2 have stated that defendant No. 4's *Mehta* attended at their Attorney's office from June 1, 1931, till February 27, 1932, for one hundred and ninety-eight days in all, and three to four hours per day, and full

and free inspection was given of every book and paper that was asked for. The inspection was not completed, as the *Mehta* was dismissed. She filed her written statement in February 1933, and has charged defendants Nos. 1 and 2 with diverse breaches of trust, alleging that they have misapplied and wasted the estate of the deceased and made unauthorized investments and payments. A schedule giving the particulars of the alleged maladministration is annexed to the written statement. She accordingly prays for an account against defendants Nos. 1 and 2 on the footing of wilful default, and for the appointment of a Receiver of the estate of the deceased, except such portion thereof as is in the possession of the Central Bank of India, Ltd., with power to recover the income and profits thereof. Defendants Nos. 1 and 2 put in their written statement only recently, as it was alleged on their behalf that certain negotiations were going on for an amicable settlement between the parties. An objection was taken to their written statement being taken on the file at this stage, but I thought that the executrices should be heard in their defence, and I ordered the written statement to be taken on the file. They allege that on March 31, 1926, the deceased made a gift of certain sums of money in favour of defendant No. 1 together aggregating Rs. 1,20,618-11-3. They further allege that he also made a gift of a sum of Rs. 21,487 on the same day in favour of two of the daughters, *viz.*, defendants Nos. 2 and 5. They, therefore, contend that they and defendant No 5 are creditors of the estate for the said sums. Defendants Nos. 1 and 2 admittedly took possession of the properties after the death of the deceased. They made no inventory of the properties, but are willing to tender an account of their management of the estate since the death of the deceased.

Some time after the death of the deceased suits were filed in this Court against defendants Nos. 1 and 2 as executrices and other heirs of the deceased both by Mr. F. E. Dinshaw and the Central Bank of India, Ltd., to realize their mortgage securities. Mr. Dinshaw's claim has since been entirely paid off, and by an order of the Court, dated July 27, 1931, defendants Nos. 1 and 2 were allowed to enter into a fresh mortgage in favour of the Bank. Pursuant to the order they created an equitable mortgage giving a first charge to the Bank on the immovable properties of the deceased in Bombay and two immovable properties in Mahableshwar to secure the repayment of the sum of Rs. 42,00,000 with interest at six and a half per cent. The mortgage is dated February 1, 1932, but even before that date, *i. e.*, in or about September 1930, defendants Nos. 1 and 2 had handed over the management of all the Bombay properties to the Bank.

It is alleged in their written statement that this was done with the consent of all the heirs. They continued to live in the family house known as "Chateau Ajam" at Narayan Dabholkar Road, Malabar Hill, but they offered to vacate after the Bank took over the management. Defendant No. 2, Havabai left the house about two years ago and went to live with her husband at Chakla. Defendant No. 1 continued to reside in that house but vacated in or about July-August 1933. Thereafter the Central Bank of India, Ltd., filed Suit No. 1914 of 1932, on the equitable mortgage in their favour, and by a consent order dated December 20, 1932, Mr. H. C. Captain, the Secretary of the Bank was appointed Receiver of the shares belonging to the estate and lying with the Bank with the powers mentioned therein, and the Bank agreed to pay to defendants No. 1 and 2 the sum of Rs. 400 per month for a period of three years beginning from July 1, 1932, in consideration of their assisting the Bank in the realization of the mortgaged propeties, and so long as they continued to act as executrices and observed the terms of the order. It is also provided in the will of the deceased that defendants Nos. 1 and 2 should get Rs. 400 per month each after the death of the deceased, the words being "in lieu of their services as long as my property is administered." The will has not been admitted to probate, but there is no statutory obligation on a Muhammadan executor to take out probate of the testator's will. A Muhammadan executor can establish his right in a Court without taking such probate: see *Mahomed Yusuf* v. *Hargovandas Jivan* (1), following *Shaik Moosa* v. *Shaik Essa* (2). The will was not admitted by the plaintiff. He refers to it in para. 3 of the plaint as an alleged writing purporting to be the will of the deceased, and evidence was led on behalf of the executrices to prove the wil

(1) 70 Ind. Cas. 268; A I R 1922 Bom. 392; 47 B 231; 24 Bom. L R 753.
(2) 8 B 241.

in Court, and the will has been proved. There is, however, no dispute about its contents or its validity, as the testator has directed that his estate should be distributed according to the principles of the Sunni Muhammadan Law.

The main issues for the Court in this suit are, whether defendants Nos. 1 and 2 should be ordered to account on the footing of wilful default, whether the deceased made the gifts as alleged by defendants Nos. 1 and 2, and if so, whether the same are valid and binding. The onus of proving the gifts is on the alleged donees. The burden of proof of wilful default is, in the first place, always on the party who alleges the default. It is for defendant No. 4, not merely to give proof of such default, but to prove clearly and affirmatively at least one act of wilful default to the satisfaction of the Court before the Court can make a reference for taking accounts on that footing. It must also be shown that the estate has suffered loss or damage, and that such loss or damage is due to circumstances of wilful neglect or default on the part of the executrices. It has, however, been held that a debt i really the foundation of a decree on the footing of wilful default, and, if the debt is proved or admitted, the burden shifts to the executors to show why they have not got in it: see *In re Stevens*; *Cooke* v. *Stevens* (3). Wilful default can therefore only be decreed against executors in respect of something which the executors could have received but for their wilful default or neglect, and such default or neglect must be proved by the party alleging it.

Defendant No. 4 has given a list of the particulars of amounts misapplied by the executrices or taken for their own use and wrongly debited to the estate. It is annexed to her written statement. Before dealing with the same I may here mention that neither defendant No. 4 nor her husband nor any one on her behalf has given evidence in this case. The plaintiff has also not given any evidence, and though he does not allege any wilful default in his plaint, he seemed to make common cause with defendant No. 4 at the hearing. Counsel for defendant No. 4 has selected two items out of the particulars annexed to the written statement, one being a sum of about Rs. 30,000 which is described as

"amount due by Ahmed Muhammad Saley Aloo of Rangoon in respect of outstandings of the deceased and rents and dividends recovered by him as the agent of the executrices at Rangoon and not accounted for."

The other item is a sum of Rs. 25,000 which is described as

"amount advanced to Husseinbho A. Lalji, a friend of the executrices on personal security."

With regard to the first item of Rs. 30,000, it appears that Ahmed Muhammad Saley Aloo is the brother of defendant No. 2's husband, and as he was doing his own business at Rangoon, he was employed by the deceased to look after his immovable properties at Rangoon during his lifetime. He continued to manage for six or eight months after the death of the deceased, but as the executrices were not satisfied with his management, he was removed. The estate claimed from him a sum of about Rs. 28,000, but according to him the amount due was much less. His indebtedness was settled on his return from Rangoon to Rander (near Surat) in 1929 or 1930, and on September 8, 1930, he passed a promissory note for Rs. 25,000 in favour of defendants Nos. 1 and 2. According to his brother's evidence he suffered great loss in his business, and has since been unable to re-pay the amount of the promissory note. Defendant No. 1 also stated that Ahmed Muhammad was living in very straitened circumstances at Rander. She said that she pressed him for re-payment, but he was unable to pay, and he wrote a letter to her and defendant No. 2 by post on September 10, 1931, acknowledging his liability for the said amount but praying that no suit may be filed against him in view of his present financial condition. It was argued that that letter was written on September 10, 1930, and the date was subsequently altered at the instance of the executrices in 1931 in order to show that the claim was not time-barred.

There would, in my opinion, be no meaning in passing a promissory note on September 8, and writing the letter immediately on the 10th. Further, for the purpose of saving limitation, there was nothing to prevent the executrices from taking another letter in order to extend the period of limitation. It is true that the debtor has not been called to give evidence, but I am not satisfied that the change in the date which is apparent was deliberately made for the purpose alleged. If the executors have a well-founded belief that any action taken against the debtor to the estate will be fruitless, they are entitled to withhold action, but the onus is on them to prove the grounds of their belief. Such grounds have been given both by defendant No. 1 as well as by defendant No. 2's husband who

(3) (1898) 1 Ch. 162; 46 W R 177

is the brother of the debtor, and I see no reason to disbelieve their testimony. Moreover, an executor has always a right to settle a debt due to the estate. It has therefore not been shown to my satisfaction that this sum has been lost under circumstances which make defendants Nos. 1 and 2 liable for wilful default. In any event the claim is not yet time-barred.

With regard to the second sum of Rs. 25,000, the promissory note that was passed in favour of defendants Nos. 1 and 2 was not executed by Husseinbhoy A. Lalji, a friend of defendants Nos. 1 and 2 as alleged, but by the firm of Abdullabhoy Lalji & Co., of which presumably Husseinbhoy A. Lalji is a partner. Moneys were advanced to their firm at six per cent. interest. Counsel for defendants Nos. 1 and 2 said that the whole amount has been recovered, the only outstanding dispute being over a small sum of about Rs. 50 for interest. No evidence was led as to any loss sustained by the estate, as there was some misunderstanding by which Counsel for defendants Nos. 1 and 2 was led to believe that there was no dispute between the parties, about the principal amount having been recovered, and that the only dispute was as to the rate of interest charged to the debtors. Counsel for defendants Nos. 1 and 2 informed the Court that all the items of the sums recovered appeared either in the books of their Solicitors, or in the books of the firm of Abdullabhoy Lalji & Co., and that they were willing to produce the same whenever required. With regard to the rate of interest, it was argued on behalf of defendant No. 4 that the interest charged by Mr. F. E. Dinshaw as mortgagee was at first seven per cent. per annum and subsequently was raised to seven and a half per cent. The interest on the mortgage in favour of the Bank is also six and a half per cent. In either case the debt was secured. In this case the amount was lent on personal security at six per cent. per annum. The deceased, however, had several accounts with the Central Bank of India, Ltd., and in his overdraft account he only paid five and a half per cent. to the Bank up to his drawings to the extent of Rs. 20,00,000 and over that six per cent. per annum. I agree with Counsel for defendant No. 4 that the moneys of the estate should not have been lent by the executrices on personal security. Any executor who invests the moneys belonging to the estate in an unauthorized or hazardous investment is liable for the loss arising therefrom, however prudent such an investment of his own moneys he might think it to be.

There is, however, no loss to the estate in respect of this debt, and defendant No. 4 has not succeeded in proving that there was wilful default on the part of the executrices. All the other items in the list of particulars are generally instances of alleged acts of devastavit, and the executrices will have to render accounts of their management. In my opinion, wilful default has not been proved, and if sufficient proof is not given, the Court cannot order an inquiry as to liability based upon a supposed breach of default. It is of course open to the Court at any subsequent stage of the proceedings upon application by a party and on his showing that there is sufficient evidence of wilful default to direct that accounts may be taken on that footing. For the present there will be an order only for the usual and common accounts in an ordinary administration suit.

The next question relates to the gift in favour of defendants Nos. 1, 2 and 5, referred to in para. 11 of the written statement of defendants Nos. 1 and 2. It is alleged that on March 31, 1926, the deceased gave as a gift to his wife, defendant No. 1, a sum of Rs. 1,20,618-11-3 made up of three different sums which are entered in the journal for 1925-26. These three sums have also been credited to account in the ledger for 1925-26. On the same day a sum of Rs. 21,487 was given as a gift to defendants Nos. 2 and 5. Defendants Nos. 1 and 2 have given evidence in relation to the gifts set up by them. Defendant No. 1 stated that her husband told her that he had given to her as a gift a sum of about Rs. 1,20,000 which was credited to her in his books. He said this about two years before he died, and also several times before that. The only person present at that interview was defendant No. 2. About the gift to the daughters both defendants Nos. 1 and 2 stated that rupees two lakhs were set apart for the marriage expenses of defendants Nos. 2 and 5, that the two daughters were both married at the same time in April, 1922, and a balance of about Rs. 22,000 was left over.

This balance was credited to the account of defendants Nos. 2 and 5. Defendants Nos. 1 and 2 also stated that the deceased asked them to withdraw the amount or any portion thereof as and when they liked, but that nothing was withdrawn by the daughters as they did not need any amount, and defendant No. 1 stated that she with-

drew about Rs. 10,000 in all after her husband's death. According to defendant No. 2 the conversation about the gift to the two daughters was after the conversation with defendant No. 1 about the gift to her, whereas according to defendant No. 1 the conversation about the gift to the two daughters was before the conversation about the gift to her. In the written statement it is alleged that the gift was made to defendant No. 1 and defendants Nos. 2 and 5 on the same date. There is no other oral evidence as to the gifts except the evidence of defendants Nos. 1 and 2. Defendant No. 5 has not been called. No other member of the family nor any relation nor friend has been called to prove the alleged gifts. Defendants Nos. 1 and 2, however, rely on certain entries in the books of account kept by the deceased for the purpose of proving the gifts. [His Lordship discussed the evidence relating to these entries in the account books and proceeded]:

In my opinion these book entries, even apart from their genuineness which is challenged and is not altogether free from doubt, are not sufficient to support the alleged gift. The gift has nowhere been mentioned before, and is for the first time referred to in the written statement of defendants Nos. 1 and 2. The deceased himself has not referred to it in his will. There is not sufficient evidence to show that the deceased intended to make a gift. Book entries do not by themselves confer or determine the rights of parties: see *Hariram Serowagee* v. *Madan Gopal Bagla* (4). There is nothing before me in the evidence to show that the deceased relinquished his control over these moneys and divested himself completely of his beneficial interest therein, so that he could not have operated upon these sums if he wanted to. The mere fact that he did not do so for a couple of years does not by itself prove any relinquishment. In any event the entries do not show that even if a gift was intended, it was completed by the deceased.

The effect of these entries does not give to defendant No. 1 and defendants Nos. 2 and 5 a complete dominion or right of property over the moneys or the right to use the same as and when they liked. They have no doubt deposed to certain statements alleged to have been made to them by the deceased, and these are relied on as a declaration of his intention. But the statements are vague and hazy, and I do not accept them. They are not supported by any other independent evidence. Under the Muhammadan Law there must not only be a declaration by the donor of his intention to make the gift, but the subject of the gift must be accepted by and on behalf of the donee, and delivery of possession must be given to the donee in the manner which the subject of the gift is capable of. A relinquishment of control over the subject is necessary to complete the gift: see *Musa Miya* v. *Kadar Bux* (5). Delivery of possession is also necessary, though the delivery may be constructive in some cases, and manual delivery, especially in the case of husband and wife, is not always necessary. There is no evidence, however, of any possession, actual or constructive, given to defendant No. 1 and defendants Nos. 2 and 5, and the book entries in themselves do not amount to delivery of possession. It was argued that at any rate defendant No. 1 withdrew large sums of money aggregating to Rs. 49,000 odd from the amount gifted to her, but I have already held that there is no evidence that she withdrew the sums as against the gift. Defendants Nos. 2 and 5 admittedly never withdrew any amount at all. Defendants Nos. 1 and 2 tried to get over this difficulty by alleging that they had no need. Further, no interest is credited either to defendant No. 1 or to defendants Nos. 2 and 5 in their account. The *Mehta* said that the parties were Mussalmans who are against taking and giving interest, but in the same breath he admitted that there was an interest account or *Vyaj Vahi* in the books of the deceased in which there are entries both for interest received and interest paid. The *Mehta* in his long examination has not even mentioned that these sums were gifted to defendant No. 1 and defendants Nos. 2 and 5, nor that his master had told him that he had made the gifts. A gift of such large amounts would be generally known in the family and amongst relations. No evidence has been called. It was also argued by Counsel for the plaintiff that the gift to the two daughters is a gift of money which is capable of division, and not having been divided either by the donor or at any time after his death, there is, strictly speaking,

(4) 114 Ind. Cas. 565; A I R 1929 P C 77; 49 C L J 335; 33 C W N 493; 31 Bom. L R 710; (1929) A L J 406; (1929) M W N 422 (P C).

(5) 109 Ind. Cas. 31; A I R 1928 P C 108; 55 I A 171; 52 B 316; 26 A L J 457; 47 C L J 517; 53 M L J 655; 32 C W N 733; 30 Bom. L R 766; 28 L W 33 (P C.).

no gift under the doctrine of *Mushaa* known to the Muhammadan Law. It is not necessary for me to discuss that portion of the argument, for it has been held that this doctrine must be applied within very strict limits. I am content to rest my decision on the evidence of defendants Nos 1 and 2 and on the book entries relied on by them, and considering both together, I cannot say that the case of the alleged gifts has been made out. Why these sums were credited to defendant No. 1 and defendants Nos. 2 and 5, and why these book entries were made, is not for the other side to explain. The onus lay on defendants Nos. 1, 2 and 5 to prove the gifts, and they have failed to discharge the onus. The gifts, if at all intended, were never completed, and not being completed, are not valid under the Muhammadan Law. Under the circumstances no legal effect can be given to them.

The last issue is, whether each of defendants Nos. 1 and 2 is entitled to the remuneration of Rs. 400 per month as provided by the will or otherwise. Under cl. 6 of the will, which has now been proved, each of the two executrices was to be paid out of the property of the deceased Rs. 400 per month after the death of the deceased in lieu of their services as long as the property is administered, that is, I take it, administered by the executrices. It was argued that this provision was not binding upon the other heirs of the deceased, unless they consented expressly or impliedly to this payment. The payment is a sort of commission payable to the executrices by way of remuneration. It is a gratiutous bequest and not a debt: see *Aga Mahomed Jaffer Bindanim* v. *Koolsom Beebee* (6), and *A. E. Salayjee* v. *Fatima Bibi* (7). Being payable to defendants Nos. 1 and 2, it is a bequest to heirs, and can only be rendered valid by consent of the other heirs. Such consent need not be express. It may be implied by the unequivocal conduct of the other heirs. All the heirs of the deceased are *sui juris*. He died in March, 1928, and the plaintiff filed the suit in June 1928. In para. 4 of the plaint it is alleged that defendants Nos. 1 and 2 were expending a larger sum than Rs. 400 per month allowed under the alleged will of the deceased. All the parties were presumably aware of this provision, and defendant No. 4 has stated in para. 8 of her written statement that she will contend that by reason of the neglect, default and breaches of duty on the part of the executrices they were not entitled to the commission of Rs. 400 a month as provided for by the will of the deceased. Except defendant No. 4 none of the other parties has raised this contention. Inspection of the books has been taken by all the parties. No protest was ever made by any one of them, and they must be deemed to have impliedly consented to this payment of Rs. 400 per month. It was further argued that every recurring payment of Rs. 400 per month is a gift *in futuro*, and therefore ineffective in Muhammadan Law. This, however, is not a gift out of the future income of the estate, for the testator has clearly provided that the remuneration must be paid out of his property, meaning out of the corpus of the estate, and is therefore not, in my opinion, a gift *in futuro*.

I have, however, stated before that the Central Bank of India, Ltd., took over the management of the properties in Bombay in or about September 1930. In 1932 an equitable mortgage was created in favour of the Bank to secure repayment of Rs. 42,00,000. The Bank filed their suit No. 1914 of 1932 against defendants Nos. 1 and 2 alone, and on the notice of motion for Receiver, an order was taken by consent on December 20, 1932, in which the payment of Rs. 400 per month has been provided for. It was argued that this notice of motion was not served upon the other heirs, and as they had no notice, the sum of Rs. 400 should be debited only to the shares of defendants Nos. 1 and 2 from and after the date of the order, *viz.*, December 20, 1932. Counsel for defendants Nos. 1 and 2 contended that this payment should be debited as against the whole estate, for the order merely continued the provision made in the will. It is, however, only the figure of Rs. 400 mentioned in the will that the Bank took for its guidance. The estate is not now administered by defendants Nos. 1 and 2. At least, such part of the estate as is still with them has dwindled considerably. There is no question of any acquiescence or consent, express or implied, on the part of defendant No. 4, for in her written statement filed in February 1933, she has protested against this payment. None of the other heirs of the

(6) 25 C 9; 24 I A 196; 7 Sar. 99 (P C).

(7) 71 Ind. Cas. 753; A I R 1922 P C 391; 1 R 60; 44 M L J 332; 25 Bom. L R 301; 32 M L T 96; 37 C L J 302; 18 L W 44; 2 Bur. L J 1; (1923) M W N 522; 28 C W N 31 (P C).

deceased made any protest. I would therefore order that a separate account should be taken of the sum of Rs. 400 per month paid to defendants Nos. 1 and 2 from and after July 1, 1932, and that in taking the accounts of the estate, the share coming to defendant No. 4 should not, in any way, be affected by payment of this sum of Rs. 400 to defendants Nos. 1 and 2 after July 1, 1932.

Counsel for defendant No. 4 lastly applied for the appointment of a Receiver. He said that notice had been served on defendants Nos. 1 and 2 on December 21, 1933, that she would press for the appointment of a Receiver on the grounds of the alleged negligence on the part of defendants Nos. 1 and 2. All the properties of the deceased, however, are now managed by the Central Bank of India, Ltd., except the Dumas House which, it is alleged, is in the occupation of the plaintiff and the other heirs of the deceased, and certain houses at Rander which are in the occupation of the heirs of the deceased. Counsel said that there were also certain ornaments belonging to the estate. Defendant No. 4 wrote to the Attorneys for defendants Nos. 1 and 2 alleging that defendant No. 1 had taken out certain ornaments from one of the safes at Rander, but in her Attorney's reply of January 21, 1931, she pointed out that it was only the ornaments of defendant No. 5 that were taken out to be given to her when she was sent to live in her father-in-law's house. It is provided by para. 4 of the will that the ornaments which remained in the possession of defendant No. 1 and the children and grand-children of the deceased had all been gifted to them during his lifetime, and none of his heirs and creditors were entitled to the same. The only other property is the family house, and I have already stated before that defendants Nos. 1 and 2 offered to vacate the same when the Bank took over the management in September 1930, and have since vacated it. It is now lying vacant. No ground has been made out for the appointment of a Receiver.

[After finding on the issues, his Lordship referred the matter to the Commissioner with certain directions to take the usual administration accounts.]

The only other question is one of the costs of this hearing. Several issues were raised, and on some of them defendant No. 4 has failed. On the issue of the alleged gifts defendants Nos. 1 and 2 have also completely failed. I do not agree with Counsel for defendants Nos. 1 and 2 that the costs of proving those gifts should be considered part of the costs of administration of the estate. This was an inquiry about an adverse claim made against the estate. On the issue of wilful default it is still open to the parties to apply to the Court on further evidence for a direction that accounts should be taken on that footing, but until then it will be difficult to ascertain what exactly will be the costs of and incidental to that issue. It may be that no wilful default is proved, and such costs may have to be set off against the costs which defendants Nos. 1 and 2 may be ordered to pay in respect of the issues relating to the gift. Taking all these facts into consideration, the only order I propose to make at present is that all costs and further directions be reserved until the Commissioner has made his report.

D. *Order accordingly.*

LAHORE HIGH COURT

First Civil Appeal No. 2147 of 1928
March 21, 1934

BHIDE AND RANGI LAL, JJ.

Musammat BEGAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALI GOHAR AND OTHERS—PLAINTIFF AND DEFENDANTS — RESPONDENTS

Custom (Punjab) — Succession — Muhammadan Gujars of village Bodhaya in Dasuya Tahsil, of Hoshiarpur district—Sisters, if preferred to collaterals—Riwaj-i-am—"Qarabati", *meaning of.*

It is well-established that sisters are generally not recognised as heirs and the onus is on them to prove their claim as against collaterals howsoever distant even if the property is non-ancestral.

Whatever the origin of the word "*qarabati*" may have been as used in *Riwaj-i am*, there is no doubt that it is now used to denote all kinsmen whether near or distant.

F. C. A. from the decree of the Senior Sub-Judge, Hoshairpur, dated June 6, 1928.

Messrs. *Badri Das* and *J. L. Kapur*, for the Appellants.

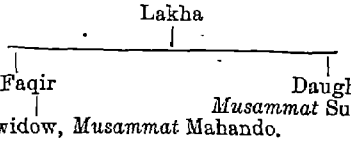
Mr. *Abdul Karim*, for the Respondents.

Rangi Lal, J.—The parties to this case are Muhammadan *Gujars* of village Bodhaya in the Dasuya *tahsil* of the Hoshiarpur District and the contest is between the step-sisters of the last male holder of the land in dispute and a collateral of his in the 10th degree. The lower Court held in favour of the collateral and the step-sisters have appealed.

I am, however, clearly of opinion that there is no force in the appeal. It is well established that sisters are generally not recognised as heirs and the onus is on them to prove their claim as against collaterals, however distant, even if the property is non-ancestral *vides Husain Bibi* v. *Nigahia* (1) and *Sant Kuar* v. *Sher Singh* (2). In the present case the *riwaj-i-am* entry clearly negatives the right of the sisters. The anwer to question No. 45 which runs thus: "Does the property ever devolve on sisters or upon their sons?" is as follows:

"Generally the right of sisters and their sons to succeed is not admitted but *Gujars*, *Pathans*, *Sianis* and *Sheikhs* say they succeed in the absence of all collaterals."

The learned Counsel for the appellants drew our attention to the vernacular *riwaj-i-am* in which the word "*qarabati*" is used for collaterals. He urged that that word being derived from the root "*qurab*" which means nearness, denotes only near collaterals. The Persian English Dictionary by F. Steingass gives the meaning of the word "*qarabati*" as follows: related, connected, akin, consanguinous. The learned Counsel was not able to cite any authority in support of the restricted meaning which he desired to place on that word. Whatever the origin of the word may have been, there is no doubt that it is now used to denote all kinsmen whether near or distant. This meaning is made quite clear by the English version of the *riwaj-i-am* which has been quoted above. No serious attempt was made to rebut the strong presumption arising from the aforesaid entry. The witnesses appearing on behalf of the defendants were able to refer to only one instance in which a sister is said to have succeeded. The following pedigree table will help in explaining the facts of that case.



Musammat Sultani and *Musammat* Mahando were holding the land which had come down from Lakha in equal shares. On the remarriage of *Musammat* Mahando her share was mutated in favour of Sultani. The mutation proceedings do not show that there was any other claimant at all. The vague statements of the defendants' witnesses that some collaterals of Lakha were alive, cannot be relied on. It is not clear whether the last male holder was Faqir or Lakha. This solitary instance, is, in my opinion, of no help to the defendants. The decision of the lower Court on this point must, therefore, be upheld.

The learned Counsel for the appellants pointed out that one-ninth of the holding in dispute was held by *Musammat* Azizan, defendant at the time of the death of her step-brother Fazal Qadar and urged that the plaintiff as the preferential heir of Fazal Qadar had no right to succeed to it. This point was not raised before the lower Court and cannot be raised for the first time in appeal. It is admitted that *Musammat* Azizan was allowed to remain in possession of one-ninth of the holding by way of maintenance till her marriage and that she is now married. The parties apparently realized at the time of the trial that the land held by her was on her marriage to be treated as if it formed part of the estate of Fazal Qadar. She had not succeeded to it as an heir and she cannot, in my opinion, change the course of succession in respect of it. I would, therefore, dismiss the appeal with costs.

Bhide, J.—I agree.

D. *Appeal dismissed.*

(1) 55 Ind. Cas. 828; A I R 1920 Lah. 410; 1 Lah. 1; 70 P L R 1920; 34 P W R 1920; 1 Lah. L J 89.

(2) 73 Ind. Cas. 786; A I R 1923 Lah. 476; 4 Lah. 392.

OUDH CHIEF COURT

Civil Application No. 87 of 1933

March 8, 1935

SRIVASTAVA, J.

GAYA PRASAD—PLAINTIFF—APPLICANT

versus

JAMNA PRASAD—DEFENDANT—OPPOSITE PARTY

Contract Act (IX of 1872), s. 23—Plaintiff advancing money to defendant in consideration of his promise to give a girl in marriage to plaintiff's brother—Non-compliance with promise—Criminal prosecution for offences under ss. 417, 420, 500, Penal Code (Act XLV of 1860)—Arbitration—Bond in pursuance of award—Suit on bond—Maintainability.

The plaintiff had advanced Rs. 63 to the defendant in consideration of the latter's promise to give a girl in marriage to the plaintiff's brother. When the defendant did not comply with the promise, the plaintiff prosecuted him for offences under ss. 417, 420 and 500 of the Penal Code. While the prosecution was pending, the parties referred their differences to arbitration and the arbitrators decided that the defendant should pay Rs 53 to the plaintiff. In pursuance of this award of the arbitrators, the bond in suit was executed and the prosecution was withdrawn:

Held, that although the institution of the criminal prosecution was the occasion for the reference to arbitration which resulted in the execution of the

bond in suit, yet it was in reality the civil dispute between the parties as regards the sum of money alleged to have been advanced by the plaintiff to the defendant, which was the subject of reference to the arbitration. Further, one of the offences forming the subject-matter of the criminal prosecution was compoundable by the parties and the other two compoundable with the permission of the Court. Consequently, the real object of the agreement not having been to interfere with the course of justice, the suit should not be dismissed on the ground of the consideration being opposed to public policy. *Saktay Sah* v. *Mahadin* (1), followed.

C. App. against the order of the Munsif (as Judge of Small Cause Court) Tarabganj at Gonda, dated September 9, 1933.

Mr. *S. N. Roy*, for the Applicant.

Mr. *H. D. Chandra*, for the Opposite Party.

Judgment.—This is a plaintiff's application for revision of the judgment and decree dated September 9, 1933, passed by the learned Munsif of Tarabganj at Gonda in the exercise of his Small Cause Court jurisdiction.

The plaintiff sued on the basis of a bond executed by the defendant in his favour. The only defence raised was that the bond was not enforceable being void under s. 23 of the Indian Contract Act, as its object was to stifle a criminal prosecution. The learned Munsif accepted this plea and dismissed the suit. According to the plaintiff's case he had advanced Rs. 63 to the defendant in consideration of the latter's promise to give a girl in marriage to the plaintiff's brother. When the defendant did not comply with the promise, the plaintiff prosecuted him for offences under ss. 417, 420 and 500 of the Indian Penal Code. While the prosecution was pending, the parties referred their differences to arbitration and the arbitrators decided that the defendant should pay Rs. 53, to the plaintiff. In pursuance of this award of the arbitrators, the bond in suit was executed and the prosecution was withdrawn. The defendant admitted that the parties had made the reference to arbitration. He also admitted the execution of the bond in suit. It is also not denied that after the execution of the bond in suit the prosecution was withdrawn.

The question is whether in these circumstances the consideration of the bond in suit can be said to be unlawful within the meaning of s. 23 of the Indian Contract Act. No doubt the institution of the criminal prosecution was the occasion for the reference to arbitration which resulted in the execution of the bond in suit, but I am satisfied that it was in reality the civil dispute between the parties as regards the sum of money alleged to have been advanced by the plaintiff to the defendant, which was the subject of reference to the arbitration. Further, it would appear that out of the three offences which formed the subject of the criminal prosecution, the offence under s. 508 was compoundable by the parties. The other two offences under ss. 417 and 420 were also compoundable with the permission of the Court. Although no evidence has been given about such permission having been granted, yet the fact being admitted that the Magistrate allowed the prosecution to be withdrawn, it can be presumed that he gave the necessary permission for the compounding of those offences. An agreement to stifle prosecution is distinguishable from the lawful compounding of a compoundable offence. It could not be said that the real object of the agreement was to interfere with the course of justice. The case appears to me to be covered by the decision of a learned Judge of this Court in *Saktay Sah* v. *Mahadin* (1). In this case it was held that when the offence with which a particular person was charged is compoundable, he is at liberty to come to a settlement with the prosecutor and the settlement so arrived at cannot be considered to be one, the consideration of which might be considered to be illegal. I am in full agreement with this decision. I am, therefore, of opinion that the learned Munsif was wrong in dismissing the suit on the ground of the consideration being opposed to public policy.

The result, therefore, is that I allow the application, set aside the decree of the lower Court and decree the plaintiff's claim with costs in both the Courts. He is also allowed interest from the date of suit till realisation at 6 per cent. per annum.

N. *Application allowed.*

(1) 125 Ind. Cas. 385; A I R 1930 Oudh 196; 4 Luck. 669; 7 O W N 575; Ind. Rul. (1930) Oudh 305.

LAHORE HIGH COURT

Second Civil Appeal No. 137 of 1928
May 15, 1934

BRIDE AND DIN MOHAMMAD, JJ.

GANGA BISHAN-KUNJ BIHARI LAL —DEFENDANTS—APPELLANTS

versus

M. FAZAL KARIM AND OTHERS —PLAINTIFFS —RESPONDENTS

Custom (Punjab)—Abadi — Non-proprietor—Right of occupation—Forfeiture by reason of disclaimer —Whether operates — Village growing into town—

Effect on proprietor—Person not owner of village site —Whether shows he is tenant.

In the case of non-proprietors who have built on sites presumably with the consent of the proprietors, the non-proprietors and their heirs are entitled to occupy the houses as long as they choose to do so, and the proprietors of the sites can re-claim the sites of the houses only if the non-proprietors abandon the houses or sell the sites without his consent. *Mahomed Alam* v. *Ajab* (1) and *Zarif* v. *Akbar* (2), referred to.

Forfeiture by reason of disclaimer is an incident that attaches to tenancy but it cannot be extended to the non-proprietors' tenure of house in the "*abadi*" merely by analogy.

It cannot be said that when a village grows into a town, the proprietor of the village sites on which houses have been built automatically loses his rights therein.

It does not follow from the fact that a person is not owner of the village site in the *abadi* that he is a tenant.

S. C. A. from the decree of the Additional District Judge, Hoshiarpur, dated October 11, 1927.

Messrs. *Nawal Kishore* and *M. C. Mahajan*, for the Appellants.

Messrs. *Shuja-ud-din* and *Khurshaid Zaman*, for the Respondents.

Bhide, J.—This second appeal arises out of a suit for the possession of two houses in the *abadi* of Urmur in the Hoshiarpur District instituted in the year 1921 by one Fazal Karim Khan against Gokal Chand. Both Fazal Karim Khan and Gokal Chand are dead and are now represented by their heirs Although the original suit was for possession of the houses, it is conceded that the plaintiff could only claim the sites underneath the houses—the houses having been built by the defendant's ancestors.

The original plaintiff Fazal Karim Khan claimed to be the sole proprietor of Urmur and alleged that the defendant Gokal Chand was his tenant and that he had forfeited the tenancy owing to his express denial of the plaintiff's title in the course of evidence given by him on February 5, 1921, in a case to which the plaintiff was a party. The defendant's main pleas were that Urmur was a town and not a village, that the residents in the *abadi* of Urmur including himself were the owners of the sites of their houses, that even if he was not the owner of the sites, his statement dated February 5, 1921, did not amount to denial of plaintiff's title, and lastly, that in any case he was not liable to be ejected merely on account of that statement. The trial Court held that Urmur was a town and not a village: that the plaintiff was the proprietor of the *abadi* sites, though his rights had become very much limited in course of time; that Gokal Chand's statement of February 5, 1921, did amount to disclaimer of plaintiff's title, but that the position of the defendants was not that of tenants but of *quasi*-owners or licensees, and they were therefore not liable to be ejected on account of Gokal Chand's statement. The trial Court therefore merely granted a decree to the plaintiffs declaring their title to the sites underneath the houses in dispute.

On appeal the learned Additional District Judge held that Urmur was not a town but a village, that Fazal Karim Khan and his descendants were the owners of the *abadi* sites, that the position of the defendants was that of tenants and they were therefore liable to ejectment on account of Gokal Chand's denial of plaintiffs' title. He accordingly accepted the appeal and granted the plaintiffs a decree for possession of the sites of the houses in dispute after removal of the materials of the houses. From this decision the defendants have preferred the present appeal. The Courts below have given a concurrent finding, that the plaintiffs are owners of the sites of the houses in dispute, and this being a finding of fact, cannot be challenged in second appeal. The learned Counsel for the appellants has urged that the learned Additional District Judge was wrong in holding that Urmur was a village and not a town, but this point seems to be really immaterial for the purposes of the above finding as the finding that the plaintiff is the owner of the house sites in the *abadi* is based on direct evidence and does not turn on any presumption arising from the fact whether Urmur is a town or a village.

The learned Counsel for the appellant was unable to cite any authority in support of his contention that when a village grows into a town, the proprietor of the village sites on which houses have been built automatically loses his rights therein. Such a position appears to my mind to be clearly unsustainable in law.

Assuming then that the plaintiffs are the proprietors of the sites of the houses in the *abadi*, the next question is whether the defendants are their tenants. The learned Additional District Judge has held that the defendants are tenants but the finding does not appear to be based on any evidence. The learned Judge appears to have held the defendants to be tenants merely because it was not proved that they were owners or licensees as alleged by

them. But it does not necessarily follow from this that the position of the defendants must be that of tenants. There is no evidence on the record to show that the defendants' ancestors were allowed to occupy the sites of the houses in dispute as tenants or that they ever paid any rent to the plaintiffs or their ancestors. The learned Counsel for the plaintiffs referred to the fact that the defendants were occupancy tenants of agricultural land in the village, that this would not necessarily show that the land in the *abadi* was also held by them as tenants. The next piece of evidence to which the learned Counsel referred was the entry in the revenue records showing that the *abadi* was in the possession of the residents of the village. This again cannot establish that these residents occupied the sites as tenants.

So far as the *abadi* is concerned, the position of the defendants appear to be that of non-proprietors who have built on sites therein—presumably with the consent of the proprietors. In such cases, according to the well recognised custom, the non-proprietors and their heirs are entitled to occupy the houses as long as they choose to do so, and the proprietors of the sites can reclaim the sites of the houses only if the non-proprietors abandon the houses or sell the sites without his consent *cf*: paras. 236 and 238 of Rattigan's Digest of Customary Law, also *Mahomed Alam* v. *Ajab* (1), and *Zarif* v. *Akbar* (2). In the present instance no such contingency has arisen. It is true that Gokal Chand disclaimed the plaintiff's title but it is not proved that either according to custom or any agreement between the parties, the defendants are liable to be ejected by reason of such disclaimer of title. Forfeiture by reason of disclaimer is an incident that attaches to tenancy, but it cannot be extended to the non-proprietors' tenure of houses in the *abadi* merely by analogy. It was incumbent on the plaintiffs to establish that such a result follows in the case of non-proprietors occupying *abadi* sites, but they have failed to do so. The declaratory decree granted by the trial Court was quite sufficient to protect the plaintiffs' rights and I would accordingly accept this appeal and restore that decree. In view of the circumstances I would leave the parties to bear their costs throughout.

Din Mohammad, J.—I agree.

N. *Appeal allowed.*

(1) 34 P R 1882.
(2) 50 P R 1888.

OUDH CHIEF COURT
Full Bench

Criminal Appeal No. 124 of 1934
March 13, 1935
KING, C. J., SRIVASTAVA AND ZIA-UL-HASAN, JJ.

EMPEROR—COMPLAINANT—APPELLANT
versus
Sheikh MUMTAZ HUSAIN—ACCUSED—RESPONDENT

U. P. Municipalities Act (II of 1916), ss. 186, 307, 318, 321—District Magistrate making appellate order under s. 318 upholding legality of notice issued by Board under s. 186—Criminal Court trying case under s. 30 for failure to comply with notice—Whether can go into the question of legality, validity, or reasonableness of notice—Authority in s 321, scope of.

Per *King, C. J.*, and *Srivastava, J.*—When the District Magistrate has made an appellate order under s. 318, U. P. Municipalities Act, upholding the legality or the validity of the notice issued by the Board under s. 186, the Criminal Court which tries a case under s 307, for failure to comply with the notice, cannot go into the question of the legality, validity or reasonableness of the notice. Where the accused has admittedly failed to com ply with the notice, he is guilty of an offence under s. 307. *Yusuf Hussain* v. *Emperor* (5), overruled. [p. 353, col. 2]

The word 'authority' in s. 321 is sufficiently wide to cover both civil and Criminal Courts. [p. 349, col. 1.]

[Case-law discussed.]

Per *Zia-ul-Hasan, J.*, (*dissentiente*).—A Criminal Court can, in a prosecution under s 307 of the Municipalities Act for failure to obey a notice issued by a Municipal Board under s 186 of the Municipalities Act, go into the question of the legality, validity and reasonableness of the notice. [p 351, col 1.]

Cr. A. against the order of the Magistrate, Second Class, Sitapur, dated November 7, 1933.

Order of Reference to a Full Bench

King, C. J. and Zia-ul-Hasan, J.—(*January* 11, 1935).—An important question of law has been raised in this appeal, namely, whether a Criminal Court can, in a prosecution under s. 307 of the Municipalities Act for failure to obey a notice issued by a Municipal Board under s. 186 of the Municipalities Act, go into the question of the illegality, validity and reasonableness of the notice. On this point there appears to be some conflict of judicial opinion. On the one hand we are referred by the learned Government Advocate to the cases of:—

Mannu v. *Emperor* (1), *Har Prasad* v. *Emperor* (2), *Municipal Board* v. *Jwala*

(1) 58 Ind. Cas. 153; 18 A L J 187; 42 A 294; 21 Cr. L J 729.
(2) 138 Ind. Cas. 839; (1932) A L J 579; Ind. Rul (1932) All. 497; 33 Cr. L J 692; A I R 1932 All. 673; L R 13 A 136 Cr.; (1932) Cr. Cas. 825.

Prasad (3) and *Mahadeo Prasad Bakkal* v. *Jamila Khatun* (4),

A contrary view is expressed in the cases of:—

Yusuf Hussain v. *Emperor* (5) and *Ram Charan* v. *Improvement Trust, Lucknow* (6).

We, therefore, refer the above question to a Full Bench for decision under s. 14 (1) of the Oudh Courts Act.

Mr. *H. S. Gupta*, Government Advocate, for the Crown.

Messrs. *H. D. Chandra* and *Nizam-ud-din*, for the Accused.

Judgment of the Full Bench

King, C. J.—(*March* 5, 1935).—The question of law which has been referred to this Full Bench is, whether a Criminal Court can, in a prosecution under s. 307 of the Municipalities Act, for failure to obey a notice issued by a Municipal Board under s. 186 of that Act, go into the question of the legality and reasonableness of the notice.

Although the question is put in a general and abstract form, I think it is necessary to state briefly the facts out of which it has arisen.

The respondent Mumtaz Husain bought a house within the limits of Sitapur Municipality in October, 1931. According to the case for the prosecution Mumtaz Husain constructed a *chabutra* and a thatched shed in front of his house without obtaining from the Municipal Board permission to make such constructions. On October 22, 1932, the Municipal Board issued a notice under s. 186 of the Municipalities Act, to him stating that he had constructed a platform with a thatch over it without obtaining permission, and ordering him to demolish the platform and the thatch within a week. This notice was duly served upon Mumtaz Husain on November 4, 1932. He appealed to the District Magistrate under s. 318 of the Municipalities Act. The District Magistrate dismissed the appeal by an order dated May 25, 1933. He took all the facts into consideration and held that Mumtaz Husain had erected the *chabutra* and the thatched shed without the Board's permission, and that the notice under s. 186 was, therefore, regular.

After this appeal had been dismissed, the Municipal Board prosecuted Mumtaz Husain under s. 307, for failing to comply with the notice under s. 186. In the Magistrate's Court the accused reiterated the same plea that he did not construct the *chabutra* or shed himself and for that reason he did not comply with the notice. He also stated that the notice was unreasonable and illegal. The learned Magistrate found that the *chabutra* and shed had been in existence at this very spot before Mumtaz Husain bought the house, and that he was not responsible for having constructed them, and therefore, acquitted the accused. The judgment implies that the notice was illegal or unreasonable although no such finding was expressly recorded.

An appeal against the acquittal has been filed on behalf of the Local Government and the main point argued by the learned Government Advocate is that the District Magistrate's appellate order, declaring the notice to be "regular" *i. e.* legal and proper, became final under s. 321 of the Municipalities Act and that it was not open to the Magistrate to go behind that order and re-open the question of the legality or propriety of the notice and come to a finding which was in substance a reversal of the District Magistrate's appellate order.

It appears to me that this contention is correct. Under s. 186 the Board is competent to issue a written notice to the owner of any land directing him to demolish a building upon the land in any case where the Board considers that the erection of the building is an offence under s. 115. It must be noted that it is for the Board to decide whether the erection of the building is an offence under s. 185. The Board may be right or wrong in its decision, but if it considers that the erection of the building amounts to an offence under s. 185, then it is competent to issue a notice under s. 186. In the present case, therefore, it appears to me that the Board was clearly acting within the scope of its authority in issuing the notice because it clearly considered the erection of the building to be an offence under s. 185.

The accused when served with the notice availed himself of the remedy provided by the Statute under s. 318, and appealed to the District Magistrate. The District Magistrate considered the propriety and legality of the notice and dismissed the appeal.

Now we come to the important s. 321, upon the interpretation of which the decision of this reference primarily turns. This section lays down that no order or direction

(3) 151 Ind. Cas. 45; 11 O W N 1622; 7 R O 152; 36 Cr. L J 471; (1932) Cr. Cas. 286.

(4) 123 Ind. Cas. 55; 7 O W N 396; Ind. Rul. (1930) Oudh 151; A I R 1930 Oudh 201.

(5) 140 Ind Cas. 185; 9 O W N 870; Ind. Rul. (1932) Oudh 393; A I R 1932 Oudh 305; 33 Cr. L J 933; (1932) Cr. Cas. 816.

(6) 85 Ind. Cas. 243; A I R 1925 Oudh 546; 10 O & A L R 935; 1 O W N 611; 26 Cr. L 499.

eferred to in s. 318 shall be questioned in any other manner or by any other authority than is provided therein. It further lays down that the order of the appellate authority confirming, setting aside or modifying any such order or direction shall be final. Under s. 321, therefore, the appellate order of the District Magistrate was final. I take this to mean that the question of the legality and propriety of the notice, which had been finally decided by the District Magistrate, could not be reopened and decided by any Civil or Criminal Court. In other words, the trying Magistrate was precluded by s. 321, from trying the question which had been finally decided by the District Magistrate under s. 318 and was bound to treat that decision as conclusive just as if the trial had been barred by the principal of *res judicata*.

For the respondent it is contended that a Magistrate cannot convict under s. 307 without satisfying himself that the notice under s. 186 was legal and proper, and, therefore, he is not bound to treat the District Magistrate's appellate order as final and conclusive on that point.

Several authorities have been cited on behalf of the appellant and the respondent, respectively.

For the appellant the case of *Mannu* v. *Emperor* (1) has been cited. In that case a person applied for a licence to store firewood but the Board refused to grant him the licence, without giving any reasons. He did not appeal against the refusal to grant a licence but continued to store firewood without permission. He was prosecuted and convicted. The prosecution in that case was for the breach of a bye-law made under Part G (*x*) of s. 298. The order of the Board refusing to grant the license was held to be an order made under the bye-law and, therefore, to be appealable under s. 318. The learned Judge held that the applicant, having failed to seek his remedy by an appeal under s. 318, could not challenge the order of the Board in the Criminal Proceedings and was rightly convicted. The learned Judge observed that the Criminal Courts should not refuse to enforce the provisions of the Statute according to their plain meaning merely on the ground that there seemed reason for suspecting that the Municipal Board was using its powers under the Statute in an oppressive manner and not in accordance with the spirit of s. 298 of the Act. The view taken in this case certainly supports the contention of the appellant.

The case of *Mahadeo Prasad Bakkal* v. *Jamila Khatun* (4), has also been cited but it is readily distinguishable and throws no light upon the correct decision of the question before us.

The case for *Har Prasad* v. *Emperor* (2), is clearly in favour of the appellant. In that case the accused was prosecuted under s. 307, for failure to comply with two notices issued by the Municipal Board under ss. 186 and 211 ordering him to remove a certain construction which was encroaching upon a public drain. It was proved that the notices had been served and had not been obeyed. The accused maintained that he had not made any encroachment on the public drain and, therefore, the Municipal Board had no jurisdiction to issue the notices. It was held that s. 318 gave to the accused a remedy by way of appeal to the District Magistrate to challenge the legality or validity of the notices, and as he failed to avail himself of that remedy, the Criminal Court was under s. 321, precluded from questioning the legality or validity of the notices. It was further held that there is nothing in the language of s. 307 of the Municipalities Act which indicates that it is the duty of the Court to satisfy itself that the notice was "lawfully" issued by the Municipal Board. As I was a member of the Bench which decided that case, I may say that I still adhere to the same view. I think there is an important difference between the language of s. 147 of the U. P. Municipalities Act, 1900, and the corresponding s. 307 of the Muncipalities Act, 1916. Under the former Act s. 147 provided a penalty for disobedience of any lawful direction given by the Board or any notice lawfully issued by it. Section 307 of the Act of 1916 provides a penalty for failing to comply with a notice "given under the provisions of this Act". It has been contended that the law has not really been changed, because if a notice has been given under the provisions of the Act, it must have been "lawfully" given. I am not prepared to accept this contention. The Legislature when enacting s. 307 of the Act of 1916 deliberately omitted the words "lawful" and "lawfully" which were contained in the corresponding section of the previous Act. It must be presumed that this deliberate omission was intended to effect some change of meaning, and it would be most astonishing if it were

held that the omission of such important words left the meaning of the section unchanged. I think it is possible for the Board to give a notice under s. 186 legally or illegally. Supposing a Magistrate convicts an accused person under s. 379, Indian Penal Code, the conviction may be set aside as illegal on the ground that the Magistrate refused to allow any cross-examination of the prosecution witnessess, or refused without any adequate reason to summon defence witnesses. But although the conviction was illegal, could it be denied that the accused was convicted under s. 379, Indian Penal Code? So in the present case I think it could not fairly be denied that the notice was given under s. 186. Both in form and in substance the notice was such a notice as the Board, was empowered to give under s. 186, and it is not argued that the notice was void *ab initio*, or a nullity, owing to lack of inherent jurisdiction or for any other reason. The Municipalities Act itself contemplates the possibility of an illegal "order or direction made by a Board under the powers conferred upon it by s. 186" (and by the other sections mentioned in s. 318). Section 319 provides that if the officer hearing the appeal under s. 318 entertains reasonable doubt as to the legality of the notice or order he may refer the point for the decision of the High Court. This shows that it is possible for an order made by a Board under s. 186 to be an illegal order. The legality of such a notice or order is, therefore, a question which the District Magistrate has exclusive jurisdiction to determine, either on his own responsibility or in conformity with the decision of the High Court. If he upholds the legality and propriety of the notice, I think his decision is final and the question cannot be re-opened and tried again by the Magistrate who tries the case under s. 307.

The question of law has, however, been framed in such general terms that it is necessary to consider the position in case no appeal has been preferred to the District Magistrate under s. 318. In such a case I think that in a prosecution under s. 307 the trying Magistrate can consider and decide whether the notice in question was given by the Board under s. 186. I think it is open to the Magistrate to hold that the notice was void *ab initio*, a mere nullity which is devoid of any legal consenquences, and therefore that it is not a notice which has been given under s. 186 and therefore failure to comply with it does not constitute an offence under s. 307. Cases of this sort are probably rare, but it is possible, for example, that the notice was issued by a Subordinate Official who was not empowered to do so on behalf of the Board. Or the notice might have been issued in respect of a building situate outside the Municipal limits. So if it is pleaded that the notice is a nullity, or that it is not a notice which has been given by the Board under s. 186, then I think that the trying Magistrate can try and decide that question, if it has not already been decided by the District Magistrate under s. 318. If the trying Magistrate finds that the notice is not a nullity, then I think he is precluded by s. 321 from trying its legality, validity or reasonableness.

The case of *Municipal Board of Bahraich* v. *Jwala Prasad* (3) is also in favour of the appellant, but only indirectly. In that case the accused was prosecuted under s. 307 for non-compliance with a notice to close a drain, issued under s. 267. The Bench of Magistrates came to the conclusion that the notice was unreasonable and acquitted the accused. A learned Judge of this Court held that it was only necessary for the Magistrates to consider whether the accused had failed to comply with a notice properly issued to him and they had no jurisdiction to enter into the merits of the Municipal Board's decision to issue the notice and to reverse it. This case is not directly in point because the decision does not depend upon the interpretation of s. 321. The notice under s. 267 was not appealable to the District Magistrate under s. 316, so no question arose whether s. 321 precluded the Criminal Court from questioning the validity of the notice. Never-theless, the learned Judge held that in a prosecution under s. 307 a Magistrate only had to consider whether the accused had failed to comply with a notice properly issued to him. When he speaks of a notice being "properly issued, he probably means a notice which is both in form and in substance a notice which could be issued by the Board and which has in fact been issued by authority of the Board within the scope of its jurisdiction.

The respondent has referred to the case of *Kashmiri Lal* v. *Emperor* (7). In that case a notice had been issued by the Board under s. 267 (1) (*b*) requiring the owner

(7) 63 Ind. Cas. 410; 19 A L J 511; 22 Cr. L J 650; 43 A 644; 3 U P L R (A) 175.

of premises to construct a cesspool. He was prosecuted under s. 307 for failing to comply with the notice. It was held that the order could not be questioned on the merits in the Magistrate's Court provided that the order was made within the jurisdiction of the Board. In other words, the view was that s. 321 prohibits the Magistrate from questioning the reasonableness or parcticability of the order but not its legality. I agree to this extent that it is open to the Magistrate (if the point has not been concluded by the District Magistrate's appellate order) to consider whether the order is a complete nullity, as I have explained above, but if it appears that the order was not a complete nullity, then I think it is not open to the Magistrate to question whether the Board's jurisdiction was wrongly or illegally exercised.

The case of *Ram Charan* v. *Improvement Trust, Lucknow* (6) was decided by a single Judge of the Judicial Commissioner's Court. In that case it was held that if a notice is not issued according to the provisions of the Act, a person to whom the notice is issued may disobey it and yet not be liable to punishment; hence to sustain a conviction under s. 307 it is necessary to prove that the notice was issued under the provisions of the Act or under a rule or a bye-law. This judgment is very brief. We do not know under what section of the Act the notice was issued or whether it was appealable under s. 318. There is no reference whatever to s. 318 or s. 321 and I do not think that this decision is of much help.

The case of *Yusuf Husain* v. *Emperor* (5) is certainly in point and is in the respondent's favour. In that case the accused applied for sanction to make a construction and the Board by ignoring his application and further ignoring his reminder, granted constructive sanction to the applicant who thereupon started to construct his building. Subsequently the Board issued a notice under s. 186 directing him to demolish the building. The learned Judge held that disobedience to such a notice was not an offence under s. 307 and it was immaterial that no appeal against the illegality of the notice was taken under s. 318. In that case the notice under s. 186 was clearly illegal and clearly indefensible. Unfortunately the accused did not avail himself of the remedy provided by the statute in s. 318 by appealing to the District Magistrate. If he had appealed, undoubtedly the notice would have been set aside as illegal. As he failed to appeal, the question was whether he could challenge the legality and validity of the notice in the criminal prosecution. The learned Judge referred to the language of s. 147 of the Municipalities Act of 1900 and expressed the opinion that the change of language in the corresponding s. 307 of the present Act had made no change in the law. With due respect, I am unable to accept this view for reasons which I have already stated. Under the new Act I think that the accused was guilty of a technical offence in disobeying a notice illegally issued under s. 186. I think that even in that case it must be held that the notice in question was a notice issued by the Board under s. 186. The notice was not a mere nullity. The Board had jurisdiction to issue the notice but they exercised their jurisdiction illegally or wrongfully. In such a case I think that the Criminal Court was precluded by s. 321 from questioning the legality of the notice for the purpose of finding the accused guilty or not guilty. The point could no doubt be taken into consideration for the purpose of passing sentence, and a nominal fine could be imposed for a technical offence.

The learned Judge observed that the notice under s. 186 could not be held to have been given under the provisions of Act, because the construction did not amount to an offence under s. 185, and therefore the Board could not have considered in good faith that the construction did amount to an offence under 185. It will be observed that the learned Judge seems to hold that the Board is required to consider "in good faith" that the construction constituted an offence under s. 185. The Statute itself, however, does not require the Municipal Board to consider "in good faith". Probably it was not contemplated that a Municipal Board would act otherwise than in good faith, but as the law stands, the Board is given complete discretion and if it acts in bad faith, its proceedings are not vitiated for that reason. I have every sympathy with the learned Judge in wishing to acquit the accused in that case. His decision was certainly just and equitable, but in my opinion it does not rightly interpret the effect of ss. 186, 307 and 321.

The last case for the respondent is *Kashi Prasad Verma* v. *Municipal Board*,

Benares (8). In that case it was held that the jurisdiction of a Criminal Court hearing a complaint under s. 155 of the Municipalities Act, to inquire into the question whether the goods imported are in fact liable to octroi duty, is not barred by s. 162 (1) of the Act; and before an offence under s. 155 can be established the Municipal Board must satisfy the Criminal Court that the goods are in fact liable to octroi. A question was raised in that case whether s. 164 (1) did not absolutely preclude the Criminal Court from questioning the assessment of the goods to octroi duty. Sub-s. (*i*) runs as follows:—

"No objection shall be taken to a valuation or assessment, nor shall the liability of a person to be assessed or taxed be questioned in any other manner or by any other authority than is provided in this Act."

The learned Judge has held that this provision barred the jurisdiction of Civil Courts in matters of municipal taxation, but did not bar the jurisdiction of Criminal Courts in such matters. The reason was that

"a Criminal Court is one of the authorities referred to in this very Act for hearing complaints under s. 155 of the Act."

Apparently s. 160 is referred to, which allows an appeal relating to taxation being made to the District Magistrate. The mere fact, that the District Magistrate is the authority who can hear appeals relating to taxation, does not seem to me to warrant the inference that every Magistrate is authorised to question assessments to taxation in the course of trying a criminal case. Section 164 does not merely prohibit any other authority from questioning municipal taxation but prohibits any authority from questioning municipal taxation *in any other manner* than is provided in this Act. I take this to mean that even the District Magistrate himself could not decide questions relating to taxation except by way of appeal, *i. e.*, he could not do so in the course of trying a criminal case.

The respondent goes to the length of arguing that the word "authority" in s. 321 does not include a Criminal Court, although it may include a Civil Court. It to me seems impossible to hold that the word "authority" is not wide enough to cover Criminal Courts as well as Civil Courts. It is perhaps worth noting that the marginal note of s. 164, the language of which is similar to s. 321, is Bar to jurisdiction of Civil and Criminal Courts in matters of taxation. It is not always clear whether marginal notes can be referred to in case of the obscurity of any expression in the text of the Statute. The answer depends upon whether the notes can be regarded as inserted by, or under the authority of the legislature. In the Full Bench case of *Ram Saran Das* v. *Bhagwant Prasad* (9), it was held that marginal notes to sections of an Act can be referred to for the purpose of interpretation if they can be regarded as inserted by, or under the authority of, or assented to, by the legislature. It was shown in that case that the marginal notes to the sections of the Agra Pre-emption Act, 1922, should be regarded as inserted in the Act with the assent and authority of the Legislative Council and that they could be referred to for the purpose of interpreting the sections. We have no information as to whether the procedure adopted by the Legislative Council in passing the U. P. Municipalities Act of 1916 was similar to the procedure adopted by the Legislative Council in passing the Agra Pre-emption Act of 1922, but we have no reason to suppose that the procedure was different. If the marginal note of s. 164 can be referred to as showing what meaning the Legislature attached to the section, it is clear that they meant the word "authority" to include both Criminal and Civil Courts. It is also worth noticing that s. 131 (1), of the U. P. District Boards Act, 1922, is word for word the same as s. 164 (1) of the U. P. Municipalities Act, 1916, and the marginal note is also the same showing that "authority" was understood to include Civil and Criminal Courts. As the former Act was passed in the same year as the Agra Pre emption Act, I think the marginal note may confidently be taken as inserted with the authority of the Legislature. I would not, however, base my opinion upon the marginal note of s. 164. I think that the word "authority" is sufficiently wide to cover both Criminal and Civil Courts. In fact I think it has never been doubted that Civil Courts are "authorities" contemplated by ss. 164 and 321 and if Civil Courts are authorities, it is difficult to understand why Criminal Courts should not also be authorities.

It has been argued for the respondent that, s. 321 should not be so construed as to deprive a citizen of his elementary right

(8) 154 Ind. Cas. 750; (1935) A L J 68; A I R 1935 All 28; 7 R A 790; 36 Cr. L J 560.

(9) 113 Ind. Cas 412; 51 A 411; A I R 1929 All. 53 (1929) A L J 290 (F B).

of defending himself in a Criminal trial. If he pleads that the notice was illegal or unreasonable, then the Court should not convict him without deciding the plea against him. I think the answer is that a Court cannot refuse to give effect to a statutory provision, according to its plain and ordinary meaning, on the ground that it would result in hardship or injustice. The plea must no doubt be recorded but I think the Legislature is competent to prohibit the Court from re-opening a question which has been finally decided, in substance if not in form between the same parties, by an authority having exclusive jurisdiction to decide it. The appeal under s. 318 was decided between Mumtaz Husain and the Board. The prosecution is in form between the King-Emperor and Mumtaz Husain, but in substance it is between the Board and Mumtaz Hussain. The Board is the complainant and the Court cannot take cognizance of the offence except on the complaint of the Board. The Police are in no way concerned and the Crown is not directly interested. So the effect of s. 321 seems to be merely to apply the rule of *res judicata* which broadly speaking, prohibits the re-opening of a question finally decided between the parties by a Court of competent jurisdiction.

In the case before us it is clear that if the trying Magistrate goes behind the District Magistrate's appellate order and decides the legality and validity of the notice upon the merits, the appellate order is not "final" and the accused will be allowed to have an indirect appeal against it. In fact the trying Magistrate has in effect reversed the appellate order which is declared by statute to be "final". This procedure seems to be in direct conflict with the Statute. The question whether such procedure is desirable and just seems beside the point. It is not for us to justify the acts of the Legislature but to give effect to them. If the District Magistrate's appellate order happens to be made in conformity with the decision of the High Court, on a reference regarding the legality of the notice, it would perhaps be more difficult to stress the "injustice" to the accused in precluding the trying Magistrate from re-opening and deciding the question decided by the final order. But the principle is the same whether the appellate order represents the District Magistrate's decision or the decision of the High Court. In either case the appellate order is final and I think the trying Magistrate cannot go behind it.

In my opinion the answer to the question formulated for our decision depends on whether the District Magistrate has, or has not, made an appellate order under s. 318. If he has, then the answer to the question is in the negative. If he has not, then the trying Magistrate may decide (if the question is raised) whether the notice is a notice which has been given by the Board under s. 186 or a nullity. If he finds that the notice was given by the Board under s. 186, then he is precluded from trying its legality validity or reasonableness.

Srivastava, J.—*(March 7, 1935).* I agree with the answer given by the Hon'ble Chief Judge to the question which has been referred to the Full Bench. Its answer depends solely on the interpretation to be placed on the provisions of s. 321 and 307 of the U. P. Municipalities Act (II of 1916). It should be noted that no question has been raised before us as regards the competence of the Local Legislature to enact a provision like that contained in s. 321, if it is supposed to affect any fundamental right or to contravene any principle of criminal law. I have no doubt that the word "authority" used in sub-s. 1 of s. 321 is sufficiently wide to include a Criminal Court. An order under s. 186 being specifically mentioned in s. 318, the effect of s. 321 cl. (1) clearly is that such order cannot be questioned "in any other manner or by any other authority than is provided" in s. 318. The manner laid down in s. 318 is by way of an appeal and the authority provided therein is the District Magistrate. The obvious interpretation, therefore, of this provision of s. 321 is that an order made by a Municipal Board under s. 186 can be questioned only by means of an appeal to the District Magistrate. Section 186 empowers the Board to stop erection, re-erection or alteration of any building and to direct the alteration or demolition thereof. The policy underlying the whole enactment seems to be to give wide and extensive powers to the Boards in Municipal matters and to restrict the litigation in respect of them. It is frequently necessary to restrict the rights and liberties of individuals for the larger good of society. The Legislature could well presume that the actions of Municipal Board constituted of a majority of the elected representatives

of the public will, as a rule, be based on considerations of public interest and will not be unreasonable or capricious if, therefore, in a matter like that provided in s. 186 which is essentially a civic matter, the right of the citizen to question the orders of the Board is restricted to an appeal to the District Magistrate, I can see nothing unreasonable in such a provision.

The second clause of s. 321 provides that the order of the appellate authority confirming setting aside or modifying any such order or direction shall be final. There would be no finality in the order, if it could be questioned either in the Civil Court or in the Criminal Court. The provision is tantamount to this that the District Magistrate as a Court of Appeal is given exclusive jurisdiction to deal with the legality or propriety of orders of the Board in matters provided for in s. 318. The province of a Court is only to expound the law as it stands and not to scan its wisdom or its policy. The language of s. 321 appears to me to be so plain and unambiguous that it can admit of but one meaning and except by straining, it we cannot adopt a different construction.

Next as regards s. 307 which deals with the consequences of disobedience to a notice all that the section requires is that the notice has been given "under the provisions of this Act." The words "under the provisions of this Act" in this section must be construed consistently with the provisions of s. 321. They should not be construed so as to nullify the provisions of the latter section and enable an accused to question the order, otherwise than as provided under s. 318 or to affect the finality of the order of the appellate authority. Of course if the accused can show that the notice given to him could not in the eye of law be regarded as a notice at all under the provisions of the Act, then s. 307 would have no application and no conviction could be made under that section. I would, therefore, answer the question referred to the Full Bench in the same terms in which it has been answered by the Hon'ble Chief Judge.

Zia-ul-Hasan, J. (*February 25, 1935*)—In this appeal on behalf of the Local Government the following question has been referred to the Full Bench.

"Whether a Criminal Court can, in a prosecution under s. 307 of the Municipalilies Act for failure to obey a notice issued by a Municipal Board under s. 186 of the Municipalities Act, go into the question of the legality, validity and reasonableness of the notice".

I have given my best consideration to the arguments of the learned Government Advocate, who pleaded for the question being answered in the negative, but am definitely of opinion that the answer must be in the affirmative. To hold otherwise would not only in the words of the Hon'ble Chief Justice of the Allahabad High Court (in the case of *Kashi Prasad Verma* v. *Municipal Board, Benares* (8), "stultify Criminal Courts, which would be constrained to convict persons of an offence, although they know that they are not guilty", but would also go against the very basic principle of criminal justice, namely, that an accused person is of right entitled to defend himself in a trial.

Out of the cases cited by the learned Government Advocate, only three need be considered, namely, *Municipal Board, Bahraich* v. *Jwala Prasad* (3), *Mannu* v. *Emperor* (1) and *Har Prasad* v. *Emperor* (2). The first of these is a single Judge case but in this case also the learned Judge held that the only matter the Magistrate has to consider is whether the accused has failed to comply with a notice properly issued to him. This clearly shows that the Magistrate has to judge of the propriety of the notice issued by the Municipal Board. The second was a case in which a person had been convicted for storing firewood on a piece of land without obtaining a license for the purpose from the Municipal Board as required by the bye-laws framed by the Municipality under s. 298 of the Municipalities Act, and there arose no question of any notice issued by the Municipal Board much less of the validity or legality of such a notice. In fact, the learned Judge's attention was drawn to s. 318 of the Municipalities Act but the learned Judge was of opinion that

"the discussion (whether the provisions of s. 318 would apply to the facts of the case) is not really relevant, because the validity of the conviction of Mannu for breach of the rule prohibiting unlicensed persons to use any plot of land within Municipal limits for the purpose of storing wood does not depend upon the consideration of the remedies, if any, open to Mannu against the refusal of the Municipal Board to grant him the license for which he applied."

Further on the learned Judge states,

"If I am right in this view, it would seem to follow that the Board's order refusing a licence could not be questioned by a suit in any Civil Court; but on this point I do not pronounce my final opinion because questions might arise as to the competence of the Local Legislature to take away the jurisdiction of the ordinary Courts in such a matter."

This case is, therefore, no authority for holding that the jurisdiction of Criminal

Courts to determine the question of the validity or otherwise of a notice issued by the Municipal Board is barred though the head-note of the ruling shows otherwise with regard to the third case which was decided in the Allahabad High Court by the present Chief Judge of this Court and Mr. Justice Thom. I may observe that the accused was not represented in that case before their Lordships and if the authorities in support of the contrary view had been placed before them, it is probable that the decision of their Lordships of the Allahabad High Court would have been different.

We were also referred to some cases in which it has been held that s. 321 of the Municipalities Act bars the jurisdiction of the Civil Court, but they are obviously not in point in this case.

It was urged that the policy underlying the Municipalities Act of 1916 was to extend the powers of Municipal Boards to a large extent. This may be so, but an extension of the powers of Municipal Boards does not necessarily involve the curtailment of the rights of the public, especially in the matter of defence in Criminal Courts, and I cannot persuade myself to believe that though admittedly in 1900 an accused person was given the right to challenge the validity of a notice issued by a Municipal Board, this elementary right was taken away from him in 1916 when education had appreciably advanced in the country and when the rights of the subject had begun to be recognized more and more.

No doubt s. 321 of the Municipalities Act lays down that

"No order or direction referred to in s. 318 shall be question in any other manner or by any other authority than is provided therein"

and further that "the order of the appellate authority confirming, setting aside or modifying any such order or direction shall be final"; but I cannot bring myself to believe that by enacting this section the Legislature meant to take away the elementary right of a citizen to defend himself in a criminal trial. It appears to me that by the word "authority" they intended to mean an authority that might be appealed to or moved against an order or direction made by a Municipal Board by the person against whom the order or direction has been made under any of the sections referred to in s. 318 and did not intend thereby to deprive a citizen of his right to defend himself if prosecuted in a Criminal Court by the Board, though to guard against even the remotest possibility of such a person moving the Criminal Court, they used a word comprehensive enough to include Criminal Courts.

Reliance was also placed on the marginal note to s. 164 which runs, "Bar to jurisdiction of Civil and Criminal Courts in matters of taxation"; but in the first place their Lordships of the Privy Council have held that marginal notes to the sections of an enactment are not part of the enactment and cannot be relied upon for basing an argument about the construction of the enactment, in the second, there is no similar marginal note to s. 321 with which we are concerned at present, and in the third, the view that I have taken about the construction of s. 321 easily explains that marginal note.

It cannot be denied that an order of any of the authorities referred to in s. 318, Municipalities Act, must, in the very nature of things, be a quasi executive order and not a judicial order. It follows, therefore, that if the plea of the learned Government Advocate be accepted, a person prosecuted by a Municipal Board under s. 307 must be much worse off than the most hardened criminal, in that he can never get the benefit of a judicial trial.

It may also be noted that the learned Government Advocate could not point to any other enactment by which the jurisdiction of a Criminal Court to go into the facts of a case before it or the right of an accused to defend himself should have been barred.

I am supported in the view that I have taken by the following cases, in all of which accused's right to question the validity of the notice issued by the Municipal Board was recognised.

Ram Dayal v. *Emperor* (10), *Emperor* v. *Piare Lal* (11), *Kashmiri Lal* v. *Emperor* (7), *Ram Charan* v. *Improvemeat Trust* (6), *Ata Karim* v. *Municipal Board, Fatehpur* (12), *Yuruf Hussain* v. *Emperor* (5), and *Kashi Prasad Verma* v. *Municipal Board, Benares* (8), (referred to above).

With regard to the case of *Kashi Prasad Verma* v. *Municipal Board, Benares* (8) it was urged that the learned Chief Justice took the word "authority" in s. 164 to include a Criminal Court on

(10) 8 Ind. Cas. 562; 7 A L J 1075; 33 A 147; 11 Cr. L J 681.

(11) 23 Ind. Cas. 745; 12 A L J 254.

(12) 119 Ind. Cas. 248; A I R 1929 All. 756; Ind. Rul (1929) All. 1000.

the ground that a Criminal Court itself was an authority referred to in the Act but that this reasoning could not be applied to s. 321 in which the words are "authority other than that mentioned in s. 318" which does not mention a Criminal Court. This was, however, one of the reasons and not the sole reason of His Lordship's decision. Another and a stronger reason is contained in the following words:

"Section 164 would more appropriately apply to cases where the goods are detained by the Municipal authorities or where octroi duty has been paid which the importer thinks is in excess of what he was bound to pay. On such matters the order of the Appellate authority is final and the importer has no right to claim a refund in any Civil or Criminal Court.":

and the learned Judge goes on to say:

"But we are unable to hold that on that account a Criminal Court is compelled to convict an accused even though satisfied that the goods on which he has not paid octroi were not liable to the payment of octroi."

As regards the cases of *Ram Dayal* v. *Emperor* (10) and *Emperor* v. *Piare Lal* (11), it was urged that they were under the old Municipalities Act of 1900, in which s. 147 itself showed that what was made an offence was the disobedience of any lawful direction of the Board or of any notice lawfully issued by it and much stress was laid on the fact that the words "lawful" and "lawfully" were omitted from the penal section (307) of the present Act. It was, therefore, argued that the omission of these words from the penal section indicated that the intention was not to leave the plea of illegality of the direction or notice open to the accused. This argument was no doubt accepted in the case of *Har Prasad* v. *Emperor* (2), but with all respect to the learned Judges who decided that case, I regret I am unable to take that view. As was pointed out by Mr. Justice Kisch in *Yusuf Hussain* v. *Emperor* (5), the omission of these words is not of much significance inasmuch as s. 307 still contains the sentence. "If a notice has been given under the provisions of this Act", which is equivalent to saying "if a notice is lawfully given", for a notice given under or in accordance with the provisions of the Act must be lawful or legal. Now, when the very first condition of the proof of an offence according to s. 307 is that the notice given by the Board should be under the provisions of the Act, or in other words legal, I fail to understand how it can be said that the Court in which the prosecution is launched is precluded from going into the question of the legality or otherwise of the notice. In fact, under s. 307 itself, the very first thing that the Court must see is whether the notice was legal or not.

It might be said and was in fact said, that what was meant by the sentence. "If a notice has been given under the provisions of this Act," was that the Court should see whether or not the Board had jurisdiction to issue a notice of the kind in question and was not concerned with the question whether the notice was right or wrong, legal or illegal, I am unable to accept this interpretation of s. 307. If that had been the intention of the Legislature nothing was easier than to express. "If a notice has been given purporting to be under the provisions of the Act," instead of saying "If a notice has been given under the provisions of this Act".

It is thus clear that to interpret s. 321 of the Act in the manner contended for by the learned Government Advocate will not only be against the very elementary principles of the administration of criminal justice but would also be against the provisions of s. 307 of the Act itself.

I would, therefore, answer the question in the affirmative.

King, C. J. and Zia-ul-Hasan, J.—(*March 13, 1935*).—The majority of the Judges constituting the Full Bench have decided that when the District Magistrate has made an appellate order under s. 318, upholding the legality or the validity of the notice issued by the Board under s. 186, the Criminal Court which tries a case under s. 307, for failure, to comply with the notice, cannot go into the question of the legality, validity or reasonableness of the notice.

In the present case, therefore, the trying Magistrate was precluded from finding that the notice was illegal or invalid.

The accused admitedly failed to comply with the notice and was, therefore, guilty of an offence under s. 307.

We, therefore, allow the appeal, set aside the Magistrate's order of acquittal dated October 17, 1933, and convict the accused *Sheikh* Mumtaz Husain under s. 307, U. P. Municipalities Act, 1916, and sentence him to pay a fine of Rs. 20 within one week from the date when this sentence is communicated to him by the trial Court and order that in default of

payment of the fine within the period mentioned, he shall undergo simple imprisonment for one week.

N. *Appeal allowed.*

LAHORE HIGH COURT

Miscellaneous First Civil Appeal No. 1131 of 1933
April 4, 1934
ABDUL RASHID, J.
Chaudhri QAMARUDDIN—JUDGMENT-DEBTOR—APPELLANT
versus
DHANPAL SINGH—DECREE-HOLDER—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 92, O. XLIII, r. 1 (j)—Order refusing to set aside sale—Appeal—Auction-purchaser, if a necessary party.

In an appeal from an order passed under O. XXI, r. 92 of the Civil Procedure Code, rejecting an application to set aside a sale in execution of a decree, the auction purchaser is a necessary party and the appeal cannot proceed in his absence. *Mela Ram* v. *Narain Das* (1), *Khaire* v. *Salem Raj* (2), *Bhawani Shankar* v. *The Industrial Bank of India, Ltd. Ludhiana* (3), *Bahadur Ali Khan* v. *Co-operrtive Credit Society Basti Babo Khel* (4) and *Nanak Chand* v. *Raja Singh* (5), referred to.

Misc. F. C. A. from the order of the First Class, Sub-Judge, Delhi, dated March 27, 1933.

Mr. *Bishan Narain*, for the Appellant.

Mr. *Shamair Chand*, for the Respondent.

Judgment.—This is an appeal from an order passed under O. XXI, r. 92, Civil Procedure Code, rejecting an application to set aside a sale in execution of a decree which is appealable under O. XLIII, r. 1 (*j*) of the Code.

The learned Counsel for the respondent has raised a preliminary objection to the effect that the appeal cannot proceed as the auction-purchaser has not been made a respondent. In my opinion this objection is sound and must succeed. It was laid down in *Mela Ram* v. *Narain Das* (1) that where in an appeal from an order passed under s. 312, Civil Procedure Code, rejecting an application to set aside an execution-sale it appeared that the judgment-debtor has not made the auction-purchaser a party to the proceedings, the appeal must be dismissed as the auction-purchaser was a necessary party in order to enable the Court to effectually adjudicate upon all the questions involved in the application. It was held in *Khaira* v. *Salem Raj* (2), that an appeal against an order confirming an auction-sale, to which the auction-purchasers were not made parties till long after the appeal was time-barred as against them, should be dismissed. Reference may also be made to *Bhawani Shankar* v. *The Industrial Bank of India, Ltd.* (3), *Bahadur Ali Khan* v. *Co-operatrive Credit Society, Basti Baba Khel* (4) and *Nanak Chand* v. *Raja Singh* (5) in this connection.

It was contended on behalf of the appellant that the observations made in *Khaira* v. *Salem Raj* (2) and *Bhawani Shankar* v. *Industrial Bank of Inaia, Ltd.* (3), were inapplicable to the facts of the present case as those cases arose out of insolvency proceedings. It must, however, be remembered that the *ratio deciaendi* of those rulings was that no order to the detriment of the auction-purchaser could possibly be made without giving him an opportunity of being heard and that therefore it was necessary to make him a party to the appeal wherein the validity of the sale in his favour was challenged. Moreover, *Mela Ram* v. *Narain Das* (1), and *Nanak Chand* v. *Raja Singh* (5) are cases arising out of execution of decrees under the Civil Procedure Code, and the reasoning embodied in those rulings is fully applicable to the present case. For the reasons given above, I dismiss the appeal of the judgment-debtor with costs.

N. *Appeal dismissed.*

(1) 188 P R 1882.

(2) 51 Ind. Cas. 935, 1 Lah. 21; 60 P L R 1920; 36 P W R 1920.

(3) 50 Ind. Cas. 645; 31 P L R 1919; 4 P W R 1919; 70 P R 1919.

(4) 120 Ind. Cas. 165; A I R 1929 Lah. 778; Ind. Rul. (1930) Lah. 5.

(5) 112 Ind. Cas. 623; A I R 1933 Lah. 324; 34 P L R 8; Ind. Rul. (1933) Lah. 223.

CALCUTTA HIGH COURT

Civil Appeal Nos. 549 and 550 of 1933
March 9, 1934
BUCKLAND, AG. C. J.
On difference between
LORT-WILLIAMS AND M. C. GHOSE, JJ.
DURGADAS DAS—PLAINTIFF—APPELLANT
versus
NALIN CHANDRA NANDAN AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act (V of 1908), O. XIX, r. 3, O. XXXIX, r. 1, O. XXXVIII, r. 5—Affidavit stating grounds of belief — Necessity of— Essentials for an order under O. XXXIX, r. 1— Present intention of obstruction or delaying execution of decree must be proved—Injunction or attachment, when to be granted—Orders under O. XXXVIII, r. 5, and O. XXXIX, r. 1—Whe-

ther discretionary—Interference by Appellate Court.

Where the deponent in his affidavit does not say which part is based on information and which on belief, nor the grounds of his belief, the affidavit is defective *Padmabati Dasi* v. *Rasik Lal Dhar* (1), relied on.

Before any order can be made under the provisions of O XXXIX, r. 1, Civil Procedure Code, the plaintiff must prove some overt act towards the alienation of the properties such for example as negotiations or offers for sale and that the property is in danger of alienation.

Where there is nothing in documents filed by way of objections by the defendants to an application under O. XXXVIII, r. 5, Civil Procedure Code, to show that the defendants ever had any intention of obstructing or delaying the execution of any decree which might be passed against, them or with such intent were about to dispose of their property, it cannot be said that the Court could be satisfied "otherwise" within the meaning of r. 5 (1) of O. XXXVIII, Civil Procedure Code. and the mere fact that a defendant has in the past mortgaged or disposed of his property is not a sufficient ground for levying attachment. There must be a present intention. *Sanaji Kapurchand* v. *Pannaji Devi Chand* (3), *Nowroji Padamji* v. *Deccan Bank, Ltd.* (4) and *Manmatha Nath Sett* v. *Nagendra Nath Bhattacharjya* (5), relied on. [p. 357, col. 2.]

Prima facie case is essential before either injunction or attachment can be granted. Moreover, the Court must be satisfied that interference is necessary to prevent injury which is irreparable, and that the mischief or inconvenience which is likely to arise in consequence of withholding the relief will be greater than that from granting it. *Daily Gazette Press, Ltd.* v. *Karachi Municipality* (6) and *Vathiar Ramanuja Aiyangar* v. *Aiyanachariar* (7), referred to.

Orders pressed under O. XXXVIII, r. 5 and O. XXXIX, r. 1, Civil Procedure Code, are discretionary, and an Appellate Court ought not to interfere with the exercise of a Judge's discretion unless satisfied that it was not judicially exercised, that is to say, that the Judge acted on wrong principles. The mere fact that the Judges of the Appellate Court might have taken a different view is not a sufficient ground for interference. If the Judge rightly appreciates the facts, and applies to those facts the true principles, that is a sound exercise of judicial discretion. *Daily Gazette Press, Ltd.* v. *Karachi Municipality* (6) and *Subba* v. *Haji Badahaw* (12), referred to.

Neither injunction nor attachment ought to be lightly granted. It would be a serious thing if persons in possession were restrained from making use of the property merely because a suit had been instituted about it It is only where it is essential that property should be kept in its existing condition pending suit, that the Court should interfere. *Begg Dunlop & Co.* v. *Satish Chandra* (13), relied on. [p. 358, col. 1.]

C. A. from the original orders of the Sub-Judge, First Court, Alipur, dated November 17, 1932.

Messrs. *Sarat Chandra Rai Chaudhuri* and *Urukramdas Chakerbertty*, for the Appellant.

M. C. Ghose, J.—These two appeals were argued by Mr. Sharat Chandra Rai Choudhuri on February 15 last. My learned brother, on hearing him proposed to dismiss them summarily. I proposed to admit them for hearing. I do not propose to say more than certain of the arguments advanced by Mr. Rai Chaudhuri which inclined me in favour of admission of these appeals. He urged that the learned Subordinate Judge committed an error in making adverse remarks on the plaintiff's case. He should have noted that the plaintiff was a small child when his mother died and his elder sister, defendant No. 2, took care of him and defendant No. 1 who married her came to live as *Ghar Jamai*, and during his infancy they exercised their influence on him.

During his minority, his case is that they and defendant No. 3 managed the estate and embezzled large sums of money and when he was 20 years old, they induced him to execute three deeds of release to the extent of one lac of rupees on the representation that his father desired that the gifts should be made, but that there was nothing in his will to that effect. The learned Subordinate Judge criticised the affidavit filed on behalf of the plaintiff; but having regard to the provisions of O. XXXVIII, r. 5 (1) and O. XXXIX, r. 1, which provide that the facts might be proved by affidavit or otherwise, the learned Judge should have taken into account the admission of defendant No. 3 that immediately before the suit he had been trying to dispose of one of the properties. All these properties had been brought during the time they were managing the estate. The learned Judge was wrong to criticise the plaintiff for not paying sufficient court-fees for consequential relief, inasmuch as the suit should be valued according to the statement of the plaintiff. The plaintiff stated in the plaint that he was in possession of all the six properties, that he himself was in direct possession of one property and the other five properties were let out to tenants from whom he was getting rents and that the learned Judge was wrong in holding that the defendants were in possession of the properties.

It was suggested that the appeals were made very late. It was urged in reply that the petitions were made immediately the suit was filed and they were disposed of on November 17 and, thereafter, the plaintiff made no delay but immediately

obtained copies of the necessary documents and filed the appeals in the beginning of December and it was not his fault that the appeals were not heard till the middle of February. In my view, we should admit these appeals, look at the records and hear the parties before forming our final opinion.

Lort-Williams, J.—These are two appeals from a judgment of Mr. Hiralal Mukherjee, Subordinate Judge at Alipur refusing to grant two applications by the plaintiff (1) for attachment of property before judgment under O. XXXVIII, r. 5, Civil Procedure Code and (2) for a temporary injunction under O. XXXIX, r. 1, Civil Procedure Code. The plaintiff's father died in January 1929, leaving considerable property, both movable and immovable, and a will under which plaintiff became sole owner of the estate. He attained his majority in August 1929, and took out letters of administration in November. In 1933, when he was 22 years of age, he brought the present suit against his sister and her husband, and the manager of the estate. The plaint is a long, rambling and scandalous pleading, full of unnecessary and irrelevant matter, and deficient in particulars. It offends against all the rules of pleading contained in O. IV, Civil Procedure Code, and, if any attention were paid in the Subordinate Courts to the rules of pleading and procedure, it ought to have been struck out long ago under O. VI, r. 16, as tending to prejudice, embarrass and delay the fair trial of the suit. So far as it is possible to ascertain from this confused document what the plaintiff claims, he seems to allege that he was a person of weak intellect, and under the control and dominance of the defendants, who conspired together to defraud him; that, *inter alia*, they took possession of all his properties, and used the money belonging to his estate to buy, in their own names, certain other properties, enumerated 1 to 6 in Schedule '*Chha*' and induced him by fraud to execute three deeds of release for sums amounting to one lac of rupees. He asks for a declaration of title to the properties in Schedule '*Chha*', and for accounts. He does not ask for possession or for any other consequential relief, or for an injunction.

The defendants deny the allegations of fraud *in toto*, admit the deeds, which were duly registered, and which they say, the plaintiff executed voluntarily two years after he attained majority, and in accordance with the wishes of his father, and state that they purchased the properties in Schedule '*Chha*' with their own money. The application for attachment related of course to defendants' own properties, and was in respect of plaintiff's claim for accounts. The application for an injunction related to the properties in Schedule '*Chha*' which plaintiff sought to restrain defendants from alienating. The pleadings and affidavits disclose the following facts. The properties in Schedule '*Chha*' are in the possession of the defendants. They have built houses thereon, and have been living there for some time and have let out part to tenants, from whom they collect the rents. Their names are registered as owners and they pay the Municipal Taxes. The title deeds to properties 1-4 were left, with other properties, in plaintiff's house, and have been misappropriated by him. The title deeds to properties Nos. 5 and 6 are in the possession of the manager to whom they belong. He borrowed money in 1933 by hypothecating property No. 5 only, for the purpose of buying another house, and transferred the title-deeds to the mortgagee. Subsequently, in order to pay off the mortgage, he decided to sell the property and executed a *bainapatra*. This was long before the institution of the suit, but on hearing of the suit he postponed registration of the document, returned the *baina* money, with costs and fees thereon, to the purchaser, recovered the document, and filed it in Court. The Subordinate Judge did not deal with the matter summarily but heard the Pleaders at considerable length and after carefully considering all the facts and documents he refused both applications. His reasons for refusing an injunction were :

1. That the plaintiff's affidavit, is inadequate and defective. He, alleges, in para. 12 thereof simply that the defendants are trying to dispose of the properties in Schedule '*Chha*' and states that his allegation is based partly on information which he believes to be true and partly on belief. He does not say which part is based on information and which on belief, nor does he state the grounds of his belief, contrary to the provisions of O. XIX, r. 3, Civil Procedure Code: *Padmabati Dasi* v. *Rasik Lal Dhar* (1). No overt act towards the alienation of the properties in Schedule '*Chha*' is even

(1) 6 Ind Cas. 666; 37 C 259

suggested in the application, such for example as negotiations or offers for sale, and there is no proof that the property is in danger of alienation. These reasons clearly are sound and unanswerable, and such proof is essential before any order can be made under the provisions of O. XXXIX, r. 1.

2. The plaintiff, in respect of the Schedule '*Chha*' properties, asks in his plaint only for a declaration of title, without any consequential relief, and without asking for an injunction. It is clear from the pleadings and affidavits that he is out of possession, yet he does not ask for it. His claim is barred under s. 42, Specific Relief Act.

3. The title deeds of the properties are in the possession of the plaintiff. (This statement is not quite accurate. The plaintiff has possession of the deeds of properties Nos. 1-4), In view of this and the pendency of the suit, the plaintiff cannot have any reasonable apprehension of alienation. No person would be willing to purchase property which is the subject of *lis pendens*. These reasons also are sound. In a suit for declaration an injunction should not be granted where there is no claim for consequential relief or permanent injunction: *Shiromani* v. *Banta* (2). The learned Judge's reasons for refusing attachment were that the affidavit was sworn, not by the plaintiff, but by an employee of the plaintiff, who states in paras. 4 and 6 that the defendants are trying to, and are about, to dispose of their properties with intent to obstruct and delay the execution of the decree, and that his statements are based partly on information and partly on belief, without stating which are based on which and without stating his grounds of belief. Therefore this affidavit also is inadequate and defective, and open to the same objections as the other, and offends against the order and the decision to which I have already referred. The learned Advocate for the plaintiff argued that in addition to plaintiff's affidavits, which he admitted were inadequate and defective, there were in the objections filed by the defendants admissions upon which the Judge could be satisfied "otherwise" within the meaning of O. XXXVIII, r. 5 (1).

But the Court must be thoroughly satisfied, and there is nothing in these documents to show that the defendants ever had any intention of obstructing or delaying the execution of any decree which might be passed against them, or with such intent were about to dispose of their property. Mere vague allegations are not sufficient: *Sanaji Kapurchand* v. *Pannaji Devi Chand* (3) and see *Nowroji Padamji* v. *Deccan Bank, Ltd.* (4). And the mere fact that a defendant has in the past mortgaged or disposed of his propertyis not a sufficient ground for levying attachment. There must be a present intention: *Manmatha Nath Sett* v. *Nagenra Nath Battacharjya* (5). Further the Judge held, for the reasons given in his judgment, that the plaintiff had failed to make out a *prima facie* case. This is essential before either injunction or attachment can be granted. Moreover, the Court must be satisfied that interference is necessary to prevent injury which is irreparable, and that the mischief or inconvenience which is likely to arise in consequence of withholding the relief will be greater than that from granting it; *Daily Gazette Press, Ltd.* v. *Karachi Municipality* (6) and *Vathiar Ramanaja Aiyangar* v. *Aiyanachariar*, 17 Ind. Cas. 219 (7) and many other cases.

The question of appeal raises the further question whether the procedure under the Code and the machinery of the High Court are generally appropriate to appeals in such matters as these. It is true that an appeal is given, but in most, if not in every such case, it must be fruitless and should not therefore be admitted except in very exceptional circumstances. Both injunction and attachment are intended to give prompt relief from immediate or impending danger of injury which will be irreparable. These applications were heard and refused by the learned Judge on November 17, 1933. They came before this Court for disposal under O. XLI, r. 11, Civil Procedure Code, on February 15, 1934, no less than three months after the alleged danger had arisen. If admitted, these appeals will be heard some two or three years hence. (The Court is now hearing Miscellaneous Appeals of 1931 and 1932). Long before that date, in all probability, the suit itself will have been decreed. Could any procedure be more

(2) 96 Ind. Cas. 439; A I R 1923 Lah. 504; 8 L L J 289; 27 P L R 453.

(3) 64 Ind. Cas 580; A I R 1922 Bom 276; 46 B 431; 23 Bom. L R 1228.

(4) 63 Ind Cas. 958; A I R 1921 Bom. 69; 45 B 1253; 23 Bom. L R 559

(5) 94 Ind. Cas. 880. A I R 1926 Cal. 855.

(6) 127 Ind. Cas. 690; A I R 1930 Sind 287; Ind. Rul. (1930) Sind 306.

(7) 17 Ind. Cas. 219; 23 M L J 316.

absurd or more likely to bring the Court and the administration of justice into contempt? In my opinion the Court ought not to admit appeals from such orders, except in cases of serious misdirection in law or fact, when special directions might be given for expedition.

Moreover, it must be remembered that both these orders were discretionary, and an Appellate Court ought not to interfere with the exercise of Judge's discretion unless satisfied that it was not judicially exercised, that is to say, that the Judge acted on wrong principles. The mere fact that the Judges of the Appellate Court might have taken a different view is not a sufficient ground for interference : *Daily Gazette Press, Ltd.* v. *Karachi Municipality* (6), *Watson* v. *Rodwell* (8), *Sheffield* v. *Sheffield* (9), *Mass* v. *Gaslight and Coke Co.* (10) and *Donald Compbell & Co.* v. *Pollak* (11) and many other cases.

If the Judge rightly appreciates the facts, and applies to those facts the true principles, that is a sound exercise of judicial discretion : White, C. J., in *Subba* v. *Haji Badahaw* (12). This well established rule frequently seems to be over-looked or disregarded by Appellate Courts in India, or Appellate Judges too readily come to the conclusion that a discretion has not been exercised judicially. Finally neither injunction nor attachment ought to be lightly granted. It would be a serious thing if persons in possession were restrained from making use of the property merely because a suit had been instituted about it. It is only where it is essential that property should be kept in its existing condition pending suit, that the Court should interfere: *Begg Dunlop & Co.* v. *Satish Chandra* (13). For all these reasons, I am of opinion that these appeals ought to be dismissed, but as my learned brother does not agree, the matter must be referred for hearing by a third Judge, under the provisions of cl. 36 of the Letters Patent.

Buckland, Actg. C. J.—I am not satisfied that the learned Subordinate Judge wrongly exercised his discretion ; and I agree with my learned brother Lort-Williams, J., that these appeals should be summarily dismissed under O. XLI, r. 11, Civil Procedure Code.

D. *Appeals dismissed.*

(8) (1876) 3 Ch. D 380; 45 L J Ch. 744; 35 L T 86; 24 W R 1009.
(9) (1875) 10 Ch. D 206; 44 L J Ch. 304; 23 W R 378.
(10) (1911) 2 K B 543; 80 L J K B 1313; 27 T L R 473; 55 S J 566; 104 L T 767.
(11) (1927) A C 732; 96 L J K B 1132; 137 L T 656; 71 S J 803; 43 T L R 787.
(12) 26 M 168.
(13) 54 Ind. Cas. 862; A I R 1920 Cal. 276; 46 C 1001; 23 C W N 677; 29 C L J 584.

ALLAHABAD HIGH COURT

Second Civil Appeal No. 855 of 1931
February 5, 1935
SULAIMAN, C. J. AND BENNET, J.

RAM CHANDAR—DEFENDANT—APPELLANT
versus
Tiwari HUB LAL—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS

Agra Tenancy Act (III of 1926), ss. 196, 197 (a) (b)—Planting of grove—Whether changes nature of occupancy holding—Grove, if rendered capable of being mortgaged—Sale in execution of mortgage decree—Legality of.

The planting of a grove may change the nature of the occupancy holding and render the grove capable of being mortgaged and of being sold in execution sale on a mortgage decree. Where trees have been standing for a very long time on a holding, when the *zemindar* gives implied permission that the tenant should plant a grove on a particular number of his occupancy holding, the *zemindar* must have consented to the alteration of the tenure of that number from an occupancy tenure to a grove tenure and that number becomes capable of mortgage and can be sold in execution of a mortgage decree. *Jalesar Sahu* v. *Raj Mangal* (3), *Man Singh* v. *Madho Singh* (4) and *Sultan Husain Khan* v. *Jwala* (5), relied on. *Daya Kishen* v. *Mohamad Wazir Ahmad* (1) and *Ram Dial* v. *Narpat Singh* (2), not followed.

S. C. A. from the decision of the Subordinate Judge of Etawah, dated March 11, 1931.

Mr. *A. P. Pandey*, for the Appellant.

Mr. *Shiva Prasad Sinha*, for the Respondent.

Judgment.—This is a second appeal by defendant No. 3 against concurring decrees of the two lower Courts which have granted the plaintiffs-mortgagees a decree for sale on a mortgage of June 21, 1913, executed by one Lalla, who is defendant No. 1. The mortgage purported to be in regard to two of the former numbers, plots Nos. 50 and 51. We are concerned in the present suit only with plot No. 50 which is the present No. 85. It is found by the lower Appellate Court that this number was one of seven numbers which formed the occupancy holding of defendant No. 1 and it was recorded as an occupancy holding in the papers of the settlement of 1872. The plot No. 50 is now occupied by 92 trees, of which 88 are mango trees standing in regular rows and the lower Appellate Court has found that this plot is, therefore, grove-land and was

a grove at the time of mortgage. The question which has been agitated in second appeal is that because the plot was originally part of an occupancy holding, therefore, the mortgage in 1913 was invalid and the mortgage cannot be enforced by a decree for sale. For the respondents the view is put forward that when the trees were planted on this plot, the plot changed its nature and ceased to be part of an occupancy holding and became grove-land and was, therefore, transferable by way of mortgage and can be sold in execution of a mortgage decree. There are a number of rulings to which reference has been made and learned Counsel for the appellant relies on the following rulings:—

Daya Kishen v. *Mohamad Wazir Ahmad* (1) a ruling of 1915: *Ram Dial* v. *Narpat Singh* (2), a ruling of 1909. In the earlier of these rulings of 1909, there was no consideration as to whether the existence of the grove land had changed the nature of the holding, but it was merely held that where an occupancy tenant purported to mortgage a grove which was his occupancy holding, the grove could not be sold in execution of a decree on the mortgage. In *Daya Kishen* v. *Mohamad Wazir Ahmad* (1), it was held that the planting of a grove by an occupancy tenant on his holding with the permission of the *zemindar* does not change the nature of the holding from an occupancy tenancy to grove-land and the tenant has not got the right to sell the trees so planted, nor can the trees be sold in execution of a decree against the tenant. This ruling undoubtedly is in favour of the appellant, and if this ruling had been followed by this Court, we consider that it would be a strong reason to allow this appeal. But the ruling has not been followed by this Court. In *Jalesar Sahu* v. *Raj Mangal* (3), two learned Judges of this Court held the contrary, and this was followed by a learned Single Judge in *Man Singh* v. *Madho Singh* (4), and also by another learned Single Judge in *Sultan Husain Khan* v. *Jwala* 78 Ind. Cas. 480 (5). These later rulings ranging from 1921 to 1924 lay down that the planting of grove may change the nature of the occupancy holding and render the grove capable of being mortgaged and of being sold in execution sale on a mortgage decree. That view of the character of the groves has been adopted by the legislature in framing the Agra Tenancy Act, Act III of 1926, and in ss. 196 and 197 (*a*) and (*b*) it is provided that where a tenant, such as an occupancy tenant, plants trees on a part of all of his holding so that the portion planted becomes a grove, that part becomes grove-land and is held under non-occupancy tenure and is transferable and the lease will expire when the land ceases to be grove-land. As the view of the later rulings has now been adopted by the legislature we do not think that we should go back to the earlier rulings of 1909 and 1915 on which learned Counsel relies, particularly as in one of these rulings, that of 1909, this aspect of the case was not considered as to whether the existence of the grove-land changed the nature of the holding. In the case before us the trees have been standing for a very long time on the holding and the lower Appellate Court finds that these trees range in age from 30 to 50 years. On this view of the case we consider that when the *zemindars* gave implied permission as the lower Appellate Court has held that the tenant should plant a grove on this particular number out of his occupancy holding, the *zemindars* must have consented to the alteration of the tenure of that number from an occupancy tenure to a grove tenure. Accordingly that number became capable of mortgage and could be sold in execution of a mortgage decree.

The decree, therefore, of the lower Appellate Court is correct and we dismiss this second appeal with costs.

N. *Appeal dismissed*

(1) 30 Ind. Cas. 565; 13 A L J 813.
(2) 9 Ind. Cas. 931; 33 A 136; 8 A L J 190.
(3) 63 Ind. Cas 437; 19 A L J 616; 43 A 605.
(4) 79 Ind. Cas. 599; 22 A L J 70; A I R 1924 All. 430; L R 5 A 31 Rev.
(5) 78 Ind. Cas. 480; A I R 1924 All. 831.

MADRAS HIGH COURT

Civil Appeal No. 296 of 1930
December 5, 1933

KRISHNAN PANDALAI AND CURGENVEN, JJ.

TIRUNARAYANA PILLAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

P. R. Y. MANICKAVACHAGAM CHETTIAR AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXII, rr. 11, 3, 4—Party impleaded both in appeal and memorandum of objections—Two separate applications, if necessary for bringing his legal representative on record—Breach of trust—Cause of action, if survives against legal representatives of deceased trustee—Trusts Act (II of 1882), ss. 19, 23, 37, 62—Breach of trust—Suit for, against trustee—Accounts—Nature of proof—Trustees not rendering accounts properly—Liability for interest — Accounts

to be taken must be common account and not on footing of wilful default—Trustee, if authorised to give possession of property before receiving purchase-money—Conditional release where trustees have purchased trust property — Power of Court to order.

Where a party is already impleaded both in the appeal and the memorandum of objections, there is no necessity of two separate applications to bring his legal representatives on the record. *Venkatachariar* v. *Ponnappa Aiyangar* (1), referred to.

The cause of action for breach of trust survives against the legal representatives of a deceased trustee and legal representatives of a deceased trustee can be proceeded against in respect of breaches of trust by the deceased. [p. 362, col. 2.]

Where in a suit for the breach of trust, the plea is that the trustees have not kept proper accounts or furnished them to the beneficiaries, it is not sufficient to show that the account was not regularly and correctly kept from day to day but was mostly written up for the purpose of being produced in Court. What is more important is the question whether the account as far as it goes can be shown to be untrue in the sense that the actual receipts are not entered or the expenditure entered is fictitious or excessive. Thus the faults in the mode of keeping accounts are to be distinguished from the faults involving dishonesty or misconduct.

An accounting party not rendering accounts properly but retaining trust moneys (such as the unpaid purchase moneys due by them on the several *benami* purchases) in their hands must pay interest even if the debt by its nature does not carry interest. *Pearse* v. *Green* (6), relied on.

In a suit for breach of trust the account to be taken must be a common account which will give the beneficiaries liberty to surcharge and falsify but not an account on the footing of wilful default. *Peary Mohan* v. *Manohar* (7), relied on.

Trustees are not authorised to give possession of property comprised in a trust for sale before receiving the purchase money. *Oliver* v. *Court* (3), relied on.

Under s. 62, *Trusts Act*, the Court has no power to make an order directing a conditional re-sale conditional on such sale producing a higher price than that for which the trustees themselves bought.

C. A. from the decree of the Sub-Judge, Mayavaram, in O. S. No. 17 of 1927.

The Advocate-General and Mr. *C. A. Seshagiri Sastri*, for the Appellant.

Messrs. *M. Subbaraya Ayyar K. S. Krishnasawami Iyengar*, *K. S. Rajagopala Iyengar* and *K. Ramanathan Chettiar*, for the Respondents.

Judgment.—The appellants are defendants Nos. 1 and 2 in the lower Court. On the death of appellant No. 1 (defendant No. 1) pending this appeal the other appellant applied to add his legal representative who opposed the application and stated that he did not wish to continue the appeal. The appellants being co-trustees and the presence of all trustees before the Court being necessary to determine the appeal by the surviving trustee and the questions arising between the trustees and the respondents *cestui que trust*, we ordered the addition of the legal representative of the deceased defendant No. 1 as a co-respondent.

The suit though originally brought by two plaintiffs was afterwards continued as a representative one on behalf of all creditors of defendants Nos. 5 to 8 for whose benefit they executed a trust deed Ex. 1 dated August 19, 1923, of all their properties mentioned in the schedules attached thereto constituting defendants Nos. 1 to 4 and another, since deceased trustees to sell and distribute the proceeds rateably among their creditors mentioned in Sch. A thereto. The plaintiffs (respondents Nos. 1 and 2) charged the trustees with, several breaches of trust passive and active such as not getting in all the properties, not getting the lands cultivated and houses let, not keeping proper accounts, buying the trust properties at auctions themselves in the name of *benamidars* while not paying the purchase money due on those purchases, underselling the trust properties, partiality in the distribution of dividends, etc., and prayed for removal of the trustees and appointment of new trustees, administration of the trust properties, accounts of the dealings by the trustees and recovery of what may be found due from the trustees and other appropriate reliefs.

Defendants Nos. 1 to 3 adopted the same defence denying the charges and asking that the suit should be dismissed. The lower Court raised four issues of which the most important was Issue No. 1 which raised the question whether the acts of malfeasance, misfeasance, and gross negligence complained of against defendants Nos. 1 to 4 are true, and if so, to what relief the plaintiffs are entitled. The learned Judge heard the evidence which was voluminous and delivered a careful and painstaking judgment considering the several charges and passed a preliminary decree in terms of para. 95 of his judgment removing the trustees from their office and proposing to appoint suitable persons in their stead at the time of the final decree. He also directed that the new trustees when appointed should take the steps mentioned in the decree and carry out the trust in luding *inter alia* the resale of certain trust properties which he found the trustees had themselves purchased *benami* in the names of others provided that the re-sale fetched a better

price than that at which the trustees themselves had purchased and ordered the trustees to pay four sums of money which he found that they had made themselves liable for by reason of their neglect of duty.

In this appeal by defendants Nos. 1 and 2 most of the conclusions arrived at by the learned Judge are not questioned by them but respondent No. 1 has raised, by way of memorandum of objection, questions involving the liability of the trustees which the learned Judge has either rejected or not expressed any opinion upon on account of the state of the contention before him. On account of the number of questions thus involved, the most convenient way of disposing of this appeal is to deal seriatim with the objections raised by both parties and then decide what in the circumstances at present existing is the most suitable form of decree to be passed. (Their Lordships then decided some of the objections on facts and proceeded.) The next objection raised by the appellants relates to the directions in the decree about the re-sale of the properties which the learned Judge found had been purchased by the trustees themselves in the names of their servants and dependents. This would appear to have been the subject which occupied the bulk of the trial in the lower Court. The trustees denied that they had purchased any properties for their own benefit. The plaintiffs alleged that defendant No. 1 purchased the properties specified in the judgment for a total price of Rs. 5,775 in the name of one Somasundara Mudaliar and that defendant No. 2 purchased the properties also specified for a total price of Rs. 34,080, through one Mahadeva Ayyar. It was also elicited that a firm of which defendant No. 4 was a partner had been allowed to buy a mill for Rs. 5,050, that defendants Nos. 1 and 2 had not brought into account even the above-said sums on the due dates, that defendant No. 2 was still in arrears to the extent of Rs. 8,939-11-6 and that 4th defendant's firm had paid nothing at all as a consequence of which a decree was obtained against the firm. It appeared also that defendant No. 4 was quite unable to pay any portion of the decree amount. He did not appear at the trial nor has he appeared here. The learned Judge dealt with the *benami* purchase of defendants Nos. 1 and 2 very elaborately in paras. 43 to 86. In para. 86 he records these findings that the purchases by defendants Nos. 1 and 2 of the properties mentioned therein were *benami* and for their own benefit and invalid. In para. 87 he deals with the purchase by defendant No. 4's firm but says that that was not included in the charges mentioned in the plaint. On these findings he directed in the preliminary decree that the properties bought by defendants Nos. 1 and 2 should be re-sold by the new trustees when appointed but that if the re-sale did not fetch the price at which the defendants had bought, the sales to the defendants should stand. He did not give any direction as to the price of the mill and, therefore, must be deemed to have held that the new trustees should be bound by the sale and that they should recover the amount of the decree obtained therefor from the judgment-debtors (defendant No. 4 and his partner).

The appellants' objection about this part of the decree is that by s. 62, Trusts Act, the Court had no power to make an order directing a conditional re-sale conditional on such sale producing a higher price than that for which the trustees themselves bought. This objection is valid and would have had to be given effect to and the decree amended in consonance with s. 62. But this objection has now become unnecessary to entertain because respondents Nos. 1 and 2 (plaintiffs) represent that owing to the change of conditions principally that fall in land values on account of the economic depression which has prevailed for the last three years, a re-sale of the properties is not necessary at all because the properties are not likely to fetch anything like the price for which the trustees themselves bought in 1925. They, therefore, say that they are willing that the trustees should keep their purchases upon the footing that they owed the price to the trust fund from the dates of those purchases and be made to account on that footing. The learned Advocate-General has not questioned the finding that the purchases were *benami* in favour of defendants Nos. 1 and 2 and that they were grave breaches of trust. He has also properly admitted that on that finding if those purchases are upheld as the plaintiffs are willing that they should be upheld, the trustees would be liable to account for the purchase money from the due dates and can be charged with interest for the unpaid sums during the time they failed or delayed to bring it to account. He, however, asks that in calculating the interest on the unpaid purchase money credit should be

given according to the resolution of the trustees and the conditions of sale for dividends payable to the purchasers as creditors. This was not questioned by the plaintiffs and suitable directions will have to be given in the decree by omitting the provision for the re-sale of the properties and substituting therefor an inquiry into the purchase-money payable by defendants Nos. 1 and 2 with interest on the above footing.

Now we come to the objections raised by the respondents. But before dealing with them we may refer to two objections raised by the added respondent, the legal representative of the deceased defendant No. 1. His first objection is that though he has been added as a respondent on the application of appellant No. 2 (defendant No. 2) that is effective only for the purpose of the appeal and that as respondents Nos. 1 and 2 have not made a separate application to implead the legal representatives of the deceased defendant No. 1 in the memorandum of objections he cannot be deemed to be a party to the memorandum of objections so as to be bound by adverse finding against defendant No. 1, if any, arrived at therein. This, in our opinion, is an incorrect view. Defendant No. 1 was originally impleaded in the memorandum of objections.

It is true that on his death pending the appeal, there was no separate application to bring his legal representatives on the memorandum of objections apart from the application by the co-appellant himself to bring on the record of the appeal. This, in our opinion, was sufficient to implead the legal representatives of the deceased defendant No. 1 for the purposes both of the appeal in which he was originally a party (appellant) and of the memorandum of objections to which also he was originally made a party. For this purpose the memorandum of objections and the appeal itself cannot be regarded as two separate proceedings requiring that the same party should be impleaded by two separate applications for the same purpose. Order XLI, r. 22 (4), Civil Procedure Code, was relied upon as showing that an appeal and a memorandum of objections have now been regarded as separate proceedings as it is now the law that though the original appeal is withdrawn or dismissed for default, the memorandum of objections has still to be proceeded with. That provision was inserted in the Code of 1908 to alter the law which existed before, that when for any reason such as withdrawal or dismissed for default, the appeal ceased to be pending, the memorandum of objections fell with it.

But this provision has not the effect of making the two distinct proceedings for the purpose now contended that where a party is already impleaded both in the appeal and the memorandum of objections, two separate applications are necessary to bring his legal representatives on the record. No authority was cited for this contention and the only one which was referred to, *Venkatachariar* v. *Ponnappa Aiyengar* (1), is rather against than in favour of the contention. We disallow it. Another contention of the added respondent was he cannot be impleaded on account of breach of trust which may be established against the deceased defendant No. 1. According to the learned Advocate the cause of action for breach of trust does not survive against the legal representatives of a deceased trustee but dies with him. This is quite incorrect as the legal representatives of a deceased trustee can certainly be proceeded against in respect of breaches of trust by the deceased. The manner in which and the extent to which they will be liable are different matters but ordinarily there can be no doubt that the assets of the deceased in their hands are liable for the breaches of trust: Lewin, Edn. 13, p. 949, *Hardwicke* v. *Vernon* (2).

Respondents Nos. 1 and 2 first object that the trustees should have been made liable for taking no steps to get in the outstandings due to the business carried on by defendants Nos. 5 to 8 at Colombo. The trust deed (Ex. 1) does contain a general clause at the end vesting in the trustees for the benefit of the creditors all other properties of the debtors besides those enumerated in the schedules. But the schedules which appear to have been carefully drawn up do not mention any outstandings at Colombo as due to the debtors. But if it were shown that the trustees had reasonable grounds to know that there were any such outstandings, they would still be liable to exercise reasonable diligence to realise them. As a matter of fact there is no evidence of a tangible character to show that there were any outstandings worth pursuing at Colombo. The trustees themselves requir-

(1) 45 Ind. Cas. 959; A I R 1919 Mad. 1026; 7 L W 614.

(2) (1798) 4 Ves. 411; 31 E R 209; 4 R R 244.

ed the debtors to produce all their books including the Colombo accounts, but it appears from the evidence of D. W. No. 6, who was looking after the management of the trust under the trustees and of D. W. No. 27 (defendant No. 2), that the Colombo accounts were not produced. There is nothing, however, to show that the trustees received any later information of any outstandings at Colombo nor is there in this case, in which 44 witnesses were in all examined, anything to show that there was any such outstanding. In the absence of any such proof the only conclusion possible is that the plaintiffs have failed to establish any negligence or breach of trust against the trustees in this matter.

The second objection relates to the sale of the Vijiyapuram mill. The facts about this property are that after the fruitless attempts to sell the properties referred to already, the mill which had cost the debtor's family Rs. 19,500 to erect was finally sold for Rs. 5,050 at an auction held on December 5, 1925, to one Chidambara Thevan. It is now admitted that this Chidambara Thevan was an *alias* for the firm of defendant No. 4 and his partner. This defendant No. 4 who was one of the trustees was also the person who was put in charge of the mill pending the sale and also of some properties belonging to the trust in that village. Thus the price was really payable by defendant No. 4 and his partner. Quite apart from the gross impropriety of allowing a trustee himself to buy trust property of which all these trustees, *viz.*, defendants Nos. 1, 2 and 4 seem to have been guilty, there was in this case the additional breach of trust of not insisting upon the payment of the price; for it is now admitted that no portion of this price has ever been paid and defendant No. 4 also did not account to his co-trustees for the income of the trust properties in his charge. The mill stood on some leasehold property. The lease expired. Defendant No. 4's firm re-sold the mill to third parties who removed the materials of the mill from the premises. Thus the trust has lost both the trust property and the price therefor as a result of the action of the trustees. Therefore they had to institute a suit (O. S. No. 14 of 1929) for the recovery of the price and the income from the village with interest thereon less the dividend due to the firm as creditors.

They obtained a decree for Rs. 5,453-1-0 against the firm, *i. e.*, defendant No. 4 and one Khadir Ibrahim Rowther. Defendant No. 4 is described as quite unable to pay anything. Whether anything will be recovered from the other defendant cannot now be stated. These facts which have not in any way been controverted, furnish an instance of very grave breach of trust on the part of these trustees. It was bad enough for the trustees to buy trust properties for themselves but, to do so without even paying the price for which they bought was scarcely honest. Trustees are not authorised to give possession of property comprised in a trust for sale before receiving the purchase money: Lewin, Edn. 13, p. 1072; Godefroi, Edn. 5, p. 321 citing *Oliver* v. *Court* (3). The learned Judge's only ground for not visiting the trustees with the consequence of this act was that the plaintiffs did not make out a specific charge in the plaint. But as the evidence and the judgment show, the facts which were elicited at the trial were incapable of dispute and it is, therefore, necessary to deal with the point in a suit brought for breach of trust. For the reasons given already for the purchase of defendants Nos. 1 and 2 and for the additional reason that the mill can no longer be traced, the only course left is to make the trustees liable for the money due to the trust which we may take as fairly represented by the decree amount in O. S. No. 14 of 1929 with interest thereon as provided therein. The trustees who obtained that decree may if they pay their money to the trust according to the directions in the decree execute it for their personal benefit and recover what they can from the judgment-debtors.

The third objection raised by the respondents is that the trustees have not maintained proper accounts or furnished them to plaintiffs on demand and that on the facts proved in the case an account should be ordered against them on the footing of wilful default. The learned Judge deals with this question of the accounts kept by the trustees in paras. 34 and 42. He found that the only account produced by the trustees was Ex. 12 and that it was not regularly and correctly kept from day to day but was mostly written up for the purpose of being produced in Court. In aid of this conclusion he referred to the fact that it is in the handwriting of Narayanasawami Ayyar who was not employed by the trustees before August 1925, that pp. 1 to 58

(3) (1818) 8 Price 166.

appear to have been written at the same time and that the book contains entries of payments not on the dates they should occur but on subsequent dates and he also points out other inaccuracies. With much of this criticism it is impossible not to agree, but we are not prepared to say that Ex. 12 is a fabrication which does not represent as far as it goes a *bona fide* presentation of the income and expenditure of the trust funds. It must be remembered that the trustees themselves are not accountants. They are *mirasdars* and agriculturists. The men employed by them, *viz.*, Chandrasekharam Pillai and Pakkiria, were apparently not capable of maintaining accounts in proper form. Exhibit 12 which is written by D. W. No. 6, Narayanaswami Ayyar, is also in this sense not above criticism as an account book. The more important question, however, is whether Ex. 12 as far as it goes can be shown to be untrue in the sense that the actual receipts are not entered or the expenditure entered is fictitious or excessive. After the discussion which this matter has undergone in the lower Court and before us, except as to the matters in which the trustees can be made liable for breach of trust, our attention has not been drawn to any instance in which Ex. 12 has been shown to be untrue by omitting to enter actual receipts or by entering untrue disbursement.

The faults of Ex. 12 are really due to the faults in the mode of account keeping. They are not faults involving dishonesty or misconduct. We do not say that the trustees were justified in not heeding the notice Ex. CC, dated December 6, 1926, given to them before the suit by the plaintiffs for the disclosure of their accounts and if they had done so many of their difficulties in this case would have been minimised. Therefore, if for no other reason they have been personally visited with the costs by the lower Court, an order fully justified by numerous authorities, *Springett* v. *Dashwood* (4), *Wroe* v. *Seed* (5). And if for no other reason than that an accounting party not rendering accounts properly but retaining trust moneys (such as the unpaid purchase moneys due by them on the several *benami* purchases) in their hands must pay interest even if the debt by its nature does not carry interest, these trustees must pay interest: *Pearse* v. *Green* (6). But we are unable to agree with the learned Judge when he says that Ex. 12 is not a true account of the trust estate. We do not mean that it is not necessary to take an account for that has not been done. What we mean is that the account to be taken must be a common account which will give the plaintiffs liberty to surcharge and falsify: see *Peary Mohan* v. *Manohar* (7), citing *In re Stevens*; *Cooke* v. *Steens* (8), but not an account on the footing of wilful default. Our reason for refusing to order an account on the ground of wilful default for the period covered by Ex. 12 is not that instances of wilful default have not been proved which might have justified such an order, but that the plaintiffs having ample opportunity of scrutinising Ex. 12 have made all their charges thereon to the lower Court by I. A. No. 300 of 1929 and we have considered them and incorporated our conclusions on such of them as are worthy of notice in the direction we propose to give. It will only lead to further acrimonious and protracted disputes to leave any such matters open.

The above, however, relates only to the period to which the account Ex. 12 relates, *i. e.*, up to the end of 1928. Soon after this appeal was filed, a stay order was obtained from this Court staying practically the whole of the further proceedings contemplated by the preliminary decree passed by the learned Judge. All that has been done in pursuance of that decree is, we are informed, that Rs. 7,560-10-0 mentioned therein has been deposited by the trustees in Court and has been received by the plaintiffs and other creditors in payment of what remained due out of the 1½ annas in the rupee dividend declared by the trustees. In consequence of this the administration of the trust and maintenance of accounts have remained in the hands of the trustees up to date. The accounts subsequent to January 1, 1929, have not been produced into Court at all and this makes it necessary that the accounts for that period also should be taken. The evidence in the case naturally does not refer to this period nor to any matters arising therefrom. We have considered the

(4) (1860) 2 Giff 521; 66 E R 218; 7 Jur. (N. S.) 93; 3 L T 512; 128 R R 212.

(5) (1863) 4 Giff. 425; 66 E R 773; 9 Jur. (N. S.) 1122; 9 L T 254; 141 R R 266.

(6) (1819) 1 Jac. Walk 135; 37 E R 327; 20 R R 258

(7) 74 Ind. Cas. 373; A I R 1924 Cal. 160; 27 C W N 989; 38 C L J 255.

(8) (1898) 1 Ch. 162; 67 L J Ch. 118; 14 T L R 111; 46 W R 177; 77 L T 508.

basis on which this account should be ordered and have come to the conclusion that in view of what has been disclosed as to the period before December 31, 1928, in the first instance the account for this period also should be a common account with liberty to the plaintiffs to allege any further specific acts of wilful default within the subsequent period which may be disclosed from the account of that period to be hereafter produced.

To explain our meaning, we would refer to the distinction between the two ways in which an account on the footing of wilful default may be ordered: see *Peary Mohan* v. *Manohar* (7). We do not think that the evidence justifies an order for a general account on the footing of wilful default, but we direct that if on the accounts to be hereafter produced which the plaintiffs have had no opportunity to scrutinise, any particular transactions should be disclosed which are open to the charge of wilful default, the plaintiffs should have a chance of having those particular charges investigated. Even where the period from which such charges arise is such that they should be put on the pleadings and unless so put, the Court will not inquire into them at all, the mere fact that they are not on the pleadings will not prevent such charges from being raised if in the course of the investigation (of an account in common form) facts are ascertained which render it reasonable to believe, there has been wilful default and in such a case the Court will assist parties complaining of misconduct by trustees: Per Denman, J. in *Smith* v. *Armitage* (9) at p. 729*. Where, however, the period of the account to be investigated is after the suit and the charges could not therefore be put into the pleadings and instances of wilful defaults have been proved as to the period for which accounts are produced to give liberty to the plaintiffs to allege particular instances when they are discovered in the actual account taking is the only possible way of not shutting them out altogether without a hearing. The case cited by the learned Advocate-General *In re Wrightson*; *Wrightson* v. *Cooke* (10), was one of charging further breaches of trust and the distinction is there pointed out at pp. 793 and 800† between charging fresh breaches of trust not alleged in the pleadings for obtaining relief against the trustees on that ground or for removing them and the rule enabling further instances of wilful default to be proved on an account ordered on that basis. In English practice the former is not permissible but the latter is.

The fourth objection raised by the respondents relates to the interest on the unpaid purchase money due by defendant No. 2 on his purchase through Mahadeva Ayyar, amounting according to the statement furnished to us to Rs. 8,939-11-6, and on the payments made by defendants Nos. 1 and 2 long after the purchase money was due. We have already referred to this subject and propose to make suitable directions in the decree charging defendants Nos. 1 and 2 with interest for non-payment or late payment of the purchase moneys.

We have now dealt with the specific objections raised by the appellants and the respondents. As matters now stand, the surviving trustees do not object to their removal and it is not necessary to appoint new trustees for carrying out what remains of the trust as we are told that only one property (a small house in Thirumalavasal) remains to be sold. We have decided to get this done by an officer of Court and for the remainder it consists mostly of taking accounts and winding up this trust for sale which has already been pending too long. As a result, in modification of the decree of the lower Court, we declare as follows: (Their Lordships concluded with directions for drawing up the decree).

A.-D. *Decree modified.*

(9) (1884) 24 Ch. D. 727; 52 L J Ch. 711; 32 W R 88; 49 L T 236.

(10) (1908) 1 Ch. 789; 77 L J Ch. 422; 98 L T 799.

*Page of (1884) 24 Ch. D.—[*Ed.*]

†Pages of (1908) 1 Ch.—[*Ed.*]

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1161 of 1932

February 1, 1935

GANGA NATH, J.

PADUMAN DAS—PLAINTIFF—APPELLANT

versus

Shrimati PARBATI AND ANOTHER—DEFENDANTS—RESPONDENTS

Customary Right—Right of privacy—Suit to remove construction affecting right of privacy—Customary right of privacy must be proved to have existed—Party wall—Right of co-owner of party wall—Interference with reasonable use of wall—Co-owners—Minor—Implied permission to sue by guardian—Absence of formal order granting leave to sue—Whether fatal to suit.

In a suit for removal of constructions affecting the plaintiff's right of privacy, it is necessary for the

plaintiff to allege that a customary right of privacy existed in the particular neighbourhood in which the plaintiff was living or that he individually or as a member of a particular class was entitled to take advantage of the customary right of privacy. *Bhagwan Das* v. *Zamurrad Husain* (1), referred to

Co-ownership implies that each co-owner should have a reasonable user of the thing owned in common and so long as each co-owner uses the wall reasonably without interfering with the enjoyment of that wall by the other party, or without doing anything which would weaken, damage or increase or diminish the wall enjoyed in common, he is entitled to do what he likes. A co-owner of a party wall has no right to do any act which may have the effect of excluding the other co-owner from the wall or interfere with his reasonable use of the wall.

In a suit by the guardian on behalf of the minor where implied permission of the Court to sue can be presumed, the absence of a formal order granting leave to sue is not necessarily fatal to the suit. *Sridhar Rao* v. *Ram Lal* (3), referred to.

S. C. A. from the decision of the Subordinate Judge of Benares, dated August 15, 1932

Mr. *K. Varma* for the Appellant.

Mr. *Shiva Prasad Sinha*, for the Respondents.

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by him against the defendants-respondents for a declaration that the western wall of house No. 24/70 situate in *Mohalla* Gopal Das Sahu, Benares City, appertains to house No. 24/70 which belongs to the plaintiff and defendant No. 2 and that it was not the eastern wall of house No. 24/68 which belongs to defendant-respondent No. 1, and that the plaintiff was not bound by decree No. 521 of 1925 in the case of *Ganesh Das* v. *Srimati Parbati*, defendant. The plaintiff further prayed for the demolition and removal of certain constructions alleged to have been made in the intervening wall in dispute as they interfered with the privacy of the plaintiff. The defendants contended that the suit was not maintainable under O. XXXIV, r. 2, Civil Procedure Code, that the wall in dispute was a joint wall of the parties and that the suit was barred by s. 11, Civil Procedure Code. Both the Courts below have found that the suit was barred by s. 11, Civil Procedure Code. The plaintiff Paduman Das is a minor. The former suit was brought by his brother Ganesh Das on his own behalf and that of plaintiff in respect of the same wall. The interest of Ganesh Das was not adverse to that of plaintiff, nor was plaintiff prejudiced in any way. Both the Courts below have found that the plaintiff is bound by the decree in the former suit.

As a matter of fact and quite independently of the former decision both the Courts below have found that the wall in dispute belongs to the parties. Both the Courts below dismissed the plaintiff's suit. In this appeal the first point urged is that the plaintiff's suit as regards the removal of the construction which affected his right of privacy should have been decreed. The Courts below have found that the plaintiff's privacy is not affected by the constructions in dispute. There is another fatal defect to this part of the plaintiff's case. The plaintiff did not come into Court on the basis of any customary right of privacy. As held in *Bhagwan Das* v. *Zamurrad Husain* (1), it was necessary for the plaintiff to have alleged that a customary right of privacy existed in the particular neighbourhood in which the plaintiff was living or that he individually or as a member of a particular class was entitled to take advantage of the customary right of privacy. As against this, both the Courts below have recorded a finding that on all sides there are houses which overlooked the plaintiff's house and interfered with the plaintiff's right of privacy. The plaintiff's suit, therefore, has been rightly dismissed as regards his relief concerning his right of privacy. The other point urged by the learned Counsel for the appellant was that the defendants have no right to rest their beams on any portion of the wall. It appears from the judgment of the lower Appellate Court that the respondents have placed their beams about 6 inches inside the wall towards their side and have covered the wall with plaster. The lower Court has observed:

"Some portion of the beams has been covered by the plaster, and as such, there is practically no support of it nor any interference has been caused nor she has done any act as to make the wall exclusively her own."

Co-ownership implies that each co-owner should have a reasonable user of the thing owned in common and so long as each co-owner uses the wall reasonably without interfering with the enjoyment of that wall by the other party, or without doing anything which would weaken, damage or increase or diminish the wall enjoyed in common, he is entitled to do what he likes. A co-owner of a party wall has no right to do any act which may have the effect of excluding the other co-owner from the wall or interfere with his reasonable use of the wall. Nothing has been done by the respondents which might tend to interfere with the reasonable

(1) 119 Ind. Cas. 833; (1929) A L J 1028; A I R 1929 All. 676; Ind. Rul. (1929) All. 1073; 51 A 986.

use of the appellant. In *Baij Nath* v. *Janki Prasad*, 127 Ind. Cas. 585 (2), an order refusing to restrain a co-owner of a party wall from opening an almirah in the wall and from placing some beams of his side of the wall was upheld. The lower Courts, therefore, rightly refused to grant an injunction to the appellant. A preliminary objection was raised by the learned Counsel for the respondents that inasmuch as the plaintiff had a certificated guardian, this suit which has been brought by the minor under the guardianship of Ranchor Das who is not a certificated guardian is not maintainable. Both the Courts below have held that implied permission of the Court would be presumed and I think rightly because the suit has not been dismissed on the ground of want of permission. The absence of a formal order granting leave to sue is not necessarily fatal to the suit: *vide Sridhar Rao* v. *Ram Lal* (3). There is no force in the appeal. It is, therefore, ordered that the appeal be dismissed with costs and the decree of the lower Court confirmed.

Permission to file a Letters Patent Appeal is refused.

N. *Appeal dismissed.*

(2) 127 Ind. Cas. 585; A I R 1930 All. 318; Ind. Rul. (1930) All. 937.

(3) 1 Ind. Cas. 555; 31 A 7; A W N 1908, 249; 5 A L J 626.

PATNA HIGH COURT

Appeal from Appellate Decree No. 976 of 1933

February 13, 1935

JAMES, J.

RAMSUNDER TEWARI AND ANOTHER —DEFENDANTS—APPELLANTS

versus

DULHIN BATASO KUER—PLAINTIFF —RESPONDENT

Transfer of Property Act (IV of 1882), s 116—Tenant holding over after expiry of lease—Institution of suit for rent—Effect—Tenancy from year to year—Whether can be presumed—Bengal Tenancy Act (VIII of 1885), s. 51—Rent to be paid by such tenant.

If a tenant holds over after the expiry of his lease he ordinarily becomes a trespasser, unless the landlord in some manner signifies his intention of recognizing the continuance of the tenancy. Such intention will be sufficiently indicated by institution of a suit for rent. When the tenant is found to be continuing in possession he will be presumed to be a tenant from year to year, in the absence of any evidence providing that he holds on a different tenure.

As for the amount of rent payable, in the absence of evidence of a special contract varying the amount to be paid, he provisions of s. 51, Bengal Tenancy Act will apply, since those provisions apply to all agricultural tenancies: and from year to year the rent which was payable in the previous year will be presumed to be the rent payable for the holding. In the absence of proof of any contrary arrangement he must be deemed to be governed by the same conditions as governed his tenancy while he was holding under the *kabuliyat*.

A. from a decision of the District Judge of Shahabad, dated June 9, 1933, reversing that of the Munsif, Sasaram, dated November 23, 1932.

Mr. *Harinandan Singh*, for the Appellants.

Mr. *D. N. Varma*, for the Respondent.

Judgment—This second appeal arises out of a suit for arrears of rent instituted in the following circumstances. The defendant, who is a proprietor in his estate gave a usufructuary mortgage of *bakasht* land to the plaintiff who then leased the land to the defendant for a term of three years, reserving an annual rent of 26 maunds $3\frac{1}{2}$ seers of paddy. The lease expired in 1333 *Fasli* but the plaintiff stated that after the expiry of the lease it was being renewed annually and that the defendant continued to hold the land on the same terms as before. The defendant denied that he had continued to be the tenant of the plaintiff after the expiry of the term of the *kabuliyat* and the Munsif, finding that the renewal of the lease had not been proved, dismissed the suit. His decision was reversed on appeal by the District Judge who found that the defendant was still in possession of the land, and came to the conclusion that the defendant had voluntarily held over during the years in the suit with the consent of the plaintiff. Therefore, applying the principles of s. 116 of the Transfer of Property Act, he found that the defendant was liable to pay rent to the plaintiff at the rate specified in the *kabuliat*.

In coming to his conclusion the learned District Judge laid some stress on the entries in a *khasra* prepared by the Irrigation Department wherein were entered the names of persons who had taken a long lease of canal water. The defendant's name appears in this *khasra* of 1335 as indicating that he is the lessee under the Irrigation Department. The learned Advocate for the appellant argues that weight should not have been given to this *khasra* because it may have been merely a continuation of a previous *khasra* in which the name of the original lessee was continued as a matter of course. But the learned District Judge, discussing this *khasra*, has quoted the evidence of the plaintiff's

husband, which he accepts, wherein this witness said that the *khasra* in question was prepared in 1335 *Fasli* for a seven years' lease in a certain man's name who had stood in that *khasra*, although he had transferred this holding in 1336, because the lease had originally been made with him in 1335. The learned District Judge accordingly considered that the entry of the defendant's name as having taken the lease in 1335 implied that he had not abandoned the cultivation of the land on the expiry of his *kabuliyat* in 1333. The learned District Judge has remarked that the presumption of correctness attaching to the entries has not been rebutted but apparently all that he means by this is, that this evidence, which is admissible under s. 35 of the Indian Evidence Act, does *prima facie* show that the defendant was cultivating the land in 1335 and that the defendant has not been able to rebut this evidence by proving that he has not been cultivating. The learned District Judge going on to discuss the case in general remarks that the defendant's story that he has quarrelled with the plaintiff over the question of premium payable on the plaintiff's entry on other land in the estate which he has puchased, rather supports the case of the plaintiff than that of the defendant, accounting for the fact that the defendant was contesting this suit; and he comes to the conclusion that the defendant had voluntarily held over in the years in suit with the tacit consent of the plaintiff. It would have been better if the learned District Judge had discussed the oral evidence in more detail, but I do not consider that it is possible to say that he has arrived at this conclusion on the point of fact without considering the evidence in the case.

It is argued that if the provisions of s. 116 of the Transfer of Property Act are to be held to apply to the occupation of this land by the defendant, it must be proved that the defendant, holding over in this fashion, has agreed to pay the rent which he paid, and that the landlord has expressly consented to this holding over. If a tenant holds over after the expiry of his lease he ordinarily becomes a trespasser, unless the landlord in some manner signifies his intention of recognizing the continuance of the tenancy, which in the present instance is sufficiently indicated by the fact that the suit for rent has been instituted. If the plaintiff had sued the defendant for damages on account of his wrong occupation of his land, it would have been necessary, if the defendant wished to deny that he was a trespasser, that he should indicate that the landlord had in some way or other signified his intention of the continuance of the tenancy but that question does not arise when by the very form of his plaint the landlord recognizes the tenancy.

It may possibly be doubted whether the provisions of s. 116 of the Transfer of Property Act apply as Statute Law to govern the relationsip of the parties in this case in view of the provisions of s. 117 of the Act, which excludes leases for agricultural purposes from the operation of Chap. V. The same doubt might apply to the application of s. 106 of the Act. But the rule laid down in s. 106 of the Transfer of Property Act did not become part of the law of India for the first time by the enactment of the Transfer of Property Act. It was a rule which had been observed before the passing of this Act in the consideration of agricultural leases not governed by any special law. Therefore, when the defendant is found to be continuing in possession he will be presumed to be a tenant from year to year, in the absence of any evidence providing that he holds on a different tenure.

On the question of what would in such cases be deemed to be the amount of rent payable, in the absence of evidence of a special contract varying the amount to be paid, there can be no doubt that the provisions of s. 51 of the Bengal Tenancy Act will apply since those provisions apply to all agricultural tenancies; and from year to year the rent which was payable in the previous year will be presumed to be the rent payable for the holding. It is possible that the tenant might here be entitled to the benefit of the provisions of s. 44-A of the Bengal Tenancy Act, though I doubt whether he could be held to be a *raiyat* of his own *bakasht* land, merely because he has created a temporary intermediate tenure. However that may be, when we find that the defendant is holding over, it cannot be doubted that, in the absence of proof of any contrary arrangement, he must be deemed to be governed by the same conditions as governed his tenancy while he was holding under the *kabuliyat*. So that whether the learned District Judge has erred or not in regarding the provisions of s. 116 of the Transfer of Property Act as applicable, the conclusion at which the Court is to arrive in a suit of this kind for arrears of rent instituted by the landlord, will be the conclusion at which the learned District Judge has actually arrived; and in

legal ground has been made for interfering with his decision.

The learned Advocate takes the objection that, although the plaintiff landlord treats his claim as a claim for rent, he has claimed interest at a rate which would not ordinarily be allowed in a rent suit. But this question has not been discussed by the learned District Judge, whose judgment omits any mention of interest, which is also omitted from the decree. The plaintiff has preferred no cross-objection on this point; and the decree must stand as it is. The plaintiff might probably have been able to claim interest as legally due by virtue of the provisions of s. 67 of the Bengal Tenancy Act; but as he has omitted to make the claim in the appeal, there is no reason for making any alteration in the decree.

The appeal is, therefore, dismissed with costs.

N. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Criminal Appeal No. 162 of 1934

November 26, 1934

HARRIS AND RACHHPAL SINGH, JJ.

BACHCHA BABU AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT

Penal Code (Act XLV of 1860), s. 120-B—Charge of criminal conspiracy — Essentials to be proved—Evidence of association—When of value for prosecution —Approver—Corroboration, necessity of—Nature of corroboration required, in conspiracy cases—Evidence Act (I of 1872), s. 114, illus. (b), s. 45—Discrepancy between evidence of approver and of witnesses—Value of evidence — Criminal trial—Accused telling lie—Conviction, if can be based on it—Whether can be used to corroborate approver — Expert evidence—Document typed on same machine as another document—Admissibility of evidence.

To establish a charge of criminal conspiracy, the prosecution must prove an agreement between two or more persons to do or cause to be done some illegal act or some act which is not illegal by illegal means provided that where the agreement is other than one to commit an offence, the prosecution must go further and prove that some act besides the agreement was done by one or more of the parties in pursuance of it. Where the agreement, therefore, is one to do or cause to be done an act which is itself an offence, no overt act, *i. e.*, any act done by one of the parties to the agreement in pursuance of it, need be proved; the crime of criminal conspiracy is established once such an agreement is proved. Consequently where the conspiracy alleged is one to commit a series of serious crimes mere proof of such an agreement between the appellants is sufficient to sustain a conviction. Proof of overt acts committed by the accused or any of them is not strictly necessary on this charge, but proof that the accused or some of them were concerned in the overt acts alleged would go far to establish that the agreement alleged was in fact made between them. Though proof of overt acts is not necessary in a case yet it may well be that if such acts are proved, the Court will be bound to infer that they are not unconnected and isolated acts, but acts which must have been committed in pursuance of an agreement made between the accused [p. 373, col. 1.]

Evidence of association to be of any value should suggest something suspicious in such association and no inference one way or another can be drawn from a mere casual meeting or meetings or conversation between the parties in a public place or park where mere acquaintances frequently meet and talk. [p 378, col. 2.]

The evidence of an approver has to be corroborated by some independent evidence. This rule is particularly necessary in cases of conspiracy to commit crimes where the crime of criminal conspiracy is established the moment an agreement between the accused persons to commit such crimes is proved. Evidence of a mere agreement can easily be concocted or manufactured, hence the need of independent testimony by way of corroboration is manifestly essential. To amount to corroboration the evidence must implicate the accused, *i. e.*, it must confirm in some material particular not only the accomplice or approver's evidence that the crime has been committed, but also that the accused committed it. The corroborative evidence need not shew positively that the accused committed the crime; it is sufficient if it is merely circumstantial connecting him with the crime. It must be evidence which shews or tends to shew that the approver's evidence implicating the accused is true; it must be independent testimony on a material particular or material particulars demonstrating to the Court the truth of the approver's evidence implicating the accused. Evidence to amount to corroboration must be independent testimony and therefore the evidence of one approver cannot amount to corroboration of the evidence of another. *Rex* v. *Baskerville* (1), relied on. [p. 373, col. 2.]

Where there is a serious discrepancy between the evidence of the approver and that of witnesses, it makes it impossible for the Court to act upon such evidence either by itself or as corroboration of the approver's testimony.

The fact that an accused person tells a lie is not sufficient to convict him by itself, nor can it be corroboration of the approvers' statement. [p. 380, col. 1]

The opinion of an expert that one document has been type-written on the same machine as another document is not admissible under s. 45, Evidence Act. The Court may ask the witness points in favour of the view whether the two documents have or have not been type-written on the same machine, but must come to its own conclusion and not treat such assistance as an expert opinion, a relevant fact in itself. *Jhabwala* v. *Emperor* (2), relied on. [p. 375, col. 1.]

Cr. A. from an order of the Sessions Judge, Agra, dated February 19, 1934.

Dr. *K. N. Katju*, Messrs. *Hazari Lal Kapoor*, *S. B. L. Gaur*, *G. S. Pathak*, *Nanak Chand*, *K. D. Malaviya*, *Din Dayal*, *B. S. Darbari*, *Prabhat Kumar* and *S. N. Misra*, for the Appellants.

The Government Advocate, for the Crown.

Judgment.—In this case which has been referred to as the Agra Conspiracy Case all six appellants were charged with conspiracy, the charge being that between

February 1931 and August 1932 at Agra, they jointly and severally agreed and conspired together with one another and with Dau Dayal, who is absconding, and also with Uma Shankar, Ram Nath and Vishwa Nath, approvers, and with other persons known or unknown and not before the Court, to do or cause to be done jointly and severally illegal acts, the illegal acts being to collect and possess firearms and ammunition and explosive substances, to commit attempts to murder, to commit dacoities and extortion which are offences under the Arms Act, the Explosive Substances Act, and the Penal Code. In the charge it was further alleged that in pursuance of the aforesaid conspiracy: (*a*) a revolver and an automatic pistol were stolen on February 19, 1931, and July 13, 1931, respectively; (*b*) a dacoity was committed in the godown of Manohar Bhagat Dhyan Ram on March 14, 1932, in which firearms were used and a man was hurt: (*c*) another dacoity was committed on July 13, 1932, in the godown of one Jamna Das in which a man was killed; (*d*) an attempt was made on the life of S. O. I., Chatta, on April 1, 1932, by throwing a bomb behind his quarters; and (*e*) another attempt was made on the life of Anandi Lal on April 6, 1932, by placing a bomb at his house in Agra for the purposes of extorting money from him.

The appellant Bachcha Babu *alias* Kamta Prasad (hereinafter referred to as Bachcha Babu) was further charged: (1) That he abetted the commission of a dacoity before referred to at the house of Manohar Bhagat Dhyan Ram on March 14, 1932, in which one Gulzari Khan received a bullet injury, the abetment being supplying arms to the dacoits which were used in the dacoity and subsequently recovered from his house contrary to s. 395-397, Penal Code, read with s. 109, Penal Code. (2) That he abetted the commission of a dacoity at the godown of Jamna Das on July 13, 1932, in which one Durga was killed by a revolver bullet, the abetment being supplying arms to the dacoits which were used in the dacoity and which were later recovered from his house contrary to s. 395-396, Penal Code, read with s. 109, Penal Code. (3) That on August 5, 1932, he was found in possession of a large number of weapons and arms which were recovered from a secret place in his house contrary to s. 20, Arms Act. (4) That on August 5, 1932, he was found in possession of two bottles containing picric acid and ammonia which are ingredients of a highly explosive nature under circumstances which raised a reasonable suspicion that they were not being kept for a lawful object contrary to s. 5, Explosive Substances Act. (5) That on August 5, 1932, he was found in possession of a pistol and a revolver which weapons had been stolen, well knowing that the same had been stolen or having reasonable grounds to believe that the same had been stolen contrary to s. 411, Penal Code.

The appellant Umrao Singh *alias* Nepali (hereinafter referred to as Nepali) was further charged: (1) That on April 1, 1932, at the Police Station, Chatta, in Agra City, he threw a bomb in a compound behind the said Police Station with intent to cause an explosion calculated to cause danger to human life or serious injury to property contrary to s. 4 (*a*), Explosive Substances Act. (2) That on July 13, 1932, he committed a dacoity in the godown of Jamna Das in which one Durga was killed by a shot fired by him.

The appellant, Rishi Nath was further charged that he on June 19, 1931, was found in possession of explosive substances in his shop in Kinar Bazar, Agra, which articles exploded and caused injury to his hand and that he was in possession of such articles under circumstances that raised a suspicion that they were not being kept for a lawful purpose contrary to s. 5, Explosive Substances Act. The appellant, Ram Singh was further charged that on July 13, 1931, in the house of his uncle *Hakim* Gyan Singh he stole a revolver belonging to Durvijey Singh who was staying there as a guest contrary to s. 380, Penal Code.

The appellant, Bengali Mal was further charged: (1) That on March 14, 1932, he committed dacoity in the godown of Manohar Bhagat Dhyan Ram during which deadly weapons were used and Gulzari Khan received a bullet injury contrary to s. 395-397, Penal Code. (2) That on April 1, 1932, at Police Station, Chatta, he threw a bomb in a compound at the rear of the said Police Station with intent to cause an explosion and thereby endanger human life and property contrary to s. 4 (*a*), Explosive Substances Act. (3) That on April 6, 1932, he abetted the commission of an offence of extortion by supplying a typewriter upon which a threatening letter

was typed and which was placed along with a bomb at the house of one Anandi Lal contrary to s. 387, Penal Code read with s. 109, Penal Code.

The appellant, Jwala, was further charged that on March 14, 1932, he committed dacoity at the godown of Manohar Bhagat Dhyan Ram in which dacoity he was armed with deadly weapons and in which Gulzari Khan received a bullet wound. Before the learned Sessions Judge the appellants pleaded not guilty to all the charges. The appellant, Bachcha Babu was convicted on all the charges and sentenced to death under s. 120-B, Penal Code, read with s. 395-396, Penal Code. On the charge under s. 20, Arms Act, he was sentenced to seven years' rigorous imprisonment, on the charge under s. 5, Explosive Substances Act, to five years' rigorous imprisonment and on the charge under s. 411, Penal Code, to three years' rigorous imprisonment; the sentences to run concurrently. As he was convicted and sentenced for conspiracy, no separate sentences were imposed in respect of the charges of abetment of dacoities although he was found guilty and convicted in respect of each of the abetments.

The appellant, Nepali, was found guilty on all the charges and sentenced to death on the charge under s. 120-B, Penal Code, read with s. 395-396, Penal Code. He was also convicted and sentenced to death on the charge under s. 395-396, Penal Code. On the charge under s. 4 (*a*), Explosive Substances Act, he was sentenced to seven years' rigorous imprisonment. The appellant, Rishi Nath was convicted on the charge of conspiracy contrary to s. 120-B, Penal Code, read with the other sections mentioned in the charge and sentenced to ten years' rigorous imprisonment. On the charge under s. 5, Explosive Substances Act, he was found not guilty and acquitted.

The appellant, Ram Singh, was convicted of conspiracy under s. 120-B, Penal Code, read with the other sections mentioned in the charge and sentenced to seven years' rigorous imprisonment. On the charge under s. 380, Penal Code, he was convicted and sentenced to one year's rigorous imprisonment; the sentences to run concurrently. The appellant, Bengali Mal, was convicted of conspiracy under s. 120-B, Penal Code, read with the other sections mentioned in the charge and sentenced to seven years' rigorous imprisonment. On the charge under s. 395-397, Penal Code, he was convicted and sentenced to seven years' rigorous imprisonment and on the charge under s. 4 (*a*), Explosive Substances Act, he was convicted and sentenced to seven years' rigorous imprisonment; the sentences to run concurrently. On the charge under s. 387, Penal Code, read with s. 109, Penal Code, he was convicted, but no separate sentence was given. The appellant, Jwala, was convicted on the charge of conspiracy and sentenced to ten years' rigorous imprisonment and on the charge under s. 395-397, Penal Code, he was convicted and sentenced to ten years' rigorous imprisonment; these sentences to run concurrently. Against all these convictions the six appellants have preferred an appeal to this Court.

The case has proved to be a long and complicated one. In the Sessions Court 114 witnesses were called for the prosecution and the evidence of four other witnesses admitted. For the defence no less than 85 witnesses were examined and the evidence and arguments lasted, so we are told, 48 days. 253 exhibits were produced and proved before the Court. Before us the case has been argued on both sides with great force and we should like to express our appreciation of the ability and exemplary fairness displayed by all Counsel concerned. The appeal was a long and difficult one, but throughout we have received the greatest possible assistance from all Counsel in the fullest and frankest manner. The case for the prosecution was that Bachcha Babu was a dangerous revolutionary and that he together with the appellants and others had formed a conspiracy to promote revolutionary ideas and to assist in overthrowing the Government by force. Funds, however, were lacking for these unlawful purposes and it is alleged that these persons subsequently conspired together to steal arms and ammunition and by means of them commit armed dacoities for the purposes of obtaining money to carry out the above-mentioned revolutionary objects. Another method employed to obtain money, it is suggested, was extortion and in carrying out these various methods it is alleged that firearms and explosive substances were freely used and that in one case a person was seriously injured and in the other case actually murdered.

The existence of such a conspiracy, it is stated, had been suspected for sometime and the Police acting on information in their possession, raided the house of Bachcha Babu on August 5, 1932. Two

previous searches of this house had been made, but nothing incriminating had been found, but on this last occasion there was found cunningly concealed in a space between a false and the real ceiling of the latrine a pistol, four revolvers, four knives, ammunition in a packet, percussion caps, a hilt of a knife of dagger with a broken piece of blade attached and two bottles. In other parts of the premises were found an air pistol concealed in some bedding, a large bottle containing liquid, pieces of glass, two torches, a bullet and a picture pierced with holes alleged to have been caused by target practice with an air pistol. The bottles were subsequently found to to contain picric acid and ammonia, substances which when mixed together form a highly explosive mixture and is frequently used for the purpose of making bombs.

On the premises were found Bachcha Babu, Vishwa Nath who subsequently became an approver, and one Sarju Prasad. These persons were immediately arrested and taken to the *Kotwali* and, according to the prosecution Vishwa Nath evinced an immediate desire to confess and there and then made a statement to the Police. Presumably in consequence of that statement Rishi Nath, Ram Singh and Uma Shankar were arrested the same day and in the evening about 9 P. M. Uma Shankar also made a statement to the Police. On August 7, 1932, Bengali Mal was arrested and on August 19, 1932, Ram Nath, who later became an approver, was arrested in his own house at Agra and made a statement to the Police the moment he arrived at the *Kotwali*. On October 4, 1932, Nepali was arrested at Bharan, his native village, and on November 16, 1932, Jwala was arrested at Bhind in Gwalior State. Sarju Prasad, though arrested in Bachcha Babu's house, was only detained three days and then released presumably for want of evidence. Uma Shankar, Vishwa Nath and Ram Nath having each expressed a desire to confess were placed before a Magistrate and their confessions were recorded on August 7, 8 and 27, respectively. It is to be noted, however, that Uma Shankar did not complete his confession on the August 7, owing, it is alleged, to the fact that he was too tired, but it was completed on the following day.

These confessions, it is suggested, made it clear that a conspiracy, as alleged, did in fact, exist. These confessing accused referred to a number of crimes which up to that time had never been satisfactorily cleared up and consequently investigation was continued with the greatest vigour. As stated previously, arrests were made and the facts relating to these previous undetected crimes were thoroughly inquired into. These crimes were: (1) The theft of a revolver from the house of Mr. Kehri Singh, *Vakil* at Agra, on February 19, 1931. Investigation showed that this revolver was amongst the weapons found at Bachcha Babu's house on the raid of August 5, 1932. (1) The theft of a revolver from the house of *Hakim* Gyan Singh on July 13, 1931. Investigation showed that this revolver was amongst the weapons recovered from Bachcha Babu's house. (3) On March 14, 1932, a dacoity had taken place in the godown of Manohar Bhagat Dhyan Ram in *Gali* Bara Bhai, Agra. In this dacoity which was unsuccessful five or six dacoits participated and a number of shots were fired, one wounding Gulzari Khan *Chaukidar* in the left thigh. Bullets and cartridges were recovered from the scene of this dacoity and it is alleged that later investigation showed that these bullets and cartridges were fired from one of the revolvers found in Bachcha Babu's house. (4) On April 1, 1932, a bomb was thrown at the rear of the Police Station, Chatta, in the city of Agra. Explosive materials found on the premises of Bachcha Babu, it was suggested, might well have been used to make such a bomb. (5) On April 6, 1932, a bomb together with a threatening letter was placed in the house of one Anandi Lal. According to the Police, investigation showed that the letter which was typed, had been typed upon a typewriter belonging to Bengali Mal's father and to which Bengali Mal had access. (6) On July 13, 1932, a serious dacoity had taken place at the godown of Jamna Das in *Gali* Bara Bhai, Agra, in which Durga Prasad was killed.

In this dacoity firearms were used and bullets and cartridges found on the scene afterwards. It is alleged by the Police that investigation showed that these bullets and cartridges had been fired from a revolver which was recovered from Bachcha Babu's house during the raid.

As a result of these investigations into these various crimes and the approver's statements, the Police were satisfied that these were not isolated crimes, but must have been committed in pursuance of an agreement or conspiracy and consequently a charge of conspiracy under s. 120-B, Penal Code, was launched against the appellants who, with others, had been

implicated by the confessing accused who later became approvers. In the event of the failure to prove this charge of conspiracy, the charges indicated previously were brought against the individual appellants in respect of the various crimes in which, it is alleged, they had participated. To establish a charge of criminal conspiracy the prosecution must prove an agreement between two or more persons to do or cause to be done some illegal act or some act which is not illegal by illegal means provided that where the agreement is other than one to commit an offence, the prosecution must go further and prove that some act besides the agreement was done by one or more of the parties in pursuance of it. Where the agreement therefore is one to do or cause to be done an act which is itself an offence, no overt act, *i. e.*, any act done by one of the parties to the agreement in pursuance of it, need be proved; the crime of criminal conspiracy is established once such an agreement is proved.

In the present case the conspiracy alleged is one to commit a series of serious crimes and therefore mere proof of such an agreement between the appellants is sufficient to sustain a conviction. Proof of overt acts committed by the appellants or any of them is not strictly necessary on this charge, but needless to say proof that the appellants or some of them were concerned in the overt acts alleged would go far to establish that the agreement alleged was in fact made between them. Though proof of overt acts is not necessary in this case yet it may well be that if such acts are proved, the Court will be bound to infer that they are not unconnected and isolated acts, but acts which must have been committed in pursuance of an agreement made between the appellants such as that alleged.

To prove the case of conspiracy against the appellants the prosecution relied in the main upon the evidence of the three accomplices Vishwa Nath. P. W. No. 2, Ram Nath, P. W. No. 3 and Uma Shankar, P. W. No. 4, who became approvers in the case. There is no rule of law in India which prevents a Court convicting on the sole evidence of an approver, but adopting the practice which has for many years been followed in England no Court in this country will convict an accused person upon such evidence unless it is corroborated by some independent testimony. The reasons for this very salutary rule of English practice were given in the judgment of the Court in well-known case of *Rex* v. *Baskerville* (1), and these reasons apply in our judgment with equal, if not greater, force to the conditions existing in India. The necessity for corroboration of the evidence of an approver has been emphasised time and again in recent Indian decisions and this rule of practice has now become in India, though possibly not in England, as binding upon the Courts as a rule of law. Such a rule is particularly necessary in cases of conspiracy to commit crimes where the crime of criminal conspiracy is established the moment an agreement between the accused persons to commit such crimes is proved. Evidence of a mere agreement can easily be concocted or manufactured, hence the need of independent testimony by way of corroboration is manifestly essential.

In *Rex* v. *Baskerville* (1), previously cited the Court of Criminal Appeal in England considered what evidence could and could not properly be regarded as corroboration. In that case which has been followed and approved many times by this and other Courts in India, it was laid down that evidence in corroboration must be independent testimony connecting or tending to connect the accused with the crime. To amount to corroboration the evidence must implicate the accused, *i. e.*, it must confirm in some material particular not only the accomplice or approver's evidence that the crime has been committed, but also that the accused committed it. The corroborative evidence need not shew positively that the accused committed the crime; it is sufficient if it is merely circumstantial connecting him with the crime. It must be evidence which shews or tends to shew that the approver's evidence implicating the accused is true; it must be independent testimony on a material particular or material particulars demonstrating to the Court the truth of the approver's evidence implicating the accused. Evidence to amount to corroboration must be independent testimony and therefore the evidence of one approver cannot amount to corroboration of the evidence of another. The fact that a witness is an approver creates a suspicion in the mind of the Court and that suspicion cannot be removed by merely calling another approver. To hold that one

(1) (1916) 2 K B 658; 86 L J K B 28; 80 J P 446; 60 S J 696; 115 L T 453.

approver could corroborate another would result in wiping out the salutary rule that independent testimony is required by way of corroboration of such evidence and this indeed has been conceded by the Crown in this case. The Government Advocate with his customary frankness admitted that he could not ask us to convict the appellants unless the evidence of these three approvers was corroborated by other witnesses who were not themselves in the alleged conspiracy. In the present case, therefore, the Court cannot convict upon the charge of conspiracy or any of the other charges upon the evidence of the three approvers unless there is independent testimony on a material particular or material particulars which, in our judgment, shews that the approvers' evidence implicating the accused in the conspiracy or in the other crimes charged against them is true.

It was contended, however, by the prosecution that there was in this case ample independent testimony of the character previously indicated which clearly shewed that the approvers were speaking the truth when implicating the accused in the various crimes with which they were charged. With these considerations in mind it will now be convenient to consider in some detail the various classes of evidence adduced by the prosecution to establish their case.

Before discussing the evidence of each individual approver it will be convenient at this stage to make some general observations upon the evidence of the three of them. All three showed a most extraordinary and immediate desire to confess, and it is difficult to believe that such a desire was genuine. Vishwa Nath, who was arrested at Bachcha Babu's house in the raid on August 5, 1932, made a statement that very evening to the Police, and although the terms of that statement were not before us, we can safely presume that it was in the nature of a confession because he was placed before a Magistrate on August 8, and his confession recorded. Uma Shankar was arrested later in the day on August 5, 1932, and likewise made a statement that very evening. His confession was recorded on August 7 and 8. So it will be seen that within three days of the raid which gave rise to this charge of conspiracy, two of the accused had actually confessed before a Magistrate.

Ram Nath was not arrested until August 19, but he admitted that he made a statement the moment he arrived at the *Kotwali*, and on August 24, his confession was recorded by a Magistrate. Further it is admitted that in the entry in the jail register these three persons were from the first described as approvers, and no satisfactory explanation has ever been forthcoming as to how this entry came to be made. It would appear that from the very outset these persons were to be regarded as approvers and therefore it has been suggested on behalf of the defence that these three persons were tools of the Police and were nothing more than Police spies. Again from the outset these three approvers were treated differently from the other co-accused. In evidence they admitted that they never wore fetters as the others did, and the learned Magistrate who committed the appellants, noted at the request of their Counsel that the approvers appeared in Court well dressed and well groomed and in a condition very different from the other appellants. According to the note, Uma Shankar was actually wearing a flower in his coat whilst the other accused were wearing fetters. This undoubted preferential treatment causes grave suspicion in our minds, and though the defence have not satisfied us that these approvers were nothing more than spies or informers, the prosecution have themselves to blame for such a suggestion being made by Counsel on behalf of the appellants. We must express our disapproval of such conduct on the part of the prosecution.

Further it is on the record that the warrant for the arrest of Ram Nath was actually issued on August 11, 1932; whereas he was not arrested until August 19, when the arrest took place at his house in the outskirts of the city of Agra. Ram Nath explains this failure to execute the warrant by saying that he had after the raid fled from his home to Neemuch. In cross examination, however, he could not say with whom he had stayed or whether his alleged host was a relative of a friend of his or not. In short, he could give no explanation of his stay at Neemuch, and we cannot accept his statement that he ever stayed at Neemuch or in fact ever left his home. It follows therefore that the failure to execute the warrant and to arrest Ram Nath until August 19, is wholly unexplained, and this delay and the overwhelming desire to confess the moment he arrived at the *Kotwali* raises in our minds most serious doubts as to the voluntary nature and genuineness of this confession.

If Ram Nath, who had been implicated by Uma Shankar, had not left Agra, the Police could have arrested him immediately. The fact that he was not arrested suggests that he was being used for some purpose.

Again all three approvers give the same reason for confessing, namely, a desire to speak the truth and to expiate their sins, an explanation which we find impossible to believe in the circumstances of this case. There is another extraordinary feature in these confessions which is obvious to any one on a most cursory reading of them. In each case the general scheme and order of the confession is the same. Each begins with the history of his childhood, boyhood and early education. Each then goes on to describe how he became interested in politics and how later he became involved in revolutionary politics. Then follows an account of his introduction to Bachcha Babu and then a full account of the part which he and others played in the conspiracy. How three young men with only very ordinary education came independently of each other to make detailed confessions in precisely the same manner following exactly the same order is difficult to understand. The similarity in the general scheme and order of these confessions is amazing, and we cannot believe that it is a mere coincidence. In our view there was a mind guiding the minds of these three confessing accused and that the general scheme and order of facts adopted by each emanated from that guiding mind and not from the minds of the approvers. No suggestion has been made against the learned Magistrate who recorded all three confessions, and therefore in our view the inference is irresistible that the approvers were carefully coached by some one before they were taken before the Magistrate.

A comparison between the confession of Uma Shankar and that of Ram Nath discloses further disquieting features. The gaps left by Uma Shankar appear to have been carefully closed up by Ram Nath whose confessno was recorded some three weeks pter. But it will be more convenient to discuss these features when dealing with the evidence of each individual approver. (After dealing with their evidence in turn, his Lordship proceeded). From the foregoing summary of the evidence of the three approvers it will be seen that all three deposed to a conspiracy as alleged by the prosecution and that Bachcha Babu was the leader of it. Uma Shankar and Ram Nath further depoed that the appellants Nepali, Rishi Nath, Bengali Mal and Ram Singh were members of this conspiracy and Uma Shankar further stated that Jwala was also in he conspiracy. All three deposed to the fact that Bachcha Babu kept arms, amunition and explosive substances on his premises and that such were kept for the purpose of dacoities and terrorism. Uma Shankar and Rishi Natn make it clear that it was Bachcha Babu who enginereed and provided arms for these dacoities.

Uma Shakar and Ram Nath implicate Nepali, Rishi Nath Bengali Mal and Ram Singh in the dacoity of July 13, 1932, at the godown of Jamna Das. Both also implicate Nepali and Bengali Mal in the bomb incident at Chatta *thana* though neither were concerned in the affair. They deposed that they were told of the incident by Bachcha Babu and other members of the conspiracy. They also implicated Ram Singh in the theft of the pistol from the house of his uncle *Hakim* Gyan Singh whilst Uma Shankar deposed further to the fact that it was Bachcha Babu who arranged for the placing of the bomb at Anandi Lal's house and actually handed the bomb and the typewritten letter to Dau Dayal who placed it there. Uma Shankar further stated that the letter had been typed by or with the assistance of Bengali Mal.

Objection was taken by Counsel for the appellants to the admissibility of the statements made to the approvers by one appellant implicating the others. In certain circumstances such statements might be admissible by reason of s. 10, Evidence Act. Having regard, however, to the view which we take of the evidence regarding the alleged conspiracy in this case it is unnecessary for us to decide whether such evidence is or is not admissible.

Apart from the evidence of the approvers, the prosecution called a large number of witnesses to establish either directly or by way of corroboration of the approvers' evidence, the guilt of the appellants. It was contended on behalf of the Crown that this evidence taken by itself or together with the approvers' testimony showed that there was a conspiracy as alleged and that the appellants were parties to it, and further that the individual appellants were guilty of the crimes specifically charged against them. The object of this evidence was to show that the various criminal acts

alleged were not isolated acts independent of each other but were so linked up one with the other as to give rise to an irresistible inference that they were committed by persons acting together in furtherance of a common intention and object. In short, that there were common factors in all these criminal acts and that such common factors proved the complicity of Bachcha Babu in each of them, and the other appellants in some, if not all of them.

It is, therefore, necessary to consider this evidence in some detail to ascertain whether it establishes the guilt of the appellants independently of the approvers' evidence or, if it does not, whether it is sufficient corroboration of the approvers testimony to warrant a Court acting upon the latter. (After examining the evidence of some of the witnesses his Lordship proceeded). Mr. Scott also gave evidence with a view to showing that the letter found with bomb at Anandi Lal's house on April 6, 1932, was typed on a typewriting machine proved to have been in the possession of Bengali Mal's father and to which Bengali Mal had access. Evidence of this kind cannot be regarded as expert evidence as it has been laid down in the well-known Meerut Conspiracy case: *Jhabwala* v. *Emperor* (2), that the opinion of an expert that one document has been type-written on the same machine as another document is not admissible under s. 45, Evidence Act.

The Court may ask the witness points in favour of the view whether the two documents have or have not been type-written on the same machine, but must come to its own conclusion and not treat such assistance as an expert opinion a relevant fact in itself. We called for and saw the original letter placed with the bomb and letters admittedly typed on this type-writing machine. Further we caused various letters of the alphabet to be typed in our presence on this machine and examined and compared them with the letter placed with the bomb. Again we found similarities and differences and we are not satisfied that the incriminating letter was typed on the type-writing machine proved to have been in possession of Bengali Mal's father. In any event even if the letter had been typed on this type-writer the prosecution would still have to prove that either Bengali Mal typed or caused it to be typed or permitted the use of the machine. There is no evidence of any kind before us suggesting either of these alternatives.

Mr. B. N. Pal, P. W. No. 98, an authority on explosives was called to prove that substances said to have been found near the Chatta *Thana* after the explosion were fragments of an explosive bomb and that picric acid and ammonia mixed together form a highly explosive substance. Even if this evidence is accepted, it proves nothing, for it in no way connects Bachcha Babu or any other of the appellants with the actual bomb which was thrown at the rear of the Chatta *Thana*. Bachcha Babu may have kept ammonia and picric acid for the purpose of making bombs, but it in no way proves that the actual bomb which exploded at the Chatta *Thana* was made by Bachcha Babu or out of materials in Bachcha Babu's possession.

Upon the evidence already discussed other than that of the approvers, we are satisfied that arms, ammunition and explosive substances were found at Bachcha Babu's house and that they had been secreted there by Bachcha Babu for some unlawful purpose. We are further satisfied that two of the weapons found on the premises were weapons which had been stolen from the houses of Kehri Singh and *Hakim* Gyan Singh and that Bachcha Babu either knew that they had been stolen or had good grounds for believing that they had been stolen. We are not satisfied, however, that Bachcha Babu instigated the thefts of these revolvers or that they were stolen in pursuance of any conspiracy. Though the mode of concealment convinces us that these weapons, ammunition and explosives were intended for some unlawful purpose; the evidence does not satisfy us that there was any connection between these arms, ammunition and explosives and the two dacoities and the bomb incidents at the Chatta *Thana* and the house of Anandi Lal.

In short, the evidence already discussed other than that of the approvers, does not of itself prove a conspiracy in which Bachcha Babu was the central figure and further affords no corroboration of the approvers' evidence that such a conspiracy existed. This evidence does not establish any common factors between the arms, ammunition and explosive substances found at Bachcha Babu's house and the various

(2) 145 Ind. Cas. 431; A I R 1933 All. 690; (1933) Cr. Cas 1202; 34 Cr. L J 967; (1933) A L J 799; L R 14 A 259 Cr. C R A 65.

criminal offences which it is alleged are the overt acts of this conspiracy.

A large number of witnesses were also called with regard to the various overt or criminal acts alleged. These were called with a view to proving the factum of each particular overt or criminal act and to identify the persons concerned in the commission of such act. It was the submission of the prosecution that this evidence also showed that these acts were the result of a conspiracy, as a number of the appellants were identified as taking part in the various crimes and that in each crime a connection with Bachcha Babu was established. This according to the prosecution went beyond the realm of coincidence and permitted of only one inference, namely, that Bachcha Babu and the appellants were acting together with a common intention and object and that these crimes were committed in pursuance of such common intention or object. Further this evidence was also tendered to prove the guilt of the individual appellants in respect of the specific crimes which were charged against them.

Again it is necessary to examine this evidence to ascertain whether it establishes a conspiracy and the participation of the various appellants in it and in the overt acts alleged to have been committed in pursuance of it, or if it does not, whether it amounts to sufficient corroboration of the approvers' evidence to sustain a conviction for conspiracy or for any of the other crimes charged against the appellants. This class of evidence is concerned in the main with three incidents: (*a*) the unsuccessful dacoity at the house of Manorath Bhagat Dhyan Ram on March 14, 1932; (*b*) the bomb explosion at the Chatta *Thana* on April 1, 1932; and (*c*) the dacoity attended with murder at the godown of Jumna Das on July 13, 1932. It will be convenient therefore to deal with the evidence with regard to each incident separately to ascertain whether the appellants or any one of them were concerned in each particular crime. (*a*) Dacoity at house of Manorath Bhagat Dhyan Ram on March 14, 1932.

That such a dacoity took place is beyond question and is not challenged by the appellants. The witnesses, Gulzar Khan, P. W. No. 21, Deo Narain, P. W. No. 10, Sohanpal, P. W. No. 20, Inderjit, P. W. No. 33 and Sukhdeo Prasad, P. W. No. 12, prove it beyond doubt. In this dacoity revolvers were fired and Gulzar Khan was hit in the left leg. This witness later identified Jawla as one of the dacoits at an identification parade in Bhind jail. Deo Narain also identified Jwala at Bhind jail and Bengali Mal at an identification parade in Agra jail. The witnesses Sohanlal, Inder Jit and Sukhdeo Prasad failed to identify any one.

The identification of Jwala by two witnesses and Bengali Mal by only one witness might, if the identification was satisfactory be sufficient to convict them of the dacoity particularly when they have been both implicated by approvers. An examination of the record, however, shows that these identifications were far from satisfactory. The identification proceedings at Agra were carried out in the presence of Mr. Triloki Nath, a Magistrate of the First Class, and in his report and evidence he stated that Deo Narain, though he identified Bengali Mal correctly, made one mistake identifying one non-suspect. In our judgment it would not be safe to convict Bengali Mal on this evidence alone or upon the approvers' statement corroborated only by such an identification. (After further examining the evidence, the judgment proceeded). There is, therefore, a very serious discrepancy between the statements of the approvers and the evidence of these witnesses which makes it impossible for us to act upon such evidence either by itself or as corroboration of the approvers' testimony.

Raghbar, P. W. No. 17, saw the party that night and in jail identified Uma Shankar. He, however, failed to identify him in Court and consequently his evidence is worthless. Sham Lal, P. W. No. 35, deposed to the fact that he spoke to Ram Nath and Rishi Nath late in the evening upon which the dacoity took place. The point at which he met them was a matter of a mile and a half or so from the scence of the dacoity. There appears to be no reason why this witness who knew Rishi Nath and Ram Nath well should have remembered this incident. But even if it took place, it does not in our view amount to corroboration of the approvers' statement. He might well have met these persons at the time he did; but even if he did, it does not in any way corroborate the approvers' statement that Rishi Nath and Ram Nath were present earlier in the evening at the scene of the dacoity a mile and a half away.

In our judgment the evidence of these eye-witnesses of the party proceeding to

and from the dacoity at Jumna Das's godown is worthless and is neither direct proof that the appellants or any of them were concerned in the dacoity nor corroboration of the approvers' statement. It is evidence that could easily be procured after Ram Nath's confession, and we have no hesitation in rejecting it. In our judgment, therefore, it has not been proved by the prosecution that any of the appellants were concerned in the dacoity in which murder was committed at the godown of Jumna Das on July 13, 1932.

No eye-witnesses were produced to identify any persons connected with the placing of the bomb and letter at the house of Anandi Lal on April 6, 1932. That such a bomb and letter was placed there, is abundantly proved by Kastur Chand, P. W. No. 39, Constable Mahandra Singh, P. W. No. 27 and Sub-Inspector, Mohd. Ali Khan, P. W. No. 36. As we have stated previously, we are not satisfied that the letter was typed on the machine owned by Bengali Mal's father to which Bengali Mal had access. Previous letters demanding money by threats had been received by Anandi Lal who had reported the matter to the Police and in this case an attempt was made to connect Bachcha Babu with these letters. Anandi Lal, P. W. No. 37, deposed that after he had received two of the letters, a man stopped his car who he was told was one Tek Chand. The latter asked him if he had received any letters, and on being told that he had warned him that he had better pay as the letters came from a very dangerous man whom he later named as Bachcha Babu. Anandi Lal never told the Police of this incident, although he had already reported to the Police the receipt of the letters and it is difficult, therefore to believe that this incident ever took place. The learned Sessions Judge accepted this evidence, but in our view even if it were true, it is inadmissible against Bachcha Babu or any of the appellants. It is not alleged by the prosecution that Tek Chand was a conspirator, and therefore we cannot see how anything he said could be evidence against Bachcha Babu or any of the other appellants. In our judgment the prosecution has wholly failed to prove any connection between the appellants and the placing of the bomb at Anandi Lal's house or the letters demanding money by menaces which preceded it.

A number of witnesses were called to show that the appellants were frequently seen together during the period it was alleged that the conspiracy existed.

Sharif-ud-Din, P. W. No. 100, Mohd. Husain P. W. No. 101 and Shujat Husain, P. W. No. 102, deposed to having seen Bachcha and various members of the alleged conspiracy from time to time in Hewett Park in deep conversation and later identified a number of the appellants in jail. Ladli Prasad already referred to, also, refers to association between Bachcha Babu and some of the other appellants and reference is made also to such association in the evidence of a number of other witnesses. It is unnecessary to consider this evidence in any detail, because in our view it cannot assist the prosecution. It is not denied that the appellants knew each other and they might well have met in the park or elsewhere in the cool evening to converse without being guilty of conspiracy or having any unlawful purpose. Evidence of association to be of any value should suggest something suspicious in such association and no inference one way or another can be drawn from a mere casual meeting or meetings or conversation between the parties in a public place or park where mere acquaintances frequently meet and talk. It is not suggested by any of these witnesses that there was anything suspicious or strange or secret in the way these persons met and spoke. It is true that some witnesses said that Bachcha Babu and his friends in the park stopped their conversation when the witnesses approached, but there is nothing strange in this. There might have been 101 reasons other than the existence of a conspiracy which would induce Bachcha Babu and his companions to stop conversing whilst these witnesses were within earshot. In any event we find it difficult to believe that these witnesses could remember such incidents particularly when they attached no importance whatsoever to them when they occurred. Evidence of this kind is easily procurable and it is significant that none of these witnesses ever reported anything suspicious in the conduct of Bachcha Babu or any of the appellants until after the raid on August 5, and investigation into this alleged conspiracy had commenced.

In our view, therefore, the prosecution have wholly failed to establish the conspiracy alleged by them. The evidence called independent of the approvers proves

nothing at all neither does it afford any corroboration of the statement of the approvers. Having regard to the circumstances in which these approvers first confessed and the obvious discrepancies between the confessions themselves and between the confessions and the subsequent evidence which they gave, we are not inclined to give any great weight to their evidence but whatever weight we give to it we cannot act upon it alone in the absence of corroboration. Having regard to the nature of the approvers' evidence it would require very strong and cogent corroboration before, we would regard it as safe to convict these appellants of conspiracy. There is no such strong and cogent evidence by way of corroboration; in fact there is no corroborative evidence worth the name at all. Further, in our view the prosecution have wholly failed to establish that any of the appellants were concerned in the criminal acts charged against them in this case excepting always the charges brought against Bachcha Babu in connection with the possession of arms, ammunition and explosive substances discovered at his house on August 5, 1932.

In conclusion, it is necessary for us briefly to consider the case against each appellant.

Bachcha Babu.—For the reasons already given the prosecution have failed to prove that Bachcha Babu was guilty of the conspiracy alleged. They have further failed to prove any connection between this appellant and the two dacoities of March 14, 1932, and July 13, 1932. The convictions, therefore, for conspiracy and abetment of these two dacoities cannot stand. For the reasons already given we are satisfied that the appellant was in unlawful and secret possession of a large quantity of arms, ammunition and explosive substances in circumstances which created offences under s. 20, Arms Act, s. 5, Explosive Substances Act and s. 411, Penal Code. He was, therefore, in our view, properly convicted by the learned Sessions Judge on these charges.

In the result we set aside the conviction and sentence of death passed upon this appellant for conspiracy contrary to s. 120 B, Penal Code, read with the other sections mentioned in the charge. We further set aside the convictions on the two charges of abetment of dacoities for which no separate sentences were imposed upon him by the learned Sessions Judge. We, however, uphold the conviction and sentence of seven years' rigorous imprisonment under s. 20, Arms Act, and the conviction and sentence of five years' rigorous imprisonment under s. 5, Explosive Substances Act, and the conviction and sentence of three years' rigorous imprisonment under s. 411 Penal Code. The sentences will run concurrently as directed by the learned Sessions Judge. To this extent the appeal of Bachcha Babu is allowed.

Nepali.—As we are not satisfied that the prosecution have proved the charge of conspiracy, the conviction and sentence of Nepali for conspiracy cannot stand. Further, in our view, it has not been proved that this appellant was concerned in the Chatta *Thana* bomb incident of April 1, 1932, or the dacoity at Jamna Das's godown on July 13, 1932, and the convictions and sentences in respect of these charges are, therefore, in our judgment not justified. We, therefore, allow the appeal of this appellant and set aside the convictions and sentences of death passed upon him for conspiracy contrary to s. 120-B, Penal Code, read with the other sections mentioned in the charge and for dacoity with murder under s. 395-396, Penal Code, and the conviction and sentence of seven years' rigorous imprisonment under s. 4 (*a*), Explosive Substances Act. We direct that this appellant be set at liberty forthwith unless required by the authorities upon any other charge.

Rishi Nath.—As we are not satisfied of the existence of conspiracy, his conviction under s. 120-B, Penal Code, read with the other sections mentioned in the charge is not justified. In his case there is a further reason why he should be acquitted. A body of evidence was called on his behalf which proved beyond doubt that this appellant was not in Agra between about May 20, 1932 and June 20, 1932, yet Ram Nath approver spoke of meeting him on a number of occasions during this period and of introducing him about this time to Bachcha Babu. The learned Sessions Judge accepted this *alibi* evidence and rightly so, as it appears to us to be convicing, straight forward and truthful. This evidence makes it clear that Ram Nath is either most inaccurate in his testimony or deliberately untruthful. Rishi Nath further called evidence to show that he was away from Agra on the night of July 13, 1932, when the dacoity was committed at Jamna Das's godown. This evidence was rejected by the learned Sessions Judge and it is not

necessary for us to discuss it in any detail. But it does raise in our minds very grave doubts about the accuracy of the approvers' statement that Rishi Nath was connected with the dacoity of July 13, 1932. However it is for the prosecution to prove the case and as the case against Rishi Nath stands entirely upon the evidence of the approvers, his conviction cannot be sustained.

We have not discussed the evidence which was tendered to show that this appellant was in unlawful possession of explosives on June 19, 1931, and therefore guilty of an offence under s. 5, Explosive Substances Act. The learned Judge was not satisfied that the undoubted explosion which took place on that day on Rishi Nath's premises was due to explosives. In his view it might have been caused by petrol vapour as alleged by the accused. He, therefore, acquitted the accused upon this charge and, in our view rightly. In our judgment, evidence relating to this incident cannot therefore be used upon the charges of conspiracy. In the result we allow the appeal of this appellant and set aside the conviction and sentence of 10 years' rigorous imprisonment for conspiracy under s. 120-B, Penal Code, read with the other sections mentioned in the charge and direct that he be set at liberty forthwith unless he is required by the authorities upon any other charge.

Ram Singh.—This appellant told an obvious lie as to his movements on the night of the dacoity on Jamna Das's premises and a body of evidence was called to prove this. However the fact that an accused person tells a lie is not sufficient to convict him by itself, nor can it be corroboration of the approvers' statement. For the reasons we have already given we are not satisfied that the conspiracy is proved, nor are we satisfied that this appellant was the person who stole the revolver from the house of his uncle *Hakim* Gayan Singh on July 13, 1931, and therefore the convictions and sentences upon these charges cannot be sustained. We, therefore, allow the appeal of this appellant, set aside the conviction and sentence of seven years' rigorous imprisonment under s. 120-B, Penal Code, read with the other sections mentioned in the charges and the conviction and sentence of one year's imprisonment under s. 380, Penal Code, and direct that this appellant be set at liberty forthwith unless he is required by the authorities upon any other charge.

Bengali Mal.—For the reasons stated we are not satisfied that this appellant is guilty of the charge of conspiracy. Nor are we satisfied that he was present at the dacoity of March 14, 1932, at the house of Manohar Bhagat Dhyan Ram. Further, we are not satisfied that he threw or was concerned in the throwing of a bomb at the Chatta *Thana* on April 1, 1932. For the reasons we have already given we are also not satisfied that this appellant abetted the crime of extortion by providing a typewriter on which the letter to Anandi Lal accompanying the bomb was typed. In the result we allow the appeal of this appellant, set aside the conviction and sentence of seven years' rigorous imprisonment under s. 120-B, Penal Code, read with the other sections mentioned in the charge and the conviction and sentence of seven years' rigorous imprisonment under s. 395-397, Penal Code, and the conviction and sentence of seven years' rigorous imprisonment under s. 4 (*a*), Explosive Substances Act, and the conviction under s. 387, Penal Code, read with s. 109, Penal Code, for which no separate sentence was given as the offence and punishment were merged with the conspiracy and direct that this appellant be set at liberty forthwith unless required by the authorities upon any other charge.

Jwala—As we are not satisfied that the prosecution have proved the charge of conspiracy, the conviction of this appellant under s. 120-B, Penal Code, read with the other sections mentioned in the charge cannot be sustained. Further we are not satisfied that this appellant was present at the dacoity which took place at the godown of Manohar Bhagat Dhyan Ram on March 14, 1932, and therefore his conviction for that offence is also not justified. In the result we allow the appeal of this appellant, set aside the conviction and sentence of seven years' rigorous imprisonment under s. 120-B, Penal Code, read with the other sections mentioned in the charge and the conviction and sentence of seven years' rigorous imprisonment under s. 395-397, Penal Code, and direct that he be set at liberty forthwith unless he is required by the authorities upon any other charge.

N. *Order accordingly.*

MADRAS HIGH COURT

Civil Revision Petition No. 1303 of 1930
September 28, 1934
PAKENHAM WALSH, J.
SAVARALA VENKATASUBBIAH—
PETITIONER
versus
KUMARA RAMIAH—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 115, Sch. II, r. 15—Decree on award—Revision, whether lies—Arbitrator basing decision on private enquiries and inadmissible evidence—Validity of award—Interference in revision.

It cannot be laid down as a general rule that the High Court cannot interfere in revision under s. 115, Civil Procedure Code, with a decree passed in accordance with an award. Revision is permissible if the arbitrators or the Court have exceeded their jurisdiction or acted with material irregularity in exercising their jurisdiction. *Ghulam Khan* v. *Muhammad Hasan* (1), distinguished. *Dabir-ud-Din* v. *Amina Bibi* (2), *Aramanai Rajagopala* v. *Aramani Rangasami* (3) and *Delhi Cloth and General Mills Co.* v. *Firm Kidai Pershad-Cheddi Lal* (4), relied on.

Where the arbitrators in arriving at their decision were influenced by private inquiries about the case, their conduct amounts to misconduct and the award will be invalid *Palavesam Chettiar* v. *Narayana Aiyar* (5), *Neba Ram* v. *Khota Ram* (6), *Ram Chander* v. *Hans Ram* (7) and *Marali Visram* v. *Sheriff Dewji* (8), relied on.

Where the arbitrators acted upon a very material document which was, however, not proved to be genuine:

Held, that the award was bad and a decree based thereon could be set aside in revision. *Sanyasi Rao* v. *Venkata Rao* (10) and *Dobson* v. *Groves* (11), referred to.

C. R. P. under ss. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Madanapalle, dated December 14, 1929, and made in O. S. No. 35 of 1929.

Mr. *S. A. Seshadri Ayyangar*, for the Petitioner.

Mr. *T. R. Arunachalam*, for the Respondent.

Judgment.—This revision petition is against an arbitrator's award to which objection was made in the lower Court but which was confirmed. The plaintiff in O. S. No. 35 of 1929 on the file of the Court of the District Munsif of Madanapalle brought a suit against the defendant on three items: (1) for 12 measures of paddy delivered by the plaintiff to the defendant's brother-in-law, the defendant having promised to pay for the same; (2) for a debt of Rs. 86-11-0 due by the defendant to the plaintiff in respect of tamarind and sugarcandy trade with regard to which the defendant executed a letter dated August 25, 1927; and (3) for three measures of Koru paddy cultivated in the *manyam* land of the plaintiff. The matter was referred to arbitrators who awarded the full sum to the plaintiff. Objections to the award were put in but were disallowed.

A preliminary objection has been raised that there is no power of revision in this Court in cases where the lower Court has confirmed the decision of the arbitrators and in support the well-known Privy Council case *Ghulam Khan* v. *Muhammad Hassan* (1), is quoted. At first sight this seems to be a very strong case. The question of jurisdiction of the Court had been raised there as an issue but was referred with the rest of the suit to the arbitrators. The arbitrators having found wrongly on this point that the Court had jurisdiction, the Court accepted the award. It was held that as the arbitrators had jurisdiction to decide the law wrongly and the Court accepted the award, it could not be challenged in revision. But, if that case is looked into closely, it will be seen that the arbitrators' action had not fallen under any of the clauses of r. 15 of the Second Schedule, Civil Procedure Code. Therefore, the Court was bound to accept the award and did not act either without jurisdiction or with material irregularity in exercising its jurisdiction by doing so. This case has been considered in this connection in *Dabir-ud-Din* v. *Amina Bibi* (2), where it was held:

"It cannot be laid down as a general rule that in no case in which an award has been filed and decree passed in accordance therewith, can the High Court interfere under s. 115, Civil Procedure Code. Revision is permissible in cases in which the arbitrators or the Court may have exceeded their jurisdiction or acted with material irregularity in the conduct of the proceedings."

Similarly it was held—though there mark was obiter—in *Aramanai Rajagopala* v. *Aramanai Rangasami*, 31 Ind. Cas. 458 (3), with reference to the same case:

"There is no appeal against a decree based upon an award, but if it can be shown that the lower Court acted without jurisdiction or acted with material irregularity in dealing with the award, it would be open to the High Court on a proper case being made out to revise such an order."

A number of cases have been quoted before me in which the High Court has so interfered. One of them, *Delhi Cloth and General Mills Co.* v. *Firm Kidai Pershad-Cheddi Lal*, 64 Ind. Cas. 363 (4), is on its facts a close parallel to the present. There, an arbitrator received documents from one party and based his award upon those documents without giving the other party

(1) 29 C 167; 29 I A 51; 4 Bom. L R 161; 12 M L J 77; 6 C W N 226; 8 Sar. 154; 25 P R 1902 (P C).
(2) 78 Ind. Cas. 335; A I R 1925 Cal. 475.
(3) 31 Ind. Cas. 458.
(4) 64 Ind. Cas. 363; 3 U P L R (L) 15; 22 P L R 1922.

an opportunity of seeing those documents and of meeting the inferences deducible therefrom. It was held that a revision lies against a decree passed upon an award, where the Court which passed the decree has committed an error in procedure or has misused the jurisdiction. In *Palavesam Chettiar* v. *Narayana Aiyar* (5), it was held that arbitrators cannot import their own personal knowledge unless empowered to do so. That is exactly the view taken in *Neba Ram* v. *Khota Ram* (6). In *Ram Chander* v. *Hans Ram* (7), it was held:

"Where it appears from the award that the arbitrator in arriving at the decision was influenced by secret enquiry about the case made by him after recording the evidence and by the opinion of third persons about the merits of the case, his conduct amounts to judicial misconduct and vitiates the award."

In *Marali Visram* v. *Sheriff Dewji* (8), the Privy Council case is also quoted and it was held, leave being given to convert the appeal into an application under s. 115, Civil Procedure Code, that the conduct of the arbitrators was so unauthorised with regard to procedure from first to last by any law that the Court could allow the application. I, therefore, overrule the preliminary objection.

Coming to the actual facts in the present case, the only objection to the award which is argued before me is the conduct of the arbitrators with regard to the alleged letter acknowledging the debt of Rs. 86-12-0. The petitioner (defendant) is one Savarala Venkatasubbayya. The disputed letter is signed 'S' in English and Venkatasubbayya in Telugu and this is very important in considering the conduct of the arbitrators. It is necessary here to quote the award on that point in full. It states as follows:

"We saw many letters written by the defendant himself:

1. Letter dated September 24, 1927, written to Venkatanarayana
2. " " May 17, 1927, to Ramayya
3. " " August 27, 1927, "
4. " " September 12, 1925, "

The defendant admitted having written these letters. Therein in some the defendant has written ..... (S. Venkatasubbayya in Telugu) in some Savarala Venkatasubbayya... ..... When we made enquiries privately we ascertained that in the account maintained in the sundry bazaar of Meda Lakshminarayana in Kadiranathakota in the account of Savarala Venkatasubbayya at p 63 (July 22, 1929), p. 132 (July 15, 1928), p. 280 (September 15, 1928), p. 286 (August 26,) there is found signature of the defendant as (S. Venkatasubbayya) (S. .....). So in the examination made by us in all ways we believe that the letter filed by the plaintiff was written by the defendant. We also think that the letter was written by the defendant with a bad motive. Therefore, we decide the 2nd issue in favour of the plaintiff"

* * * * *

List of witnesses examined on behalf of

Plaintiff.	*Defendant.*
1. Plaintiff K. Ramiah.	1. S. Venkatasubbayya.
2. Jari Siddappa.	2. B. Venkataramayya.
3. Konda Chinnappa Reddi.	3. Thalari Narappa.
4. Kolla Sankarappa.	4. S Bapanna.
5. Madireddi Ramappa.	

Exhibits read on behalf of Plaintiff.

1. Letters written by Venkatasubbayya September 24, 1927, to M. Venkatanarayana. February 17, 1926, to Ramayya. September 12, 1926, Account *patti* to Ramayya. August 27, 1927, to Ramayya

Exhibits on behalf of defendant: Nil."

Several things are to be noted about this judgment. This is a judgment of men who have some acquaintance with the rules of evidence and even the manner of drawing up a judgment. They have drawn up a separate award. They called on the defendant to state whether he had written the four letters therein exhibited and got his admission. They carefully note that in some letters he has written 'S' in English and Venkatasubbayya in Telugu and that in some other "Savarala Venkatasubbayya" in Telugu. They have also been careful to mark these letters as exhibits for plaintiff as well as to give the list of witnesses examined for the plaintiff and for the defendant, and also to note that the exhibits on behalf of the defendant are nil. It is also to be observed that in the sentence "When we made enquiries privately," they use the English word "Privately." It is also perfectly clear that the defendant must have relied strongly in denying the disputed letter on the fact of the English "S" which is found in the signature there but which is not found in any of the letters which he admitted, and which were signed entirely in Telugu characters. One would never suppose on reading this judgment that this highly important account which contained his signature written with English "S" was shown to the defendant or his statement about it taken. This is strongly borne out by the fact that it is not marked as an exhibit, nor is the name of Meda Lakshminarayana, in whose account is the signature of the defendant, found in the list of witnesses examined. There can be no question that if this document of vital importance was not shown to the petitioner, the arbitrators were guilty of

(5) 88 Ind. Cas. 660; A I R 1925 Mad. 1086; 49 M L J 115; (1925) M W N 503.
(6) 110 Ind. Cas. 833; A I R 1928 Lah. 550.
(7) 131 Ind. Cas. 220; A I R 1931 Lah. 111.
(8) 12 Ind. Cas. 687; 36 B 105; 13 Bom. L R 1017.

misconduct and that therefore the award should be set aside. This would be a case exactly like *Delhi Cloth and General Mills Co.* v. *Firm Kidai Pershad Cheddi Lal* (1), quoted above and in this respect it would be clearly distinguishable from *Sheikh Mohidin Sahib* v. *Ramaswami Chetty* (9), quoted for the respondent. The lower Court got over this objection by relying on the evidence of one of the arbitrators given before it, and if that evidence could be reconciled with what is stated in the award, then the fact that this Court might not attach the weight to it which the lower Court has done, would not be a sufficient reason for holding that the lower Court acted without jurisdiction or with material irregularity in the exercise of its jurisdiction, though there would be still one more matter outstanding which I shall mention later. I shall set out the evidence of this arbitrator in so far as it concerns this matter. He says in examination-in-chief:

"We compared the signature of Subbayya in the presence of both parties before all the arbitrators by looking into account book of Lakshmidassayya. The account was sent for on the request of the plaintiff. We held no private enquiries."

In cross-examination he says:

"We acted on the evidence before us only. The private enquiry referred to in the award relates to the comparison of signature. Really there was no private enquiry as the accounts were sent for publicly."

I must confess that I cannot see how this statement can be reconciled with what is so clearly set out in the arbitrator's judgment. It is there distinctly stated:

"When we made enquiries privately we ascertained that in the account of M. Lakshminarayana, there is found the signature of the defendant".

No doubt that in itself would not have been irregular if the account had been brought to the notice of the defendant before the arbitrators. That is not the sort of explanation which the witness attempts to give. He now says that the account was sent for on the request of the plaintiff, and that the arbitrators held no private enquiries, and in cross-examination he says "The private enquiry referred to in the award relates to the comparison of signature." This explanation of private enquiry seems to me a pure subterfuge. The comparison of signature by arbitrators is not a private enquiry. It is most important to note that even in his deposition there is no statement that the defendant was asked whether he admitted or denied his signature in this account. I have remarked above that the arbitrators have expressly stated in their judgment that the defendant admitted his signature in the letters there exhibited. In the nature of things, when this much more important document containing what was alleged to be his signature was in question, had he been present, he must have been asked whether he denied or admitted it. When we find that fact neither noted in the original judgment nor deposed to by the witness and when the judgment does not contain the document as one of the exhibits, the conclusion seems to be irresistable that the evidence of the witness cannot be reconciled with the judgment. The lower Court makes no attempt to do so. It simply ignores the apparent difference. For the lower Court to have thus accepted the evidence of the arbitrator which was in direct conflict with the judgment and which evidence it was of course natural for the arbitrator to give in order to excuse himself and the fellow-arbitrators if they had adopted the procedure which on the face of the judgment they appear to have adopted, was a material irregularity in exercising its jurisdiction.

Another point to be mentioned is this, and even accepting the arbitrators' evidence, as the lower Court does, it still remains outstanding. There is no proof that any evidence was taken that this entry in the account was in the writing of the defendant. As I have said, Meda Lakshminarayana is not stated in the arbitrators' judgment to have been examined by the arbitrators. His name does not appear in the list of witnesses given in their judgment and it is not stated by P. W. No. 1 in his evidence before the Court that he was examined or was called as a witness. It is just arguable that it was still open to the arbitrators by mere comparison of the signatures in the admitted letters with the signature in the account to conclude that both are similar and that therefore that the disputed letter was written by the defendant. But if that was the case, the signature in the account did not really amount to any additional evidence at all because the question then was exactly the same as to whether the signature in the disputed letter was the same as the signature in the admitted letters, and if that could be determined by a mere comparison of the writing of the documents, then an unproved signature in the account would not be any additional evidence. In *Sanyasi Rao* v. *Venkata*

(9) 65 Ind. Cas. 676; 41 M L J 276; 14 L W 394; (1921) M W N 509.

Rao (10), *Dobson* v. *Groves* (11), is quoted wherein Lord Denman, C. J., observed:

"When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biassed, there is a sufficient objection."

In the same Madras case, it is stated

"In any event, it is settled law that if evidence is improperly admitted, the Courts will not consider the question whether such evidence had or had not an effect upon the arbitrator's mind, and in this case the arbitrator having made private enquiries and obtained information, his award is thereby vitiated."

Here, the evidence improperly admitted is crucial evidence in the case. There can be no doubt that it must have very strongly affected the arbitrators' minds.

In the result, therefore, the whole award must be set aside, the petition allowed with costs, and the suit remanded for disposal.

A. *Petition allowed.*

(10) 73 Ind. Cas. 470; 47 M 30; 17 L W 71; (1923) M W N 7; 44 M L J 263; A I R 1923 Mad. 301; 32 M L T 32.

(11) (1844) 6 Q B 637; 14 L J Q B 17; 9 Jur. 86; 66 R R 509; 115 E R 239.

LAHORE HIGH COURT

Criminal Revision Petition No. 179 of 1934

March 29, 1934

JAI LAL, J.

UTTAM SINGH—ACCUSED—PETITIONER

versus

MUNICIPAL COMMITTEE, RAWALPINDI—OPPOSITE PARTY

Punjab Municipal Act (III of 1911), s. 173—Scope and applicability of—Structure made with permission of Municipality years ago—Continuance after expiry of period without payment — Offence, if committed —Remedy of Municipal Committee—Civil suit.

Section 173, Punjab Municipal Act, applies only to encroachments which have recently been made and it is the act of building or erecting the encroachment which has been made punishable and the section does not apply to encroachments or erections which have existed for some years. Where a movable encroachment or projection was made some years ago and with the permission of the Municipal Committee on payment of rent, no offence is committed if the structure is continued after the period fixed without payment of rent. In such a case the relation between the parties is that of landlord and tenant or licensor and licensee and hence the aggrieved party should seek his remedy in the Civil Court.

Cr. R. P. from an order of the Sessions Judge, Rawalpindi, dated January 31, 1934.

Facts.—The petitioner had a hut erected on a site leased by him from the Municipal Committee but the permission to occupy the site had expired and he had not paid any rent for some several months before he was prosecuted.

The ground of revision is that as the petitioner had erected his hut originally with the permission of the Municipal Committee and had kept it on the site for some time with that permission, he could not now be prosecuted under s. 173 for mere non-payment of rent. On behalf of the petitioner the ruling *Kirpa Ram* v. *Municipal Committee, Amritsar* (1), was cited in which a conviction under s. 172, Municipal Act, regarding some encroachments which had been in existence for a period of 8 to 15 years was held to be illegal. The wording of s. 172, although it deals with slightly different offences from those covered by s. 173, is the same to the extent of saying: "Whoever without the written permission of the Committee builds, places or erects....." It is clear from the prosecution evidence in this case that when the petitioner placed his movable hut on the site in question, he did so with the permission of the Municipal Committee and even if that permission has now expired, he cannot now be said to have committed the offence of placing his hut there and I do not think the section is intended to cover cases in which a man has merely failed to pay rent for a site which he occupied originally with the permission of the Committee.

I accordingly forward the case to the High Court with the recommendation that the conviction be set aside.

Mr. *Gobind Ram Khanna*, for the Opposite Party.

Order.—This is a reference by the Sessions Judge of Rawalpindi recommending that the conviction of the petitioner, Uttam Singh, under s. 173, Punjab Municipal Act, be set aside.

The facts found by the learned Sessions Judge are that the petitioner applied to the Municipal Committee of Rawalpindi for permission to place a movable structure in front of his building, which amounted to an encroachment on or over a street. This permission was granted to him on payment of rent fixed by the Municipal Committee. It appears that this structure was then built or placed on or over the street by the petitioner and he continued to pay the rent to the Municipal Committee for some time. Later, however, he ceased to pay the rent and after making some attempts to recover it from him, the Municipal Committee prosecuted him under

(1) 28 Ind. Cas. 734; A I R 1914 Lah. 554; 2 P R 1915 Cr.

s. 173, Municipal Act. The question is whether under the circumstances mentioned above, that is to say, when it is established that the encroachment on or over the street was originally made with the sanction of the Committee, assuming that the sanction was conditional, the petitioner could be convicted under s. 173, even on breach of the condition. In other words, whether it can be said that on the breach of the condition, which, in this case, is the non-payment of the rent, the petitioner can be said to have placed in front of his building a movable encroachment on or above the street.

The learned Counsel for the Municipal Committee has also contended before me that in this case the period for which the lease has been granted by the Municipal Committee originally had expired. There is no documentary evidence on the record to establish this and the learned Sessions Judge has not found this to be the case. But assuming that the lease had expired in this case, the question is whether s. 173, applies. In my opinion, the same considertions apply to both the cases so far as the interpretation of s. 173 of the Act is concerned.

No direct authority has been cited before me. But there are a number of cases in which s. 172, Punjab Municipal Act, has been interpreted by this Court. The only difference between the two sections is that s. 172 relates to immovable encroachments on or above the streets and s. 173 relates to movable encroachments. Section 172 lays down that whoever places or erects an immovable encroachment shall be punishable. Section 173 says that whoever places in front of any building any movable encroachment shall be punishable. It has been held that s. 172 applies only to encroachments which have recently been made and it is the act of building or erecting the encroachment which has been made punishable. The section has therefore been held not to apply to encroachments or erections which have existed for some years. In the present case, the movable encroachment or projection was made some years ago and with the permission of the Municipal Committee. Can it, therefore, be asserted with any justification, that because either the sanction has expired, or rather the tenancy or license has expired, or because having made the projection or encroachment, the petitioner has failed to comply with the conditions which had to be performed on his part, he placed the encroachment without the sanction of the Committee. In my opinion the view of the learned Sessions Judge is correct that s. 173, as it is worded, cannot be applied to such cases. On the other hand, it applies to cases of recent encroachments made without sanction of the Municipal Committee. The result may be unfortunate, but, in my opinion, according to law, as it is, the remedy of the Committee is to have recourse to the Civil Courts and not to prosecute in the Criminal Courts. The Committee having sanctioned the encroachment on payment of what is described to be rent and the relationship between the Committee and the petitioner being that of landlord and tenant or licensor and licensee, it seems to me that it is all the more reasonable that the aggrieved party should seek its remedy in the Civil Courts.

I accordingly accept the recommendation of the Sessions Judge and acquit the petitioner and direct that the fine, if paid, be refunded to him.

N. *Recommendation accepted.*

PRIVY COUNCIL

Appeal from the Madras High Court

March 5, 1935

LORD THANKERTON, LORD ALNESS AND SIR SHADI LAL

RAMAKRISHNA AYYAR—APPELLANT

versus

PARAMESWARA AYYAR AND OTHERS —RESPONDENTS

Hindu Law—Joint family—Transfer of one member's share to near relation for nominal consideration to save it from creditors—Whether constitutes separation—Right to share in outstandings realised by other members—Practice—Privy Council—Concurrent findings based on appreciation of evidence—Whether will be disturbed by Privy Council.

Where a member of a joint Hindu family is induced to assign his share in the family property to a near relation (his father-in-law), for a nominal consideration, the transfer being intended not to deprive him of his property, but to save it from his creditors, the transfer does not extinguish his interest in the estate and he does not cease to be a co-parcener in the joint property and he is entitled to a share in the outstandings, if any, realised by the other members on behalf of the family.

Concurrent findings of the Courts below, proceeding upon an appreciation of the evidence adduced by the parties, will not be disturbed by the Privy Council

Mr. *Subba Row*, for the Appellant.

Sir Shadi Lal.—This appeal arises out of an action brought by the plaintiff Parameswara Ayyar for partition of the property

belonging to a Hindu co-parcenary consisting of himself and his father and brothers. The main defence to the claim was that the plaintiff had parted with his share in the estate by a deed executed by him on August 31, 1916, and ceased to have any interest in the property sought to be partitioned. This plea has been over-ruled by the Courts in India with the result that the plaintiff has been granted a preliminary decree for partition of the joint estate.

On this appeal preferred by one of the brothers of the plaintiff (the father having died during the pendency of the suit in the trial Court), it is again urged that the deed referred to above operates as a bar to the action. The circumstances which led to the execution of the document may be briefly stated. The plaintiff, who was an improvident young man of loose character had embarked upon a career of extravagance and reckless borrowing. Both his father and father-in-law were, therefore, anxious to prevent his creditors from seizing his share in the estate in satisfaction of the debts due to them. They accordingly induced him to assign his share in favour of his father-in-law for a nominal consideration of Rs. 1,000. But the High Court in concurrence with the trial Judge have decided that the transfer was intended not to deprive him of his property but to save it from his creditors, and that it did not extinguish his interest in the estate. The concurrent findings of the Courts below, proceeding, as they do, upon an appreciation of the evidence adduced by the parties, cannot be disturbed, and it is clear that the plaintiff having successfully removed the obstacle in his way must be held to be a co-parcener in the joint property.

In order to determine the property which was available for partition, the Courts had to adjudicate upon certain alienations of the co-parcenary property, which were made by the plaintiff's father after August 31, 1916. There are only two transactions which now require consideration. One of them is a gift made by the father in October 1916. Now the deed evidencing the gift contains an express clause to the effect that in the event of the donee dying without leaving any male issue, the gifted property would revert to the donor. It is beyond dispute that the donee has died and left no male issue. The clause in question, therefore, comes into operation and without impeaching the deed of gift the plaintiff is entitled to claim the property as part of the estate which should be partitioned.

The other transfer was made by the father on November 12, 1916, by an instrument which purported to sell to his sister for a sum Rs. 7,000 the property specified therein. There is, however, no evidence that she ever paid the money which was the ostensible consideration for the transfer. Indeed, as stated by the High Court she does not lay any claim to the property, and has, in fact, re-conveyed it to the appellant who represents the joint family. The learned Judges of the High Court were, therefore, justified in treating it as part of the joint estate.

No reasonable objection can be taken to the finding that the plaintiff is entitled to a share in the outstandings, if any, realised by the defendants on behalf of the family.

Their Lordships are of the opinion that there is no substance in any of the grounds raised by the appellant, and they will, therefore, humbly advise His Majesty that the appeal be dismissed and the judgment and the decree of the High Court be affirmed.

N. *Appeal dismissed.*

Solicitors for the Appellant.—Mr. *Harold Shephard.*

PRIVY COUNCIL

Appeal from the Calcutta High Court

March 1, 1935

LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, SIR LANCELOT SANDERSON AND SIR SHADI LAL

EMPEROR—APPELLANT

versus

DAHU RAUT AND OTHERS—RESPONDENTS

Criminal Procedure Code (Act V of 1898), ss. 421, 422, 423, 439—Powers of Appellate Court to dismiss appeal summarily—Appeal not dismissed summarily—Duty of Court to comply with provisions of ss 422 and 423—Powers of Appellate Court under s. 423 and High Court under s. 439—Whether same—Jurisdiction of Courts conferred by Statute—Courts cannot go outside the provisions.

Upon the true construction of the Criminal Procedure Code, the Appellate Court is not entitled to dismiss an appeal summarily in terms of s. 421 unless the Court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in the appeal, and where the appeal is not dismissed summarily, the Court, is bound in order to the disposal of the appeal, to comply with the provisions of s. 422 as to notice, and with the provisions of s. 423 as to sending for the record, if such record is not already in Court.

The terms of s 421 exclude the possibility of partial summary dismissal, *e. g.*, in so far as the conviction is appealed against. Failing summary dismissal, the provisions of ss. 422 and 423 apply

and, the provisions as to notices in s. 422 and the provision as to sending for the record in s. 423 are clearly peremptory, and there can be no room for revision at that stage. The words "admitted" and 'admission' in reference to appeals which are not summarily dismissed, though not infrequently used in the Courts in India, are not happily chosen From their ordinary meaning they would imply that the appeal requires to be admitted at this stage, whereas the Appellate Court are bound to deal with the appeal, and they can only do so when they have complied with the preliminary steps of giving the statutory notices under s. 422, and sending for the record, which will enable the Court to deal with the appeal in accordance with the provisions of s. 423. The powers conferred on the Appellate Court under s. 423 are as ample as the High Court would have on revision under s. 439, with the exception of the power to enhance the sentence, and if the appeal is before a High Court, and it is thought to be desirable, there is no reason why the accused should not be warned that, at the hearing on the petition, he may be called on to show cause why his sentence should not be enhanced. The jurisdiction of the Court in these matters is statutory, and the Court, however admirable its intentions, is not entitled to go outside these provisions and, in effect, to legislate for itself.

A. against the judgment of Mr. Justice Lort-Williams and Mr. Justice McNair of Calcutta High Court in admitted. Appeals Nos. 326, 340, 407 and 432 of 1933, dated August 29, 1933, reported as 145 Ind. Cas. 937; 34 Cr. L. J. 1100.

Messrs. *A. M. Dunne*, *K. C.* and *W. Wallach*, for the Appellant.

Messrs. *Majid* and *J. M. Pringle*, for the Respondent.

Lord Thankerton.—These are consolidated appeals by special leave from four judgments of the High Court of Judicature at Fort William in Bengal dated respectively May 29, May 29, May 31, and June 7, 1933, which reduced the sentences passed on the respective respondents by the respective Criminal Courts of first instance on the March 25, the February 28, the April 1, and March 18, 1933.

In each case the respective respondents presented petitions of appeal to the High Court against both the conviction and the sentence, in exercise of the statutory right conferred on them by the Criminal Procedure Code, and the question in the present appeals is whether the orders of the High Court in each of the four cases by which the sentences were reduced, were in conformity with the requirements of the Code. The Crown, as appellant, maintains that the orders were passed in violation of the statutory provisions and were beyond the jurisdiction of the High Court. The Crown desires to test the validity of the procedure adopted by the High Court, but does not ask for any interference with the reduction of the sentences made by these orders.

The sections of the Code which prescribe the procedure to be followed on presentation of a petition to the Appellate Court—in this instance, the High Court,—are as follows:—

"4 9. Every appeal shall be made in the form of a petition in writing presented by the appellant or his Pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under s. 367.

"420. If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court.

"421.—(1) On receiving the petition and copy under s. 419 or s. 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily;

"Provided that no appeal presented under s. 419 shall be dismissed unless the appellant or his Pleader has had a reasonable opportunity of being heard in support of the same.

"(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so.

"422. If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his Pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal; and, in cases of appeals under s. 417, the Appellate Court shall cause a like notice to be given to the accused.

"423.—(1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record and hearing, the appellant or his Pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under s 417, the accused if he appears, the Court may, if it considers that there is no sufficient ground for interfering dismiss the appeal, or may—

"(*a*) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

"(*b*) in an appeal from a conviction, (1) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of s. 106, sub-section (3), not so as to enhance the same;

"(*c*) in an appeal from any other order, alter or reverse such order;

"(*d*) make any amendment or any consequential or incidental order that may be just or proper.

"(2) Nothing herein contained shall authorise the Court to alter or reverse the verdict of a

jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him".

The following facts are common to each of the four cases:—No order was passed for summary dismissal of the appeal under s. 421 (1); no notice was sent in terms of s. 422 to the Legal Remembrancer, who is the officer appointed by the Local Government; the record was not sent for, as provided by s. 423 (1); in each case an Advocate was present on behalf of the accused, when the order was made by the High Court, but none was present on behalf of the Crown.

There were slight variations in the form of the orders. In the case of two of the orders it was stated that the appeal was admitted, while a third order stated "This appeal is allowed on the question of sentence only"; the fourth order is silent on this point. But all four orders are expressed as pronounced in exercise of the Court's criminal appellate jurisdiction.

On becoming aware of what had been done, the Deputy Legal Remembrancer approached the Acting Chief Justice (Sir Charu Chandra Ghose) on the matter, and on August 8, 193', the latter passed an order in the following terms:—

"This matter was mentioned before me on Thursday last by the Deputy Legal Remembrancer. I have no jurisdiction whatsoever to interfere with the orders of the Division Bench. As Mr. Justice Lort-Williams has written to me as Chief Justice that he would like to look into the matter further, I direct that the two learned Judges referred to on this page (Lort-Williams and McNair, J J.) do form a Division Bench on Friday August 11, at 4 P. M., when the Crown, if so advised, may mention the matter to the learned Judges."

Subsequently, the matter was mentioned before the two learned Judges named in the above order, when the Advocate-General, on behalf of the Crown submitted that the orders in the four petitions of appeal were made without jurisdiction in respect that they had been passed without notice to the Legal Remembrancer and without sending for the records, that they were therefore, null and of no effect, and that the petitions should be disposed of according to law. Lort-Williams, J., passed one judgment in all four cases on August 29, 1933, and McNair J., delivered a separate judgment on August 31, 1933. Both of the learned Judges held that they could not review or alter their orders, except in regard to clerical errors within the meaning of s. 369 of the Code, but they differed as to the existence of such errors in the orders in question, and no alteration or correction was made.

In explanation and justification of the orders Lort-Williams, J., stated as follows:—

"It is complained that as the appeals were admitted, the usual notices ought to have been given, and the appeal heard as provided in ss. 422 and 423 of the Criminal Proceuure Code. In each of these orders as drawn up, there are clerical errors, and the form of the order is not in accordance with the judgment which I gave. This was overlooked when the orders were signed—what I said was, that there was no necessity to send for the record, and then I proceeded to give reasons why the sentences ought to be modified According to my recollection, nothing was said about admitting or dismissing the appeal, but the effect of the order was, that the appeal was dismissed summarily under s 421 of the Criminal Procedure Code, and the sentence was varied under the Court's revisional powers, the proceedings having otherwise come to its knowledge within the meaning of s. 439, Criminal Procedure Code.

This kind of order is not the usual one of admission or rejection of the appeal, and doubt seems to have arisen in the mind of the Bench Clerk, and in the office, about the correct form of the order. In future, the senior Judge of the Criminal Bench should be consulted, when any doubt or difficulty arises about the from of the judgment of the Court.

A number of similar orders were made by the Criminal Bench over which I presided two years ago, and no complaint was made by the Crown or by any one. This form of order is convenient and useful, and is intended to save unnecessary waste of time, labour and expense, which is a matter not to be lightly disregarded in these difficult days. Where the Court is satisfied that the conviction was justified, but thinks that there may be grounds for reduction of sentence, it will generally invite the Crown and the appellant, or either of them, to furnish information in order to assist the Court to arrive at a decision. In such a case, the practice is to admit the appeal on the question of sentence only, though it is doubtful whether this procedure is strictly within the provisions of the Code But where the Court does not require any further information on the point, it would be merely a waste of time, money and labour, to issue notices, and send for records, and summon parties whom the Court does not wish to hear.

It must be remembered that the question of punishment is peculiarly a matter for the Court. In revision the Crown has no right to seek to influence the Court on this question unless invited by the Court to do so. The Deputy Legal Remembrancer must have overlooked this, when he complained to the Acting Chief Justice that he had a great deal to say upon the subject in connection with the four sentences to which I have referred. The Court always hears him with patience, but in revision neither party has any right of audience, though no order must be made to the prejudice of the accused, unless he has had an opportunity of being heard. (Sections 439 and 440, Criminal Procedure Code.)

I am satisfied that the Court has jurisdiction to proceed as it did. If such procedure were not strictly within the provisions of the Code, provision for it ought to be made without delay. But in my opinion we have the power already. The powers of the Court in revision are almost unlimited. In

particular it has all the powers conferred on a Court of Appeal by ss. 423, 426, 427 and 428, Criminal Procedure Code. In an appeal under s. 423 the Court has no power to enhance the sentence, but it may do so in the exercise of its revisional powers. If the Court has power to enhance the sentence in revision, surely it has power to modify or reduce it. The Court when hearing an appeal may alter the finding, and then under its revisional powers enhance the sentence. (See the case of *In re Bali*) *Reddi* (1). In the case of *Hridoy Mondal* v. *Emperor* (2) the accused had pleaded guilty to murder, and had been sentenced to transportation for life, and had appealed. The Court dismissed the appeal, because he had pleaded guilty, and the minimum sentence had been passed, but in exercise of its revisional powers, the Court altered the conviction to one under s. 304, Indian Penal Code, and sentenced the appellant to seven years' rigorous imprisonment."

McNair, J. stated as follows -

"The facts of each case and the orders made have been referred to in detail by my learned brother, and it is unnecessary for me to analyse the exact procedure which was adopted, or the reasons which prompted us to make the orders. It may well be, as stated by my learned brother, that we intended to dismiss the appeals and to deal with the question of sentence under our powers of revision.

The orders, as worded, purport to show that the appeals were admitted and the sentences reduced."

These observations of the learned Judges appear to show either a confusion of thought as to the provisions of the Code or an attempt to justify a practice which is inconsistent with its provisions. The jurisdiction of the Court in these matters is statutory, and the Court, however admirable its intentions, is, not entitled to go outside these provisions and—in effect—to legislate for itself.

Chapter XXXI of the Code, as its title bears, is a complete Code relating to appeals and the Appellate Court referred to includes other Courts than the High Court. Chapter XXXII, on the other hand, confers a special jurisdiction on the High Court only as regards references and revision.

On presentation of a petition of appeal in exercise of the statutory right conferred on the accused the Appellate Court is given a power of summary dismissal by s. 421, "if it considers that there is no sufficient ground for interfering," and their Lordships have difficulty in understanding the suggestion of Lort-Williams, J., that the appeals could have been summarily dismissed in the present case, since each appeal asked for reduction of sentence, and the Appellate Court took the view that there was sufficient ground for interfering with the sentences. The terms of the section equally exclude the possibility of partial summary dismissal, *e. g.*, in so far as the conviction is appealed against. Failing summary dismissal, the provisions ss. 422 and 423, apply and, in their Lordships' opinion, the provisions as to notices in s. 422, and the provision as to sending for the record in s. 423, are clearly peremptory, and there can be no room for revision at that stage. The words 'admitted' and 'admission' in reference to appeals which are not summarily dismissed, though not infrequently used in the Courts in India, do not appear to their Lordships to be happily chosen. From their ordinary meaning they would imply that the appeal requires to be admitted at this stage, whereas the Appellate Court are bound to deal with the appeal, and they can only do so when they have complied with the preliminary steps of giving the statutory notices under s. 422, and sending for the record, which will enable the Court to deal with the appeal in accordance with the provisions of s. 423. The powers conferred on the Appellate Court under s. 423 appear to be as ample as the High Court would have on revision under s. 439, with the exception of the power to enhance the sentence, and if the appeal is before a High Court, and it is thought to be desirable, there is no reason why the accused should not be warned that, at the hearing on the petition, he may be called on to show cause why his sentence should not be enhanced. A similar course was taken in the case of *In re Bali Reddi* (1), which was referred to by Lort-Williams, J., although the decision of the Madras High Court on the main point in that case has been doubted in the decision of this Board in *Kishan Singh* v. *Emperor* (3). In the other case referred to by the learned Judge, *Hridoy Mondal* v. *Emperor* (2), the High Court first dismissed the appeal and, thereafter, exercised their power of revision. *In re Chunbidya* (4).

Their Lordships are, therefore, of opinion that the procedure of the High Court in the four appeals here in question was in violation of their statutory duty in respect of their failure to comply with the provisions of s 422 as to notice to the Crown,

(1) 22 Ind. Cas. 756; 37 M 119; 15 Cr. L J 180.

(2) 22 C W N 91 (*xci*) *notes.*

(3) 111 Ind Cas. 332; 55 I A 330; A I R 1928 P C 254; 29 Cr. L J 823; 5 O W N 911; 28 L W 396; (1928) M W N 749; 29 P L R 575; 33 C W N 1; 48 C L J 397; 50 A 722; 30 Bom. L R 1572; 55 M L J 786; 26 A L J 1099 (P C).

(4) 153 Ind. Cas 936; 62 I A 36; A I R 1935 P C 35; 7 R P C 129; 68 M L J 166; 41 C W 183; 36 Cr. L J 482; 37 Bom. L R 160; (1935) M W N 177; (1935) Cr. Cas. 199; 16 P L T 181; 39 C W N 350; 60 C L J 593.

and the provisions of s. 423 as to sending for the record.

Accordingly, their Lordships will humbly advise His Majesty that the appeals should be allowed, and that it should be declared that, upon the true construction of the Criminal Procedure Code, the Appellate Court is not entitled to dismiss an appeal summarily in terms of s. 421, unless the Court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in the appeal and that where the appeal is not dismissed summarily, the Court is bound, in order to the disposal of the appeal, to comply with the provisions of s. 422 as to notice, and with the provisions of s. 423 as to sending for the record, if such record is not already in Court. In respect that the appellant does not desire any order with regard to the reduction of the sentences, no further order is necessary.

N. *Appeals allowed.*

Solicitors for the Appellant:—*Solicitor' India Office.*

Solicitors for the Respondents:—Messrs. *Hardcastle Sanders & Co., Clarke Rawlins & Co., Watkins* and *Hunter.*

ALLAHABAD HIGH COURT

First Civil Appeal No. 309 of 1930
December 5, 1933
KING AND RACHHPAL SINGH, JJ.,
SRI NATHJI AND OTHERS—DEFENDANTS —APPELLANTS
versus
Musammat PANNA KUNWAR—PLAINTIFF —RESPONDENT

Limitation Act (IX of 1908), Sch. I, Arts. 132, 123—Plaintiff asking only for money decree—No prayer for enforcement of charge—Art. 132, if applies—Suit for recovery of legacy from persons in possession who are legally bound to pay it—Limitation for suit.

Article 132, Limitation Act will not apply to a case in which the plaintiff does not ask for the enforcement of any charge but simply asks for a money decree against the defendants. [p. 391, col. 1.]

A suit for recovery of a legacy from persons in possession of the estate who are legally bound to pay the same is governed by Art. 123, Limitation Act.

F. C. A. from the decision of the Additional Sub-Judge, Mutura, dated March 11, 1930.

Messrs. *S. N. Sen* and *G. S. Pathak*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondent.

Rachhpal Singh, J.—This is a defendants' appeal arising out of a suit to recover a sum of money. The facts which have given rise to this litigation between the parties may briefly be stated as follows: *Musammat* Panna Kunwar, the plaintiff-respondent, is the daughter of one *Pandit* Baldeo Narain Singh who died on January 11, 1912. He was the owner and in possession of considerable property. On January 5, 1912 B. Baldeo Narain Singh executed a will in favour of one Keshab Deo *alias* Kabli Singh, his nephew. Under the terms of the aforesaid will he directed Keshab Deo to pay a sum of Rs. 500 yearly to *Musammat* Panna Kunwar and her son. On the death of *Pandit* Baldeo Narain Singh a dispute arose between the plaintiff on the one side and Keshab Deo on the other as regards the estate left by the deceased. The plaintiff *Musammat* Panna Kunwar instituted a suit to recover possession over the entire estate left by the deceased on July 11, 1915, on the allegations that she was the sole heiress of her father and that the will set up by the defendant was a forgery. The suit was decreed by the first Court but that decree was reversed by the High Court which decision was finally upheld by their Lordships of the Privy Council on December 16, 1925. On December 10, 1928, *Musammat* Panna Kunwar plaintiff-respondent instituted a suit to recover the arrears of maintenance from January 5, 1912, till the date of the suit together with interest thereon. She claimed a sum of Rs. 8,000 on account of principal and Rs. 4,547-8-0 for interest, the total amount claimed being Rs. 12,547-8-0. It appears that *Babu* Keshab Deo *alias* Kabli Singh had died before the date of the suit. He had on August 23, 1922, during the pendency of the appeal in the suit which the plaintiff had instituted for possession over the estate of her father, executed a will under which he left his entire estate which he had got under the will of *Pandit* Baldeo Narain Singh in favour of Thakur Sri Nathji an idol. The other defendants in the case before us are trustees of the temple in whose favour Keshab Deo had made a will.

The defendants resisted the claim and alleged *inter alia* that the suit was not within limitation that it was barred by the rule of *res judicata* and was not maintainable and that the plaintiff was not entitled to recover interest; all these pleas have been decided against the defendants

and it has been held by the learned Subordinate Judge that the claim is within limitation and that the plaintiff is entitled to recover the amount for which she sued. The present appeal has been preferred against the decree made by the learned Subordinate Judge.

The plea that the suit of the plaintiff was barred under s. 11, Civil Procedure Code, was abandoned in this Court.

Only two pleas have been urged in this appeal before us one is that of limitation and the other relates to interest.

We proceed to consider the plea of limitation first. The learned Subordinate Judge has held that either Art. 132 or Art. 123, Sch. I, Limitation Act, is applicable. We are of opinion that Art. 132 is not applicable to the case before us. That Article applies to a case where the plaintiff seeks to enforce payment of money by enforcing his charge upon an immovable property. In the case which we are hearing, the respondent did not ask for the enforcement of any charge but simply asked for a money decree against the defendants. The learned Counsel for the respondent had to concede that Art. 132, Limitation Act could not be made applicable to the case before us in view of the fact that the plaintiff in her plaint did not seek to enforce her charge against the immovable property in possession of the appellants. He, however, made an application on behalf of the respondent during the hearing of the appeal asking for permission to amend the plaint by adding a relief for enforcing a charge against the immovable property which is liable for the payment of the maintenance of the plaintiff-respondent. That application was rejected by us for the reasons recorded in our order. As the plaintiff asked for a money decree only, it must be held that Art. 132, Limitation Act, would not apply to the case. This Article would apply only where the claim is to realise the money by a sale of the property upon which it is charged.

The next question for our consideration is whether Art. 123, Limitation Act, is applicable. Article 123 enacts that in a suit for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate, the period of limitation is 12 years from the time when the legacy or share becomes payable or deliverable. The contention which has been raised by the learned Counsel for the appellants is that the suit of the respondent is governed by Art. 120 and not by Art. 123. This question came up for consideration in a case before a Full Bench of the Madras High Court in *Parthasarathy* v. *Venkatadri* (1). There the Court held that a suit of this description would be governed by Art. 123. The learned Chief Justice Schwabe, C. J., dealing with the question made the following observations on this point which are to be found at p. 205*:

"But it is contended that this Article only applies to actions against executors and administrators and that neither the defendants nor their fathers were either. But, in my judgment this Article applies to any one in possession of the state and bound to pay the legacies."

Coutts Trotter, J., at p. 209* dealing with this question remarked:

"I agree further with my Lord in thinking that Art. 123 applies to such a case as the present even where the person sued is not an executor but a person who is in fact in possession of the estate in circumstances which render him accountable in equity to those having claims upon the estate."

Kumaraswami Sastri, J., at p. 246* in the same ruling remarked as follows:

"Whatever doubts there may be as regards cases of intestacy, I do not see any reason for holding that a suit for a legacy or for a share of a residue bequeathed by a testator can fall under Art. 123 only if it is against an executor and not if it is against one in possession of assets which are liable for payment of the legacies. The wording of Art. 123 is general. It refers to a suit for a legacy or for a share of a residue bequeathed by a testator and if the legatee has a cause of action against the person in possession of the assets of the testator, I do not see why there should be a further qualification that the person in possession of the assets should be an executor or administrator. I think it will be reading into the Article words which are not there, namely, that the suit should be for a legacy or for a share of a residue against an executor or administrator."

In the case before us the suit of the respondent is one against persons who admit that the estate in their possession is liable for the legacy. The very fact that the defendants-appellants concede their liability for the payment of the maintenance for six years prior to the date of the suit goes to show that they are persons who admit their liability for the maintenance claimed by the respondents. It may be remarked that the Full Bench case of the Madras High Court mentioned above went in appeal before their Lordships of

(1) 70 Ind. Cas. 689; A I R 1922 Mad. 457; 46 M L J 100; (1922) M W N 532; 16 L W. 379; 43 M L J 486; 31 M L T 221 (F. B.)

*Pages of 46 M.—[*Ed.*]

he Privy Council and the judgment in appeal is to be found in *Venkatadri* v. *Parthasarathi* (2), in which the decision of the Full Bench was affirmed. The learned Counsel for the appellants has, however, contended that the case reported in *Ghulam Muhammad* v. *Ghulam Husain* (3), which is a Privy Council case supports his contention. In that case at p. 252* their Lordships of the Privy Council made the following observations:

"Before the Board it was for the first time suggested that the suit in reality falls under Art. 123, which applies to a suit for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate. The period of limitation in such a case is 12 years from the date when the legacy or share became payable or deliverable."

A perusal of that ruling will show that in fact it does not support the contention of the appellants. The argument raised before their Lordships of the Privy Council was based on the assumption that the owner of the property must be deemed to have died intestate and that what the appellants were claiming was a distributive share in the estate. It was on this assumption that the contention was put forward that to a case of that nature Art. 123, Limitation Act, would be applicable. Their Lordships of the Privy Council were of opinion that this contention was not well founded because in a long series of rulings of various High Courts in India it had been settled that in a case between several co-heirs of an intestate the Article applicable would be 144 and not 123. It will be seen that most of the cases referred to by their Lordships in that judgment were cases between co-heirs and the question which had to be considered in those cases was whether the period of limitation under Art. 123 should be applied or the cases should be governed by Art. 144. The Courts were of opinion that if Art. 123, Limitation Act was made applicable, then it would be in conflict with the rule of law under which the possession of one co-heir is to be deemed as possession of the other co-heirs. It was under those circumstances that their Lordships of the Privy Council held that in suits between co-heirs, the Article of limitation applicable would be Art. 144 and not Art. 123. The decision reported in *Ghulam Muhammad* v. *Ghulam Husain* (3), has no application to a case in which the plaintiff claims a legacy and that is why we find that there is no mention of the Madras Full Bench ruling in it. In a case reported in *Bai Jivi* v. *Bai Bihanboo* (4), it was held by a Bench of two learned Judges that:

"The word 'distribution' has a peculiar meaning of distribution of an estate which has vested in an executor or administrator. Article 144, and not Art. 123 therefore applies to a suit to recover a share by a Muhammadan heir from a person in management of the property."

In dealing with this point the following observations were made:

"On the first question as to whether Art. 123 applies, we think that Art. 123 is restricted to suits where a share is sought to be recovered as such from a person who legally represents the estate of the deceased either as executor, administrator or otherwise, and who is bound by law as such representative to pay or deliver the share. The appellants rely on the decision in *Shirinbai* v. *Ratanbai* (5), and particularly on the remarks of Macleod, J., at pp. 860 and 861* and the ruling of the Privy Council in *Maung Tun Tha* v. *Ma Thit* (6), and the decision of the Madras High Court in *Parthasarathy* v. *Venkatadri* (1). In the subsequent decisions of this Court in *Kallangowda* v *Bibishaya* (7), and *Nur Din* v. *Bu Umrao* (8), Sir Norman Macleod was of opinion that Art. 144 would apply where a suit is brought by a Muhammadan sharer to recover his share of the immovable property from the person in possession of such property. Fawcett, J., in *Nur Din* v. *Bu Umrao* (8), expressed the view that the decision of the Privy Council in *Maung Tun Tha* v. *Ma Thit* (6), which related to the right of succession of the eldest son under the Burmese Buddhist Law to be asserted not within a certain limited period of time but within the period of limitation did not really decide the point as to whether Art. 123, Limitation Act, applied to a case of a Muhammadan suing to recover his share, from a person in possession or management of the property and preferred to follow the earlier Privy Council decision in *Muhammad Riasat Ali* v *Hasin Banu* (9), and held that the word 'distribution' has a peculiar meaning of distribution of an estate which has vested in an executor or administrator. The Madras case of *Parthasarathy* v. *Venkatadri* (1), and *Venkatadri* v. *Parathasarathi* (2), refer to a

(2) 87 Ind. Cas. 324; A I R 1925 P C 105; 52 I A 214; 48 M 312; 23 A L J 261; 48 M L J 627; L R 6 A P C 82; 27 Bom. L R 823; 3 Pat. L R 208; (1925) M W N 431; 29 C W N 989 (P C.).

(3) 136 Ind. Cas. 454; A I R 1932 P C 81; 59 I A 74; 54 A 93; (1932) A L J 245; 34 Bom. L R 510; 36 C W N 310; 62 M L J 371; 35 L W 464; Ind. Rul (1932) P C 118; 9 O W N 399 (P. C.).

* Page of (1932) A. L. J.—[*Ed.*]

(4) 118 Ind. Cas. 785; A I R 1929 Bom. 141; 31 Bom L R 199; Ind. Rul. (1929) Bom. 481

(5) 51 Ind. Cas 209; A I R 1918 Bom. 54; 43 B 845; 21 Bom. L R 384.

(6) 38 Ind Cas. 809; A I R 1916 P C 145; 44 I A 42; 44 C 379; 19 Bom. L B 294; 15 A L J 96; 32 M L J 71; 21 M L T 97; 21 C W N 527; 26 C L J 169; 9 L B R 56; 10 Bur L T 138 (P. C.).

(7) 58 Ind. Cas. 42; A I R 1920 Bom. 26; 44 B 943; 22 Bom L R 936.

(8) 59 Ind. Cas. 780; A I R 1921 Bom. 56; 45 B 519; 22 Bom. L R 1429.

(9) 21 C 157; 20 I A 155; 6 Sar. 374; 17 Ind Jur. 484; (P. C.).

*Pages of 43 B.—[*Ed.*]

suit to recover a legacy and to such a suit Art. 123 would clearly apply The view of the Madras High Court in the earlier Full Bench decision in *Khadersa Haji Bappu* v. *Ayssa Ummah* (10), was followed by this Court in *Maktumawa* v. *Allama*, Second Appeal No. 108 of 1916, decided on February 25, 1919, by Scott, C. J , and is consistent with the decision of this Court in *Keshav Jagannath* v. *Narayan Sakharam* (11). The same view was taken by the Calcutta High Court in *Ahidinnessa Bibi* v *Isuf Ali Khan* (12). The decision in *Nur Din* v. *Bu Umrao* (8) was followed by this Court in *Fatemiya* v. *Sardarkhan* Cross Appeal No 276 of 1925 decided on January 31, 1928 by Patkar and Baker, JJ. We think, therefore, that we should follow the decision in *Nur Din* v. *Bu Umrao* (8), and hold that Art. 123 would not apply to a suit such as the present to recover a share by a Muhammadan heir from a person in management of the property. It would, therefore, follow that Art. 144 would apply."

It may be pointed out that in the case of *Ghulam Muhammad* v. *Ghulam Husain* (3), it was held by their Lordships of the Privy Council that Art. 123 applied not only to suits against executors or administrators, but also in suits against persons legally charged with the distribution of the estate. We are, therefore, of opinion that the case before us which is one for the recovery of a legacy by the respondent from persons who are in possession of the estate and who are legally bound to pay the same, is governed by Art. 123, Limitation Act.

The plaintiff's suit for the recovery of maintenance for a period of 12 years would be within limitation. The plaintiff, however, has sued to recover maintenance for a much longer period, that is from January 5, 1912. The contention of the plaintiff which has found favour with the learned Subordinate Judge is that there was an acknowledgment of liability by Keshab Deo in the will which he had executed in favour of the idol Thakur Srinathji which would bring her claim for maintenanee for the prior period also within limitation. Reliance is placed in support of this contention on a statement made by Keshab Deo in the will executed by him on August 23, 1912, and which is printed at pp. 49 and 50. This statement runs as follows:

"Under the will made by him my younger maternal uncle wished that Rs. 500 a year should be paid to his daughter *Musammmt* Panna Kunwar during her lifetime but she did not accept it and at the instigation of my adversaries, entered into litigation with me. If she wants to take it now, it shall after deducting the expenses which I have defrayed in the case against her be paid to her for three years preceding the date of payment and also in future annually till so long as she is alive although on account of the improper litigation and also for the reason that she did not abide by will, and gave it out to be false she is not entitled to it according to law and justice."

It was contended by the respondent that this statement amounted to an acknowledgment of liability in respect of the maintenance which was due before that date. We are of opinion that this contention cannot be accepted, and the statement referred to above would not, in our opinion, attract the consequences of s. 19, Limitation Act. After reciting the fact that a maintenance has been fixed for the plaintiff, Keshab Deo, goes on to say that if she wanted to take it now it shall after dedcuting the expenses which he had defrayed in the case against her, be paid to her for three years preceding the date of the suit and also in future annually. He does not admit his liability for the payment of past maintenance. All that he says is that if she agrees to certain conditions, then the maintenance for three years before the date on which he made the will would be paid to her. He does not admit any legal liability on his part, but says that as a matter of grace it might be paid to her. Under these circumstances we do not agree with the view taken by the Court below on this point.

The question for our consideration is whether the plaintiff-respondent should have been awarded any interest at all on the amount claimed by her. We are clearly of opinion that no interest should have been awarded to the plaintiff till August 25, 1927. After the execution of the will by her father, the plaintiff declined to accept its genuineness. On the other hand, she instituted a suit challenging the validity of the will When she adopted that attitude it could not be expected that the defendant would make any payment to her for her maintenance nor was it likely under those circumstances that she would have accepted even if she had been offered the same. It appears that in 1927 a notice was sent by the defendants to the plaintiff asking her to pay the costs incurred by them in the litigation which was started by her. The plaintiff in reply to that notice sent a letter printed at p. 55 and which is dated August 25, 1927, in which she said:

"That I would request you to ask your clients, the decree-holders, to deduct their proper dues from the aforesaid sum and remit the balance to me per money order."

This statement may be taken to be a

(10) 6 Ind. Cas. 50; 34 M 511; 20 M L J 288; 8 M L T 4; (1910) M W N 447.

(11) 14 B 236.

(12) 74 Ind Cas. 1010; A I R 1924 Cal. 142; 50 C 610; 27 C W N 941.

request for the payment of maintenance which was due to the plaintiff at that time and as no payment was made after this demand, it would be quite reasonable to allow the plaintiff interest under the provisions of Act XXXII of 1839 (Indian Interest Act). Under these circumstances we are of opinion that the plaintiff should get simple interest at the rate of 6 per cent. per annum.

The result of our finding is that the plaintiff is entitled to a decree for a sum of Rs. 6,000 for 12 years' maintenance. She will also get interest in the manner which will be indicated in our order.

For the reasons given above we allow this appeal and modify the decree of the Court below and grant the plaintiff a decree for Rs. 6,000. On the amount which was due to the plaintiff on August 26, 1927, she will get interest at the rate of 6 per cent. per annum, from that date. She will further get interest on the subsequent instalments at the above-mentioned rate as they fall due. For the purpose of reckoning interest, we direct that it will be taken that each instalment of Rs. 500 is payable each year on December 10, and that the first instalment for the first year, would be deemed to be payable on December 10, 1917, and the last on December 10, 1928. The parties will pay and receive their costs in both the Courts in accordance with their success and failure. The decree money will be realised from the assets of Baldeo Narain Singh in the hands of the defendants. Out of the decretal amount realised, the court-fee which the plaintiff had to pay in the Court below will be realised as first charge by the Government.

N. *Appeal allowed.*

LAHORE HIGH COURT

Second Civil Appeal No. 1665 of 1932
June 22, 1934
AGHA HAIDAR, J.

CHIMAN LAL AND OTHERS - PLAINTIFFS —APPELLANTS
versus
PALI RAM AND OTHERS—DEFENDANTS —RESPONDENTS

Mortgage—Undertaking by mortgagor to third party subsequent to mortgage—Mortgagee, if bound.

A mortgagee is not bound by any undertaking given by his mortgagor to a third party subsequent to the date of the mortgage.

S. C. A. from a decree of the District Judge, Karnal, dated July 29, 1932.

Messrs. *Fakir Chand* and *Chandra Gupta*, for the Appellants.

Judgment.—This is the plaintiffs' appeal which arises out of a suit for a perpetual injunction, restraining defendants Nos. 1 to 4 from opening a door marked D in the plan, Ex. P-2, and further prohibiting them from making any opening in their wall towards the *chabutra* marked A, belonging to the plaintiffs. The trial Court decreed the plaintiffs' claim ordering the defendants to close the opening in dispute and to refrain from making any aperture in the southern wall of their house which would open upon platform B. Only defendant No. 4 went in appeal to the learned District Judge. The position of the houses of the parties and the disputed door and the *chabutra* is clearly mentioned in the judgment of the lower Appellate Court with reference to the plan, Ex. P-2, (not Ex. P-3 as mentioned in the judgment of the lower Appellate Court) and it is not necessary for the purpose of this appeal to go into details in respect of them. Defendants Nos. 1 to 3 are the owners of the house which lies to the north of the plaintiffs' house. Defendant No. 4 is the mortgagee from defendants Nos. 1 to 3. There was a litigation in 1926 between defendants Nos. 1 to 3 and the present plaintiffs. In that suit the then plaintiffs (now defendants Nos. 1 to 3) sued the defendants (now plaintiffs) for demolition of a portion of the *chabutra* contiguous to their house. The trial Court dismissed that suit. There was an appeal to the lower Appellate Court, but the matter was compromised on April 22, 1929. In that compromise the present defendants Nos. 1 to 3 who were plaintiffs gave an undertaking that they would not make any opening in their wall on this side.

The mortgagee, Pali Ram, has now broken open the southern wall in the house of defendants Nos. 1 to 3 with the object of ultimately making a door in it. This led the plaintiffs to bring the present suit for the relief already mentioned. There were two points really argued in appeal before me. One is a question of law, namely, how far Pali Ram, a mortgagee, was bound by the undertaking given by defendants Nos. 1 to 3 in the previous litigation which ended in the compromise. In my opinion the Judge of the Court below was quite right in holding that since the mortgage of Pali Ram was executed on November 2, 1921, he cannot be bound by any undertaking given by his mortgagors to a third

party subsequent to the date of the mortgage. Therefore this plea raised by the appellants fails.

The next point argued was whether the plaintiffs were the exclusive owners of the *chabutra* marked B on which the door contemplated by Pali Ram is to open. The learned Judge has held on the evidence that the plaintiff is not the exclusive owner of this *chabutra*, a finding of fact which is binding upon this Court in second appeal. This being so, the plaintiffs cannot restrain the defendant from making an opening in the wall of the house of which he is a mortgagee with possession. In fact, even if it be assumed in favour of the plaintiffs for the sake of argument that the *chabutra* marked B is their exclusive property, there is no law to prevent the defendant Pali Ram in the present case from making a breach in the wall and converting the same into a door.

The result is that so far as Pali Ram is concerned, the plaintiffs' suit stands dismissed. When the mortgage in favour of Pali Ram is redeemed, then there would be time enough for the plaintiffs to raise the question of the compromise as against the defendants Nos. 1 to 3. I therefore affirm the finding of the lower Appellate Court and dismiss the plaintiffs' appeal with costs throughout.

N. *Appeal dismissed.*

LAHORE HIGH COURT

First Civil Appeal No. 1813 of 1933
January 30, 1935
YOUNG, C. J., AND ABDUL RASHID, J.

JAMUN—PLAINTIFF—APPELLANT
versus
SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT

Crown—Prerogative—Servant, dismissal of, at will—Railway—Damages.

The right of the Crown to dismiss its servant at will and pleasure exists even though there is included in the contract of service an express term to the contrary, unless the Crown has deprived itself of the prerogative by statute. *Denning* v. *Secretary of State for India in Council* (1), referred to.

F. C. A. against a decree of the Sub-Judge, First Class, Lahore, dated May 19, 1933.

Messrs. *Shamair Chand* and *Kabul Chand*, for the Appellant.

Diwan *Ram Lal*, Government Advocate, for the Respondent.

Young, C J.—Jamun was engaged as a cleaner in the North Western Railway. After serving some years his sight was found to be defective and he was dismissed. He brought a suit in the lower Court against the Secretary of State for India in Council for damages for wrongful dismissal. The defendants pleaded, firstly, that the Courts had no jurisdiction to entertain such a suit and, secondly, that they were justified in dismissing the plaintiff. The learned Judge in the lower Court came to the conclusion that no action lay against the Secretary of State and dismissed the suit. Jamun appeals.

The Secretary of State in this matter represents the Crown. The plaintiff as a servant of the Crown is liable to be dismissed at will and pleasure unless the Crown has deprived itself of the prerogative by statute. The law on this point is well settled: see *Denning* v. *Secretary of State for India in Council* (1). The right to dismiss a servant of the Crown at will and pleasure still exists even though there is included in the contract of service an express term to the contrary. Counsel for the appellant cannot point to any statutory protection in favour of the plaintiff. The appeal is, therefore, dismissed. The Counsel for the Secretary of State does not press for costs.

D. *Appeal dismissed.*

(1) (1920) 37 T. L. R. 138.

MADRAS HIGH COURT

Criminal Revision Cases Nos. 647 and 648 of 1934
(Criminal Revision Petitions Nos. 601 and 602 of 1934)
September 18, 1934
CURGENVEN AND CORNISH, JJ.

KATIKINENI VENKATA GOPALA NARAIMHA RAMA RAO—PETITIONER
versus
CHITRLURI VENKATARAMAYYA—COMPLAINANT—RESPONDENT

Criminal Procedure Code (Act V of 1898), ss. 215, 439—Order admitting evidence in preliminary inquiry prior to committal—Interference in revision.

The High Court will not in the exercise of its revisional powers interfere with an order admitting a certain piece of evidence made by a Subordinate Court in the course of a preliminary inquiry prior to commitment to the Sessions in view of the fact that if the case is committed for trial, it will rest upon the trial Court independently to decide upon the admissibility of the evidence and if it is not committed intervention would have been unnecessary. *In re Ponnusami Chetty* (1), commented upon.

Cr. R. P. under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of the Sub-Divisional Magistrate of Kovvur, dated August 12, 1924, on petitions dated August 5, 1934, and July 26, 1934, respectively, in P. R. C. No. 1 of 1934.

Mr. *S. Sreenivasa Ayyangar* for Messrs. *K. S. Jayarama Ayyar* and *B. T. M. Raghavachari*, for the Petitioner.

The Advocate-General for Mr. *V. Suryanarayana* for the Respondent.

Mr. *K. Venkataragahavachari*, for the Public Prosecutor, for the Crown.

Judgment.—The question which these criminal revision petitions raises is as to the admissibility of certain statements made by the complainant in an Income-tax return. The case is in the stage of a preliminary enquiry, and if committed will eventually be heard by the Sessions Court. In these circumstances it has been urged upon us by the complainant that we should not interfere with the order of the learned Sub-Divisional Magistrate admitting the evidence. We believe it to be very unusual for this Court to hold up a preliminary enquiry while it adjudicates upon an order of this kind. Indeed, only one reported case, a recent one decided by Burn, J., in *In re Ponnusami Chetty* (1) has been brought to our notice in which a question of the admissibility of evidence at this stage has been entertained, and it does not appear that any objection, such as is raised now, was preferred. We are influenced by the consideration that if the case is committed for trial, it will rest upon the trial Court independently to decide upon the admissibility of this evidence, and it seems undesirable that, by a decision at this stage, we should in any way interfere with that Court's discretion. If the case is not committed, our intervention will have been unnecessary. Mr. S. Sreenivasa Ayyangar objects that this petition has passed the admission stage, when it was open to the Court to throw it out on these grounds. We do not think that our hands are thereby tied, as on the previous hearing, there was no occasion for the objection to be raised.

For these reasons, we decline at this stage to interfere with the decision to admit the evidence and dismiss these petitions.

A. *Petition dismissed.*

(1) 143 Ind. Cas. 424; 56 M 475; (1933) M W N 90; 37 L W 441; 64 M L J 519; A I R 1933 Mad. 372; Ind. Rul. (1933) Mad. 299; (1933) Cr. Cas. 555; 34 Cr. L J 582.

LAHORE HIGH COURT

First Civil Appeal No. 1691 of 1932
April 30, 1934

ADDISON AND AGHA HAIDER, JJ.

SUNDAR SINGH AND OTHERS—APPELLANTS

versus

Mahant NARAIN DAS AND OTHERS—RESPONDENTS

Sikh Gurdwaras Act (VIII of 1925), *ss.* 8, 14 (2), 15, 12, 7, 9, 2 (4), 16 2) (iii)—*Petition under s.* 8—*Persons competent to file*—Locus standi—*Parties to petition—Death of petitioner—Procedure—Dismissal of petition—Effect—S.* 15, *scope of—Succession from* Guru to chela—*Presumption as to dedication—Hereditary office-holder, meaning of* —Sikhs *and* Udasis, *differences*—Gurdwara Baghichi thakran *in Gujranwala City, if a* Sikh Gurdwara.

A petition under s. 8, Sikh Gurdwaras Act, is only competent, if made by (1) any hereditary office-holder or (2) twenty or more worshippers of the *Gurdwara;* and under s. 14 (2) the forwarding of the petition to the Tribunal for disposal is conclusive proof that the petition was received by the Government in time and in the case of a petition forwarded by worshippers of a *Gurdwara* under the provisions of s. 8, that the provisions of s. 8 with respect to such worshippers were duly complied with. Nothing is said about a petition forwarded by a hereditary office-holder under s. 8 except that it must be held to have been presented in time. It follows that the *locus standi* of such a petitioner can be challenged and would have to be decided before the trial can proceed. This position is not affected by s. 16 (1) of the Act, which can only apply to a petition, properly before the Tribunal. [p. 397, col. 2.]

There are no respondents in a petition presented under s. 8, and hence s. 15 has been enacted, empowering the tribunal by advertisement or otherwise, to enquire if any person desires to be made a party and to join any person whom it considers should be made a party. The practice is that the Tribunal ascertains the names of the *Sikh* worshippers who forwarded the petition under s. 7 of the Act and these persons are notified by beat of drum in the locality to come forward while notice is sometimes sent to some of them. The Shromani Gurdwara Parbandhak Committee is also notified. This Committee sometimes is added as respondent, called objector by the Tribunal, but it refuses to be so added as a rule if the original worshippers named in the petition under s. 7 or some of them are prepared to contest the petition under s. 8 and to be made objectors. The intention of s. 15 is to allow the Tribunal to consolidate rival or conflicting claims, if convenient, and to furnish a means of getting respondents or objectors to contest petition and thus to permit of petitions being tried as suits because the petitions themselves name no objectors. There is nothing in this section which can be read as permitting the Tribunal arbitrarily to add or substitute one petitioner for another, while such a course is clearly against the scheme of the Act. A petition can only be put in under s. 8 within 90 days of the notification published under s. 7 (3). [p. 397, col. 2; p. 398, cols. 1 & 2; p. 399, col 1.]

It is not open to a petitioner or petitioners

under s. 8 to dispute the existence of a *Gurdwara*, which may be interpreted as meaning place of worship. It can only be claimed that it is not a *Sikh Gurdwara*, *i. e.*, *Sikh* place of worship. A petition under s. 7 can only be presented by 50 or more worshippers of a *Gurdwara*, and that petition along with a list of all rights, title or interests in immovable properties, inclusive of the *Gurdwara*, and in all monetary endowments, which the petitioners claim to belong to the *Gurdwara*, is published by the Local Government by notification under s. 7 (3) When such a notification is published, an hereditary office-holder, can petition under s. 8 within 90 days that it should be declared not to be a *Sikh Gurdwara*. Further, by virtue of s. 7 (5) the publication of a notification under the provisions of s 7 (3) shall be conclusive proof that the provisions of sub-ss. 7 (1) (2) (3) and (4) have been duly complied with, that is, that the petition was presented by 50 or more *Sikh* worshippers of the *Gurdwara* etc., etc. The trial of a petition under s 8 must thus presuppose that there are at least more than 50 worshippers and that there is a *Gurdwara*, or place of religious worship frequented by them. It cannot be contended in such a petition that there is no *Gurdwara* or place of worship. [p. 400, col 2; p. 401, col 1.]

The *Sikhs* are a Hindu sect. The first *Guru* preached the unity of God but, apart from that, he was in other respects apparently a Hindu. History of *Sikhs* and *Udasis* and their practices described. [p. 401, col. 2.]

The *Udasis* occupy a position between Hindus proper and *Sikhs* proper, and in some cases where they become heads of *Sikh Gurdwaras*, it is difficult to distinguish them from *Sikhs* proper, except that they may privately worship at the *samadhs* of their predecessors. [p. 402, col 2.]

Where natural heirs have been excluded from succession, there is a presumption that the institution has been dedicated to religious uses even though there is no direct evidence of dedication. *Indar Singh* v *Fateh Singh* (2), referred to. [p 401, col. 1.]

The definition of the term 'hereditary office-holder' in s. 2 (4) of the Act, contemplates participation in the management or performance of public worship in a *Gurdwara* or in the management or performance of any rituals or ceremonies observed therein. [p. 401, col. 1.]

Gurdwara Baghichi Thakran in Gujranwala City is not a *Sikh Gurdwara* within the meaning of s. 16 (2) (*iii*), Sikh Gurdwaras Act.

F. C. A. from a decree of the Sikh Gurdwaras Tribunal, Lahore, dated August 31, 1932.

Mr. *Bhagat Singh*, for the Appellant.

Messrs. *Badri Das*, *J. L. Kapur*, *Achhru Ram* and *Mohan Sunder Das*, for the Respondents.

Addison, J.—More than fifty-six *Sikh* worshippers of an institution described as *Gurdwara Baghichiana* or *Baghichi Thakaran* in Gujranwala City, forwarded to the Local Government under the provisions of s. 7 (1), Sikh Gurdwaras Act, a petition praying that the *Gurdwara* be declared a *Sikh Gurdwara*. Under s. 7 (3), the Local Government published it along with the accompanying list, by notification No. 416-1723-G., dated May 28, 1928. Under s. 7 (5) the publication of this notification is conclusive proof that the provisions of s. 7 (1), (2), (3) and (4) have been complied with. Thereupon, a petition under s. 8 was forwarded to the Local Government by one *Thakur* Narain Das, an *Udasi*, claiming that the institution was his private property, and was not a *Sikh Gurdwara* or even a place of worship. In para. (11) of the petition he, however, added that, if it was held to be a *Gurdwara*, he was the hereditary owner thereof. He stated in the petition that two Hindus, Nihal Chand and Hara Mal, had made an application under Act XIV of 1920, in the Court of the District Judge to the effect that the *Baghichi Thakaran* was *wakf* for religious and charitable purpose, that the proceedings were stayed to allow him to institute a regular Civil suit against him and that he had done so and obtained a declaration in the Court of the Subordinate Judge, First Class, on May 26, 1926, to the effect that it was his private property and not *wakf*. Lastly, it was said that *Sikhs* had never had anything to do with the place and that his predecessors and he were *Udasis* who believed in the Hindu Shastras.

This petition under s. 8, by *Thakar* Narain Das was forwarded to the Sikh Gurdwaras Tribunal for trial by the Local Government under s. 14 (1). It may be noted here that a petition under s. 8 is only competent, if made by (1) any hereditary office-holder or (2) twenty or more worshippers of the *Gurdwara*; and under s. 14 (2) the forwarding of the petition to the Tribunal for disposal is conclusive proof that the petition was received by the Government in time and in the case of a petition forwarded by worshippers of a *Gurdwara* under the provisions of s. 8 that the provisions of s. 8 with respect to such worshippers were duly complied with. Nothing is, however, said about a petition forwarded by a hereditary office-holder under s. 8 except that it must be held to have been presented in time. It follows that the *locus standi* of such a petitioner can be challenged and would have to be decided before the trial can proceed. This position is not affected by s. 16 (1) of the Act, which can only apply to a petition, properly before the Tribunal.

There are no respondents in a petition presented under s. 8, and for this reason

s. 15 has been enacted, empowering the Tribunal, by advertisement or otherwise, to enquire if any person desires to be made a party and to join any person whom it considers should be made a party. The practice appears to be that the Tribunal ascertains the names of the *Sikh* worshippers who forwarded the petition under s. 7 of the Act, (this petition is not sent to the Tribunal) and these persons are notified by beat of drum in the locality to come forward while notice is sometimes sent to some of them. The Shromani Gurdwara Parbandhak Committee is also notified. This committee sometimes is added as respondent, called objector by the Tribunal, but it refuses to be so added as a rule, if the original worshippers named in the petition under s. 7 or some of them are prepared to contest the petition under s. 8 and to be made objectors. These worshippers were the objectors here.

They pleaded that the petitioner, *Mahant* Narain Das, had no *locus standi* to present a petition as he did not come in as a hereditary office-holder, but denied the existence of a *Gurdwara* as place of worship and claimed it as his private property, a matter which should form the subject of a petition under s. 10 of the Act. On the merits they pleaded that it was a *Sikh Gurdwara*, commonly known to have been founded by *Bhai* Gurdial Singh, a *Granthi* of *Maharaja* Ranjit Singh, as a *Sikh* place of worship, since when it had been used as a *Sikh Gurdwara*. There had never been any other object of worship except the *Granth Sahib*. It was admitted that the petitioner under s. 8 was the *Mahant Granthi* or Manager of the *Gurdwara*. It was denied that it was the private residence of the petitioner. It was admitted that *Baba* Kulla was the first *Mahant*, appointed by the *Sikh* residents of Gujranwala, just as the petitioner was. It was denied that there had been any *kathas* (religious dissertations) from the Shastras or Puranas, that is, the Hindu scriptures, and it was claimed that the *kathas* which took place were based on the *Granth Sahib*.

The issues were then, framed as follows: (1) Whether the institution is a *Sikh Gurdwara* ? (2) Whether the petitioner has any *locus standi* to bring the petition? (3) Whether the previous litigation has any effect on the present case. Before evidence commenced *Thakar* Narain Das died on November 21, 1931, and his *chela Pandit* Parma Nand applied to be brought on the record as his legal representative. This was objected to and two other issues were framed: (4) Is *Pandit* Parma Nand the legal representative of *Thakar* Narain Das deceased ? (5) Does the right to prosecute the petition survive to *Pandit* Parma Nand ?

A certain amount of evidence was taken on the last two issues, but without determining them, the Tribunal decided to join Parma Nand as a party under s. 15 which I have already referred to. Evidence was then led on the merits. In the final judgment the findings of the Tribunal were: (*a*) that it was conceded that the previous litigation in the Court of the Subordinate Judge, First Class, had no effect so far as these proceedings were concerned (Issue No. 3); (*b*) that *Thakar* Narain Das had a *locus standi* to bring the petition as he had taken up the alternative position that he was an hereditary office-holder and as under s. 16 of the Act, the question whether it was a *Sikh Gurdwara* had to be tried before anything else was decided (Issue No. 2); (*c*) that *Pandit* Parma Nand had the right to prosecute the petition of *Thakar* Narain Das because he had been joined by the Tribunal under s. 15 of the Act, because that question also could be gone into, only after the issue as to the place being *Sikh Gurdwara* was tried, and because, in any case, *Pandit* Parma Nand was an hereditary office-holder, successor, *chela* and legal representative of *Thakar* Narain Das in possession (Issues Nos. 4 and 5), and (*d*) that the institution had not been proved to be a *Sikh Gurdwara* within the meaning of s. 16 (2) (*iii*) of the Act, the case set up for the objectors, though it was held to be a religious institution, of which the successive heads had been various *Mahants*, and where Hindus in general as well as *Sikhs* had worshipped, (issue No. 1). A decree was accordingly granted, declaring it not to be a *Sikh Gurdwara* within the meaning of the Act, and the objectors have appealed.

It will be best to dispose of the preliminary points at once. I agree with the learned Counsel of the appelants that *Pandit* Parma Nand could not be joined by the Tribunal under s. 15 of the Act. In effect this order substituted one petitioner for another while the intention of s. 15 was to allow the Tribunal to consolidate rival or conflicting claims, if convenient, and to furnish a means of getting respondents or objectors to contest petition and thus to permit of petitions being tried as suits

because the petitions themselves name no objectors. There is nothing in this section which can be read as permitting the Tribunal arbitrarily to add or substitute one petitioner for another; while such a course is clearly against the scheme of the Act. A petition can only be put in under s. 8 within 90 days of the notification published under s. 7 (3). If no petition is put in within that time, the Local Government shall publish a notification declaring *Gurdwara* to be a *Sikh Gurdwara* under the provisions of s. 9 (1) and this notification takes the place of a judgment *in rem*. Thereafter petitions under s. 10 could of course be tried, but in these trials the existence of institutions notified to be *Sikh Gurdwaras*, could not be challenged. It follows that a petition must be forwarded to the Local Government within the time fixed and it is that petition which is sent for disposal to the Tribunal. It must therefore be prosecuted by the original petitioner or his legal representative, the Tribunal being bound to follow in this respect the provisions of the Civil Procedure Code. This is clear from s. 12 (9) and (11) of the Act.

Similarly, before anything else is done, the question of *locus standi* of the petitioner must be decided; for, if there is no competent petitioner, there is no petition to be disposed of. I have already shown that the question of the *locus standi* of a petitioner under s. 8, who claims as an hereditary office-holder, is left open under the provisions of s. 14 (2) while the status of petitioners under s. 8, who claim to be twenty or more worshippers of the *Gurdwara* cannot be contested. The words, "any other matter in dispute relating to the said *Gurdwara*" in s. 16 must be interpreted according to the plain words. Whether the petition is competent or not is a matter in dispute relating to the *Gurdwara*. What is meant, for example, is that if a petition under s. 10 or s. 11, comes before the Tribunal, before there has been a decision that the *Gurdwara* is a *Sikh Gurdwara*, the latter question must first be tried or that a petition under s. 8 must be tried before one under s. 10 or s. 11. I might add that this question has already been before this Court and decided in this sense: see, *Tehal Singh* v. *Harnam Singh* (1). It is, therefore, necessary, to see whether *Thakar* Narain Das was competent to bring the petition and whether *Pandit* Parma Nand is entitled to continue it as his legal representative.

Before doing so, I desire to notice certain matters, which were mentioned before us, but which do not directly arise in this appeal. If there is no petition under s. 8 the Local Government must, under s. 9 (1), notify the *Gurdwara* to be a *Sikh Gurdwara* and this notification is in effect a judgment *in rem*. If a petition is put in within time, it is forwarded to the Tribunal under s. 14 (1) for disposal, the question of the *locus standi* of a petitioner, claiming to be an hereditary office-holder being left open under the provisions of s. 14 (2), while the question of the *locus standi* of the twenty or mere worshippers of the *Gurdwara* is not left open. When the Tribunal or this Court on appeal has found that the *Gurdwara* should be declared to be a *Sikh Gurdwara*, then the Local Government must under s. 17 of the Act, publish a notification declaring the institution to be a *Sikh Gurdwara*, and this notification, like the one under s. 9 (1), is in effect a judgment *in rem*. In the case of a petition by worshippers, there must be a decision on the merits whether the institution is or is not a *Sikh Gurdwara*, unless the petition is withdrawn or not prosecuted. In the case of a petition by a person claiming to be an hereditary office-holder, there may be a finding that there is not a competent petition before the Tribunal as the petitioner has no *locus standi*, while such a petition may also be withdrawn or not prosecuted.

The question is what should be done when petitions under s. 8 are withdrawn or not prosecuted or when it is held that the petition is not competent. Should such a petition merely be dismissed, leaving the Local Government to notify the institution under s. 9 as a *Sikh Gurdwara*, on the ground that no petition had been presented in accordance with the provisions of s. 8 of the Act; or should the Tribunal proceed to hear *ex parte* evidence on behalf of the objectors without allowing the petitioner or petitioners to intervene so as to be able to give a declaration that the *Gurdwara* is a *Sikh Gurdwara*, and thus enable the Local Government to issue a notification under s. 17; or should the Tribunal automatically grant such a declaration without taking evidence on the merits, on the ground that the dismissal of the petition as incompetent or for want of prosecution or by reason of its withdrawal must entail such a consequence? It would appear that, where a petition is dismissed by reason of its being

(1) 148 Ind. Cas. 1007; A I R 1934 Lah. 98; 6 R L 626.

incompetent, it must be taken not to have been presented in accordance with the provisions of s. 8 and that the Local Government could notify the institution under s. 9. But where it is withdrawn or not prosecuted, there is room for some difference of opinion. I understand that petitions are now being withdrawn or not prosecuted in the hope that the intention of the Act may be defeated: that is, the notification under s. 9 does not issue because the petition is presented, and it is thought that a notification under s. 9 or s. 17 will not issue.

If the petition is merely dismissed and no declaration is given that the *Gurdwara* is a *Sikh Gurdwara*, as under s. 17 it is a condition precedent for the publication of a notification that such a declaration be given. In fact the Act seems to contemplate that all petitions will be fought to a conclusion and by far the best course would be to amend either s. 9 or s. 17 so as to make it clear that when a petition is withdrawn or not prosecuted or when it is held that the petitioner has no *locus standi*, then, either the Local Government must publish a notification declaring the *Gurdwara* to be a *Sikh Gurdwara* or the Tribunal should be directed to inquire into this matter *ex parte* in the absence of the petitioner and give a declaration one way or the other. If it is not amended, the question will have to be decided one day whether the Tribunal would not be justified in giving automatically, in the above circumstances, a declaration that the institution is a *Sikh Gurdwara*, or whether it should hear *ex parte* evidence on behalf of the objectors in the absence of the petitioner and give on such evidence whatever declaration it finds to be established. If neither of these courses is adopted and the Local Government does not see its way to issue a notification under s. 9, the whole object of the Act can be defeated by putting in an incompetent petition or withdrawing a competent petition. It was said that, in the beginning, the Tribunal used to hear evidence *ex parte* on behalf of the objectors in such circumstances and either grant or not grant the declaration, but latterly that it has been dismissing the petitions or allowing them to be withdrawn without giving any declaration. Until the question comes directly before the Court, it is impossible for me to decide it finally.

I am of opinion that *Thakar* or *Mahant* Narain Das had a *locus standi* to present the petition and that *Pandit* Parma Nand is his legal representative and is competent to continue its prosecution. *Mahant* Narain Das presented two petitions, one under s. 8 and one under s. 10. The latter has not yet been tried and if the decision of the Tribunal in the petition under s. 8 is upheld, no trial will be necessary. It is under s. 10 that a petitioner can claim a right, title or interest in property notified under s. 7 (3) by the Local Government, while the petition under s. 8 must be confined to a claim that the *Gurdwara* is not a *Sikh Gurdwara*. It is true that Narain Das claimed in the petition under s. 8 that the place in dispute was his private property and that there was thus no *Gurdwara* or place of worship of any kind in existence, though he had been allowing preaching (giving *kathas*) from the Hindu Puranas and Shastras to take place there, just as many private individuals did in their houses. He went on to say that in any case the *Sikhs* had nothing to do with the place and that he and his predecessors had been *Udasis* who believed in the Hindu Shastras. Finally he said that, if, by any chance, it was held to be a *Gurdwara* he was its hereditary head and he prayed that it should be held not to be a *Sikh Gurdwara*. His alternative claim thus falls within s. 8, and only this claim has been tried and it was properly presented if he was an hereditary office-holder.

At this stage I might say that, in my judgment, it is not open to a petitioner or petitioners under s. 8 to dispute the existence of a *Gurdwara*, which may here be interpreted as meaning place of worship. It can only be claimed that it is not a *Sikh Gurdwara*, *i. e.*, a *Sikh* place of worship. A petition under s. 7 can only be presented by 50 or more worshippers of a *Gurdwara*, and that petition along with a list of all rights, titles or interests in immovable properties, inclusive of the *Gurdwara*, and in all monetary endowments, which the petitioners claim to belong to the *Gurdwara*, is published by the Local Government by notification under s. 7 (3). When such a notification is published, an hereditary office-holder, to take the present case only, can petition under s. 8 within 90 days that it should be declared not to be a *Sikh Gurdwara*. Further, by virtue of s. 7 (5) the publication of a notification under the provisions of s. 7 (3) shall be conclusive proof that the provisions of sub-s. (1), (2), (3) and (4) have been duly

complied with, that is, that the petition was presented by 50 or more Sikh worshippers of the *Gurdwara*, etc., etc., The trial of a petition under s. 8 must thus pre-suppose that there are at least more than 50 worshippers and that there is *Gurdwara* or place of religious worship frequented by them. It cannot be contended in such a petition that there is no *Gurdwara* or place of worship.

The objectors stated in their pleas that *Mahant* Narain Das was not an hereditary office-holder and that he was appointed by the Sikh residents of Gujranwala as *Mahant* of the *Gurdwara*. There is no proof of the latter assertion and there is abundant evidence that he was an hereditary office-holder, succession being from *Guru* to *Chela*, and the office-holders being as follows: *Baba* Kulla or Kuljas (died 1834), Ram Das (died 1845), Sant Das (died 1879). Narain Das (died 1931) Parma Nand.

There is also evidence that natural heirs have been excluded from succession and there is thus a presumption: [see *Indar Singh* v. *Fateh Singh* (2)], that the institution has been dedicated to religious uses, even though there is no direct evidence of dedication. Besides, it was admitted by the objectors in para. (1) of their pleas that Narain Das was the *Mahant*, while the Counsel appearing for them, in stating his case, said that the petitioner's predecessors were the *Mahants* of the institution and the succession had been from *Guru* to *Chela*. During the examination of the first witnesses Counsel appearing for *Mahant* Narain Das said that his client admitted that succession had been from *Guru* to *Chela*. It follows that Narain Das was an hereditary office-holder as defined in s. 2 (4) of the Act, though that definition contemplates participation in the management or performance of public worship in a *Gurdwara* or in the management or performance of any rituals or ceremonies observed therein and Narain Das falsely denied the existence of public worship in part of his petition, a position which also was not open to him. His petition was, therefore, competent.

I am further am of opinion, that *Pandit* Parma Nand is his legal representative and, as such, competent to continue the petition. Succession has been from *Guru* to *Chela* to the exclusion of natural heirs; there is no proof that any confirmation of the new *Mahant* is necessary; there is a registered will dated July 9, 1922, by *Mahant* Narain Das in his favour and he is in possession. Clearly he is the legal representative. This takes me to the merits, namely, whether the *Gurdwara* or institution in question is a *Sikh Gurdwara* within the meaning of s. 16 (2) (*iii*) which is the case set up on behalf of the objectors. Section (2) (*iii*) runs as follows:—

"If the Tribunal finds that the *Gurdwara* was established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs before and at the time of presentation of the petition under sub-s. (1), s. 7, the Tribunal shall decide that it should be declared to be a *Sikh Gurdwara* and record an order accordingly."

A few general remarks are here essential. It must be accepted that the Sikh are a Hindu sect. The first *Guru* preached the unity of God, but apart from that, he was in other respects apparently a Hindu. It is difficult to define the Hindu faith, but it includes the worship of numerous deities and idols and belief in various incarnations of God; while there is authority for the proposition that it commenced with the conception of one God, Guru Nanak's mission, it seems to me, was to attempt to get back to this original conception and to stop idolatry, but he continued to follow the old Hindu custom and faith in other respects. He was not succeeded by his son Sri Chand and the latter founded the monastic order of *Udasis*, which was celibate in its origin, though many of them from time to time married, especially when the institution, where they lived, became wealthy. As time went on the Sikh doctrines, became more dogmatic, but the practice remained much the same. Then came the *Akali* movement which is responsible for the Sikh Gurdwaras Act, in s. 2 (9) of which a present day Sikh is defined as one who makes the following declaration:

"I solemnly affirm that I am a Sikh, that I believe in the *Guru Granth Sahib*, that I believe in the ten *Gurus* and that I have no other religion,"

though in the case of a deceased person, he will be held to be a Sikh if he professed the Sikh religion or was known to be a Sikh during his lifetime. The definition of a present day Sikh would appear to mean that the Sikh religion has nothing to do with Hinduism, though it sprang from it. In actual practice, however, in spite of the Sikh doctrines Sikhs have since the inception of the sect tended to retain many of the Hindu rites and ceremonies, such as performing *Shrads*, reverence towards *Samadha* (the resting place of the

(2) 59 Ind. Cas. 734; 1 Lah. 540; 49 P L R 1921; 64 P W R 1920.

ashes of *Gurus* and holymen) and even toleration of idols, etc. Belief in the *Gurus* and the *Granth Sahib* has often been an addition to Hindu ceremonies though of course the latter are secondary considerations. The *Akali* movement, which is responsible for the Sikh Gurdwaras Act, has its object the strict enforcing of the beliefs stated in the definition just given which would mean the divorce of the Sikh faith from Hinduism, but it has been found difficult to insist on this. Sikhs still inter-marry with Hindus freely; in many families some members profess to be Sikhs and others profess to be Hindus. Many Hindus believe in the *Gurus* and *Granth Sahib* and read it, but strenuously object to being called Sikhs. There is another class, who shave their hair, and appear to be Hindus and yet call themselves *sehjdhari Sikhs*, and who would be prepared to make the declaration already set forth, though in reality in many matters they follow Hindu ceermonies and are in sympathy with great portions of the Hindu scriptures.

It is not very long ago that the Sikhs used to be included in the generic name of Hindus, and even in the beginning of this century the *Guru Granth Sahib* might be seen in a place where there were Hindu idols and the Sikhs of that day were only distinguishable from Hindus in the great respect they paid to the *Granth Sahib* and the reverence they had for the *Gurus*. If questioned, they would probably have called themselves Hindus, unless they were specially asked if they were followers of the *Gurus*. All along Sikhs have followed Hindu Law, and still do so though, amongst agriculturists, they are mainly governed by Customary Law just as Hindus and Muhammadans are. This state of affairs is responsible for the definition of a deceased Sikh as a person who professed the Sikh religion or was known to be a Sikh during his lifetime, but it will be apparent that in this confusion it may often be difficult to ascertain what faith a deceased Sikh or Hindu had. Often there will be little more than the name "Singh" to distinguish the one from the other.

The *Udasis* never took the name "Singh," but always that of Das. As they are an order founded by the son of the first *Guru*, they do worship and read the *Granth Sahib*. It is customary amongst them to erect *Samadhs* (tombs) over the ashes of their *Mahants* (heads of the institution) and to reverence these, though in many instances they do not erect *Samadhs*. The usual form of worship of *Samadhs* is washing them at dusk reverentially and lighting one or more lamps which are set out on the plastered mound, but this worship is usually confined to the *Udasi* order and is not participated in by others. In some cases also this order worships a ball of ashes and the picture of *Baba* Sri Chand and even some of the Hindu deities. It was held in *Basant Das* v. *Hem Singh* (3), that the *Udasi* order constituted a separate sect of schismatics, distinct from the orthodox Sikhs and that whereas some of the "Singhs" had renounced Hinduism, the *Udasis* had all remained within its pale: that the acceptance of and showing of reverence to the *Granth Sahib* was in no way inconsistent with remaining a Hindu, that the *Udasis* are Hindus and in the wide sense of the word they are Sikhs: see also *Ram Parshad* v. *Shiromani Gurdwara Parbandhak Committee* (4). On the other hand, the reverence paid by *Udasis* to the *Gurus* and the *Granth Sahib* has resulted in very many of them becoming the priests of Sikh institutions, strictly so-called. In the majority of cases, which have come before me, this has been so.

This is due not only to their belief in the *Gurus* and *Granth Sahib*, but to the fact that they form a large body of men, who have had a theological training mostly in the *Granth Sahib*, but also sometimes in the Hindu Scriptures. As pointed out in *Arjan Singh* v. *Indar Das* (5), *Udasis* are usually either found in an *Udasi* Monastery or College which is purely an *Udasi* institution, where the reading of the *Granth Sahib* in Punjabi and of Hindu sacred books in Sanskrit is taught, or they are found as priests in *Sikh Gurdwaras*. Many of them leave the parent institutions and become the priests of *Sikh Gurdwaras*, or set up new *Udasi* institutions. They occupy a position between Hindus proper and Sikhs proper, and in some cases where they become heads of *Sikh Gurdwaras* it is difficult to distinguish them from *Sikhs* proper, except that they may privately worship at the *Samadhs* of their predecessors. Everything has thus always been very fluid, and

(3) 94 Ind. Cas. 695; 7 Lah. 275; 27 P L R 115; A I R 1926 Lah. 100.

(4) 135 Ind. Cas. 657; 12 Lah. 497; 32 P L R 910; A I R 1931 Lah. 161; Ind. Rul. 1932) Lah 113.

(5) 151 Ind. Cas. 1005; A I R 1934 Lah. 13; 15 Lah. 247.

still is. The practice of certain Hindus approaches that of certain Sikhs, these Hindus revering the *Granth Sahib* and those Sikhs having tended to lapse back into many Hindu observances, if ever they had given them up. There is in fact no way of distinguishing such a Hindu from a *Sehjdhari Sikh* unless the latter makes the declaration mentioned, except that the *Sehjdhari* may call himself a "Singh." Some *Udasis* have retained many of the Hindu beliefs, but all of them revere the *Gurus* and read the *Granth Sahib*, while others are much nearer to Sikhism than to Hinduism. The Hindu religion is very wide embracing and it now includes the sect of Arya Samajists, who also, like the Sikhs, preach and believe in the unity of God, though, of course, they do not accept the *Gurūs* and the *Granth Sahib*. In this respect they may be said to be nearer to Sikhs than to orthodox Hindus.

The position taken up by the *Mahant* in this case is that the institution is his own private property and that there is no public worship. This is of course false and there is ample evidence that it is a place of worship and that Sikhs have for a considerable time worshipped there. That of course does not necessarily mean that it is a *Sikh Gurdwara* within the meaning of s. 16 (2) (*iii*) of the Act. It is certainly not an *Udasi* Monastery or College, but a place of public worship. Was it however established for use by Sikhs for public worship and was it used for such worship by Sikhs before and at the time of the presentation of the petition under sub-s. (1), s. 7, which is dated October 20, 1926? The question is far from easy.

The appellant's case was that the place in dispute was established for public worship by a *Sikh Bhai*, Gurdial Singh, the *Granthi* of *Maharaja* Ranjit Singh, who was born at Gujranwala, and that it has ever since been used for such worship by Sikhs. The respondent's case was that an *Udasi*, *Baba* Kulla, the first *Mahant*, settled there at the beginning of the 19th century and that he and his successors added to the property which belonged to them. It is agreed that succession has been from *Guru* to *Chela* to the exclusion of natural heirs and this in itself is sufficient to establish that it is dedicated to religious purposes: see *Indar Singh* v. *Fateh Singh* (2), and that it is not the private property of the *Mahant*. The respondent maintained that the various heads have been *Udasis* with Sanatanist Hindu beliefs and that preaching from the Hindu scriptures (*kathas*) only have been allowed to take place there, and he denied that the "*Granth Sahib*" was ever installed. The appellants' case was that the *Granth Sahib* was ceremonially opened there and that that was the only form of worship, apart from preaching from the *Granth Sahib*. The evidence has been summarised in the judgment of the learned President and need not be detailed by me. The respondent's witnesses had to admit that the *Granth Sahib* was read at any rate since 1896 in the institution, but stated that *Mahant* Narain Das kept it for his private use. This evidence is shown to be false by the will of Sant Das, the predecessor of *Mahant* Narain Das, dated October 14, 1875, Ex. O-9, which establishes that the *Granth Sahib* was being daily recited there and had been recited for some time before that. The will also refers to *Kirtans*, which undoubtedly means the singing of hymns from the *Granth Sahib*. The oral evidence proves that the *Granth Sahib* was kept for public recital there, that hymns from the *Granth* were sung and that Sikhs worshipped there prior to 1875 up to 1921 at least. *Mahant* Narain Das produced books kept by him from about 1896 and they contain entries which show that *bhog* and *akhand path* of the *Granth Sahib* were performed from time to time, and *karapershad* distributed with due ceremony at the conclusion of the readings. In 1901 certain articles were purchased which were used for wrapping the *Granth Sahib* in, and for the ceremonial reading thereof.

I am, however, of opinion that the evidence does not establish that the institution was founded by the *Sikh Granthi Bhai* Gurdial Singh, for public worship by *Sikhs*. There is some oral evidence to this effect which is founded on hearsay and which I think was properly rejected. In any case it has little or no value. There is no deed of grant to *Bhai* Kulla. There is a *parwana*, Ex. O-6, of the year 1827, in Sikh times, to the effect that certain property, including the Baghwala Well at Gujranwala, had been given long before by way of *dharmarth* (charity) to *Bhai Sahib* Gurdial Singh and his two sons Amir Singh and Wazir Singh. There is an extract from the Jagir Register of 1853 (Ex. O-4), that the Bhagwala Well was *muaf* to Wazir Singh and the four

sons of Amir Singh, namely, Jawahir Singh, Daya Singh, Tegh Singh and Kirpal Singh, the original grantor being *Maharaja* Ranjit Singh. The *patwaris* deposed to 40 years' possession and the above *parwana* or *sanad*, which is not the original *sanad*, was referred to. By that time, the institution was in existence, but no reference to it in any revenue paper is forthcoming, and there is nothing to show that this institution stands on land which formed part of the grant just mentioned. Exhibit O-16, is the copy of a plaint in a suit, instituted on July 28, 1856, by a Brahman *Pandit* Dila Ram, against the then *Mahant* Sant, Das, in which he claimed Rs. 150 from the *Mahant* on the ground that *Bhai* Gurdial Singh had appointed his ancestor to recite *Kathas* in his Bagh, that this right was hereditary and that he had been unjustly ousted by the Sant. The most important point established by this plaint is that Brahmans were reciting *Kathas* in the institution in 1856, and the only possible inference is that they were based on the Hindu scriptures. The recital that the *bagh* or garden was that of Gurdial Singh, does not establish that it was so, nor is the plaint relevant for that purpose. There is no doubt, however, that the dispute was about the recital of *kathas* in the institution in dispute. The suit was dismissed, the Deputy Commissioner pointing out that he had already dismissed a similar suit brought by Dila Ram against another Brahman Radha Kishan. The judgment in this last mentioned case is dated July 18, 1853. These documents go to show that so far back as 1853, there was public worship going on at the institution and that it consisted of preaching by Brahmans from the Hindu scriptures, and in practice I have no doubt that the congregation consisted of Hindus in general, including Sikhs.

Certain other documents Exs. O-3, O-10, O-11 and O-12, have been referred to. These relate to the gift of a piece of land to the *Mahant* in the year 1874. They show that the *muafidars*, who were descendants of *Bhai* Gurdial Singh, gave up their *muafi* rights in the plot, then handed over to the institution, but they do not mention that the site of the original institution was handed over by their ancestor. This plot was handed over to the institution as the place was used by the public and by *fakirs*, wayfarers and mendicants. I agree with the finding of the Tribunal that it is not proved that the *Gurdwara* was established by *Bhai* Gurdial Singh.

The will of *Mahant* Sant Das, dated October 14, 1875, is a document evidencing the nature of the worship then existing. It is a statement of one of the *Mahants* and is thus of importance: see *Mahomed Raza* v. *Syed Yadgar Hussain* (6) and *Ram Kishan* v. *Bur Singh* (7). *Pandit* Parma Nand stated that the will, which was a registered one was destroyed. The appellants were thus entitled to put in a certified copy. It was said that it had been revoked. As to this, there is no tangible evidence and in any case that would not affect its value as a statement of the then *Mahant* at a time (1875), when there was no dispute and when the *Sikhs* scarcely claimed to be different from the Hindus, except as to their belief in the *Gurus* and the *Granth Sahib*. A summary of the will may be given:

"The *Makan* (institution) *Baghichi*, in which were the *Samadhs* of *Baba* Kulla and *Thakur* Ram Das was his *Gurdwara*. He had no *Chelas* left. The congregation (or worshippers) and he desired that it should be continued. The buildings had been acquired and repaired by him and were owned and possessed by him. Hence he with the consent of the congregation made this will for the perpetuation of the *Gurdwara Baghichi* where the citizens offered prayers, holy men rested, where a fair was held on every *Amawas* day, and where preaching (*katha*) was done and the *Granth Sahib* read. He reserved to himself the right of appointing a *Chela* to succeed him but stated that when appointed he would be under one *Bhai* Prem Singh who undoubtedly was a *Nirmala Sadh*, (*Nirmalas* being Sikh priests proper). If a *Chela* was not appointed this *Nirmala* was to manage the *Gurdwara* with all powers except that of alienation The *Amawas Fair Katha* reading of the *Granth Sahib* and *Shabad Kirtan* were to go on and the manager had power to choose any *Pandit* (presumably, a *Brahman*) to do the *Katha*. The *Nirmala's Chela*, was to succeed him. If he had no *Chela* a committee of five from the families of *Rai* Mul Singh Madhok, *Bhai* Amar Singh, Mul Singh Kapur, Bhagat Singh and Bhagat Chattarpati was to manage the *Gurdwara* in consultation with the congregation (worshippers). A member of the congregation had no right to interfere with the *Nirmala's* management but he had with respect to others. It was added that the buildings were *wakf* property meant as a place of worship for the entire Hindu community."

It would seem that this will was impliedly revoked when Sant Das appointed his own *Chela*, *Mahant* Narain Das, before he died, but the will is important as proving what was going on in the time of Sant Das in the institution. It follows from it and the rest

(6) 80 Ind Cas. 485; 51 C 446: A I R 1924 P C 109; 7 N L J 116; (1924) M W N 447; 20 L W 5; 28 C W N 937; 51 I A 192; L R 5 A (P C) 76; 21 N L R 1 (P C).

(7) 151 Ind. Cas. 738; A I R 1934 Lah. 39; 15 Lah 270.

of the evidence that the *Gurdwara* was a public place of worship where a fair was celebrated on *Amawas* days, *Katha* was done by *Brahmans*, holy men rested and reading of the *Granth Sahib* and singing of hymns from the *Granth Sahib* took place and that it was meant for the whole Hindu community, including of course Sikhs. The preaching must be held to have been based on Hindu scriptures, but there is no doubt that the *Granth Sahib* had the highest place in the institution. This may be explained by the fact that the *Mahants* were *Udasis* who do venerate the *Granth Sahib*, which was then held in great respect also by many Hindus as it often is now. Orthodox Sikhs were probably few in number, and the cleavage between Hindus and Sikhs was not marked. I would hold on the evidence that the public worship at this institution was not purely *Sikh*, but was intended for all Hindus though it is obvious that the reading of the *Granth Sahib* held a very high place there and was most regularly performed, and that the Hindus were prepared to hear it read and to listen to its hymns. One family from which the committee was to be appointed was a Hindu one, though apparently the other four were Sikhs. But, as I have already pointed out, there was not a very sharp cleavage between Hindus and Sikhs then. There were, however, no idols in the institution though, of course there were the *samadhs* of the *Mahants*. This is the normal state of affairs as regards *Udasis* and these *samadhs* are erected by them, whether they are priests in *Sikh Gurdwaras* or whether they have continued to live in *Udasi* or other institutions. The existence of the *samadhs* therefore means nothing more than that the *Mahants* have all along been *Udasis*, and does not help to establish that the institution is not a *Sikh Gurdwara*. There is no evidence worth the name that there was ever any *samadh* worship though the *Udasi* incumbent may have paid reverence to the *samadhs*.

To sum up, there is no evidence as regards the foundation of the institution worthy of consideration. There is, however, evidence that there was preaching by *Brahmans* from before 1853, and that by 1875, worship of the *Granth Sahib* and singing of hymns therefrom regularly took place and continued to take place till 1921 at least, the preaching by *Brahmans* still going on as well. All the incumbents have been *Udasis*, who hold an intermediate position between Hindus and Sikhs proper, though, as already pointed out, Hindus and Sikhs may be very similar and yet one will call himself a Sikh and the other call himself a Hindu. In 1875 the institution was looked upon as dedicated to the Hindu community which then undoubtedly included the Sskhs and, as far back as we can go, preaching by Brahmans has been part of the routine of the institution. The *Mahant* Narain Das used to go on pilgrimage to Hindu as well as Sikh sacred places. He used to feed Brahmans, perform *Shradhs*, and purchase Hindu sacred books, etc., etc. It is impossible to infer from the nature of the worship that the institution was established for use by Sikhs for public worship. In my judgment, therefore, the decision of the Tribunal was correct and I would dismiss this appeal.

The second question does not now arise. It is whether the institution was used for such worship by Sikhs before and on October 20, 1926, when the petition under s. 7 (1) was presented. The *Akalis* tried to take forcible possession of the *Gurdwara* in 1921. This appears to have frightened *Mahant* Narain Das. Then came the application under Act XIV of 1920, which compelled him to institute the civil suit already referred to. At about this time Narain Das cut his hair and trimmed his beard. From this time also he commenced to try to prove that the institution was his private property. This renders very probable the evidence that the *Granth Sahib* was removed sometime after 1921. The Judge trying the civil suit inspected the place sometime early in 1926, and Sundar Singh, O. W. No. 5, appellant's witness, has deposed that the *Granth Sahib* was not open at that time. Mathra Parshad, P. W. No. 7, said that it was removed in 1922-1923. Ganga Ram, P. W. No. 17, deposed that Narain Das ceased to read the *Granth Sahib* after the *Akalis* tried to take possession. Parma Nand, who succeeded Narain Das was educated at Benares, and he leans decidedly towards the Hindu Shastras and beliefs. He had returned to the institution by that time. It seems to me that the *Sikh* worship, which used to take place, ceased sometime after 1921, and long before 1926. The requirements of s. 16 (2) (*iii*) are thus not fulfilled in this respect also.

There is a cross-appeal by Parma Nand which was not argued except as to the question of costs. The proper order as to costs, however, in view of the attitude of *Mahant* Narain Das and *Pandit* Parma

Nand is that parties should bear their own costs throughout. With this remark I would dismiss both the appeals.

Agha Haidar, J.—I agree.

D. *Appeals dismissed.*

ALLAHABAD HIGH COURT

Criminal Revision Application No. 695 of 1933

December 5, 1933

NIAMAT-ULLAH, J.

SADLU—APPLICANT

versus

EMPEROR OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 103—Search—Witnesses, to be selected—Qualifications—Provisions should be complied with—Non-compliance—Inference—Dangerous Drugs Act (II of 1930), ss. 2 (b) (i), (iii), 14—'Cocaine,' if implies substance prepared according to formula given in s. 2 (b) (iii)—Cocoa derivatives, if includes 'crude cocaine'.

Where respectable persons can be found in the neighbourhood, and the Police Officer making a search takes with him persons whose respectability is questionable or who come from a distant locality, the inference is that he was prompted by a desire to have such witnesses as would be easily persuaded to support any story which he might put forward.

Section 2 (*b*) (*iii*), Dangerous Drugs Act, makes mention of cocaine; and to distinguish it from "crude cocaine" the usual chemical formula has been stated. The word cocaine implies the substance prepared according to that formula, which is well known to chemists. The expression 'cocoa derivatives' also includes crude cocaine.

Cr. R. App. from an order of the Sessions Judge, Benares, dated September 22, 1933.

Mr. *Harnandan Prasad*, for the Applicant.

The Assistant Government Advocate, for the Crown.

Judgment.—This is an application for revision by one Sadlu, who was convicted by a Magistrate, 1st Class, Benares, of an offence under s. 14, Dangerous Drugs Act (II of 1930), and sentenced to rigorous imprisonment for 18 months and a fine of Rs. 200. His appeal to the Sessions Judge, Benares, was dismissed. It has been found by both the Courts below that the applicant, who was once convicted of a similar offence and sentenced to six months' rigorous imprisonment in 1932, was in possession of two packets of a substance which has been declared by the Chemical Examiner to be cocaine.

The circumstances which led to the discovery were described by the officer in charge of the Benares Kotwali. In consequence of an information received he proceeded to search the premises of the accused. There is a room on the second storey of the applicant's house, which was found to be locked. The Sub-Inspector asked the accused to furnish the key for opening that room. The applicant produced a key from his person, with which the lock was opened. On search being made two packets were found concealed under the bed on a *charpoy*. These facts, except as regards the manner in which the accused handed over the key to the Sub-Inspector, are not disputed.

The accused stated in his defence that the room in which the two packets were found did not belong to him but to his brother Mangru, who actually occupied it. He also alleged that the key which he had handed over to the Sub-Inspector was not on his person but had been sent for by him from his brother, who was at his shop. There can be no doubt that, unless the accused's statement that the room was in the actual occupation of his brother, who was in possession of the key, be accepted, the offence has been brought home to him. He produced two witnesses, who were considered by the trying Magistrate as respectable. They deposed to the room in question being the property of his brother Mangru, to whom it had been allotted at a partition a few years ago. The witnesses, however, being outsiders, could not say as to whether his brother Mangru actually occupied the room. It is easily conceivable that the room, though allotted on partition to Mangru, contiued to remain in the occupation of his brother, the applicant. It is not disputed that the families of both the brothers live in the same premises, and all that was determined at the partition of the joint property was the proprietary title.

The learned Advocate for the applicant has strongly criticised the action of the Police in not taking respectable persons residing in the neighbourhood as search witnesses. The trying Magistrate made the following observation on this part of the case :

"The learned Counsel for the accused attacked the evidence of Monnu and Gopal, the two search witnesses. They have, no doubt appeared as witnesses in criminal cases before and they are not of proper character to be selected for this purpose. The statement of the Sub-Inspector that he did not select witnesses from the locality as most of the neighbours of the accused are ex-convicts of *modak* and cocaine offences is preposterous. Evidence has been given to show that many respectable persons live in the immediate neighbourhood of the accused, and it would have been better if the Sub-Inspector had

not taken with him persons of doubtful character to witness the search."

It is not an uncommon practice for Police Officers to disregard the provisions of s. 103 of the Criminal Procedure Code. This Court has had occasions to emphasise the necessity of the due compliance with that section. Where respectable persons can be found in the neighbourhood, and the Police Officer making a search takes with him persons whose respectability is questionable or who come from a distant locality, the inference is that he was prompted by a desire to have such witnesses as would be easily persuaded to support any story which he might put forward. In this case nothing turned on the facts stated by the search witnesses; otherwise the Court would have been justified in disregarding their evidence on the point in controversy. The case can be, and was decided by the two Courts below, without reference to the evidence given by the search witnesses, except so far as they deposed to the recovery of the two packets of cocaine, a fact which is not in dispute.

Both the Courts below have rejected the accused's version that the key was in possession of his brother, from whom he got it before handing it over to the Sub-Inspector. The latter's evidence corroborated by the probabilities of the case, was considered to justify the inference that the accused carried the key on his person. Stress has been laid by both the Courts below on the fact that Mangru was not produced. Though it is possible to urge that Mangru would not have admitted that the room was in his occupation in view of the Police having found two packets of cocaine on search, I think there was enough justification for the Court below to hold that Mangru was not in possession of the room. It is in evidence that the accused did not mention this fact to the Sub-Inspector when the latter proceeded to a search the house. If Mangru had, in fact, been in possession of the room, the accused would most naturally have said that he had nothing whatever to do with that room and that if the Sub-Inspector desired to search it he should send for his brother, who was in possession of the key. The fact that he took upon himself to produce the key, as if he were the owner of the room, strongly suggests that his defence on this point was an afterthought. Probably he thought that the Police would break open the lock if he did not hand over the key and relied on the chance of the Police not being able to discover the packets of cocaine, which he knew were concealed under the bed.

The learned Advocate for the applicant has contended that s. 14 of the Dangerous Drugs Acts does not in terms apply, as that section makes possession of "manufactured drug" punishable, and as the cocaine found in the packets has not been shown to be 'manufactured drug', that the expression "manufactured drug" is not exhaustively defined in the Act; s. 2 (*g*) merely provides as to what "manufactured drug" includes. Among other things it includes "all coca derivatives", which expression is defined in s. 2 (*b*) (iii) as

"cocaine, that is methyl benzoyl laevo-ecgonine having the chemical formula C-17, H-21 No 4 and its salts."

It is argued that there is no evidence on the record to show that the cocaine found in those packets contained the ingredients mentioned in the formula given in the definition. This question was not raised at the trial; otherwise more light could have been thrown on this aspect of the case. The expression "Coca derivatives" also includes "crude cocaine": see s. 2 (*b*) (*i*). The Chemical Examiner's report is as follows:

"More than 3 per cent. of cocaine admixed with novocaine was detected in the contents of each of the two *puryas* marked Exs. 5 and 4. The cocaine being impure in each case was unfit for medicinal use."

Section 2 (*b*) (*iii*) makes mention of cocaine; and to distinguish it from "crude cocaine" the usual chemical formula has been stated. I have no doubt that the word "cocaine", occurring in the Chemical Examiner's report, implies the substance prepared according to that formula, which is well known to chemists. I do not think that anything is lacking in this case to make out an offence under s. 14 of the Dangerous Drugs Act. The applicant was rightly convicted.

The learned Advocate for the applicant has strongly pressed for the reduction of sentence. As already stated, the applicant has once before been convicted of a similar offence. I do not think that the sentence of 18 months' rigorous imprisonment is too severe. I would, however, remit the fine, maintaining 18 months' rigorous imprisonment as the only sentence. The order of the trying Magistrate as regards sentence is modified to that extent. In other respects the revision is dismissed.

N. *Revision dismissed.*

MADRAS HIGH COURT

Criminal Appeal No. 295 of 1934
August 21, 1934
PAKENHAM WALSH, J.
THIRUPATHURAN—ACCUSED—APPELLANT
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 300, Excep. I—Deceased catching hold of accused's tuft—Latter also catching tuft of deceased and stabbing him with knife—Held, case came within s. 300, Excep. I.

In an altercation the deceased returned the abuse and caught hold of accused's tuft of hair, and gave him a blow with his fist on the back. The deceased and accused then closed with each other and accused caught hold of deceased's tuft also and stabbed the deceased to death by a knife:

Held, that the offence came under s 300, Penal Code, Excep. I as there was grave and sudden provocation. *Nagalu* v. *Emperor* (1), relied on

C. A. against an order of the Sessions Judge, Salem, in Case No. 11 of 1934.

The Public Prosecutor, for the Crown.

Judgment.—The accused has been convicted of murder and sentenced to transportation for life. He prefers this jail appeal. The facts according to the prosecution are these. On November 6, 1933, the accused reported shortly before midnight to P. W. No. 6 that the deceased had come to his house the previous evening when he was absent at a shandy, knocked at his door, pushed his wife and attempted to seduce her. He asked P. W. No 6 to convene a *panchayat* about this and P. W. No. 6 did so, summoning P. W's. Nos. 7, 9, 10 and others. Deceased was called and accused laid his complaint before the *Panchyat*. Deceased denied the charge and suggested that accused's wife be sent for. This was done and she stated that somebody had knocked at her door the previous night, that on opening it she had found nobody there and had not seen the deceased. Deceased then asked accused why he had come forward with a false complaint, on which accused abused him in filthy terms saying that deceased had not only attempted to seduce his wife but was now telling lies about it. The deceased returned the abuse and caught hold of accused's tuft of hair, and gave him a blow with his fist on the back. The deceased and accused then closed with each other and accused is said to have caught hold of deceased's tuft also. As P. W. Nos. 7 and 9 approached with a view to separate them deceased fell down saying that he was stabbed. Accused ran away. A knife was found sticking in the abdomen of the deceased. Prosecution Witness No. 7 took it out and handed it to P. W. No. 6. Of the village officers the *karnam* P. W. No. 17 was the first to arrive on the scene and he was followed by the Village Munsif, P. W. N. 16 who lives about a mile from the scene of offence. The deceased was still alive when the latter came and told the village Munsif that accused had stabbed him. The village Munsif sent for the accused who admitted that he had committed the offence unknowingly. The village Munsif despached his report which the *karnam* wrote. (After discussing evidence His Lordship continued).

The circumstances of the case are such as to render it immaterial whether it was dark at the time or whether there was some starlight, for in view of the statement of the accused in the Sessions Court the highly improbable theory that somebody else came up and stabbed the deceased is not possible or else accused would certainly have known of it. I have no doubt that the prosecution evidence is substantially true. Next I have to consider whether the offence amounts to murder. The learned Sessions Judge says on this point:

"No doubt the accused may have received some provocation but it was certainly not of such gave and sudden nature as to deprive him of the power of self-control. Besides the accused was dealing with an unarmed man and he seems to have taken undue advantage over him by stabbing him with a knife and thus acted cruelly. There was really no need for the accused to have used the knife against the deceased in an ordinary fight like this."

I must say that until Mr. Bewes drew my attention to the case reported in *Nagalu* v. *Emperor* (1), I was inclined to agree with the lower Court. In that case the facts were very similar. The two Judges who heard the appeal differed, Jackson, J. holding that the offence was murder and Thiruvenkatachariar, J. holding that it was not. On a reference to a third Judge, Wallace, J., the latter agreed with Thiruvenkatachariar, J. The case is clearly parallel and I am not able to see any real distinction. In that case the deceased (while a fight was going on between some other relations of the parties) ran out of his house calling 'Where is this Nagulugadu? (the deceased)". Accused in that case standing near a tree in front of his house defied the deceased and told deceased to come on. Comparing that with the present case the accused no doubt began the abuse of deceased before the *Panchayat* and then deceased abused him in return. I see no

(1) 106 Ind. Cas. 343; A I R 1928 Mad. 136; 29 Cr. L J 7.

substantial difference at this stage between this case and the case under reference where the deceased "was provoking a fight" (to quote Wallace, J.) and the accused took up the challenge. The question, who first began the abuse does not seem to me to make any material difference. After this the cases are almost exactly parallel. The deceased in that case began the fight by catching hold of the tuft of the accused and giving him blows with his fist exactly as here. Then there was a struggle during which the deceased held the accused firmly by the tuft and then accused stabbed the deceased with a dagger which he had with him. It is true that in the present case there is evidence that after the deceased caught hold of accused's tuft and given him a blow with his fist the accused also caught hold of deceased's tuft. Even that perhaps is open to some doubt (*vide* evidence of P. W. No. 6 discussed above). But certainly if accused seized hold of deceased's tuft under such circumstances, it would be no offence, and could not alter the question as to whether he was justified in stabbing him. The only other difference is in favour of accused in the present case because the accused in that case stabbed with a dagger and here only with a knife.

Thiruvenkatachariar, J. held that both Exceps. 1 and 2 of s. 300, Indian Penal Code applied, *i. e.*, that the deceased seizing accused by the tuft and giving him blows with his fist was grave and sudden provocation (I may note here perhaps the evidence of P. W. No. 6 in this case "we did not expect this sudden trouble)," and also that accused in that case exercised the right of self-defence in stabbing his asssailant though he exceeded it. Wallace, J., does not appear to have held that the case would come under Excep. 2, at least he does not mention it in his judgment, but he held that it came under Excep. 1. I cannot distinguish that case in essence from the one before me, and as there was an express difference of opinion between the two learned Judges who tried the appeal on the point, and it was referred to a third Judge for decision, the case carries much more authority than would the mere opinion of a single Judge sitting alone here. I feel therefore bound to follow it and to reduce the conviction to one of culpable homicide not amounting to murder under the first part of s. 304, Indian Penal Code on the ground that the case is covered by Excep. 1, s. 300. In that case the sentence given was three years' rigorous imprisonment. In the present case the accused began the abuse, but on the other hand he had probably good cause to be angry. It seems unlikely that if his wife had told him nothing more than she told the *panchayat* he would have made the complaint and have had a *panchayat* held at all. I reduce the sentence to one of five years' rigorous imprisonment.

A.-D. *Sentence reduced.*

PRIVY COUNCIL

Appeal from the Allahabad High Court

March 5, 1935

LORD THANKERTON, SIR LANCELOT SANDERSON AND SIR SHADI LAL

PATEL CHHOTABHAI SINCE DECEASED AND OTHERS—APPELLANTS

versus

JNAN CHANDRA BASAK AND OTHERS—RESPONDENTS

Charitable and Religious Trusts Act (IV of 1920) —Trust—Validity of trust under the Act—Tests—Trust deed executed by Central Council of a Cult—Guru regarded as spiritual head—Gifts made to Guru in accordance with mandates of religion—Donors, if can be supposed to have intended to create trust—Deed—Construction—Held, *deed could not be treated as title deed.*

In order that a trust of a religious and charitable nature may be valid and enforceable according to law, certain material matters must be ascertainable. In the first place it is material to ascertain the author or authors of the alleged trust. Next the intention to create a trust must be indicated by words or acts with reasonable certainty. The purpose of the trust, the trust property, and the beneficiaries must be indicated in such a way that the trust could be administered by the Court if the occasion arose. [p. 41', col. 2.]

A trust deed was executed by certain members of the Central Council Radha Swami Satsang and the objects of the trust were that "the trustees named above or those that may be appointed hereafter to succeed them, all of whom will hereafter be called 'trustees,' shall collect, preserve, administer, and if necessary, alienate the properties, movable or immovable, that have been or may hereafter be dedicated to the Supreme Being, Radha Swami Dayal, or that may be acquired for or presented to the Radha Swami Satsang and its branches, in accordance with such directions as may, from time to time, be issued in this behalf by the said Council or the Sant Sat Guru for the time being, if any who is recognised as the representative of the Supreme Being Radha Swami Dayal, and as such is the sole master of all movable and immovable properties of the aforesaid Satsang, provided that *samadhs* and places of public worship of the Radha Swami Satsang shall at no time be alienated :"

Held, (*i*) that the deed could not be treated as a title deed creating a legal trust. [p. 414 col. 1.]

(*ii*) that according to the tenets of the Radha Swami religion, and in consideration of the position and authority of the Sant Sat Guru, the complete

and absolute submission of his followers to him and the teachings and doctrines, the followers of the true faith when making their gifts to the "Sant Sat Guru," whom they regarded as their spiritual head (whether he was the incarnation of the Supreme Being or only his representative) in accordance with the mandates of their religion, could not be supposed to have intended to create any trust and it could not be said that the donors of the gifts were the authors of the alleged public trust; [p. 412, col. 2.]

(*iii*) that the provisions in the deed were wholly inconsistent with any intention on the part of the "Sant Sat Guru" for the time being, to alter his position as "Sant Sat Guru" or to divest himself of the control of the property and to create a trust for a public purpose of a charitable or religious nature, such as is contemplated by the Act XIV of 1920, but on the other hand, the regulations relating to the Central Council and the provisions of the so-called 'trust" deed were in consistent with a desire on the part of the Sant Sat Guru to obtain the assistance of some of his followers in the management of the property, which was increasing as the years passed; [p. 412, col 1]

(*iv*) that in view of the essential and unalterable doctrines of the faith with respect to the "Sant Sat Guru," his supremacy and his control over the offerings, by which the properties were acquired, it would be difficult to arrive at the conclusion that it was ever intended that such a trust as is contemplated by Act XIV of 1920, should be created. [p. 415, cols. 1 & 2.]

[Doctrines, principles and tenets of the Radha Swami religion discussed.]

Messrs. *Upjohn*, *K. C.*, and *DeGruyther*, *K. C.* for the Appellants.

Messrs. *Parikh* and *B. B. Lal*, for the Respondants.

Sir Lancelot Sanderson.—This is an appeal against a decree of the High Court of Allahabad dated June 12, 1929, which affirmed a decree of the Additional Subordinate Judge at Benares dated November 30, 1926.

The litigation relates to a dispute between the plaintiffs and the added defendants on the one hand and the first three defendants on the other, with regard to certain property mentioned in the schedule to the plaint. All the parties are followers of the Radha Swami religion and the questions relating to the said property involve the consideration of the doctrines, tenets and principles of that religion, which are of vital importance to them and are of great interest to any student of theology.

The suit was brought by the plaintiffs (one of whom, *viz.*, Patel Chotabhai has died since the initiation of the suit) who alleged that they were followers of the true faith of the said religion against Jnan Chandra Basak, Anand Sarup and the Radha Swami Satsang Sabha, a registered body through its Secretary, Mr. Nihal Chand, for a declaratory decree to the following effect—

(I)—"(*a*) That the so-called Radha Swami Trust administering the properties shown in the schedule marked A is not, in law, a legal and valid trust, nor of the kind or nature alleged by the defendants.

(*b*) That the said trust, if any, is not a trust created or existing for public purpose of a charitable or religious nature or one to which the provisions of Act XIV of 1920 apply.

(*c*) That the defendant No. 1 or No. 2 or any follower or followers of defendant No. 2 represented by defendant No. 3, individually or collectively possess no interest in the alleged trust or in the properties administered by it or in the affairs of the Satsang and its branches attached to the Radha Swami Central Administrative Council.

(II) To grant such further relief as the Court may deem fit and proper."

These defendants were alleged by the plaintiffs to be dissentients from the true faith, and that the 2nd defendant, Anand Sarup Sahib, had been set up as the "Sant Sat Guru" by these defendants and other persons acting with them. Subsequently, certain other persons were added as defendants to the suit, one of whom, *viz*, Gurmouj Saran *alias* Moti Ram, afterwards became a plaintiff, and the added defendants are now respondents Nos. 4 to 9.

One of the added defendants, *viz.*, Sahib Madho Prasad, is alleged by the plaintiffs to be the recognised Sant Sat Guru of the true faith of the said religion. As already stated, the added defendants supported the case of the plaintiffs.

The Subordinate Judge dismissed the suit with costs.

The plaintiffs appealed to the High Court which, on June 12, 1929, dismissed the appeal with costs, hence this appeal by the plaintiffs to His Majesty in Council.

The defendant-respondents did not file any case in reply to the plaintiffs' appeal; consequently their Lordships have not had the advantage of hearing any argument on their behalf, but the learned Counsel who appeared for the plaintiff-appellants, have drawn their Lordships' attention very carefully and fully to the material documents and evidence in the suit, and to the contentions set up by the defendants in the Courts in India.

The suit was instituted in consequence of the following matters.

In September, 1923, Jnan Chandra Basak the first defendant presented an application in the Court of the District Judge of Agra against Gurmouj Saran, described as the Trustee and Secretary, Radha Swami Trust, Allahabad, and Madhav Prasad Sinha Sahib, described as Trustee of the Radha Swami Trust.

The application purported to be made under s. 3 of the Charitable and Religious

Trusts Act, 1920 (Act XIV of 1920), which provides as follows—

"Save as hereinafter provided in this Act, any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the Court within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate to obtain an order embodying all or any of the following directions, namely:—

(1) directing the trustee to furnish the petitioner through the Court with particulars as to the nature and objects of the trust, and of the value, condition, management and application of the subject-matter of the trust, and of the income belonging thereto, or as to any of these matters; and

(2) directing that the accounts of the trust shall be examined and audited;

Provided that no persons shall apply for any such direction in respect of accounts relating to a period more than three years prior to the date of the petition."

The material parts of the petition are as follows:

"1. That there is in existence a Charitable and Religious Trust, known as the 'Radha Swami Trust,' which was formed in 1904 by the Radha Swami Central Administrative Council, a body elected in 1902 by the votes of the members of the Radha Swami Faith, for the collection, preservation and administration of properties, movable and immovable, that had till then been dedicated or might thereafter be dedicated to Radha Swami Dayal or that might be acquired for a present to Radha Swami Satsang

2. That the immovable properties vested in the said Trust include the Holy *Samadhs* of the past Sant Sat Gurus, *i e*, the Leaders of the Radha Swami Faith and other places of worship held sacred by the Radha Swami community and properties dedicated to, or acquired with monies, presented to, Radha Swami Dayal in the form of '*bhents*' and other contributions by the members of the Radha Swami community.

4. That the applicant is a person having an interest in the said Trust in the following ways:—

(*a*) That he is a follower of the Radha Swami Faith for over thirty-three years and that for a long time, both before and after the creation of the said Trust, he has contributed his humble mite towards the properties and funds made over to, and administered by, the said Trust and that he has all along been in the enjoyment of his right of access for religious purposes to all the Holy *Samadhs* and other places held sacred by the members of the Radha Swami community and administered by the said Trust as part of the Trust property.

(*b*) That the applicant made a '*bhent*' (present) of Rs. 2,000 about the year 1903 and in lieu thereof was granted a life allowance of Rs. 5 per mensem which the applicant has since then been receiving from the said Trust."

The applicant prayed that the Court should order that the said persons mentioned in the petition should furnish the information therein asked for as to immovable properties, cash balances, value of the alleged trust property and many other matters.

It was alleged that this application gave great offence to the followers of the true faith and thereupon three of such followers (two of whom were subsequently plaintiffs in the suit), submitted to the Court that there was no legal and valid trust, that the provisions of Act XIV of 1920 did not apply and that the petitioners had no interest in the matters referred to and they undertook to file a suit in accordance with the provisions of s. 5 (3) of the said Act.

The District Judge accordingly, by his order on December 20, 1923, stayed the proceedings, and the suit was filed on March 17, 1924.

The main question in the appeal is whether there is a valid legal trust in respect of the properties mentioned in the schedule attached to the plaint, known as the "Radha Swami Trust" as alleged by the contesting defendants. They alleged that there was a trust for a public purpose of a charitable and religious nature. Both the Courts in India decided the question in favour of the contesting defendants.

In order to appreciate the contentions which have been urged by the respective parties during the litigation with regard to this question, it is necessary in their Lordships' opinion to refer shortly to the foundation and nature of the religion, its tenets and doctrines, the position of the Sant Sat Guru, and the manner in which the properties which are said to be subject of the alleged trust, were acquired.

It is common ground that the faith or religion was founded in the year 1861 by Swami Shiv Dayal: he departed from this world, to use the expression of his followers, in 1878. All persons, whether Hindus, Muhammadans, Parsis or Christians can be initiated into this religion provided they are found to be fit and suitable by the spiritual head or "*Guru*," and when initiated, they are called "Sat Sangis."

The object of the religion is to attain true and perfect salvation by the liberation of the spirit from the bondage of mind and matter, which can only be achieved by following the practices prescribed by the religion.

The founder was the first "Sant Sat Guru." After his departure from this world one called "Huzur" was the second "Sant Sat Guru", he acted from 1878 until 1898, when he, too, departed from this world. Then one called "Maharaj Sahib

became Sant Sat Guru" until 1907. Both parties recognise the above-named three persons as "Sant Sat Gurus."

The doctrines and tenets of the religion depend upon the writings and teachings of these three persons, and there is no dispute between the parties as to them. Both parties regard them as authoritative and binding upon the Sat Sangis: they do not, however, agree as to the position of the "Sant Sat Guru" in relation to the Radha Swami Faith.

As regards this last-mentioned matter, the plaintiffs hold that the spiritual leader of their religion for the time being known as the "Sant Sat Guru" is the incarnation of the Supreme Being in human form.

On the other hand, the contesting defendants say that the "Sant Sat Guru" is the representative of and is in communion with the Supreme Being but they do not accept the plaintiffs' contention that the Supreme Being is incarnate in the "Sant Sat Guru."

The learned Subordinate Judge, after hearing the evidence, came to the conclusion that the "Sant Sat Guru" may be described as "a person who has risen to such height spiritually that the Supreme Being sends a ray or current from his own to him that he may accomplish His mission under His impulse."

The learned Judge said that as an issue had been raised upon this matter he had to deal with it, otherwise he would have refrained from saying anything on this point.

Fortunately, their Lordships do not find it necessary to express any opinion in respect of this issue, inasmuch as the appeal falls to be decided upon grounds which are independent of the above-mentioned issue and are sufficient for the disposal of the appeal whichever view of the above-mentioned question is taken.

The following passages illustrate the teachings and doctrines as to the relations between the "Sant Sat Guru" and the initiated; they have been accepted by both parties as Supreme and uncontrollable mandates—

"Serve the Sat Guru with your heart, body and riches and consider him as Sat Purush."

The service performed by means of money is that "it may be utilised in the services of the Spiritual Guide."

"Worship the Guru every moment, no other deity is equal to him."

"Those who slavishly follow the *Shariyat* (creed of law) always remain tied to the world. They will never find access to Durbar of the Supreme Being. But those who serve the Sat Guru of the time with body and mind and wealth will secure entrance to the presence of the Supreme Being. The Sat Guru Himself is the Supreme Being; to serve him is to serve the Supreme Being. Those who seek the Supreme Being ignoring the Sant Sat Guru will never find the Supreme Being. Those who are engaged in service of the Sat Guru have actually met with the Supreme Being. When their eyes open they will see it (*i e* that the Sant Sat Guru is the Supreme Being Himself) and until their eyes open fully they should, relying on the word of Sant Sat Guru continue in His service, go on attending Satsang and continue increasing their Faith in and love for the '*charans*' of Sant Sat Guru. One day the whole secret will be revealed to them."

"Any one desirous of reaching the Supreme Being must search for a Sant Sat Guru (incarnation of the Supreme Being) or a Sadh Guru (one who has reached the top of the second grand division) and invok His help, and receive instructions from one of these Supreme Guides as to the manner of his devotion and procedure.

A Sant Sat Guru is He who has either descended directly from the Highest Division or reached that quarter by practice of Surat Shabd Yoga under the immediate direction of the former.

The first personage or the Supreme Father and sole master is a vast and boundless Ocean of Spirit and Love and Joy from whom the Original Spirit or word current emanated. The second personage or the Supreme Mother is the Original Spirit and Sound Current the prime mover, creator, nourisher and supporter of the whole creation. It is the connecting link between the Supreme Father and the son or disciple, and leads the way and helps the son in returning to the Father's Highest Mansion.

The third, the Supreme Son or Sant Sat Guru is the Representative of the Supreme Father in human form on this earth. This incarnation of the Supreme Father or His Special and Beloved son Sant Sat Guru appears now and then in this world for the purpose of saving spirits from going down to the lower regions and raising them to the higher spheres, and finally to the Mansion of the Supreme Father. The fourth, the disciple, the son or human being is a ray or drop descended from the Supreme Sun or Boundless Ocean of Spirit, Love and Joy, but his attention having been diverted by mind and matter towards the material creation down below, he has lost all knowledge of the Supreme Father and His Highest Mansion, and cannot now return to His Holy Abode without the help externally of Supreme Father or His Special and Beloved Son assuming human form of a Sant Sat Guru, and internally, of the Supreme Mother or the connecting Spirit and Sound Current between the Supreme Father and the disciple or son who illumines the heart of a sincere lover and devotee and sheds grace and mercy upon him."

There are many other extracts to which their Lordships' attention was directed; they are to much the same effect and it is not necessary to refer to them in detail.

The properties which are the subject-matter of the suit were acquired with monies presented to the "Sant Sat Guru" in the form of "*bhents*" or other contributions by the followers of the Radha Swami Faith and one of the points strongly relied upon by the plaintiff-appellants is that having regard to the spiritual position of the

"Sant Sat Guru" whether he is regarded as the incarnation of the Supreme Being in human form or as one of such spiritual height as to be in communion with the Supreme Being and to be his Representative on earth it is almost inconceivable that the followers of the Faith when making their gifts to the "Sant Sat Guru" intended to create a "trust" within the meaning of Act XIV of 1920, of which they the donors and worshippers should be the beneficiaries.

It is necessary now to refer to certain material facts.

In 1902, while Maharaj was the "Sant Sat Guru" a Council was formed, called the Central Council Radha Swami Satsang. In the notice issued to the followers of the Faith calling a meeting to form the Council it was stated that—

"We have repeatedly received the news which show that some of the Satsangis take such proceedings and are of such character as cause interference with the proceedings of Radha Swami Satsang and it is apprehended that by formation of different parties, the real object of Radha Swami Mat that all the persons should make and render service to Radha Swami Dayal may be lost.

The object of establishing the Sabha is not to offer any kind of obstruction to the devotion, *Sewa* (service) and Supremacy of the Sant Sat Guru whenever in future He manifests Himself. At that time this Sabha will only help Him in the management of the Satsang and His orders will have priority in respect of all matters and He will be treated a *Nijputra* or successor of Radha Swami. In every matter He shall have full and unquestionable power".

The document declaring the constitutional powers of the Central Council appears to have come into being in June, 1904, and the material passages are as follows:—

"1. The constitutional powers of the Central Council Radha Swami Satsang which was established in the year 1902 by a majority of votes of the members of the Radha Swami Faith are as below:—

(a) To regulate the conduct of business pertaining to the Radha Swami Satsang and its branches and of the followers of the Radha Swami religion.

(b) To collect, preserve and administer the properties, movable and immovable that have been or may hereafter be dedicated to Radha Swami Dayal or that may be acquired for or presented to the Radha Swami Satsang for the furtherance of the objects of the Satsang.

(c) To do the above and all such other things as are incidental or conducive to the attainment of the above objects in accordance with the directions of the Sant Sat Guru for the time being, if any, who is recognised as the representative of the Supreme Creator, Radha Swami Dayal, and whose mandates shall be paramount and absolute in all the matters referred to above.

9. All property of Radha Swami Satsang and its branches both movable and immovable which exists at present or may hereafter be presented to Radha Swami Dayal or be otherwise acquired, will, for the maintenance and advancement of the objects of the Satsang, be vested in a body of trustees designated the "Radha Swami Trust."

22. The Radha Swami Trust shall prescribe rules for the proper care and custody of the movable and immovable property belonging to the Satsang and its branches and for the proper maintenance of accounts.

25. The Trust shall be revocable at the discretion of the Council and the Trustees shall hold their office at its pleasure.

27. All immovable property as soon as acquired by Satsang, either as a present or offering, shall be conveyed in the name of the Radha Swami Trust."

In October, 1904, what was called a "Trust Deed" was executed by certain members of the Central Council. The executants included the then "Sant Sat Guru," "Maharaj," who used his own name, *viz.*, Brahm Shankar Misra, Madho Prasad, the "Sant Sat Guru" recognised by the plaintiffs and their party after the death of "Maharaj," and Kamta Prasad Sinha, who was the first "*Guru*" adopted by the alleged dissenters, namely the party, to which the contesting defendants belong.

The objects of the "Trust" as stated in the deed were as follows:—

OBJECTS OF THE TRUST.

"The trustees named above or those that may be appointed hereafter to succeed them, all of whom will hereafter be called 'trustees,' shall collect, preserve, administer, and if necessary, alienate the properties, movable or immovable, that have been or may hereafter be dedicated to the Supreme Being, Radha Swami Dayal, or that may be acquired for or presented to the Radha Swami Satsang and its branches, in accordance with such directions as may, from time to time, be issued in this behalf by the said Council or the Sant Sat Guru for the time being, if any, who is recognised as the representative of the Supreme Being Radha Swami Dayal, and as such is the sole master of all movable and immovable properties of the aforesaid Satsang, provided that *Samadhs* and places of public worship of the Radha Swami Satsang shall at no time be alienated."

A similar clause appears in a later deed, *viz.*, January 2, 1920.

By a clause relating to Bye-laws, it was provided that—

BYE-LAWS OF THE TRUST.

"1. Irrespective of what is prescribed by the following rules, all mandates of the Sant Sat Guru of the time regarding the disposal of the movable and immovable properties of the Satsang and its branches or other matters connected with the Trust, shall be carried out by the trustees

2. The Trust shall be revocable at the discretion of the Council and the trustees shall hold their office at its pleasure.

4. All immovable properties, as soon as acquired by the aforesaid Satsang either as present or offerings or by purchase, or otherwise, shall be forthwith conveyed in the name of the trustees."

There was attached to the deed a specification of the properties alleged to be held in trust.

In April, 1907, certain "loan rules" were issued by the Central Council; it was stated

that in order to obviate the serious difficulties, hardships and loss which Sat Sangis have often to undergo in obtaining loans, and to afford them all reasonable facilities, the rules were sanctioned for grant of loans to them.

These rules provided for the carrying on a sort of banking business, whereby loans were to be made at interest either on security or guarantee: an object which is hardly consistent with the alleged trust being of a religious or charitable nature.

In 1907, "Maharaj" the third "Sant Sat Guru" died. It was alleged by the plaintiff appellants that before he died he had indicated, as to his successor, that the divine current was in female form in his own sister, who was known as Buaji Sahiba; but he declared that she would not publicly hold or preside at Satsang, as she was a *pardanashin* lady, and that, during her lifetime the Satsang would be conducted in accordance with her directions and orders under the presidency of *Rai Sahib* Madho Prasad Sinha Sahib, known as Bapuji Maharaj (respondent No. 4), who would succeed her, and that the followers of the true faith, in accordance with the tenets thereof, acted upon this declaration and accepted the lady as the next Sant Sat Guru accordingly.

In 1910, some Sat Sangis followed the lead of Kamta Prasad Sinha and he became the "Sant Sat Guru" of the so-called dissentient party, who formed themselves into a body called the Radha Swami Satsang Sabha at Agra, which body was the third defendant in the suit; subsequently, Anand Sarup, the second defendant became the "*Guru*" of that party.

In 1913, Buaji Sahiba died and Madho Prasad was accepted by the plaintiff-appellants' party as the true and only "Sant Sat Guru."

Both the Courts in India held that the deed of October, 1904, cannot be treated as a title deed creating a legal trust, and their Lordships agree with them in this respect.

The High Court, however, considered that it was to be regarded as a document containing admissions in unmistakable terms as to the character and nature of the properties therein referred to, and the High Court's conclusion was as follows:

"We think that the statements contained in this deed coupled with those contained in the notices and the circulars as well as the subsequent conduct of the *Gurus* themselves, can leave no doubt in our minds that these properties were not treated as the private properties of the *Gurus*, but were set apart as the properties belonging to the Satsang and its branches and held in trust by the trustees for the furtherance of the object of the Satsang"

With great respect to the learned Judges, their Lordships are not able to agree with their decision.

It may be that the offerings to the Sant Sat Guru, by means of which the properties were acquired, were not only for the personal use of the Sant Sat Guru, but also for the advancement of the faith, but in order that such a trust, as is relied upon by the contesting defendants in this case, may be valid and enforceable according to law, certain material matters must be ascertainable. In the first place it is material to ascertain the author or authors of the alleged trust. Next the intention to create a trust must be indicated by words or acts with reasonable certainty. The purpose of the trust, the trust property, and the beneficiaries must be indicated and in such a way that the trust could be administered by the Court if the occasion arose.

It is necessary, therefore, to consider who was the author or who were the authors of the trust which is alleged by the contesting defendants, to have been for a public purpose of a charitable or religious nature. Their Lordships agree with the contention of the plaintiff-appellants that the followers of the true faith when making their gifts to the "Sant Sat Guru," whom they regarded as their spiritual head (whether he was the incarnation of the Supreme Being or only his representative) in accordance with the mandates of their religion cannot be supposed to have intended to create any trust. In this connection, it is material to notice that the High Court accepted the same view in that they said that when the members of this faith make gifts to Radha Swami Dayal in the person of the *Guru*, they do not concern themselves with the manner in which the gifts will be used.

This seems to their Lordships an eminetly reasonable conclusion when the position and authority of the "Sant Sat Guru," the complete and absolute submission of his followers to him, and the above-mentioned teachings and doctrines are taken into consideration. It cannot therefore be said that the donors of the gifts were the authors of the alleged public trust.

But it is to be remembered that the properties, which are alleged to be the subject of the trust, were acquired by means of the said gifts made to the Sant Sat Guru in the form of "*bhents*" and other con-

tributions. Can it then be said that any of the three "Sant Sat Gurus" to whom the gifts were made created such a trust as is relied upon by the contesting defendants?

Their Lordships can find no trace of the creation of any trust prior to the time when the above-mentioned Council was formed. When the constitutional powers of the Central Council were declared, it was at the very outset provided that the Council was to do the things mentioned in the declaration and other matters incidental thereto, in *accordance with the directions of the Sant Sat Guru for the time being,* if any, who is recognised as the representative of the Supreme Creator Radha Swami Dayal *and whose mandates shall be paramount and absolute in all the matters referred to therein.*

In the alleged trust deed itself the "Sant Sat Guru" for the time being is recognised as the representative of the Supreme Being and as such, is *the sole master of all movable and immovable properties of the Satsang.* Further, the deed is stated to be revocable at the discretion of the Council.

These provisions, in their Lordships' opinion, are wholly inconsistent with any intention on the part of the "Sant Sat Guru" for the time being, to alter his position as "Sant Sat Guru" or to divest himself of the control of the property and to create a trust for a public purpose of a charitable or religious nature, such as is contemplated by Act XIV of 1920.

On the other hand, the regulations relating to the Central Council and the provisions of the so-called "Trust" deed are, in their Lordships' opinion, consistent with a desire on the part of the Sant Sat Guru to obtain the assistance of some of his followers in the management of the property, which, no doubt, was increasing as the years passed.

The arrangement thereby made would no doubt facilitate the dealing with the property during the lifetime of the "Sant Sat Guru," and would obviate difficulties which might arise as to succession on the death of the "Sant Sat Guru," but in view of the essential and unalterable doctrines of the faith with respect to the "Sant Sat Guru," his supremacy and his control over the offerings, by which the properties were acquired, it is difficult to arrive at the conclusion that it was ever intended that such a trust as is contemplated by the Act XIV of 1920, should be created. This is confirmed by the express provisions which have already been referred to, *e. g.*, that the Council were to act in accordance with the direction of the "Sant Sat Guru" for the time being, who is recognised as the representative of the Supreme Creator, whose mandates were to be paramount and that the trustees were to follow the directions of the "Sant Sat Guru," who was the sole master of all movable and immovable property.

This conclusion is, in their Lordships' opinion, fatal to the contention of the contesting defendants, but there are other considerations which would render it difficult to hold that the alleged trust was of a religious or charitable nature only.

Reference has already been made to the carrying on of a sort of banking business. In this connection it may be noted that Jnan Chandra Basak who presented the above-mentioned petition, alleged that he had made a gift of Rs. 2,000 in 1903 to the alleged trust and he was granted a life allowance of Rs. 5 per mensem; in other words, he bought an annuity of Rs. 60 for the sum of Rs. 2,000. In 1905, it was proposed to start a factory in which only Sat Sangis and their relations should take part. It was stated that five *lakhs* of rupees would be required and that the shares would be Rs. 50 each and Sat Sangis were invited to invest their money. Whether this proposal was carried out, their Lordships do not know, but the above-mentioned matters go to show that even if the alleged trust could be taken as having been created, it would be difficult to hold it was for a public purpose of a religious or charitable nature within the meaning of Act XIV of 1920. For these reasons their Lordships are of opinion that the appeal must be allowed, and the decrees of the Courts in India set aside and that a declaration should be made in accordance with paragraph one, sub-paragraphs (*a*) and (*b*) of the prayer in the plaint, and they will humbly advise His Majesty accordingly.

The defendants one to three must pay the costs of the plaintiff-appellants in both Courts in India, and of this appeal.

N. *Appeal allowed.*

Solicitors for the Appellants:—Messrs. *Douglas Grant & Dold.*

CALCUTTA HIGH COURT

Criminal Revision No. 811 of 1934
September 7, 1934
PATTERSON, J.

ABDUL JABBAR SARKAR—ACCUSED —PETITIONER
versus
EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 70, 71, 134 (2)—Procedure under s. 134 (2), when can be resorted to.

It is only if the order cannot be served in the manner provided for service of summons that the publication of a proclamation under sub-s. 2, s. 134, Criminal Procedure Code, may be resorted to.

Mr. *S. C. Talukdar*, for the Petitioner.

Order.—This Rule must, in my opinion, be made absolute not on the ground that the petitioner had no knowledge of the order in question, (for I entirely agree with the Courts below that he had such knowledge), but on the ground that the order for the disobedience of which the petitioner has been convicted had not been duly promulgated. Section 144, Criminal Procedure Code, lays down that an order under that section shall be served in the manner provided by s. 134, and s. 134 says that such an order shall, if practicable, be served on the person for whom it is made in a manner provided for service of summons. It is only if the order cannot be served in the manner provided for service of summons that the publication of a proclamation under sub-s. 2, s. 134, may be resorted to. The provisions regarding service of summons are found in ss. 68 to 74, Criminal Procedure Code. Section 69 lays down that a summons shall, if practicable, be served personally. Section 70 lays down that where a person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family or in a Presidency town with his servant residing with him. Section 71 lays down that if service in the manner mentioned in ss. 69 and 70 cannot, by the exercise of due diligence be effected, the summons shall be served by affixing it to some conspicuous part of the house or homestead in which the person summoned ordinarily resides.

What happened in the present case was this. The constable who went to the locality to serve the order could not find the petitioner and he forthwith instead of resorting to the procedure laid down in ss. 70 and 71, caused the order to be proclaimed by beat of drum and by attaching a copy thereof to a tree. He also took the precaution by obtaining the signature of one Kinu Mondal, who is said to be a relative and a neighbour of the petitioner, and himself one of the persons against whom the order was directed. The procedure adopted by the constable appears to have been substantially in compliance with the provisions of sub-s. (2), s. 134. But it was not, in my opinion, open to the constable to resort to that procedure, inasmuch as he had not made any attempt to serve the order through any relative of the petitioner as laid down in s. 70, or by affixing to the petitioner's house as laid down in s. 71. The constable is of course not to blame in this matter for it was not to be expected that he would be acquainted with the provisions of the Criminal Procedure Code relating to the service of an order of the kind which is at present under consideration He ought to have been given clear directions on the point and the result of the failure to give him such directions has been that the order was not served in the manner required by law.

It is further a matter for surprise that the Magistrate at the time of issuing the order, and the local Police Officer when he received the order, did not take any steps or direct any steps to be taken for the purpose of enforcing the order in the locality, and for the purpose of preventing the *mela*, the holding of which the order purported to prohibit, from being held. The Rule is made absolute. The conviction and sentence are set aside and the petitioner is acquitted. The fine, if paid, will be refunded.

D. *Rule made absolute.*

ALLAHABAD HIGH COURT

First Civil Appeal No. 16 of 1931
February 6, 1935
THOM AND IQBAL AHMAD, JJ.

BAQA ULLAH KHAN AND OTHERS—PLAINTIFFS—APPELLANTS
versus
GHULAM SIDDIQUE KHAN AND OTHERS —DEFENDANTS—RESPONDENTS

Mussalman Wakf Validating Act (VI of 1913), s. 3, proviso—Reservation of ultimate benefit contemplated by the proviso—Whether can be made impliedly—Wakf created in perpetuity—Portion of usufruct reserved for pious and charitable objects—Wakif having in view possible extinction of line of descendants—Use of words 'wakf fi-sabi-lillah'—Wakf—Validity of—Deed—Construction—Deed to be read as a whole—Effect to be given to all provisions.

The reservation of the ultimate benefit contemplated by the proviso to s. 3 of the Mussulman Wakf Validating Act can either be made expressly or impliedly. The answer to the question whether the reservation of the ultimate benefit for those purposes has been made by a deed of *wakf* must depend on the intention of the *wakif* as disclosed by the deed. In a case where the words "*wakf fi-sabi-lillah*" have been used and *wakif* has been created in perpetuity, and there is provision for the appointment of the *mutwallis* for all time to come, and a portion of the usufruct of the *wakf* property has been reserved for pious and charitable purposes, and the *wakif* had in contemplation the possible extinction of the line of his descendants who were to be the principal recipients of the profits of the *wakf* property, the irresistible conclusion is that the *wakif* intended by implication to reserve the ultimate benefit for the purposes enumerated in the proviso.

It is one of the recognized canons of the interpretation of a document that the document must be read and construed as a whole and due and legitimate effect be given to each and every one of its provisions.

F. C. A. from the decision of the Subordinate Judge of Aligarh, dated October 24, 1930.

Mr. *A. M. Khwaja*, for the Appellants.

Messrs. *S. C. Das*, *Janaki Prasad* and *K. N. Jha*, for the Respondents.

Judgment.—One Wilayat Husain Khan executed a deed of *wakf* on April 28, 1925, and the sole question for consideration in the present appeal is whether by that deed a valid *wakf* was created in accordance with the provisions of the Mussalman Wakf Validating Act (Act VI of 1913), and on the answer to that question depends the decision of this appeal.

After the execution of the deed of *wakf* Wilayat Husain on August 10, 1925, filed a suit for the revocation and cancellation of the deed and in the alternative for the rectification of the same. The suit was based mainly on the allegation that the execution of the deed was brought about by the exercise of undue influence on Wilayat Husain by Ghulam Siddique Khan, one of the defendant-respondents before us, and that as there was no ultimate dedication by the deed in favour of the poor or for some pious, religious or charitable purpose, as enjoined by the proviso to s. 3 of the Wakf Validating Act, the *wakf* was invalid. It was further stated in the plaint that Wilayat Husain intended to make provision by the deed for the maintenance, amongst others, of his nephew Imdad Husain and his descendants and that, in the event of the Court refusing to cancel the deed, provision for the maintenance of Imdad Husain and his descendants be also made in the deed by rectification of the same. The defendants to the suit were *Musammat* Taslimunnisa, the wife, and Kaniz Fatma, the daughter of Wilayat Husain and Ghulam Siddique, the husband of Kaniz Fatma, and these very persons were the principal beneficiaries under the deed of *wakf*. The suit was contested by the defendants and the learned Subordinate Judge directed Wilayat Husain to appear in person on the date fixed for striking issues, "For his examination for elucidation of material facts" Wilayat Husain did not attend in person on the date fixed and the Court on October 12, 1925, passed an order dismissing the suit for default with costs to the answering defendants.

Wilayat Husain died on January 13, 1930, and the suit giving rise to the present appeal was filed on March 20, 1930, by the plaintiff-appellants, who are the sons of Imdad Husain and the grand-nephews of Wilayat Husain. In the plaint the validity of the deed of gift was assailed on the very grounds on which Wilayat Husain had prayed for the cancellation of the *wakf* in the suit filed by him. The plaintiffs alleged that the execution of the deed of *wakf* was brought about by the exercise of undue influence on Wilayat Husain and that as there was no ultimate dedication in favour of the poor or for some religious, pious or charitable purpose, the *wakf* was invalid.

Kaniz Fatma had died in the life-time of Wilayat Husain and the defendants to the present suit were Ghulam Siddique and *Musammat* Taslimunnisa. Both the defendants contested the suit. They denied the allegation of the plaintiffs about the exercise of undue influence and maintained that the *wakf* was valid. They also pleaded that the order of the Subordinate Judge dated October 12, 1925, dismissing the suit filed by Wilayat Husain operated as *res judicata* and was a bar to the present suit in view of the provisions or O. IX, r. 9 Civil Procedure Code.

The learned Subordinate Judge upheld the contention of the defendants that O. IX, r. 9, Civil Procedure Code was a bar to the suit. He, however, held that "the ultimate benefit" was not, by the deed, expressly or impliedly reserved for the poor or for any other purpose recognized by the Muhammadan Law as religious, pious or charitable purpose of a permanent character, and, as such, the *wakf* was invalid. But, in view of his finding that the dismissal of the former suit was a bar to the present suit, he dismissed the suit.

In appeal before us the learned Counsel for the plaintiff-appellants has contended

that the learned Subordinate Judge was wrong in holding that O. IX, r. 9, Civil Procedure Code, was a bar to the suit. In our judgment there is considerable force in this contention but, as we are of the opinion that the *wakf* created by the deed was valid and the plaintiff's suit must fail on the merits, we refrain from expressing an opinion on the point.

The deed of *wakf* is couched in plain and simple language and is mostly free from legal technicalities. It begins with a recital of the fact that Wilayat Husain, the *wakif*, is the owner of the properties covered by the deed. It is then stated that the *wakif* has a daughter Kaniz Fatma and a wife Taslimunnisa and that he is anxious to make a *wakf* of his entire property in the name of God (*Fi-Sabi-Lillah*) for the sake of maintenance of himself, his wife and daughter and also with a view to obtaining the blessings of the next world so that he may be receiving blessings after his death. The deed then goes on to provide that the *wakif* had made a *wakf alal-alad* and a *wakf fi-sabi-liallah* in perpetuity and for ever and that he had no proprietary rights left in the property and that he had removed his proprietary possession and entered in possession of the same in the capacity of a *mutwalli*. Then follows the provision as to the line of *mutwallis*. The *wakif* was to be the first *mutwalli* and he reserved to himself the right of appointing any person as *mutwalli* in his lifetime in his place. After the *wakif's* death Kaniz Fatma was to be the *mutwalli* of the dedicated property and after her death the male and the female issues of Kaniz Fatma were to be the *mutwallis* in succession. Power was, however, reserved to Kaniz Fatma to appoint in her life-time any of her descendants as *mutwalli*. In the event of the extinction of the line of Kaniz Fatma, Ghulam Siddique Khan or his descendants or his nearest relations were to be the *mutwallis* of the property. The deed then went on to provide that:

"In future for discharging the duties of the *mutwalli*, preference will be given to a person, who shall be religious and honest and who shall be selected for the purpose by the members of the community (*Biradri*) and the members of the family."

Detailed provision is thereafter made by the need for the application of the usufruct of the dedicated property. It is provided by the deed that after the payment of Government revenue, etc., and the meeting of necessary expenses, 1/16th share of the net profits of the *wakf* property shall be spent in the way of God for the expenses of a mosque and for the support of the poor, widows, orphans, etc., and that the remaining profit shall be utilized for the maintenance of the *wakif*, his wife, his daughter and the descendants of his daughter. It is then declared by the deed that the *wakf*:

"shall be governed by all the rules and legal provision of the Muhammadan Law of the Sunni sect of the Hanafi School of Law to which" the *wakif* belonged.

The learned Counsel for the plaintiff-appellants has contended that as there was no express or implied reservation of the ultimate benefit arising from the *wakf* property in favour of the objects mentioned in the proviso to s. 3 of the Act, the *wakf* was invalid. We are unable to agree with this contention.

It is not disputed that Wilayat Husain intended by the deed in question to make a *wakf* in accordance with the provisions of the Mussalman Wakf Validating Act (Act VI of 1913). In accordance with that Act, it is essential for the validity of a *wakf* for the maintenance and support of the family, children or descendants of the *wakif* or for the maintenance of *wakif* during his life time, or for the payment of his debts out of the rents and profits of the dedicated property, that the ultimate benefit should expressly or impliedly be reserved for the purposes mentioned above. It is also clear that the ultimate reservation of the benefit for the above mentioned purposes was not expressly made by the deed under consideration. The only question, therefore, that remains is whether or not there was an implied reservation of the ultimate benefit for those purposes. In our judgment the answer to the question must be in the affirmative.

It is one of the recognized canons of the interpretation of a document that the document must be read and construed as a whole and due and legitimate effect be given to each and every one of its provisions. A reference to the deed of *wakf* in dispute puts it beyond doubt that the *wakif* did dedicate the property in perpetuity for the maintenance of his family and in the way of God. Further the provision in the deed as to the appointment of the *mutwallis* in the event of the extinction of the line of the *mutwallis* specifically prescribed by the *wakif*, makes it abundantly clear that the *wakif* intended the whole of the *wakf* to be in operation for ever. Similarly the provision in the deed as to the application of the 1/16th of the income of the *wakf* property for charitable and pious purposes was clearly meant to be in force for al

time to come. There is, however, no express provision about the ultimate application of the 15-16ths of the income of the *wakf* property in the event of the extinction of the line of the *wakif's* daughter and her descendants, but a perusal of the deed leaves no room for doubt that the *wakif* did contemplate the possible extinction of the line of his daughter. That being so, the *wakif* must be deemed to have contemplated the ultimate application of the 15/16ths of the income of the *wakf* property on the extinction of the line of his daughter for some pious or religious purposes, as he in terms created the *wakf* not only for the benefit of his descendants but also in the way of God *fi-sabi lillah*. The interpretation contended for by the learned Counsel for the appellants suffers from this infirmity that it leads to the conclusion that, though the *wakif* purported to create a *wakf* in perpetuity in accordance with the provisions of the Wakf Validating Act and, though he intended the *wakf* to be in operation for ever administered by *mutwallis* appointed in accordance with the provisions of the deed, and also realised the possibility of the line of his daughter becoming extinct, he inadvertently failed to make any provision as ragards the ultimate application of the 15/16ths of the profits of the *wakf* property. The reservation of the ultimate benefit contemplated by the proviso to s. 3 of the Wakf Validating Act can either be made expressly or impliedly. The answer to the question whether the reservation of the ultimate benefit for those purposes has been made by a deed of *wakf* must depend on the intention of the *wakif* as disclosed by the deed. In a case where the words "*wakf fi sabi lillah*" have been used and *wakf* has been created in perpetuity, and there is provision for the appointment of the *mutwallis* for all time to come, and a portion of the usufruct of the *wakf* property has been reserved for pious and charitable purposes, and the *wakif* had in contemplation the possible extinction of the line of his descendants who were to be the principle recipients of the profits of the *wakf* property, the irresistible conclusion is that the *wakif* intended by implication to reserve the ultimate benefit for the purposes enumerated in the proviso.

For the reasons given above, we hold that a valid *wakf* was created by the deed dated April 28, 1925, and the plaintiffs' suit was rightly dismissed by the Court below.

We accordingly dismiss this appeal with costs.

N. *Appeal dismissed.*

PATNA HIGH COURT

Civil Revision Petition No 78 of 1934
February 28, 1935
WORT, J.
MRS. M. D'SILVA—PETITIONER
versus
MRS. MINNIE LAL—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXI, r. 58, s. 100 — Possession with a person — Court, if precluded from entering into question of whether possession was of judgment-debtor—Mixed question of law and fact—Erroneous decision—Interference in revision—Legality of.

Although it is true that when once a person is found to be in possession under O. XXI, r. 58 the Court has no jurisdiction to go behind that possession and enter into a question of title yet it cannot be said that the Court is precluded from entering into the question of whether the possession of the person actually found in possession was the possession of the judgment-debtor or not. When the Court finds that some person other than the judgment-debtor is in possession, it becomes necessary to determine whether that person is in possession for the judgment-debtor and in many cases it is often necessary to go into the question if that possession was the result of a purchase and whether the purchase was a *benami* purchase or not. *Sardhari Lal* v. *Ambika Pershad* (1), referred to.

Where the question is a mixed one of fact and law, and from one point of view, the lower Court has decided erroneously, this fact does not give the High Court jurisdiction to interfere in revision

C. Rev. P. from an order of the Subordinate Judge of Ranchi, dated February 3, 1934.

Messrs *B. C. De* and *K. K. Banerji*, for the Petitioner.

Messrs. *S. K. Mitter* and *L. K. Choudhury* for the Opposite Party.

Judgment.—The result of the order made by the Subordinate Judge as far back as February 1934 may have turned out to be unfortunate for the petitioner, but that does not extend the jurisdiction which I have to revise that order. The point that arose was whether a share in the hotel which had been attached by the petitioner decree-holder should have been released from attachment as the learned Judge in this case has ordered. It is unnecessary to state the matter in detail.

A partition action was going on between Mrs. Oates and Mrs. D'Silva and a Receiver was appointed. During the course of the partition action the share of Mrs. Oates was sold to a third party. The interes

of Mrs. Oates, as I have already stated, had been attached before judgment by the petitioner in execution of a decree for rent. The learned Judge in the Court below in the application which was made under O. XXI, r. 58, went into two questions: first, whether the third party claimant to whom I have referred, was in possession as purchaser from the judgment-debtor; and secondly, whether the purchase was legal or illegal.

I shall dispose of the latter point first, because Mr. De appearing on behalf of the petitioner contends that the decision of the learned Judge should have been other than that at which he has arrived by reason of s. 64 which makes any alienation of an attached property void. But it is sufficient to say that the question was not raised in that form in the Court below where the point argued was whether the purchase was legal or illegal by reason of the possession of the Receiver. That in my judgment disposes of that point.

The substantial question was whether the property was in possession of the purchaser from the judgment-debtor. As I understand Mr. De's argument, in the first instance, it was this that when once a person is found to be in possession under O. XXI, s. 58, the Court has no jurisdiction to go behind that possession and enter on to a question of title. Baldly stated there is no dispute that that proposition of law is correct. But if Mr. De meant by his argument that the Court was precluded from entering into the question of whether the possession of the person actually found in posseseion was the possession of the judgment-debtor or not, I must say that with that I cannot agree. The very order itself precludes any such proposition of law being established. Order XXI, r. 60, provides:

> "Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached in the possession of the judgment-debtor or of some persen in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account ..... but on account of or in trust for some other person",

then the property is released from attachment. Now the question, therefore, for the Judge in the Court below was the possession of the judgment-debtor or some person in trust for him. It is true that the Court found that some person other than the judgment-debtor was in possession. It therefore became necessary to determine whether that person was in possession for the judgment-debtor, and in many cases of that kind it is often necessary to go into the question if that possession was the result of a purchase and whether the purchase was a benami purchase or not. Mr. De went so far as to say that in no circumstances could the question of *benami* be gone into. But the very case relied upon disposes of that argument. I refer to *Sardhari Lal* v. *Ambika Pershad* (1) where Lord Hobhouse in delivering the opinion of their Lordships of the Judicial Committee said in as clear terms as it is possible to say that the extent of the investigation under this part of the Code depended upon the circumstances of each case and expressly stated that their Lordships were not laying down any definite rule as to the extent of that investigation. If I may say so with great respect, from the mere reading of the order itself that seems to be obvious. Therefore I clearly come to the conclusion that there was no doubt that the Judge had jurisdiction to go into the question of whether the possession of Mr. Smith, the Receiver, was the possession of the judgment-debtor or not. If it had been the possession of the judgment-debor then *prima facie* the claim would fail.

The order can be looked at in my judgment from another point of view. Unless the decree-holder can establish that the possession of the person is the possession of the judgment-debtor, it seems to me impossible to say that he is entitled to claim against this property. That is only another way of stating the same proposition of law to which I have previously referred.

Having entered into that question as a matter of mixed question of fact and law, the Judge had to determine what that possession was. Mr. Smith was the Receiver appointed by the Court in the partition proceedings. Apparently, therefore, the possession of the Receiver would be the possession of the Court; and the only way Mr. De can succeed on this point is by saying, following the decision in *Kristamma Naidu* v. *Chapa Naidu* (2), that the decision was in direct violation of some principle of law. It is often very difficult question as to what is to be considered to be the possession of the Receiver: whether it is

(1) 15 C 521.
(2) 17 M 410.

the possession of one person or another person is by no means an easy question. In any event it would be impossible for me to say that the Judge was acting in direct violation of some principles of law in deciding in a favour of the claimant. Indeed from the judgment of the Judge in the Court below, it would seem to appear that the parties depended upon the two points which they raised and possibly agreed as to the proper principle of law to be applied. From the judgment as I understand it and from a perusal of the statement as to what the true position of law was, I should feel inclined to come to the conclusion that the parties in the Court below agreed to a position of law diametrically opposed to that which was argued by Mr. De in this Court.

But I do not propose to decide the case on that ground. It is impossible for me, however, to say, as Mr. De would suggest that the law was so clear that it must be held that when the Judge decided the question erroneously, he was deciding consciously in violation of an established principle of law. It was a mixed question of fact and law in this case and from one point of view the Judge decided erroneously; but that does not give me jurisdiction as has been pointed out so many times.

On the merits of the case, as the possession appears to have been the joint possession, there seems no particular reason why at this stage of the proceedings the petitioner should be allowed to execute against this property. But again that is a matter which has no relevance to the point before me, and I therefore, do not come to any definite conclusion with regard to it.

It seems to me from any point of view that the application must be held to fail. The Rule must be discharged with costs: hearing fee two gold *mohurs*.

N. *Rule discharged.*

LAHORE HIGH COURT

Criminal Revision No. 245 of 1934

April 20, 1934

SHADI LAL, C. J.

DINA NATH—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Electricity Act (IX of 1910), ss. 39, 50—Theft of Electric energy—Prosecution not instituted by Government Electric Inspector but by Executive Officer of Cantonment Board—Quashing of prosecution.

Prosecution for the theft of electric energy can be instituted only by one of the persons mentioned in s. 50 of the Electricity Act. A prosecution not instituted at the instance of the Government or an Electric Inspector, but by the Executive Officer of the Cantonment Board who had no authority from the Board to institute proceedings, should be quashed.

Cr. Rev. from an order of the Sessions Judge, Ambala.

Messrs *Gobind Ram Khanna* and *Lakshmi Narain Varma*, for the Petitioner.

Mr. *R. A. Jeremy*, for the Crown.

Order.—I agree with the learned Sessions Judge that s. 39, Electricity Act, IX of 1910, creates an offence, and that prosecution for the theft of electric energy can be instituted only by one of the persons mentioned in s. 50 of that Act. Now the prosecution in the present case was not instituted at the instance of the Government or an Electric Inspector, but by the Executive Officer of the Cantonment Board. But he had no authority from the Board to institute the proceedings, and I cannot hold that he should be deemed to be an aggrieved person within the meaning of the section.

I accordingly accept the recommendation made by the learned Sessions Judge, and quash the proceedings instituted against the accused.

D. *Proceedings quashed.*

PATNA HIGH COURT

Special Bench

Criminal Revision No. 39 of 1935

March 5, 1935

MOHAMMAD NOOR, JAMES AND AGARWALA, JJ.

RAM SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal trial—Case and counter-case—Court, if should wait for results of steps in counter-case—Penal Code (Act XLV of 1860), ss. 195, 186, 353—Absence of written complaint by public officer—Conviction under s. 186, legality of—Police Act (V of 1861), ss. 15, 16—Cost of additional Police quartered in village—Distress warrant for realization given to Assessment Officer—Whether can be endorsed to clerk—Property attached, not exclusive property of accused but joint family property—Liability to be attached—Assault—Ingredients of offence—Use of abusive language—Threatening with lathi in heat of temper—Assault, if committed—Sentence.

Where there is a case and counter-case, the Court is not in any way bound to adjourn the hearing of the case indefinitely, waiting for the results of the steps taken in the counter-case. When the accused has not in any way been prejudiced by the Magistrate's refusal to grant adjournment, he cannot complain that he was not given proper facilities to have his case argued before him.

Under s. 195, Penal Code, cognizance of an offence under s. 186, Penal Code, cannot be taken in the absence of a written complaint by the public officer concerned. Where the public officers concerned, the District Magistrate who issued the warrant, and the Assessment Officer to whom the warrant was addressed, have not filed a complaint and all that was done was that information was given by the person to whom the warrant was endorsed and this did not amount to a complaint under s. 195, there can be no conviction under s. 186.

Where a distress warrant for realisation of amount due by way of cost of additional Police quartered in a village is entrusted for execution to the Assessment Officer, there is no provision either in the Code or the rules framed by the Local Government under s. 386 of the Code of Criminal Procedure enabling him to endorse the warrant to his clerk.

Where the warrant is not for the realisation of fine imposed on any individual but for the realisation of cost of the additional Police quartered in a particular village which was apportioned on the inhabitants of that village, the entire family is the defaulter and the warrant for realization is issued against its head not in his individual capacity but in his capacity as head of the family which was assessed to that cost and the family property is liable to be seized. The cost may be realized as a fine but is not fine.

When an officer is entrusted with a warrant to attach the property of certain persons, his first duty is to ascertain by all means possible what property belonged to that person which is liable to be attached. Having satisfied himself that certain property belongs to that individual, it is his duty to attach that property unless some objection is raised which raises in his mind a reasonable doubt that the property does not belong to the person against whom the warrant has been issued. When no objection is raised, the Assessment Officer will be performing a legal duty when he proceeds to attach property.

Whether a particular act amounts or does not amount to an assault depends upon the circumstances of each particular case. A particular act may not amount to an assault in one case, but the same act taken along with the other surrounding circumstances may amount to an assault in another case. Where, therefore, the accused interposed between the attaching officer and the cattle which he was proceeding to attach and being removed under the orders of the officer, he indulged in the use of abusive language and thereafter went away threatening that he would return and teach them a lesson and soon afterwards he came back with a *lathi* with companions and came sufficiently close to the officers to raise in their minds a reasonable apprehension that actual force was likely to be used:

Held, that the act of the accused came within the definition of assault.

Held, also that as the accused's subsequent appearance on the scene was in the heat of the moment and soon realising the situation he ran away from the spot and no violence or force was used by him, a sentence of fine would meet he ends of justice.

Cr. R. from an order of the Sessions Judge of Monghyr, dated January 11, 1935, affirming that of the Sub-Divisional Magistrate of Monghyr, dated July 11, 1934.

Messrs. *Baldeo Sahay*, *B. N. Rai* and *Chaudhary Mathura Prasad*, for the Petitioner.

The Government Advocate, for the Crown.

Mohammad Noor, J.—The petitioner Ram Singh has been convicted by the Sub-Divisional Officer of Monghyr under ss. 353 and 186 of the Indian Penal Code. Under the former section he has been sentenced to suffer three months' rigorous imprisonment and to pay a fine of Rs. 20, and under the latter to suffer three months' rigorous imprisonment and to pay a fine of Rs. 50. The two sentences of imprisonment are to run concurrently. The conviction and the sentences have been upheld by the Sessions Judge of Monghyr.

The case is an outcome of an incident which took place at Barhee in the District of Monghyr in connection with the realisation of the costs of Additional Police quartered in that village. It seems that one Dhanukdhari Singh had defaulted in payment of the cost, and the District Magistrate issued a distress warrant for the realisation of the amount due, *i. e.* Rs. 49-5-0 and entrusted it for execution to the Assessment Officer of Monghyr, the Assessment Officer being Mr. Rizvi, a Deputy Magistrate. The warrant was returnable by December 16, 1933. Mr. Rizvi endorsed that warrant to his clerk *Maulvi* Kamrul Hussain for execution. *Maulvi* Kamrul Hussain was unsuccessful in realising the amount and reported the matter to Mr. Rizvi, saying that he could not find Dhanukdhari Singh at his home. Thereupon Mr. Rizvi made over the warrant for execution to his head clerk. No name is mentioned in the endorsement but it is admitted that the head clerk referred to is Yad Ali. Mr. Rizvi added to the endorsement that be would also go to execute the warrant if necessary. On January 15 Mr. Rizvi himself accompanied by, amongst others, Yad Ali, Mamsul Hussain, some Police constables and *chaukidars*, went to the house of Dhanukdhari Singh to execute the warrant. Demands were made from Karu Singh, son of Dhanukdhari Singh who said that he was unable to pay. What happened thereafter can best be given in the language of the learned Sessions Judge:—

"The *chaukidar* identified three cattle tethered in the *sahan* in front of the house of Dhanukdhari as his and Mr. Rizvi ordered these cattle to be

attached and driven away. At that moment the appellant, whose house is shown on a Police map (Ex. 3) as being a short distance away, entered the *sahan* and interposed between Mr Rizvi and the cattle saying that Danukdhari was his uncle and that he would not allow the attachment to be made. Mr. Rizvi expostulated, but the appellant (Ram Singh) stood there in a defiant and menacing attitude and refused to move and then Mr. Rizvi ordered the constables to remove him and a constable and a peon caught hold of him and moved him away. The appellant then flew into a temper, abused the witnesses, went away saying, that he would return and teach them a lesson. Soon afterwards there was a *hulla*, and the appellant was seen returning with a *lathi* followed by some other persons. The appellant then approached within ten or twelve paces of the witnesses, and apprehending a breach of the peace, Mr. Rizvi called on the constables to remove him. The appellant and his companians then fled and disappeared, and meanwhile the cattle under attachment also disappeared."

I must point out at the outset that the learned Sessions Judge is not correct in saying in his judgment that when the petitioner Ram Singh returned later with a *lathi* in his hand, his companions were also armed In fact, there is clear evidence on the record that they were not armed. Yad Ali informed what had happened to the officer in charge of the outpost located at Barhee. Information to that effect was sent to the officer in charge of the Police Station at Lakhi Sarai, who took up the case and sent up the petitioner for trial.

There was a counter-case lodged on behalf of the petitioner against Mr. Rizvi in which there was an allegation of assault by that officer. The complaint was entertained by the Sub-Divisional Officer, but later on the proceedings were quashed on the ground that cognizance could not be taken of the complaint against Mr. Rizvi in the absence of sanction by the local Government under s. 197 of the Code of Criminal Procedure and that order was upheld by this Court.

Coming to the facts of this case, the learned Sessions Judge has found the facts stated above to have been sufficiently proved. Several questions of law, however, have been raised before us by Mr. Baldeo Sahay in support of his revision application. They are these :—

(1) That the conviction under s. 186 of the Indian Penal Code is bad on the ground that there was no written complaint before a Magistrate as required by s. 195 of the Code of Criminal Procedure.

(2) That Yad Ali on whose information this case has been started was not performing any legal function when he is said to have been assaulted, inasmuch as the warrant of realisation of the dues could not legally be delegated to him by Mr. Rizvi.

(3) That the property sought to be attached was not the exclusive property of Dhanukdhari Singh but was a joint family property, and therefore, was not liable to be attached. Consequently neither Mr. Rizvi nor Yad Ali was performing a legal duty when they were engaged in attaching that property.

(4) That what the petitioner is alleged to have done, namely, interposing between Mr. Rizvi and the cattle, did not amount to resistance under s. 186 of the Indian Penal Code.

(5) That the facts alleged do not constitute assault and the offence does not come under s. 353 of the Indian Penal Code, as neither Mr. Rizvi nor Yad Ali whom the petitioner is said to have assaulted, was engaged in the performance of any legal duty on the grounds stated above.

(6) That the learned Magistrate did not give the petitioner proper facility to have his case argued before him.

So far as the last ground is concerned, it can be dismissed at once. It seems that when the petitioner wanted to have his cases transferred from the District of Monghyr, the learned Chief Justice had ordered that the two cases be tried simultaneously. It was in consequence of this order that after the case against the petitioner was closed, the learned Sub-Divisional Officer summoned Mr. Rizvi and postponed the hearing of the arguments in the present case. Thereafter the proceedings against Mr. Rizvi were quashed on the ground of want of jurisdiction. The petitioner was called upon to argue this case and his applications for postponement on June 28 and July 3, were rejected. On the first day postponement was sought on the ground that the petitioner wanted to move the Sessions Judge against the order quashing the proceedings and on the second day on the ground that though the Sessions Judge was moved, no order for stay in the present case could be obtained from him. I do not think the learned Sub-Divisional Officer was in any way bound to adjourn the hearing of this case indefinitely waiting for the result of the steps taken by the petitioner in the counter-case. He had come to the conclusion that the counter-case could not proceed for want of jurisdiction, and so far as he was concerned, that case had come to an end. Be that as it may, the petitioner was not in any way prejudiced on account of the

refusal of the learned Magistrate to grant postponement. In fact as the learned Government Advocate has pointed out, the petitioner had the fullest opportunity of arguing on facts before the learned Sessions Judge.

Coming to the objections which are directed against the conviction under s. 186 of the Indian Penal Code, the learned Government Advocate has, in my opinion, rightly conceded that the conviction under that section cannot stand, Section 195 of the Indian Penal Code clearly lays down that cognizance of an offence under s. 186 Indian Penal Code, cannot be taken in the absence of a written complaint by the public officer concerned. The public officers concerned in this case were the District Magistrate who issued the warrant, Mr. Rizvi to whom the warrant was addressed and Yad Ali, assuming that Mr. Rizvi would endorse the warrant to him. There is no complaint either on behalf of the District Magistrate or Mr. Rizvi. No doubt there was an information given by Yad Ali to the officer in charge of the outpost at Barhee, but it does not amount to a complaint within the meaning of s. 195. It is, therefore, not necessary to consider whether the act attributed to the petitioner amounts to an offence under s. 186 of the Indian Penal Code. In my opinion the conviction under s. 186 of the Indian Penal Code is bad and must be set aside.

Coming now to the conviction under s. 353, Indian Penal Code, the first question raised by Mr. Baldeo Sahay is that the warrant addressed to Mr. Rizvi could not be entrusted for execution to Yad Ali. There seems to me to be some force in this contention. It is at any rate doubtful whether Mr. Rizvi could make over to his head clerk the warrant addressed to him. There is no provision for such delegation either in the Code or the rules framed by the Local Government under s. 386 of the Code of Criminal Procedure. The question is, however, of academic interest in this case. Mr. Rizvi was himself present on the spot and the attachment to which the petitioner is said to have offered resistance was being carried out by him. Yad Ali and the other public servants who were there, were assisting him in the execution of that warrant. If under the law the execution of the warrant could be delegated to Yad Ali, Yad Ali was there to execute the warrant. If, on the other hand, it could not be done, Mr. Rizvi, was there and was executing the warrant. The warrant was being legally executed either by Mr. Rizvi or by Yad Ali, or by both. In fact, both of them were present there and were taking part in executing it. I confess I have not been able to appreciate the contention of Mr. Baldeo Sahay in this connection. He argued that Yad Ali could not execute the warrant as it could not legally be entrusted to him, and Mr. Rizvi himself could no longer execute it as, though not legally empowered to do so, he had in fact made it over to Yad Ali. The argument is self-destructive.

The next point urged is that the property sought to be attached was joint family property, and not the exclusive property of Dhanukdhari Singh and, therefore, its attachment was illegal. A reference is made to a Full Bench decision of this Court in *Rajendra Prasad Missir* v. *Emperor* (1). In my opinion the facts of that case have absolutely no application to the present case. In that case the question was whether the joint family property could be attached in execution of a warrant for the realisation of fine imposed on a member of the family. It is obvious that under s. 386 of the Code of Criminal Procedure and the rules made thereunder only the property of the offender can be seized, and not of any other person. In this case the warrant was not for the realisation of fine imposed on any individual but for the realisation of cost of the Additional Police quartered in a particular village which was apportioned on the inhabitants of that village. The law regarding realisation of cost is laid down in ss. 15 and 16 of the Indian Police Act of 1861. Section 15, after authorising the Local Government to quarter Additional Police in a particular area, provides in sub-cl. (4) as follows:—

"The Magistrate of the District, after such enquiry as he may deem necessary, shall apportion such cost among the inhabitants who, are as aforesaid, liable to bear the same and who shall not have been exempted under the next succeeding sub-section. Such apportionment shall be made according to the Magistrate's judgment of the respective means within such area of such inhabitants"

Section 16 provides the mode of realisation of cost and says:—

"All moneys payable under ss. 13, 14, 15, and 15-A shall be recoverable by the Magistrate of the District in the manner provided by ss. 386 and 387

(1) 140 Ind. Cas. 101; 13 P L T 549; A I R 1932 Pat. 292; (1932) Cr. Cas. 764; Ind. Rul. (1932) Pat, 281; 33 Cr L J 872; 12 Pat, 29 (F. B.)

of the Code of Criminal Procedure, 1882, for the recovery of fines, or by suit in any competent Court."

The money may, therefore, be realized as a fine, but it is not fine.

Under s. 15 the cost has to be apportioned on the inhabitants of the area concerned, except on those who may be specifically exempted by the Local Government. In this case it is in evidence of Karu Singh, son of Dhanukdhari Singh, himself that the cost was assessed on his family. He says "our family was assessed to tax." It is clear, therefore, that the tax by which he means the cost of the Additional Police was assessed not on Dhanukdhari Singh individually but on the entire family. Therefore, the entire family was the defaulter: and the warrant for realization was issued against Dhanukdhari Singh not in his individual capacity but in his capacity as head of the family which was assessed to that cost and the family property was liable to be seized. Apart from this, so far as the facts of the present case are concerned, the question whether or not the joint family property can be attached is again of no importance. In this case it is in evidence that when Mr. Rizvi and his companions demanded money from Karu Singh, son of Dhanudhari Singh, and he did not pay the amount the *chaukidar* pointed out the cattle as the property of Dhanukdhari Singh. There is nothing on the record to show that at any time any objection was raised, or any claim was made, that the cattle were not the property of Dhanukdhari Singh. When an officer is entrusted with a warrant to attach the property of certain persons, his first duty is to ascertain by all means possible what property belongs to that person which is liable to be attached. Having satisfied himself that certain property belongs to that individual, it is his duty to attach that property unless some objection is raised which raises in his mind a reasonable doubt that the property does not belong to the person against whom the warrant has been issued. No objection was raised in this case. The *chaukidar* had pointed out the cattle as the property of Dhanukdhari Singh, and therefore Mr. Rizvi was performing a legal duty when he was proceeding to attach those cattle.

The next question to be considered is whether the re-appearance of the petitioner on the scene with a *lathi* in his hand and coming up to a distance of about 12 paces where the officers were, amounted to an offence of assault. As has been urged by the learned Government Advocate, whether a particular act amounts or does not amount to an assault depends upon the circumstances of each particular case. A particular act may not amount to an assault in one case, but the same act taken along with the other surrounding circumstances may amount to an assault in another case. In this case we have it that when the petitioner interposed between Mr. Rizvi and the cattle he was removed under the orders of Mr. Rizvi, and he then indulged in the use of abusive language and thereafter went away threatening that he would return and teach them a lesson. Soon afterwards he did come back armed with a *lathi*. He had his companions also, though as I have said, they were not armed. He came sufficiently close to the officers to raise in their minds a reasonable apprehension that actual force was likely to be used. In the circumstances I think the petitioner's act comes within the definition of assault.

Now comes the question of sentence. In my opinion a sentence of imprisonment is not called for in this case. It seems that when the petitioner was removed by the constables, perhaps he lost his temper and his subsequent re-appearance on the scene was in the heat of the moment. He soon realised the situation and ran away from the spot. No violence or force was used by him. Under the circumstances, I think a sentence of fine will meet the ends of justice. While maintaining the conviction under s. 353 of the Indian Penal Code, I would set aside the sentence of imprisonment and sentence him to pay a fine of Rs 50 including the fine imposed upon him by the Magistrate under this section; in default of payment of the fine, he will suffer rigorous imprisonment for fifteen days. The conviction and the sentence under s. 18 of the Indian Penal Code are set aside.

James, J.—I agree.

Agarwala, J.—I agree.

N. *Conviction set aside.*

PRIVY COUNCIL

Appeal from the Oudh Chief Court

February 28, 1935

LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, SIR LANCELOT SANDERSON AND SIR SHADI LAL

H. HUNTER, LIQUIDATOR, BANK OF UPPER INDIA, LIMITED AND OTHERS— APPELLANTS

versus

Rani KANIZ ABID AND OTHERS— RESPONDENTS

Insolvency—Trust Deed executed by insolvent—Receiver in insolvency—Whether can deal with property comprised in trust—Property, if subject to be administered by Receiver on behalf of general body of creditors—Assets, if can be administered by Receiver in terms of trust deed—Money in Receiver's hands consisting of rents of property mortgaged to Bank—Claim by Liquidator of Bank—Provincial Insolvency Act (V of 1920), ss. 47, 48—Applicability—Receiver's right to deal with the money.

Where property of the insolvent is comprised in a trust deed, it is not the insolvent's property but is vested in the trustees, it is not competent for the Receiver in insolvency to deal with the property in any way. After the execution of the trust deed the insolvent has no interest in the properties comprised therein and consequently, they never vest in the Receiver in insolvency and are not subject to be administered by him on behalf of the general body of creditors. Nor has the Receiver in insolvency any right to administer the assets in accordance with terms of the trust. [p. 428, cols 1 & 2; p. 429, col. 2.]

Where the money which remains in the Receiver's hands, consists entirely of the rents and profits of the property which was the subject-matter of mortgages in favour of a Bank which has subsequently gone into liquidation, the provisions of ss. 47 and 48 of the Provincial Insolvency Act are not in any way material to the claim of the Liquidator of the Bank and the Receiver in the insolvency has no right to deal with the said money. [p. 429, col. 2]

Messrs. *A. M. Dunne*, *K. C.*, *Amiend Jackson* and *S. Hyam*, for the Appellant.

Messrs. *DeGruyther*, *K. C.*, *Pringle* and *Wallach*, for the Respondent.

Sir Lancelot Sanderson.—These are six consolidated appeals from decrees of the Chief Court of Oudh. Mr. H. Hunter, is the Liquidator of the Bank of Upper India, Limited, Lucknow, which is in liquidation, and for the sake of brevity he is hereinafter referred to as "the liquidator." The Bank appeals against a judgment and decree of the Chief Court dated December 22, 1930.

Rani Kaniz Abid is the beneficial owner of certain decrees obtained in respect of promissory notes executed by *Chaudhri* Shafiz uz-zaman, hereinafter called "the insolvent," and she appeals against a decree of the Chief Court dated October 15, 1929.

Chaudhri Sharf-uz-zaman, is the son of the insolvent, and *K. B. Sheikh* Matin-uz-zaman, Mohammad Wasim, *Chaudhri* Hyder Husain, *Chaudri* Ehsan Husain are the trustees of a deed of trust executed by the insolvent and dated January 30, 1912. They are hereinafter referred to as "the trustees." The above-mentioned *Chaudhri* Sharf-uz-zaman and the trustees appeal against a decree of the Chief Court, dated August 4, 1930, and the said decree of December 22, 1930, as well as the said decree of October 15, 1929.

Pande Piare Lal is a creditor of the insolvent upon certain bonds in respect of which he obtained decrees. He supports *Rani* Kaniz Abid in her appeal against the said decree of the Chief Court, dated October 15, 1929.

The insolvent is the *Talukdar* of Bhilwal in the Bara Banki District; he succeeded to the *taluqa* on September 19, 1907.

Apparently by the end of 1911 he had incurred considerable debts and on January 30, 1912, he executed the above-mentioned deed of trust and appointed certain persons as trustees of the whole of his estates. Only three of the named trustees took the trust. By the terms of the deed all the insolvent's estates as specified in Sch. A of the deed were conveyed to the trustees to be held in trust for the use and benefit of the insolvent's son Sharf-uz-zaman for the objects and on the conditions thereinafter specified.

Clauses 15, 16 and 21 are material, and are as follows: –

TRANSFER OF ESTATE.

15. That the said trustees shall from the date of this indenture enter upon and take possession of all the estates and properties mentioned in Sch. (A) aforesaid and at once apply for and obtain mutation in their names in place of mine in all the Revenue Records and shall out of the rents and profits of the said estates and properties after deducting therefrom the cost of management, the Government Revenue and after public charges payable in respect thereof and the expenses of litigation, if any, incurred in instituting or defending suits in respect of the property aforesaid or in contesting liability for any debt and the necessary repairs of houses, maintenance of private roads and the improvements in respect of the aforesaid properties such as sinking of wells, constructing of aqueducts and other improvements which the trustees may in their discretion consider necessary for the improvement and preservation and enhancement of rent of any land or lands in the aforesaid estates and properties, apply the balance to the payment of monthly allowance of—

I. Rs 400 to me for my personal use and expenses which shall be payable to me during the natural term of my life.

II. Rs. 200 to my aforesaid wife, *Musammat* Razi-un-nisa, during the term of her natural life for her personal use and expenses.

III. Rs. 100, for the education and bringing up of my aforesaid son Sharf-uz-zaman during the continuance of the trust. But the Trustees shall be at liberty to spend more money on the educational advancement of my aforesaid son either in India or abroad.

IV. Rs. 80 to my sister *Musammat* Zarif-un-nisa during the term of her natural life.

V. Rs. 50 to *Chaudhri* Ehsan Husain, the son of my eldest sister deceased, during the term of his natural life.

VI. Rs 50 to Ali Haider and Ishtiaq Ahmad, the sons of my sister *Musammat* Manzur-un-nisa deceased, for the terms of their natural lives jointly or the survivor of them, and other petty allowances which the estate may be liable to pay; and the balance to be applied towards the liquidation of my debts and liabilities chargeable upon the estate as specified in Sch. (B) and others not so charged as specified in Sch (C) aforesaid in the manner and the order the trustees may consider proper and beneficial to the estate.

AUTHORITY TO TRANSFER.

16. That the annual profits available for the payment of the aforesaid debts and liabilities being insufficient, the trustees are hereby empowered and given full authority to transfer the whole or part of any of the aforesaid estates and properties by sale, mortgage, *Zar-i-peshgi* lease or other beneficial lease of the properties but in the exercise of their discretion in matter of sale of the aforesaid properties, ragard may be had that Sikandarpore and Sharifabad estates may be sold first and in case it be necessary to sell other properties for the purpose aforesaid, the fractional shares and *pattis* of the Khanpur and Bhilwal estates may be next sold and in case the sale of the aforesaid properties be not sufficient and the trustees deem a further sale necessary for the payment of debts, the Khanpur estate may then be sold and even if this be not sufficient, then the remaining villages of Hasanpur Estate may be sold. But in no case the villages of Bhilwal and Subeha with their hamlets and appurtenances shall be sold.

NATURE OF EXPENSES AND INVESTMENTS.

21. That after payment and discharge of all debts and liabilities, the trustees shall, if there are surplus profits, increase my monthly allowance from 4 to 6 hundred and that of my aforesaid wife from 2 to 3 hundred and the surplus, if any, after meeting the aforesaid expenses shall be accumulated to accrue for the benefit of my aforesaid son, his heir and assign and it shall be lawful for the trustees to invest such surplus in Government Promissory Notes, Railway shares, debentures, village properties, house properties at Lucknow or any other advantageous investments as the trustees may think fit."

Previously to the execution of the said deed the insolvent had executed four mortgages in favour of the said Bank, which was shown as a secured creditor in Sch. B of the said trust deed in respect of the said mortgages. This schedule was described as "approximate debts to the extent chargeable upon the estates and properties mentioned in Sch. A."

The debt in respect of which *Pande* Piare Lal claims to be a creditor of the insolvent was not included in the schedules of the trust deed.

The name of *Rani* Kaniz Abid does not appear in either of the schedules, but it was alleged that she had an interest in the debts standing in the names of *Raja* Bhagwan Bakhsh and Debi Lal Moolchand which appear in Sch. C of the trust deed.

Their Lordships are not in a position to express and do not express any opinion upon this last-mentioned allegation.

A few months after the execution of the trust deed the insolvent succeeded in preventing the trustees from managing the estate, with the result that in proceedings instituted by the trustees under s. 145 of the Code of Criminal Procedure, the Magistrate took possession of the properties under s. 146 of the said Code.

The trustees then applied to the Court of the District Judge for their discharge and on August 12, 1912, the District Judge discharged the trustees, refused to appoint new trustees and held that the trust had become extinguished. The result was that the insolvent resumed management of the estate.

In 1913, the aforesaid Bank went into liquidation and at a later date, *viz.*, in 1917, Mr. Hunter was appointed Liquidator. Shafiz-uz-zaman was adjudicated an insolvent on January 27, 1914, the Deputy Commissioner of Bara Banki was appointed Receiver in the insolvency and he took possession of the properties covered by the deed of trust and other properties belonging to the insolvent.

The trustees of the deed, while in possession of the estate, had executed a further mortgage on the above-mentioned properties in favour of the Bank to secure advances needed for the management of the estate; so that at the time of the adjudication of the insolvent, there were five mortgages held by the Bank secured upon the estate of the insolvent.

On July 22, 1918, Sharf-uz-zaman, the son of the insolvent, instituted a suit in the Court of the Additional District Judge against the Receiver in the insolvency, the insolvent, the liquidator and certain other parties praying for a declaration that the properties which were the subject-matter of the suit, were comprised in the trust deed and that the deed was binding on the defendants. The District Judge dismissed the suit, but on appeal, the Judicial Commissioner's Court held that the trust was a valid trust. The Receiver in the insolvency then applied in the Insolvency Court for an

order to annul the deed of trust under s. 53 of the Provincial Insolvency Act. The result of the proceedings thus initiated was that on April 14, 1924 the Court of the Judicial Commissioner on appeal held that the deed of trust was made in good faith and for valuable consideration and was not voidable as against the Receiver. That decision has been accepted by all the parties appearing before their Lordships as a final decision binding upon them, and this appeal, therefore, has to be decided upon the assumption that a valid trust was created by the deed of January 30, 1912, in respect of the properties specified therein.

On the August 8, 1924, the insolvent appointed the trustees who are parties to these appeals as trustees of the deed and the properties specified in the deed thereupon vested in the trustees.

In 1921, the Liquidator, on behalf of the Bank, had instituted a suit on the abovementioned five mortgages against the insolvent, the Receiver in the insolvency and others. He obtained the usual preliminary mortgage decree on the May 31, 1923; the decree absolute was made on the March 11, 1924, and the total decretal amount was Rs. 16,59,929-13-6.

In August, 1924, the new trustees applied to the District Judge's Court for delivery of the insolvent's property comprised in the said trust deed to them after removing it from the control of the Receiver in insolvency. This application failed: the Judge apparently regarded the Court of Insolvency as a "*de facto* trustee" and decided that there was no necessity for "a Civil Court dealing with a trust to remove that trustee and make over possession of the trust property to other trustees." The trustees appealed, but the Chief Court on the August 3, 1926, dismissed the appeal, and expressed the opinion that there was no necessity to award the trustees relief because the Receiver had stated frankly and clearly that in distributing the assets of the estate he would take into full account anything which might be due under the trust after the liabilities of the trust had been satisfied.

The learned Judges thought that the District Judge was well justified in exercising his discretion to refuse to accede to the prayer of the trustees.

The learned Judges seem to have lost sight of the fact that the property comprised in the trust deed was not the insolvent's property, but was vested in the trustees, and that consequently, it was not competent for the Receiver in insolvency to deal with the said property in any way.

At the instance of the Liquidator the consent of the Government to the sale of the *Taluqa* was obtained, and in September, 1926, the properties comprised in the mortgages were sold at auction in pursuance of the mortgage decree, for Rs. 13,49,216-15-6.

Taking into account a sum for poundage, the balance due to the Bank after the sale under the decree was Rs. 3,24,227-14-0.

On the August 1, 1927, the Liquidator applied to the Judge of the Small Cause Court, sitting on the Insolvency Side under section 47 of the Provincial Insolvency Act (Act V of 1920), for permission to prove in the insolvency for the said balance, together with future interest at 6 per cent. per annum up to the date of settlement. From that time there were numerous proceedings initiated by one party or the other, and numerous orders made in respect thereof; their Lordships are of opinion that it is not necessary to refer to them in detail.

They were due to the fact that none of the parties seem to have appreciated the position which was created as soon as it was finally decided that the trust deed of the January 30, 1912, was a valid deed and that the property comprised therein was not part of the insolvent's estate, but belonged to the trustees.

These proceedings culminated in a judgment and decree of the District Judge, dated the January 29, 1929, whereby he allowed an appeal from the Judge of the Small Cause Court, sitting in his insolvency jurisdiction, which had rejected the Liquirdator's application for permission to prove for the said balance.

The District Judge held that the Liquidator, under section 47 of the Provincial Insolvency Act, was entitled to share in the money in the hands of the Receiver and he directed that the Liquidator's claim for Rs. 3,24,227-14-0 be allowed to rank rateably with the claims of other creditors in the distribution of the assets in the hands of the Receiver.

Rani Kaniz Abid appealed against the above-mentioned decree to the Chief Court which, on the October 15, 1929, dismissed the appeal.

This is the decree against which the said Rani and the insolvent's son and the trustees have appealed to His Majesty in Council.

The next judgment to which it is neces-

sary to refer is dated the August 4, 1930. There were no less than four appeals before the Chief Court for consideration and in the judgment it was stated that "the point now for decision is whether other creditors whose names are not included in the trust deed executed by *Chaudhri* Shafiz-uz-zaman on the January 30, 1912, are entitled "to share in the distribution of assets included in the trust deed."

The Chief Court decided that all creditors who had a claim against the estate prior to the execution of the deed of the January 30, 1912, had a right to share in the assets and they remanded the case to the Insolvency Court in order that the Court should prepare for the use of the Chief Court under section 61 of the Provincial Insolvency Act a complete list of all debts incurred by the insolvent prior to the date of the execution of the said deed whether they were due to persons named in the deed of trust or persons who were not so named.

This is the judgment of the August 4, 1930, against which the son of the insolvent and the trustees have appealed to His Majesty in Council.

On the December 22, 1930, the matter came again before the Chief Court.

The said Court had then received the list of the debts incurred by the insolvent, in accordance with the Court's direction of the August 4, 1930, and certain objections which had been made to some of the items in the list.

The material part of the judgment is that which dealt with the objection which had been raised to the sum which the Insolvency Court had declared to be due to the Bank for dividend.

Strange to say, this objection was taken by the trustees who, according to the judgment of the Chief Court, had the support of all the other creditors.

It, therefore, appears that the trustees, instead of supporting the interests of the Bank, their *cestui que trust* were opposing its claim. It may be mentioned incidentally that even during the argument before the Board, the learned Counsel for the trustees was inclined to resist the appeal of the Bank until his attention was drawn to what might be the result if his client persisted in taking up such an attitude.

The Chief Court came to the conclusion that s. 48 (2) of the Provincial Insolvency Act applied to the claim of the Bank and accordingly they deleted from the list the amount stated therein to be due to the Bank.

The effect of the order of the Chief Court was a dismissal of the appeal, inasmuch as it appeared to the Chief Court that the above-mentioned decision was in accord with the view taken by the District Judge.

This is the judgment and decree against which the Bank by the Liquidator, the insolvent's son and the trustees have appealed to His Majesty in Council.

It was agreed during the argument before the Board that the money which remains in the Receiver's hands, consists entirely of the rents and profits of the property which was the subject-matter of the above-mentioned mortgages, and that being so, their Lordships fail to understand how the provisions of ss. 47 and 48 of the Provincial Insolvency Act are in any way material to the claim of the Liquidator, or how the Receiver in the insolvency had any right to deal with the said money. It is true that it was not until April, 1924, that it was finally decided that the deed of trust dated January 30, 1912, was a valid deed, and that when the adjudication of the insolvent was made in January, 1914, the Receiver took possession of all the property which he considered to belong to the insolvent, which included the property covered by the mortgages, but the greater part of this unfortunate litigation, which has lasted for so many years, is due to the failure to recognise the true position when once it had been established that the deed of January 30, 1912, was a valid and effective deed of trust. By that deed, the insolvent's interest in the mortgaged properties became vested in the trustees to be held and administered by them on the trusts mentioned in the deed, which trusts included the payment of certain specified creditors, one of whom was the Bank.

After the execution of the said trust deed the insolvent had no interest in the properties covered by the mortgages and consequently the said properties never vested in the Receiver in insolvency and were not subject to be administered by him on behalf of the general body of creditors. Nor had the Receiver in insolvency any right to administer the asset in accordance with the terms of the trust, as seems to have been the view at one period of this litigation; such a proposition is altogether untenable.

It is, therefore, obvious that the three decrees against which the appeals are

directed must be set aside, and this will involve the setting aside of other decrees and orders to which their Lordships will presently refer.

It remains to be considered what is the proper course to adopt in order that the rights of the parties may be duly determined and that this litigation should be brought to a conclusion. With this end in view, their Lordships are of opinion that the declaration and order hereinafter set out should be made.

In view of the fact that the judgment deals only with the rights of the parties before the Board they desire to make it clear that the declaration is not intended in any way to prejudice the rights of the persons specified in clause fifteen of the trust deed as being entitled to monthly allowances.

Their Lordships are not aware what is the position with regard to this matter, and express no opinion in respect thereof, but they make the above-mentioned reference to it in case it may be necessary for the Court which administers the trust, to deal with this matter.

Their Lordships are of opinion—

I. That a declaration should be made that having regard to the validity of the trust deed of January 30, 1912, and in the events which have happened, the rents and profits received by the Receiver from the trust properties since the date of the adjudication of insolvency (A) are held by him as trustee for the trustees of the said deed and accordingly are subject to the provisions of the trust deed and in particular to the provisions of clause fifteen thereof, and (B) do not form part of the estate of the insolvent and accordingly do not fall to be administered under the Provincial Insolvency Act.

II. That the orders and decrees set forth in the schedule attached to this judgment should be set aside, except in so far as they deal with costs.

III. That upon the Liquidator undertaking forthwith to institute a suit for the administration of the trust in the appropriate Court in India having jurisdiction in that behalf and to apply to the Insolvency Court for a transfer to the Court of administration of the funds in the hands of the Receiver and for the necessary accounts if any, no further order on these appeals should be made and they will humbly advise His Majesty accordingly.

Schedule

December 14, 1927	...	Order of Small Cause Court, Lucknow.
April 17, 1928	...	Order of District Court, Lucknow.
May 18, 1928	...	Order of District Court, Lucknow.
November 15, 1928	...	Order of Small Cause Court, Lucknow.
December 20, 1928	...	Orders of Chief Court of Oudh.
January 29, 1929	...	Order of District Court, Lucknow.
April 22, 1929	...	Order of Small Cause Court, Lucknow.
October 15, 1929	...	Decrees of Chief Court of Oudh.
January 2, 1930	...	Decrees of District Court Lucknow
August 4, 1930	...	Orders of Chief Court of Oudh
November 4, 1930	..	Order of Small Cause Court, Lucknow.
December 22, 1930	...	Decrees of Chief Court of Oudh.

N. *Order accordingly.*

Solicitors for the Appellant:—Messrs. *James Grey & Son, Nehra & Co.*

Solicitors for the Respondent:—Messrs. *Watkins & Hunter, Solicitor, India Office.*

PATNA HIGH CURT
Special Bench
Civil Reference No. 3 of 1934
February 4, 1935

WORT, MOHAMMAD NOOR AND AGRAWALA, JJ.

In the matter of Babu SURJA NARAIN, A MUKHTEAR

Legal Practitioners Act (XVIII of 1879), ss. 14, 12, 13—Legal practitioner becoming surety for accused persons—Propriety of—Court refusing to accept a person as surety—Mukhtear *standing surety and entering into contract of indemnity with that person—Forfeiture of bail bond—Attempt at concealment of true facts—Conduct of* mukhtear, *if unprofessional—Suspension from practice—Propriety—Criminal Procedure Code (Act V of 1898), s. 513—Bail—Surety bond, nature and effect of.*

There is nothing against a legal practitioner becoming a surety for accused persons. But where a *mukhtear* enters into an agreement, with a person whose security the Court has refused to accept, to the effect that the amount deposited by that person with the *mukhtear* would indemnify the latter if he suffered any loss on account of the bail bond being forfeited, and the bail bond is forfeited and the *mukhtear* tries to conceal the above facts from the Court, the contract of indemnity is a public mischief, is highly unprofessional and is unquestionably illegal, being against public policy as it hampers the administration of justice. The further attempt at concealment of the agreement at the early stages of the proceedings is a serious aggravation of the crime. [In such circumstances the *mukhtear* was ordered to be suspended for three months.] *Herman* v. *Jeuchner* (1), *Consolidated Exploration & Finance Co.* v. *Musgrave* (2), *Rex* v. *Porter* (3), *Rex* v. *Brailsford* (4) and *Laxman Lal Kanak Kirt Pandit* v. *Mulshankar Pitambardas Vyas* (5), discussed

Per *Muhammad Noor, J.*—When a Court orders an accused to be released on bail on his offering

surety or sureties the question of the forfeiture of the amount of surety, in case the accused does not appear on the date fixed, is of secondary consideration; the primary consideration is the personal element of the surety or sureties concerned. When an accused is released on bail on his offering surety for the amount ordered, the Court expects the surety to see that the accused appears on the date fixed and also that the surety will take steps for getting the accused arrested in case there is any attempt on the part of the accused to abscond or to avoid attendance in Court. The surety or sureties must have a personal stake in seeing that the accused carries out his obligation. [p. 434, cols. 1-& 2.]

C. Ref. made by the Sessions Judge of Bhagalpur in his Report No. 1994 VII-9, dated June 28, 1934.

Messrs. *Yunus* and *Hareshwar Prasad Sinha*, against the Reference.

The Government Advocate, for the Ref-rence.

Wort, J.—This matter comes before this Court under s. 14 of the Legal Practitioners' Act, and is reported to the Court by the Sessions Judge of Bhagalpur.

Four accused persons were brought before the Sub-Divisional Magistrate under arrest. Ultimately on December 22, 1933, they were released on bail, Babu Surja Narain becoming surety for their appearance. It would appear that one Ramzan Khan had offered himself as surety to the District Magistrate but this had been rejected. In these circumstances the *Mukhtear* in question came forward and was accepted by the District Magistrate. It ultimately appeared that unknown to the District Magistrate an agreement had been entered into by Ramzan Khan with the *Mukhtear* that Ramzan Khan should idemnify the latter. Bail had been fixed in the sum of Rs. 200 in respect of each person and the agreement was that Ramzan Khan should deposit with the *Mukhtear* the sum of Rs. 800 but in the result Rs. 730 only was deposited.

The charge made against the *Mukhtear* was that he was guilty of professional misconduct in accepting the indemnity; and further in showing cause against the escheat of the bail as the accused persons did not appear, that he suppressed the fact that he had been so indemnified and that loss would fall upon him.

The facts are not seriously disputed. A number of arguments have been advanced by Mr. Yunus who appears on behalf of the *Mukhtear* which, in my judgment are not relevant to the question. It has been ugred that the date upon which the accused persons should appear was not January 6, as alleged; but this, as I have indicated, has no relevance to the matter in question which is quite apart from whether the accused persons appeared or not.

The charge is that this agreement of indemnity was entered into between Ramzan Khan and the *Mukhtear*. The facts apart from those which I have stated are as follows. On January 22, 1934, the Sub-Divisional Magistrate before whom the accused had been brought in custody, made this order:

"The accused are absent. The bailor says that they were discharged on January 13, 1934 The bailor files a petition showing cause as to why the accused were absent on January 6, 1934. Put up before S. D. O. for orders on February 7, 1934."

On that date, *i. e.*, February 7, 1934, Surja Narain was again heard, and the order of the Magistrate on that date was that the bill should be escheated. On Ferburary 22, 1934, the Sub-Divisional Magistrate made a note in his order-sheet that the penalty had not been paid, but there appears to have been a statement before him that in the meantime there had been an appeal to the District Magistrate. The appeal came before Mr. Mansfield, the District Magistrate, for the first time on February 19, 1934. For reasons which do not clearly appear from the order-sheet, an enquiry had been ordered, the result of which came before the District Magistrate on March 10, 1934. The Magistrate on that date made this order:—

"Report of the Post-master seen The enquiry is adjourned to March 12, 1934."

It then appears that on March 12, the District Magistrate was satsified that this sum of Rs. 730 had gone into the Post Office Savings Bank Account of Surja Narain. On March 19, 1934, there was a petition before the District Magistrate, which is not before us but which has been referred to by Mr. Yunus appearing on behalf of Surja Narain. On this date a statement appears to have been made by Surja Narain which is, in my judgment, of very considerable importance having regard to the argument addressed to this Court in his behalf. It appears that before Mr. Mansfield he made the statement that he was a poor man without means. The words contained in the District Magistrate's order-sheet are these:

"If the appellant denies the allegation he should explain whence he got this sum, and why he informed me that he was a poor man without means".

I should correct what I have just said as it would appear from what I have read that this statement as regards poverty of

Surja Narain was made on the occasion when the matter first came before, the District Magistrate in appeal from the order of the Sub-Divisional Magistrate escheating the bail. By this date it was established to the satisfaction of the District Magistrate that Surja Narain had received this sum of Rs. 730, and this fact is not disputed. It is this fact of being indemnified which is characterized as a professional misconduct. A suggestion has been made that the *Mukhtear* in entering into this agreement with Ramzan Khan was merely assuring himself that the accused persons would appear on the date named by the Magistrate: in other words, he had no control over the accused himself and by the methods which he adopted he was able to give the undertaking by means of the assistance of a person who had more control over the accused than himself. But it seems to have been forgotten that this is some sense made the offence all the more grave. The fact is that Ramzan Khan had already been rejected as a surety by the District Magistrate and this agreement of indemnity resulted in the Magistrate accepting in ignorance the surety which he had already rejected.

Now it is said by Mr. Yunus that there was no moral offence, nor was it contrary to the practice that this *Mukhtear* should stand surety for accused persons. There is nothing against a legal practitioner becoming a surety for accused persons. But again one has to come back to the point of the charge. He is not charged with acting as surety, but charged with the offence, if I may call it such, of entering into a contract of indeminty.

This matter has been dealt with in a large number of cases in England and I can state in advance that the law as laid down, there has been accepted as being the law of India. One of the earlier cases, by no means the earliest, was the case of *Herman* v. *Jeuchner* (1), where it was held that:

"A contract is illegal, whereby a defendant in a criminal case, who has been ordered to find bail for his good behaviour during a specified period, deposited money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against the defendant's default, and at the expiration of that period is to be returned".

During the course of the judgment of the Court of Appeal in that case Brett, M. R. made this statement putting the matter in the form of a question:

"That is the subtance of the contract; is it illegal? To my mind it is illegal, because it takes away the protection which the law affords for securing the good behaviour of the plaintiff. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the order of the Court".

That was a case of surety for good behaviour: and it has been sought in the course of the argument to differentiate that Icae from the case which we have before suswhich was surety for the appearance of the accused persons. The case to which have just made reference, it will be noticed, was a contract for indemnity between the accused person and another. But the question of an indemnity between two persons other than the accused was specifically decided in the case of *Consolidated Exploration and Finance Co.* v. *Musgrave* (2). There North, J., stated in question the authorities:

"An agreement by an accused person with his bail to indemnify him against liability on his recognizance is illegal as depriving the public of the security of the bail."

And later, in referring to the bail:—

"When Musgrave became bail he had cast upon him duties and given to him corresponding powers to enforce them, which powers no third person who became respondsible could have".

And later:—

"It is essential for the security of the bail that the principal should be compelled to appear at the time and place specified in the recognizance".

Then the matter came before the Court of Criminal Appeal in England which Court decided that such an agreement as that to which reference is now being made was common law conspiracy [*Vide Rex* v. *Porter* (3)], and Lord Alverstone, Lord Chief Justice of England, in the course of the judgment of the Court stated this—

"This question was very fully discussed in *Rex* v. *Brailsford* (4), and I there pointed out that it cannot of course, be maintained that every fraud and cheat constitutes an offence against the Criminal law, but the distinction between acts which are merely improper or immoral and these which tend to produce a public mischief has long been recognised"

Later –

"It is the interest of the public that criminals should be brought to justice and, therefore, that it should be made as difficult as possible for a criminal to abscond; and for many years it has been held that not only are bail responsible on their recognizance for due appearance of the person charged, but that, if it comes to their knowledge

(1) (1885) 15 Q B D 561; 54 L J Q B 340; 53 L T 94; 33 W R 606; 49 J P 502.

(2) (1900) 1 Ch. 37; 69 L J Ch. 11; 81 L T 747; 48 W R 298; 64 J P 89.

(3) (1910) 1 K B 369; 79 L J K B 241; 102 L T 255; 74 J P 159; 26 T L R 200.

(4) (1905) 2 K B 730; 75 L J K B 64; 93 L T 401; 54 W R 283; 69 J P 370; 21 T L R 727.

that he is about to abscond, they should at once inform the Police of the fact".

I do not refer to the case of *Rex* v. *Porter* (3), as an authority in this country on the question of conspiracy. That question it is unnecessary to decide, and I do not decide it but I refer to it, more particularly for the statement of Lord Alverstone that such an agreement constitutes a public mischief and public mischief in the sense that it is against public policy as it would tend towards obstructing the administration of justice by the Criminal Courts. This matter has been discussed in the Indian Courts more particularly in the case of *Laxmanlal Kanak Kirt Pandit* v. *Mulshankar Pitambardas Vyas* (5), where some of the cases to which I have made reference have also been relied upon and the passage of Bachelor, J., which I wish to adopt, is as follows after quoting the various authorities:—

"This definite principle of public policy has been admitted in England and depend upon considerations affecting the administration of public justice, which have certainly not less force in India than they have in England".

I have no doubt in my mind that an agreement of this kind can properly be described as a public mischief as being against public policy.

In the circumstances the only question that we have to determine in this case is whether the report which has been made to us has been established. The facts are not seriously disputed. It was said during the course of the argument that the *Mukhtear* apologised at the first possible moment and it is in regard to that matter that I made reference to the order of the District Magistrate dated March 19, 1934, in which reference was made to a statement made on a previous occasion to the District Magistrate. Now, not until the report had been made by these persons making the enquiry on behalf of the District Magistrate, and which report established the fact that the Rs. 730 had been received by the *Mukhtear* was an apology or anything in the nature of an apology made to the District Magistrate. Indeed not only was the suggestion that an apology was made not established, but the statement about which I have no doubt, which Mr. Mansfiled states was made by Surja Narain, indicates an attitude by him entirely opposed to the attitude of apology. This was, as I have already stated and repeat, that he was a poor man without means. Now in a sense that statement was a fraud on the Court. The fact of his being a poor man was not in issue: but it did result in the Magistrate's understanding that he (the *Mukhtear*) was to bear the loss which would result in the bail being escheated. In this connection Mr. Yunus seeks to justify the attitude of his client on the ground that in any event he was responsible for something like Rs. 70. Now, can the question of responsibility of Mr. Yunus's client for a sum of Rs. 70 out of a total sum of Rs. 800 make any substantial difference to the matter? That question seems to me to be best answered by asking another question, and that is, could the Magistrate have accepted as surety in the sum of Rs. 70 for these four accused persons? The whole matter was a fraud on the Court: and the statement that the *Mukhtear* was a poor man was, in my judgment, a clear indication by the *Mukhtear* to the Court that he was to bear the loss by this escheat. Now that attitude has a bearing upon the decision which this Court will come to in the circumstances of the case.

There is no doubt, and it is not disputed that this agreement was entered into and I do not think it can be disputed that up to the very last Surja Narain attempted to justify his conduct and that has been, as far as one can see, the instructions which he has given to Mr. Yunus in appearing before us to-day. Had Surja Narain, when the matter came before the Sub-Divisional Magistrate in the first instance, clearly stated what were the facts, I have no doubt the Sub-Divisional Magistrate in that event would have called his attention to what he considered professional misconduct and if then Surja Narain had stated that he was unaware of the gravity of his offence or that he was unaware that he was committing an offence, his explanation might have been accepted. Had there been no attempt to justify, the course this Court would adopt, would be different. There is very little more to say about the matter. The Sessions Judge recommends in his letter of Reference that the *Mukhtear* be severely reprimanded if it is not thought necessary to impose a severer penalty. In coming to a decision on this point not only the facts of the case but the position of the defendant must be considered. The defendant is a member of a legal profession whose duty it is to assist in the administration of justice, and to whom the Courts, look and ought to be in the posi-

(5) 32 B 449.

tion to expect to act in an honourable way and in such a way as to assist in every possible way in administering justice.

Taking all the circumstances into consideration, therefore, the conclusion that we arrive at is that in this case the order of the Court should be that the *Mukhtear* should be suspended for three months from this date.

Muhammad Noor, J.—I agree.

The facts are very simple. Four accused persons were ordered to be relased on a bail of Rs. 200 each by the Sub-Divisional Magistrate of Supaul. One Ramzan Khan offered to stand surety for them, but the learned Sub-Divisional Officer refused to accept him in spite of the fact that Ramzan Khan was willing to deposit the amount of surety in Court. Later on the *Mukhtear* concerned in this proceeding, stood surety for the four accused persons. The accused did not turn up on the date fixed, namely, January 6, 1934, and the learned Magistrate ordered the amount of the bond to be forfeited.

The *Mukhtear* appealed to the District Magistrate. In the course of the hearing of the appeal it transpired that before standing surety for the four accused persons, the *Mukhtear* had received from Ramzan Khan (and deposited in the Post Office Savings Bank) the sum of Rs. 730 on the understanding that the amount would go to indemnify him in case the accused persons did not turn up on the date fixed and the amount of the bond was forfeited. On this the present proceeding was started.

The charges against the *Mukhtear* are:—

1. That he entered into an agreement with Ramzan Khan to the effect that the amount deposited by Ramzan Khan with him would indemnify him if he suffered any loss on account of the bail bond being forfeited; and

(2) That he tried to conceal the above fact from the Court by representing to the District Magistrate that he was a poor man and the amount forfeited was too much for him to bear.

As shown by my Lord, the facts are practically undisputed. So far as the first question is concerned, there is no doubt that the conduct of the *Mukhtear* was unprofessional. A contract like the one into which the *Mukhtear* and Ramzan Khan entered was unquestionably illegal, being against public policy as it hampers the administration of justice. When a Court orders an accused to be released on bail on his offering surety or surties the question of the forfeiture of the amount of surety in the case the accused does not appear on the date fixed, is of secondary consideration; the primary consideration is the personal element of the surety or sureties concerned. When an accused is released on bail on his offering surety for the amount ordered, the Court expects the surety to see that the accused appears on the date fixed and also the surety will take steps for getting the accused arrested in case there is any attempt on the part of the accused to abscond or to avoid attendance in Court. The surety or sureties must have a personal stake in seeing that the accused carries out his obligation. Our attention has been drawn to s. 513 of the Code of Criminal Procedure, which, in my opinion, clearly shows that the legislature never intended that money should be the only consideration in accepting a surety. The section runs thus:

"When any person is required by any Court or officer to execute a bond with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or Officer may fix, in lieu of executing such bond".

It is obvious that under this section it is optional for the Magistrate in cases specified to allow a man who has been called upon to execute a bond with or without surety to deposit the amount in Court. Had the question of the forfeiture of the money been the only consideration, accepting the deposit to lieu of surety would not have been left to the discretion of the Court or of the Officer and the acceptance of deposit of money would have been obligatory. This shows that the finding out of a surety in cases where the Court does not think it fit to allow the deposit of a money, is essential, and that, as I have said, is intended to make some person or persons responsible for the due performance of the obligation by the man who is asked to furnish surety.

In this particular case it must have been obvious to the *Mukhtear* that the Magistrate refused to accept Ramzan Khan as surety for the due attendance of the accused in Court though Ramzan Khan offered to deposit the entire amount of bail. The *Mukhtear* did practically the very thing which the Magistrate refused Ramzan Khan to do. The practical effect of this transaction was that the real surety was Ramzan Khan who was to forfeit the amount deposited by him with the *Mukhtear* in case the accused persons did not turn up on the date fixed. Obviously

therefore the *Mukhtear* frustrated the order passed by the Magistrate. This, in my opinion, was an unprofessional conduct.

Coming to the second charge, though there was no deliberate mis-statement on the part of the *Mukhtear*, yet there was a clear attempt on his part to conceal the fact that he had received Rs. 730 from Ramzan Khan. The learned Advocate appearing on behalf of the *Mukhtear* in this Court has attempted to show that the objection raised against the forfeiture of the amount of bail was because the *Mukhtear* was afraid that in the event of his not pressing the objection, Ramzan Khan might call upon him to refund the amount deposited on the ground that it was wrongly forfeited. This, however, was not the reason put forward by the *Mukhtear* in his application of June 8, 1934, filed before the District Magistrate wherein he stated that he never wanted to conceal the fact that Ramzan Khan did deposit Rs. 730 with him but that he tried to reduce the amount so that he might not lose Rs. 70 which amount was the difference between Rs. 800 and Rs. 730. In spite of all these I should have been inclined to hold that a reprimand would be enough in the circumstances of the case, had the subsequent attitude of the *Mukhtear* been one of regret and we would have been satsified that the *Mukhtear* has realised that what he did was illegal and improper. Up till this moment there is no admission that what he did was wrong. It would have been open to the *Mukhtear*, when he was called upon to show cause to state that he did not realise at the time when he received the money from Ramzan Khan that he was doing something wrong but that he realised it then and therefore expressed his regret. Up till now his attitude has been that what he did was not wrong and that he was justified in what he did.

In these circumstances I agree with the order of my Lord suspending the *Mukhtear* for a period of three months.

Agarwala, J.—For the reasons already given by my learned brothers, I agree that the agreement between the *Mukhtear* and Ramzan Khan was one which it was highly improper for a legal practitioner or any bailor to enter into, and that the conduct of the *Mukhtear* in concealing the agreement during the early stages of the present proceedings must be viewed as a serious aggravation of the original offence that he committed. I, therefore, agree with the order of suspension proposed in his case.

N. *Suspension ordered.*

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Appeal No. 122 of 1934
August 11, 1934
MEHTA, A. J. C.

(MEHARBAN) NOWSHIRWAN IRANI —APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 377—Attempt at unnatural offence—Some activity on part of accused to thrust male organ in to anus of passive agent necessary—Mere preparation is not enough.

The offence made punishable under s. 377, Penal Code, requires that penetration, however little, should be proved strictly. Thus an attempt to commit this offence should be an attempt to thrust the male organ into the anus of the passive agent. Some activity on the part of the accused in that particular direction ought to be proved strictly. A mere preparation for the operation should not necessarily be construed as an attempt. [p. 437, col. 2.]

Where there was an intention on the part of the accused to satisfy his lust by a carnal intercourse against the order of nature and he made every preparation to satisfy that lust, but before he could thrust his organ in he spent himself; then he cannot be said to have done any act which might be construed as an attempt to commit the offence of sodomy.

Mr. *H. P. Minwalla*, for the Appellant.

Mr. *M. N. Kotwal*, for the Opposite Party.

Judgment.—The appellant, a young Irani restaurant-keeper, was charged before the learned Additional City Magistrate of Karachi, with an offence punishable under s. 377, Penal Code, in that he voluntarily had carnal intercourse against the order of nature with a lad, named Ratansi, aged 18. The learned Magistrate held that the main offence had not taken place, but that the accused could be convicted of an attempt to commit that offence. Consequently the accused was convicted under s. 377 read with s. 511 and sentenced to three months' rigorous imprisonment and to pay a fine of Rs. 100, in default, to undergo further rigorous imprisonment of one month.

This appeal has been admitted by the learned Judicial Commissioner to a regular hearing. The point to be determined in this appeal is, whether the conviction of the appellant is justifiable on the record. The prosecution story as unfolded at the trial is briefly this: Ratansi, a youth of about 18, called in the judgment of the

lower Court "a boy," employed in the firm of Rali Bros., as a marker, went on Sunday afternoon to Keamari. He visited the hotel of the appellant and had tea there. When he was paying the bill for what he had consumed, the appellant asked him why he had not been to the hotel for a long time. Ratansi replied that he had had no occasion for it. He then went over to the pier with a view to take a trip to Manora by boat; but finding that he was short of the necessary cash, started back. When he came up to near the Musjid Street, he saw the appellant standing on the road at a little distance from the hotel. The appellant called out to Ratansi and took him to his house close by. He then locked the door and began to take liberties with the youngster, who resented the overtures and wanted to be allowed to go away. The appellant nevertheless removed his own pants, loosened the trousers of Ratansi and made the lad sit on his lap on top of his organ. Ratansi got up from the lap; but in the meanwhile the appellant had spent himself, wiped his organ and put on his pants.

Whilst this incident was taking place inside the house of the appellant, one Solomon, who is in the Police and who lives next door to the appellant, having suspected something unusual, came up to the door of the appellant's house and started peeping through a chink in the door panels. He called out to one Gulabdin who was coming out of the mosque. Gulabdin had just a momentary glimpse. Being disgusted he went away. After the appellant had adjusted his dress, Solomon announced his presence and insisted that the appellant and Ratansi should march off to the Police Station with him. A complaint was got filed there in the name of Ratansi which started the prosecution with the result as noticed above. Such, in the main is the prosecution story. The original version as given at the Police Station, was that the lad was laid down on a cot, and that the appellant was seen actually on top of him committing an act of sodomy and that Solomon had witnessed the act from beginning to end. This version was entirely changed when the witnesses came before the Court. Neither Ratansi nor Solomon nor Gulabdin would now admit that he had told the Police that an unnatural offence was completed on the cot, the boy lying on the cot and the appellant lying over him although the Police Officer has had to admit that the original statements before him were to that effect. This circumstance affords a very important indication in the case as to whether the prosecution witnesses could have at all seen what actually had transpired in the room. The learned Magistrate glosses over such a glaring discrepancy by saying:

> "This seems to me to have been due to a mistake or misunderstanding on the part of the investigating Sub-Inspector who is a young man aged 25 and inexperienced. There is no reason why the witnesses should have given a different version on this point."

There is enough material on the record for the adoption of a contrary view. In the first place, there is the positive testimony of the Police Officer supported by documentary evidence which there is no good ground to discredit merely because of his youth or inexperience. A mistake may occur in one statement. It is not likely to creep into all the three statements. It appears, however, from the record that the witnesses had a motive in changing their original version. As no seminal stains were found on the cot, but some were found on the floor, the witnesses had to turn round and say that the offence did not take place in the usual manner on the cot but that what had happened was that the accused having unbuttoned his pants, was sitting on the cot with Ratansi, whose back had been bared, in his lap and that it was in that posture, that he had a discharge. Moreover, the medical evidence militates against the story of a forcible connection on the cot, the appellant who is a fairly hefty young man having intercourse in the manner stated originally. There was not the slightest symptom of violence on the hind part of the lad.

It is contended on behalf of the appellant that Solomon is his enemy: that Solomon's family do not pay regularly and in full for the refreshments consumed at the shop of the appellant. Some evidence has been led to prove this sort of disagreement between the two. It is not quite necessary to decide whether Solomon does or does not bear the appellant a grudge. Solomon's evidence as it is does not inspire much confidence. His conduct was very strange. He suspected, he says, that the lad had been locked in by the appellant for some immoral purpose yet he quietly goes and looks on through the chinks of the door and does not raise a hue and cry to prevent the appellant from pursuing his nefarious purpose any further although the lad according to him had been shouting out "*chhoro, chhoro*" and

complaining of force being used. The conduct of Gulabdin is equally queer. He says he had a peep just for an instant and then quietly went away. But there must have been some connection between Solomon and Gulabdin. Solomon being in the Police knows that if he admitted that connection, Gulabdin may not be looked upon as an independent witness so Solomon had the hardihood to say that he had not known who Gulabdin was, although Gulabdin had to admit that his friendship with Solomon was of some 10 or 12 years' duration. Under these circumstances, I am not prepared implicitly to rely on the evidence of these two witnesses, although it is not altogether unlikely that they may have suspected something wrong.

Coming to the evidence of the young man Ratansi, I must say that he appears to be a despicable specimen of humanity. On his own admission he is addicted to the vice of a catamite. The doctor who has examined him is of the opinion that the lad must have been used frequently for unnatural carnal intercourse. If he was in the house of the accused behind locked doors, I have not the smallest hesitation in believing that he had gone there voluntarily. Had there been the slightest resistance on his part, there would have been noticed some symptoms, such as torn clothes, or scratches, or some kind of injuries on his anus. After reading the medical evidence, it is unnecessary to criticise minutely the evidence of this lad who poses, or perhaps is made to pose, as a complainant before us. He has made hopelessly discrepant statements in very important particulars from time to time as it suited him during the course of his examination and cross-examination. In examination-in-chief, for instance, he tells us that the accused threw him down on a cot and unbuttoned his *pyjamas*. In cross-examination he changes the story and says that the accused sat on the cot and he, that is, Ratansi was made to sit in the accused's lap. The medical officer says that he could not notice any marks of a fresh act of sodomy on the boy. Under the circumstances, it is difficult to find any reliable evidence to convict the appellant of unnatural offence or even an attempt to commit one. Although, mainly because of the unreliable nature of the evidence in this case, I am not prepared to uphold the conviction of the appellant, I might as well discuss a particular feature which is too interesting to be omitted from consideration in this judgment.

The offence made punishable under s. 377 requires that penetration, however little, should be proved strictly. Thus then an attempt to commit this offence should be an attempt to thrust the male organ into the anus of the passive agent. Some activity on the part of the accused in that particular direction ought to be proved strictly. A mere preparation for the operation should not necessarily be construed as an attempt. All that we have in this case, if believed, is that the appellant made Ratansi sit on his lap. From the version given by Ratansi it appears to me that owing to mere friction the appellant got a discharge. That would negative the probability of an attempt at penetration. None of the witnesses says distinctly that the appellant did any act from which it may be inferred, that if successful, it would have caused the male organ of the appellant to force its way into the rear orifice of the lad. It appears to me that if the prosecution story is believed, there was an intention on the part of the appellant to satisfy his lust by a carnal intercourse against the order of nature, that he made every preparation to satisfy that lust but that before he could thrust his organ in, he spent himself; and that therefore he had not done any act which might be construed as an attempt to commit the offence of sodomy. At the most it was an inchoate offence; and if the appellant was at all guilty of any offence, it was that of wrongful confinement. At the same time, I am not prepared to believe that the young man had been kept there against his will. Consequently, even the offence of wrongful confinement cannot be said to have been made out.

As the appellant had not, even if we take the worst view against him, gone beyond a certain stage of lascivious companionship, I do not think he deserves to be convicted for any of the offences with which he was charged or could have been charged. I therefore set aside the conviction and sentence, and order that if the fine is paid, it should be remitted.

D. *Conviction set aside.*

MADRAS HIGH COURT

Criminal Revision Case No. 492 of 1934
and
Criminal Revision Petition No. 453 of 1934
October 29, 1934
PANDRANG ROW, J.
EMPEROR—PETITIONER
versus
MUTHUSWAMI—RESPONDENT

Penal Code (Act XLV of 1860), s. 75—Previous convictions outside British India—Relevancy of, in determining sentence.

Previous convictions outside British India cannot be made the basis of a charge under s. 75, Indian Penal Code and a Magistrate is not bound to consider such convictions in determining the sentence even though it is open to him to do so.

Cr. R. P. under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Chief Presidency Magistrate, Egmore, dated February 21, 1934, and passed in C. C. No. 246 of 1934.

The Crown Prosecutor, for the Crown.

Order.—This is an application by the Crown Prosecutor, Madras, to enhance the sentence passed on the accused in C. C. No. 246 of 1934 on the file of the Chief Presidency Magistrate of Madras. The accused in the case was found guilty of having stolen some cash and clothes worth in all about 12 rupees belonging to P. W. No. 1 in the case while the latter was bathing at a bathing *ghat* in Madras. The Magistrate found the accused guilty of an offence punishable under s. 379, Indian Penal Code, and sentenced him to pay a fine of rupees thirty, and in default of payment thereof to undergo rigorous imprisonment of three months, and directed Rs. 12 out of the fine, if collected, to be paid as compensation to P. W. No. 1. It would appear that the fine has not been paid. The conviction and sentence are dated February 21, 1934, and it is clear that the accused in the case must have undergone the entire sentence of imprisonment.

The only ground on which it is contended before me that the sentence imposed by the learned Chief Presidency Magistrate is inadequate is that he failed to consider the antecedents of the accused which were mentioned to him orally by the Prosecuting Inspector of Police who conducted the prosecution. It would appear that the Prosecuting Inspector of Police in reply to a question put by the Court about the previous record of the accused for the purpose of determining the sentence, stated that the accused had four previous convictions in the Police Courts of Colombo, three for theft and one for cheating, the last of them being on September 24, 1932, for which he had been awarded six months' rigorous imprisonment. It is stated that the accused admitted these convictions but that the learned Chief Presidency Magistrate declined to take these convictions into consideration for the purpose of determining the sentence on the ground that these convictions were not convictions pronounced in British India. It is contended that this view of the Magistrate, *viz.*, that convictions had out of British India should not be taken into consideration in determining the punishment is wrong. If at all it was open to the Magistrate to take into consideration the previous antecedents of the accused, the convictions outside British India were relevent. But in view of the fact that these convictions could not be made the basis of any charge under s. 75, Indian Penal Code, evidence of these convictions could be admissible only as evidence of bad character, and as there is no provision of law which compels a Magistrate to consider the antecedents of the accused before determining the sentence to be imposed upon him, I am unable to say that the learned Chief Presidency Magistrate acted illegally in the exercise of his discretion in declining to consider the previous convictions in this cease. The attempt of the prosecution was really to give these convictions outside British India the same effect for practical purposes as convictions within British India, that is to say, to induce the Magistrate to give a higher punishment than he would otherwise award. It may be that the Magistrate is not disentitled, if he thinks fit, to make such enquiries as he thinks proper, and as are not prohibited by the law, about the previous antecedents of the accused. But if he declines to look into these antecedents, he cannot be said to act illegally in the exercise of his discretion. The question of sentence is always within the discretion of the Court and ordinarily the sentence is determined only with regard to the facts and circumstances of each case unless indeed there is a liability to enhanced punishment by reason of any specific provision of law such as s. 75, Indian Penal Code. Apart from these convictions outside British India it is not contended that the sentence is inadequate The learned Chief Presidency Magistrate

was not bound to consider these convictions in determining the sentence, even though it might have been open to him to have considered them. I am not prepared to interfere in revision and enhance the sentence in this case.

The Criminal Revision Petition is, therefore, dismissed.

A. *Petition dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Appeal No. 145 of 1933
October 4, 1933
FERRERS, J. C.

BHIKCHAND GANGARAM—APPELLANT
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 408, 406—Working partner not contributing anything to partnership—Whether a clerk or servant within the meaning of s 408—Whether can be guilty of breach of trust or misappropriation—Partnership—Accused admitting receipt of money but defending by saying that he returned it—Onus of non-payment.

A working partner who has not contributed anything towards partnership business, is a 'servant' or 'clerk' within s. 408, Penal Code, and can be held guilty of criminal misappropriation or breach of trust. *Emperor* v. *Jagannath Raghunath Das* (3) and *Emperor* v. *Laloo Chella* (5), relied on. *Queen* v. *Okhoy Coomar Shaw* (2) and *Debi Prasad Bhagat* v. *Nagar Mull* (4), referred to, *Bhupendra Nath Sinha* v. *Giridhari Lal* (1), dissented from.

Where the accused, in a trial under s. 408 against him admits having received the money alleged to have been misappropriated by him, but defended himself by saying that he had made it over to the proper person, the onus to prove the payment is not upon him, but it is on the prosecution to prove non-payment; for it is only when the latter is proved that the presumption will arise of misappropriation or breach of trust. *Queen-Empress* v *Hari Dagdu* (6) and *Pritchard* v. *Emperor* (7), relied on. [p. 413, col 1.]

Cr. A. from an order of the First Class Magistrate, Karachi.

Messrs. *Balkishen H. Lulla*, for the Appellant.

Mr. *D. N. O'Sullivan*, for the Crown.

Judgment.—This is an appeal against the judgment and sentence of the First Class Magistrate, Karachi. In that Court the allegations made by the prosecution were these: The accused was a working partner in the firm of Saleh Muhammad Umar Dossal. In this capacity he had entire charge of the oil department. Yusuf, Ex. 1, is another partner of the same firm. On an inspection of the firm's books, Yusuf observed that a sum of Rs. 350 was due from another firm known as Vishindas Khanchand. The amount had been outstanding for a long time. In November 1931 Yusuf sent Mathradas to collect the money. Mathradas brought back word that the money had been paid in full on April 4, 1931. On inquiry it was discovered that the accused had in fact on that date issued to Vishindas a receipt for the whole outstanding balance which was Rs. 762-4-3. He had, however, credited the firm with no more than Rs. 412-4-3. Sometime after this discovery had been made relations between the firm of Saleh Muhammad Umar Dossal and the accused became very unfriendly. The disputed entry was made in the suspense account on April 5, 1931. On February 15, 1932, the accused was called upon to answer a charge of misappropriation.

The trial went on for some 18 months and on August 4, 1933, the learned Magistrate came to the conclusion that the accused was guilty of criminal breach of trust by a clerk or a servant and convicted him under s. 408, Penal Code. The sentence was imprisonment until the rising of the Court and fine of Rs. 1,000 to be paid within one week. In case of default the convict was to suffer rigorous imprisonment for 6 months. Of the fine if recovered, half was to be paid to the complainant's firm as compensation.

Against this conviction and sentence the present appeal has been brought. The appellant makes no attempt to deny those facts which are indisputable. He does not deny that on April 4, 1931, he issued to Vishindas Khanchand a receipt for Rs. 762-4-3 and that he signed it by procuration of the name of Saleh Muhammad Umar Dossal. This receipt is Ex. 2-C. The appellant also does not deny that the sum which was entered in the suspense account on April 5, 1931, was no more than Rs. 412-4-3 and that the same amount was carried to cash book on April 13, 1931. The balance of Rs. 350 continued to be shown a debit due from Vishindas Khanchand in the ensuing months of May and June.

These facts the appellant has not attempted to deny. He has, however, an explanation and it is this: The appellant before he became a partner in the firm of Saleh Muhammad Umar Dossal, had been doing business of a similar kind in partnership with Vishindas Khanchand and others in the name and style of Khanchand Jeramdas and Co. Khanchand Jeramdas did not prosper and on August 6, 1929, the partnership was formally dissolved by a written agreement which is Ex. 2-G. It was then agreed between the partners that

the whole of the partnership concern with all its assets, outstandings and liabilities whatsoever and wheresoever were to be taken over absolutely and exclusively by Vishindas and Sugnomal. It was also argeed that Bhikchand, the present appellant, should have no right, interest or concern whatever in any assets or effects of the aforesaid firm. Among the assets of that firm were two trade marks known as "OM" and "TALVAR" and also the punches or dies with which those trade marks were impressed upon the tins in which oil was contained.

The oil business being temporarily at a stand-still on October 24, 1929, Vishindas Khanchand wrote the letter which is Ex. 2-F. He therein allows to Bhikchand the appellant, the use of the dies "OM" and "TALVAR" subject to the condition that if the *khopra* business should ever be set on foot again those dies must be returned by Bhikchand to Vishindas. According to the appellant this revocable and permissive right to make use of the trade marks and the punches was carried by him into the partnership of Saleh Muhammad Umar Dossal. The partnership deed between the appellant and that firm is Ex. 11-B. A draft of that agreement is also put in as Ex. 11-C. It was originally proposed to include the clause relating to the dies; in the final form of agreement no such clause is to be found. There is no allegation in the agreement that the accused undertook to bring in dies for the use of the partnership or that the dies belonged to him. On May 21, 1930, a letter was addressed under the name of Khanchand Jeramdas to Messrs. Saleh Muhammad Umar Dossal. The letter complains that:

"it has come to our knowledge that two dies, *viz*, Om and Talvar are being used in Saleh Muhammad Umar Dossal's *khopra* business."

The writer claims those dies as his registered trade marks and he invites his correspondents in civil terms to show cause why a criminal prosecution should not be filed against them for using these trade marks. On behalf of Saleh Muhammad Umar Dossal an answer was made that since the firm of Khanchand Jeramdas had long since been dissolved and ceased to manufacture and sell any goods distinguished by the trade marks in question, it followed that the rights, if any, of the said firm of Khanchand Jeramdas to the exclusive use of those marks had been abandoned and ceased to exist. It was, however, stated that after the dissolution of the firm of Khanchand all the goodwill, right and use of the dies were taken over by Bhikchand Gangaram who thereafter joined Saleh Muhammad Umar Dossal as a partner and by virtue thereof Saleh Muhammad Umar Dossal were in any case entitled to use the dies in question. This answer appears for the time being to have put an end to the correspondence Saleh Muhammad Umar Dossal continued to make use of the dies which are said to have become popular and well known in the market. During all this time the firm of Vishindas Khanchand were going from bad to worse. It happened, however, that in March or April, 1931, the dissolved firm of Khanchand Jeramdas became entitled to receive certain payments from the firm of Lunidaram Pahlumal. The appellant informed the principal partner in the firm of Saleh Muhammad Umar Dossal of this opportunity and impressed upon him the necessity of recovering sums which were due from Vishindas to Saleh Muhammad Umar Dossal and of settling with Vishindas the dispute concerning the dies. The appellant's case is that Seth Osman agreed and authorised the appellant to pay for the purchase of the dies such an amount as he thought fit.

The appellant accordingly saw Vishindas and settled with him. The amount due was found to be Rs. 762-4-3. It was, however, agreed that payment of Rs. 350 should be made to Vishindas, son of Khanchand in respect of the trade marks and the punches which had come to him when the firm of Vishindas Khanchand was dissolved. Accordingly the balance of Rs. 412-4-3 was paid to the appellant in currency. Acting on behalf of the firm of Saleh Muhammad Umar Dossal the appellant passed a receipt for Rs. 762-4-3. This receipt was made out in favour of the firm of Vishindas Khanchand. In this firm there are two partners both of whom bear the name of Vishindas. The payment for dies was not to be made to the firm but to Vishindas, son of Khanchand personally. This Vishindas accordingly passed a receipt for Rs. 350 which he received on account of his trade marks. This receipt is Ex. 2-D. At the same time a third document was drawn up which is Ex. 2-C. It was written by the witness Tarachand who is a partner in the firm of Lunidaram Phalumal. The settlement between the appellant and Vishindas was made at Tarachand's shop and Tarachand is also

the writer of Ex. 2-K. This exhibit is in the form of a letter addressed by Vishindas to Bhikchand. It says that the price of the dies has been received in full settlement and ends with these words:

"I am fully entitled to the right over these dies as well as of your debt inasmuch as I have purchased the same from my brother."

These documents explain the defence which the accused desires to make. They explain why it was that he did not enter in the accounts of Saleh Muhammad Umar Dossal the whole sum of Rs. 762-4-3 for which he had given the receipt. The appellant's case is that with the asset of the managing partner he had settled the outstanding dispute concerning the use of "OM" and "TALVAR" trade marks, and on this account, he had paid Rs. 350 to Vishindas Khanchand. The reason why no mention of this payment is made in the receipt Ex. 2-C, is that that receipt was given to the firm of Vishindas Khanchand. The payment of Rs. 350 was made to Vishindas in his private capacity and not to the firm of the same name. The reason why there was a delay in carrying the entry from the suspense account to the regular account books is that the managing partner refused to acknowledge the liability of the firm. He contended that Bhikchand had brought into the firm the right to use these dies and that if there was any defect in Bhikchand's title, it was Bhikchand's business to make the defect good at his own expense. This dispute remained unsettled. It was, therefore, necessary that the sum of Rs. 350 should continue to be shown as a debt due from Vishindas and until there was a corresponding credit entry, the debit must, as a matter of book-keeping, continue to remain in the same place. This explains also the reason why in the books of May and June no *mehta* was instructed to attempt to recover the debt shown as due from Vishindas. The appellant points out that there was no attempt made to conceal. The books are written in the Gujrati language and Bhikchand cannot write Gujrati. The entries were, therefore, made by *mehtas* and those *mehtas* were fully aware of the true state of the case. To the managing partner himself the facts were also fully known from the first. It is provided in the partnership agreement that the working partner shall submit every day to the capitalist partner a true copy of the entries in the cash book. This, according to the appellant, was being done and the managing partner was aware of the facts from the day on which the disputed incident occurred. That was in April. It was not until the end of the year that the matter came to a head. The appellant was laying claim to a large sum which he alleged to have become due to him by the wrongful act of the capitalist partner. He was demanding arbitration in accordance with the terms of the partnership deed. To prejudice the appellant, the capitalist partners elected to take criminal proceedings. In January 1932 they lodged a complaint regarding an incident which had occurred in April 1931.

The points for decision which arise in this case are these: Has the prosecution proved (1) That Bhikchand was a clerk or servant. (2) That he was in that capacity in any manner entrusted with dominion over Rs. 762-4-3 due from Vishindas. (3) That out of this sum he converted Rs. 350 to his own use. (4) That he did so dishonestly. On the first question the prosecution did not lay any great stress. They quoted indeed authority to show that in certain circumstances a partner may be included within the words 'clerk" or "servant," but they pointed out that the sentence which has been inflicted under s. 408 would have been competent even under s. 406 and they, therefore, thought that it was of no consequence whether the element distinguishing s. 408 from s. 406 could or could not be established.

To me, however, this point seems, for reasons which will appear hereafter, to require some consideration. There can be no doubt that a clerk or a servant can be guilty of embezzlement. It has, however, been seriously doubted whether a criminal prosecution of this charge can be sustained by one partner against another. This position has been recently asserted in the High Court of Calcutta by Lort-Williams, J., in *Bhupendra Nath Sinha* v. *Giridhari Lal* (1). The learned Judge there observes that:

"partners are joint-owners or co-owners of the partnership property, that is to say, of the common stock. Each partner is co-owner of the whole of this common stock, though he receives or pays a share only in profits and losses arising therefrom and though his share in the partnership property is only the value of his original contribution, increased or diminished by his share of profit or loss. It is difficult, therefore, to conceive how he can be entrusted with, or with

(1) 145 Ind. Cas. 416; A I R 1933 Cal. 582; 34 Cr L J 958; 6 R C 106; (1933) Cr. Cas. 953; 37 C W N 982; 60 C 1316.

dominion over his own property, or how he can dishonestly misappropriate it or convert it to his own use."

The learned Judge by this argument was evacuating of all effect the decision of a Full Bench in *Queen* v. *Okhoy Coomar Shaw* (2). He also expressed his inability to appreciate the distinction drawn by Sir John Beaumont, C. J., in *Emperor* v. *Jagannath Raghunath Das* (3).

The distinction which the High Court of Calcutta could not appreciate seems to be the distinction which the High Court of Bombay has expressed in these words:

"We have here a capitalist partner and a working partner. The capitalist partner is one who supplies the capital for the working partner and it seems to me that in such a case it can certainly be said that the working partner is entrusted with dominion over the capitalist partner's property."

To me this appears to be a perfectly intelligible distinction. In the agreement of partnership, which is Ex. 11-B in this case, cl. 5 provides that:

"the capital of the partnership shall be the sum of Rs. 1,00,000 (Rupees one lac) which shall be paid by the firm to the working partner from time to time in such sum or sums as they in their sole discretion shall deem fit."

The High Court of Calcutta in the passage above quoted refers to the Contract Act, s. 253 (1). It has not, however, quoted the exact words of that section which are these:

"All partners are joint owners of all property originally brought into the partnership stock or bought with money belonging to the partnership, or acquired for purposes of the partnership business. All such property is called partnership property. The share of each partner in the partnership property is the value of his original contribution increased or diminished by his share of profit or loss."

Now, in the present case, the original contribution of the working partner was nothing. The capital was provided by others and it was entrusted to the working partner at their discretion in such sums and at such times as they thought fit. I find no difficulty in drawing a distinction between the capitalist partner who supplied the fund and the working partner who "managed the same in accordance with the instructions given by the firm from time to time."

It has no doubt been held in *Debi Prasad Bhagat* v. *Nagar Mull* (4) that a partner cannot be held guilty of misappropriation but is only entitled to be called upon for an account of the expenditure of the money which he has received. But so long ago as 1874 a Full Bench of the Calcutta High Court decided in *Queen* v. *Okhoy Coomar Shaw* (2), that a partner who dishonestly misappropriates or converts to his own use any of the partnership property with which he is entrusted is guilty of an offence under s. 405. This Full Bench case is referred to with approval by the High Court of Bombay in *Emperor* v. *Laloo Chella* (5) and the same view had been reaffirmed in *Emperor* v. *Jagannath Raghunath Das* (3).

In spite of the criticisms which have been raised against this decision by Lort-Willims, J., I continue to think that the decision of the High Court of Bombay is a safe guide to follow and in this particular case I am of opinion that the appellant may be regarded as coming within the meaning of the words "clerk or servant" as used in s. 408, Penal Code. To the first point for decision my answer is therefore "yes." On the second point, it will not be necessary to say much. Of the contention that one partner cannot be entrusted with dominion over the partnership property or any part of it, all that is necessary has been said. The learned Counsel who appeared for the Crown denounced with some indignation what he called "the monstrous and incredible" doctrine that a partner cannot be criminally convicted for any misappropriation of property of the firm to which he belongs.

Without adopting these epithets I should think it regrettable if no criminal remedy could be found in a case of this kind, and should it be necessary I should perhaps be prepared to hold that the Rs. 762-4-3 were entrusted by Vishindas to Bhikchand and that Bhikchand entered into an implied contract that he would discharge that trust by using the money for the extinction of the debt due by the firm of Vishindas to the firm of Saleh Mahomed Umar Dossal. In any case it appears clear to me that Bhikchand was in some way entrusted with dominion over those Rs. 762-4-3 and I find upon the second point accordingly. There remains the question whether the prosecution has proved that Bhikchand converted Rs. 350 to his own use. Now, on this point the appellant says that there is not on the record any evidence worth the name to show that this Rs. 350 were ever misappropriated by the appellant. What evidence there is, is to the contrary effect. The appellant says that he paid those Rs. 350 to Vishindas.

(2) 13 B L R 307; 21 W R 59 Cr.

(3) 136 Ind. Cas. 493; A I R 1932 Bom. 57; 33 Bom. L R 1518; (1932) Cr. Cas. 81; 33 Cr. L J 317; Ind. Rul. (1932) Bom. 189.

(4) 35 C 1198; 9 Cr. L J 74.

(5) 6 Bom. L R 553.

Vishindas says the same thing. He is Ex. 2, and his words are these:

"The price of the dies was settled at Rs. 350 I got that amount. I gave a receipt for that amount to Bhikchand which he has now produced Ex. 2-D."

The prosecution attacks this evidence with vigour. They must admit that the receipt, Ex. 2-D is authentic in so far as it is actually in the handwriting of Vishindas. They allege, however, that it is a forgery in so far as it was made with the intention of causing it to be believed that the document was signed at a time when it was not. They allege also that the oral testimony given by the witness in the box is false. The witness whom they are thus attacking is their own witness. It was the prosecution who called Vishindas. But the prosecution cannot succeed unless they can show that Vishindas has been guilty of giving false testimony in a judicial proceeding, of fabricating false evidence, and of forgery. The learned Magistrate who tried the case has not definitely committed himself to the conclusion that these points have been established. In my opinion, they remain open to very great doubt.

On this subject the law has been thus laid down by the Bombay High Court in *Queen Empress* v. *Hari Dagdu* (6). In a trial under s. 406 where the accused admitted having received the money alleged to have been misappropriated by him but defended himself by saying that he had made it over to the proper person, the onus did not lie on him to prove payment but on the prosecution to prove non-payment for it is only when the latter is proved that the presumption will arise of misappropriation or breach of trust.

This case is unreported but it is quoted with approval by the High Court of Lahore in *Pritchard* v. *Emperor* (7). It cannot in the present case be said that the Crown had succeeded in proving non-payment. The recipient of the money has given a receipt and he has gone into the box to say that that receipt is genuine and that the money was actually received by him accordingly. It is admitted that direct proof of misappropriation is altogether wanting. I am asked to infer that the appellant must have put the Rs. 350 into his own pocket because he did not enter them in the books of the firm. But he has accounted for that fact and his explanation is neither far-fetched nor hard to believe. I find it therefore impossible to hold that the prosecution has discharged the burden which rests upon them of affirmatively proving the alleged felonious conversion.

After what has been already said, the fourth point will require but little discussion. There is a presumption in favour of innocence and that presumption in this case has not been rebutted. It has not been proved that appellant had any intention of causing a wrongful gain to himself or wrongful loss to his partners. I have been asked to infer this dishonesty from the supposed fact that in defending himself the accused made use of false testimony and forged documents. It has not, however, been proved to my satisfaction either that the testimony of Vishindas is false or that the receipt which he gave is a forgery. Even however had these things been established, the inference which the prosecution desires me to draw would not follow. In this country a difficulty which constantly confronts every Criminal Court is this: Innocent persons not infrequently put forward false defences. A man may do a thing in April which at that time he believes in good faith to be innocent and lawful. Afterwards doubt is thrown upon the transaction. Criminal proceedings are threatened. The man loses his head and in the following February he puts forward a false defence. I am not saying that this is what has happened in this case. I am merely saying that if a man is so ill-advised as to set up a false defence in February, it cannot safely be inferred from that fact that an act which he did in the preceding April was tainted with dishonesty. By this reasoning I am led to these conclusions. The prosecution has not proved either that the appellant converted Rs. 350 to his own use or that he did so dishonestly. The conviction, therefore, cannot stand. The appellant is acquitted, and the security which he has given for the payment of the fine is discharged.

D. *Appeal allowed.*

(6) Rat. Un. Cr. C 872.

(7) 112 Ind. Cas. 850; A I R 1928 Lah. 382; 30 Cr. L J 18.

CALCUTTA HIGH COURT

Criminal Revision No. 793 of 1934
September 6, 1934
PATTERSON, J.

DURGA PADA CHATTERJEE AND ANOTHER—ACCUSED—PETITIONERS
versus
NILMANI GHOSE—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 339—Voluntary obstruction of vehicle—Whether constitutes wrongful restraint.

The voluntary obstruction of a vehicle cannot be held to amount to wrongful restraint within the meaning of s. 339, Penal Code.

Mr. *Suresh Chandra Talukdar*, for the Petitioner.

Order.—This Rule is directed against an order convicting the petitioners under s. 341, Indian Penal Code, on the allegation that they had prevented the carts of one Kali Pada who had purchased some paddy from the complainant Nilmony from proceeding along the public road, their object being to compel the payment to their master, the landlord of the village, of certain so-called dues known as weighman's dues. It may be remarked that it is difficult to understand why the complainant Nilmony or his master Atul Pada should have felt themselves aggrieved by the alleged action on the part of the accused, for it appears that not only had Nilmony handed the paddy in question over to Kali Pada, on receiving payment of its price in full, but that he had also realized from Kali Pada the amounts claimed by the landlord's men on account of weighman's dues, although he had no intention of making over those amounts to the landlord's men, his master having expressly forbidden him to do so. If anyone was aggrieved it was Kali Pada who, according to his own showing, had purchased the paddy and paid the so-called weighman's dues, but was prevented from removing the paddy by the accused, the present petitioners. In spite of this, for some reason which is not apparent to me, it was Nilmony and not Kali Pada who moved in the matter and who after informing the local Police, instituted the present proceedings. Whatever the explanation may be, the only question which this Court is now called upon to determine is whether the action of the petitioners in preventing Kali Pada's carts from proceeding along the public road comes within the mischief of s. 341, Indian Penal Code.

This question must, in my opinion, be answered in the negative, inasmuch as s. 341 is to be found in Chap. XVI, Indian Penal Code, which deals with offences affecting the human body, and inasmuch as it expressly makes punishable wrongful restraint of any person and not of any vehicle or anything of that sort. The definition of the offence in s. 339, Indian Penal Code, makes the matter still clearer, the offence being defined as voluntarily obstructing any person from proceeding in any direction in which that person has a right to proceed. Having regard to the wording of the definition of the offence of wrongful restraint, it is clear that the voluntary obstruction of a vehicle cannot be held to amount to wrongful restraint within the meaning of s. 339, Indian Penal Code. There is no evidence on the record from which it might be inferred that Kali Pada or Nilmony or the carters were themselves prevented from proceeding along the public road or wherever else they might have wished to go and this being so, it is clear that the conviction under s. 341, Indian Penal Code, must be set aside. I am fortified in this view by the decision of this Court in *Juggeshwar Das* v. *Koylash Chunder* (1), and by the decision of the Bombay High Court in *Emperor* v. *Rama Lala* (2). The other allegations against the petitioners, namely the allegations of theft, mischief and so forth, have been negatived by the trial Court, and it would not be proper at this stage to consider whether or not the petitioners might have been convicted under any of these sections, or even of simple assault. The Rule is accordingly made absolute, the convictions and sentences are set aside and the accused are acquitted. The fine, if paid, will be refunded.

D. *Rule made absolute.*

(1) 12 C 55.
(2) 19 Ind. Cas. 177; 14 Cr. L. J. 177.

LAHORE HIGH COURT

Criminal Miscellaneous Petition No. 89 of 1934
April 12, 1934
MONROE, J.

In the matter of CONDUCTOR ALFRED BEEDHAM, QUETTA

Army Act (VIII of 1911), ss. 87 (1), 90 (1), 100 (1), 158 (1)—Soldier, if can be retained for trial—Retention order must be from competent Military Authority—S. 90 (1), if applies to soldiers who have served for 21 years—'Convenient', meaning of—Soldier under arrest—Pay, if a subsistence allowance—Person, no more subject to military law—He can be arrested and tried within three months, else he cannot be tried by Court Martial—Contract—Breach of—Defaulter, if can defeat his own contract.

Section 87 (1), Army Act gives a power to retain a soldier in order to have the benefit of his services as a

soldier and has no bearing on his retention for the purposes of his trial by Court Martial. Before the section can operate, it is necessary to have an order of the competent Military Authority in which the period of retention must be specified. [p. 446, col. 2.]

Section 90 (1) does not apply to a soldier who has served the full period of 21 years. The word "convenient" refers only to the speed with which the discharge is effected and the section does not entitle the superior Military Authority deliberately to hold up a soldier's discharge if he has become legally entitled to it.

The subsistence allowance provided to enable a soldier to live is not his pay; the allotment and other payments not paid at his request is the unilateral act of the Military Authorities, and cannot affect his legal position.

Section 158 gives powers of arrest and trial of a person who has ceased to be subject to Military Law and his trial must commence within three months of his ceasing to be so subject: and after the expiration of this period of three months the person charged with an offence ceases to be liable to arrest or trial by Court Martial.

No one by his own default can be allowed to defeat his own contract. *Malins* v. *Freeman* (1), referred to.

Mr. *B. R. Puri*, for the Petitioner.

Mr. *Saunders*, for the Opposite Party.

Order.—On March 16, 1934, a writ of *Habeas Corpus* for the production of Conductor, Alfred Beedham, was issued from this Court to the Superintendent of the Detention Barracks at Quetta, on the application of Mr. B. R. Puri who alleged that Conductor Beedham was wrongfully detained, not being a person subject to Military Law. A return has been made to the writ jointly by Lieutenant-General Sir Torquhil G. Matteson, K. C. B., C. M. G., General Officer Commanding-in-Chief, Western Command, and Staff Quarter Master Sergeant Eric Whittaker, Superintendent, Military Detention Barracks, Quetta. So far as the relevant facts are concerned, there seems to me to be no dispute. Conductor Beedham, enlisted on August 11, 1908, for 12 years and re-engaged in 1921, for a further period of nine years, making in all a period of 21 years. He was promoted to the rank of Warrant Officer on February 4, 1924, and by a declaration then made he agreed to continue to serve until legally discharged. The period of 21 years came to an end on August 10, 1929. He was then on the Indian Unattached List and continued to serve, annual extensions being granted to him each year the last of which expired on August 10, 1933. In April 1933, he applied for one year's leave, presumably anticipating a further extension of his period of service and his leave was granted from May 1. He was recalled to duty and arrived at Quetta on July 24, 1933. On arrival he was arrested and a general idea of the nature of a number of charges which had been made against him was communicated to him. On January 11, 1934, the Director of Grass Farms, Army Headquarters, the head of Conductor Beedham's Department, granted an extension from August 10, 1933. In January 1934, Conductor Beedham made an application for discharge: this was received on January 29, and was refused. On March 2, 1934, the trial of Conductor Beedham before a General Court Martial began. It is the long delay between the arrest and the commencement of the trial which has given rise to the present proceedings, because if the trial had been commenced within three months on August 10, 1933, the raising of any objection would clearly have been precluded by the provision of s. 158, Army Act.

There is only one other fact relating to the case to which I would now draw attention. Conductor Beedham refused to receive his pay after August 10, 1933, and I shall take it as established that it was because he was under arrest and not because he considered that his service had terminated. During the whole period up to the present, he has received a small daily allowance for subsistence and certain payments have continued to be made on his behalf by the Pay Department. It does not appear to me to be material why Conductor Beedham refused to receive his pay. It will be necessary to consider later whether he was "in pay as a soldier," etc. (in the words of s. 100 (2), Army Act).

Mr. Puri, for Conductor Beedham admitted that his client had not as a matter of fact been discharged and argued that he was entitled to his discharge on August 10, 1933, and it had been improperly (*i. e.*, unlawfully) withheld. He put forward the proposition that no one by his own default can be allowed to defeat his own contract and cited in support of it *Malins* v. *Freeman* (1), and other cases to which I need not refer, because the proposition was not disputed. This proposition Mr. Puri applied to this case, his contention being that Conductor Beedham's period of service terminated on August 10, when two alternatives were open, either he might with his consent have had a further extension or he was entitled to be discharged with all convenient speed: no question arose of an extension of this period and it was not

(1) (1837) 7 L J (N S) C. P. 212; 4 Bing N. C. 395; 6 Scott. 187; 44 R. R. 737.

open to the Military Authorities by refraining from performing their duty of discharging him to extend their powers over him: if he had been discharged, as ought to have happened, the power of causing him to be tried by Court Martial would, in the circumstances of this case, have ceased to exist on or about November 10. Mr. Puri's case is, in my opinion, one that requires an answer.

The return to the writ is obscure, argumentative and even truculent: Mr. Saunders informed me that he was not responsible for it and very wisely argued that certain portions of it might be regarded as non-existent: to them I shall not now make any further reference. The grounds on which Conductor Beedham's retention in custody is justified are set out in para. 14 of the return and I must examine separately each of them.

"(*a*) Under Army Act s. 92, as he has never been legally discharged."

I have in summarising Mr. Puri's argument indicated his case on this point. He admits the absence of a legal discharge and that the section in terms applies to the facts of the case and argues that the improper withholding of the discharge cannot put his client in a worse position than that in which he would have been, if the Military Authorities had carried out the duty imposed upon by s. 90 (1) and s. 95, by virtue of which sections a soldier whose term of service has expired is entitled to be discharged with all convenient speed. Mr. Puri drew my attention to the note appended in the Manual of Military Law to s. 92 which states that "any undue delay in carrying out the discharge would give good ground for complaint on the part of the soldier." The case, in my opinion, must be decided on this point and I postpone further discussion of it, until I have mentioned the remaining grounds of objection.

"(*b*) Under Army Act s. 158 (1) as he committed offences under the Army Act while subject to Military Law and was taken into custody while so subject."

This ground is more fully stated in para. 13 of the Return where it is claimed that s. 158 (*i*) expressly sanctions the retention in the service in Military custody and the trial by Court Martial of any person subject to Military Law alleged to have committed any offence under the Army Act, while so subject; and that this interpretation is borne out by Note I to s. 90 in the Manual of Military Law which states that s. 158 gives power to detain for trial a man charged with an offence under the Act, though entitled to his discharge or transfer to the reserve. A perusal of the section shows that its terms give no warrant for this construction: the section gives powers of arrest and trial of a person who has ceased to be subject to Military Law and his trial must commence within three months of his ceasing to be so subject: it is clear that after the expiration of this period of three months the person charged with an offence ceases to be liable to arrest or trial by Court Martial.

"(*c*) Under Army Act s. 87 (1), even if he had been entitled to discharge from August 10, 1933, he can be legally detained till August 10, 1934, and therefore is only entitled to be discharged with all convenient speed."

In my opinion, this section has no application to the present case. The section gives a power to retain a soldier in order to have the benefit of his services as a soldier and has no bearing on his retention for the purposes of his trial by Court Martial. And further before the section can operate, it is necessary to have an order of the competent Military Authority in which the period of retention must be specified; no order under the section was made.

"(*d*) Under Army Act s. 90 (1), even if it were accepted that he became entitled to discharge on August 10, 1933, he can only claim to be discharged 'with all convenient speed.' It is obviously not convenient to discharge him until the charges against him are disposed of. Until he is so discharged he remains subject to Military Law. The expression 'convenient' can only mean 'convenient having due regard to the interests of the service': the superior Military Authority is the sole judge of what is and what is not convenient, as he must be of all (?) military nature."

Much might be written on this argument. Section 90 (*i*) does not apply to a soldier who has served the full period of 21 years: but s. 85 applies it by reference to such a soldier. There is no reference to the question whether it is convenient or not to discharge the soldier; that matter is dealt with in s. 90 (*i*); the word "convenient" refers only to the speed with which the discharge is effected and the section does not in my opinion entitle the superior Military Authority deliberately to hold up a soldier's discharge if he has become legally entitled to it. The argument here used might prove very damaging to the case now before me: if I were convinced that Conductor Beedham's discharge had been deliberately held back in order that contrary to the spirit of s. 186 the period during which he might be retained in custody before trial should be indefinitely prolonged, I should have no hesitation in

declaring such a course illegal and releasing him.

"(e) Under Army Act s. 100. Although the contention by the General Officer Commanding-in-Chief, Western Command, that Conductor Beedham is still subject to Military Law is not based on this section (because it is not admitted that Conductor Beedham's service legally terminated on August 10, 1933), should it be held that he should have been discharged or re-engaged on that date, then by accepting portion of his pay in the form of family allotment and subsistence allowance for more than three months after August 10, 1933, he would thereby become subject to Military Law in view of the provisions of sub-s. 1 of this section. He did not claim his discharge (on the grounds that he had not been engaged) till January 29, 1934. He has not yet been discharged in pursuance of that claim. In the words of sub-s. 2 of this section 'until he is discharged in pursuance of that claim' he is still subject to Military Law."

This argument overlooked the fact that after his arrest Conductor Beedham was no longer a free agent. He did not himself receive pay; it is absurd to suggest that the subsistence allowance provided to enable him to live was pay: the allotment and other payments were not paid at his request and the unilateral act of the Military Authorities, in making these payments could not affect his legal position.

It remaints now only to consider what was the true position on and after August 10, 1933. He had clearly become entitled to his discharge, in the absence of any lawful order to the contrary and there was no such order. But, in my opinion, there was no obligation on the Military Authorities to press his discharge on him. He did not ask for it till the end of January 1934 well within three months from the commencement of his trial and if the Military Authorities had discharged him without any request from him, it would have appeared that they were giving an indication of the result of the trial. It must be remembered that it was Conductor Beedham's intention if permitted to do so, to remain in the service after his then current year of employment: and I can see no reason why, if his trial had resulted in his acquittal, his services should not have been obtained with his consent. As far as the evidence before me goes, I can come to one conclusion only: neither party directed his attention to the question of discharge and this question was allowed tacitly to remain in abeyance pending the result of the trial. In the circumstances, I am unable to hold that on August 10, 1933, the Military Authorites became subject to an obligation of their own mere motion to discharge Conductor Beedham with all convenient speed: and accordingly, I have no power to release Conductor Beedham.

I accept the return to the writ the order for which I discharge.

D. *Return accepted.*

LAHORE HIGH COURT

Criminal Revision No. 1242 of 1933

February 2, 1934

TEK CHAND, J.

KALYAN DAS—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Special Powers Ordinance (X of 1932), s. 17—Ordinance in force on date when prosecution is begun but not in force on date of conviction—Conviction, legality of—Applicability of s. 6, General Clauses Act (X of 1897), to temporary Statute.

The provisions of s. 6, General Clauses Act, are not applicable to a temporary Statute, which expires automatically on a given date, but applies only to Statutes which are "repealed" by another enactment, and, therefore, proceedings which are pending under an Ordinance on the date of its expiry could not be continued, in the absence of a clear statutory provision to this effect. Consequently where a prosecution is begun when the Ordinance is in force but it is not in force on date of conviction, conviction is illegal and *ultra vires*. *Bansgopal* v. *Emperor* (1) followed, *Jogendra Chandra* v. *Superintendent, Dum Dum Special Jail* (2), distinguished.

Cr. R. from an order of the Additional Sessions Judge, Lahore, dated August 7, 1933.

Mr. *J. L. Kapur*, for the Petitioner.

Mr. *Din Muhammad*, for the Crown.

Order.—The petitioner, Kalyan Das, has been convicted under s. 17, Special Powers Ordinance, X of 1932, and sentenced to undergo rigorous imprisonment for six months and pay a fine of Rs. 200 or in default, to suffer further rigorous imprisonment for three months. His appeal has been rejected by the Sessions Judge and he has filed a petition for revision in this Court.

The relevant facts are that on August 20, 1932, a notice, issued by proper authority under s. 4 of the Special Powers Ordinance No. X of 1932, was served on the petitioner directing him not to join or continue in any procession or meeting (other than a purely religious procession or meeting) of six or more persons in any public place within the limits of the Lahore district, without the previous permission in writing of the City Magistrate, Lahore. This notice was duly served on the petitioner on the same day. It was alleged that the petitioner, in violation of the terms of the aforesaid notice, joined a political procession at Lahore on September 20, 1932. He

was accordingly prosecuted under s. 17 of the Ordinance. The prosecution was started on September 30, 1932, and the case continued till March 31, 1933, when the Magistrate convicted the petitioner and sentenced him as stated above.

The first contention raised on behalf of the petitioner is that the conviction is illegal, as the Ordinance was not in force on the day on which he was convicted, it having expired automatically on December 29, 1932. In support of this contention, reliance is placed on a recent decision by a Full Bench of the Allahabad High Court, reported as *Bansgopál* v. *Emperor* (1). The facts of that case were very similar to those of the one before me, and the question decided by the Full Bench was the same as that raised here. The learned Judges held that the provisions of s. 6, General Clauses Act, were not applicable to a temporary Statute, which expired automatically on a given date, but applied only to Statutes which were "repealed" by another enactment, and therefore proceedings which were pending under an Ordinance on the date of its expiry could not be continued, in the absence of a clear statutory provision to this effect. It was also pointed out that Act XXIII of 1932, which to some extent took the place of Ordinance X of 1932, came into force on December 19, 1932, but s. 20 of that Act specially saved proceedings under certain sections of the Ordinance, s. 17 not being one of them. It was accordingly ruled that the Magistrate had no power to continue proceedings in a prosecution under s. 17 of the Ordinance which had been started before, but not completed on December 29, 1932.

The learned Assistant Legal Remembrancer referred me to a Division Bench ruling of the Calcutta High Court in *Jogendra Chandra* v. *Superintendent, Dum Dum Special Jail* (2), but the facts of that case were quite different. There, the petitioner had been convicted, at a time when the Ordinance was in force, and was actually undergoing his sentence on the date when the Ordinance expired. He contended, however, that after that date, he could not be detained in Jail, to serve out the remaining portion of his sentence. This contention was rejected by the learned Judges and, if I may say so with all respect, quite rightly. The case is clearly distinguishable, and it is not necessary to discuss it any further. In my opinion the law has been laid down correctly in the Allahabad decision cited above, and following it, I hold that the conviction of the petitioner under s. 17 of the Ordinance on a date on which the Ordinance was not in force is illegal and *ultra vires*. In this view of the case, it is not necessary to consider the further question as to whether the procession in question was or was not a purely religious procession. I accept the petition, quash the conviction and sentence, and direct that the petitioner be discharged from his bail bond.

D. *Revision accepted.*

(1) 145 Ind. Cas. 6:0; A I R 1933 All. 669; (1933) Cr. Cas. 1181; 34 Cr. L J 1030; (1933) A L J 875 6 R A 141 (F B).

(2) 132 Ind. Cas. 204; A I R 1933 Cal. 280; (1933) Cr. Cas. 361; 34 Cr. L J 291; 60 C 742; 37 C W N 363; Ind. Rul. (1933) Cal. 241.

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Appeal No. 167 of 1934
September 25, 1934
FERRERS, J. C. AND O'SULLIVAN, A. J. C.
RAHIMBUX KARIMBUX—APPELLANT
versus
EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 190, 556—Sessions Judge ordering arrest and production of witness before him, for trial before City Magistrate—Magistrate committing him to Sessions—Same Judge convicting him—Magistrate, if justified in taking cognizance—Permission under s. 556 not taken—Defect, if fatal.

In the trial in the Sessions Court a man was produced and examined as a witness for the prosecution. The Sessions Judge came to the conclusion that this witness ought to have been charged as a receiver of stolen property. He consequently recorded the following order. "From the evidence recorded by me in the Sessions Case, I find that there is sufficient material before me for trying the witness under s. 411, Penal Code. I, therefore, order him to be arrested and produced before the City Magistrate, to be tried for the same offence." The City Magistrate took cognizance of this offence and committed the witness for trial in the Court of Sessions. This trial went on before the same Judge who had made the order for the arrest and for his production before the City Magistrate to be tried. The trial in the Sessions Court ended in a conviction :

Held, that the City Magistrate was justified by s. 190 (*a*) Criminal Procedure Code, in taking cognizance of this offence.

Held, also, if at the initial stage when the Sessions Judge first took up the case himself he had requested the permission of the High Court to try the case, the disqualification might perhaps have been removed, and that there was a technical defect more serious than could be overlooked. *Sergeant* v. *Dale* (1), relied on.

Mr. *R. Minwalla*, for the Appellant.
Mr. *Partabria D. Punwani*, for the Crown.

Ferrers, J. C.—The facts out of which

this appeal arises are these: The City Magistrate of Sukkur committed certain persons to the Sessions Court for trial under ss. 380 and 450, Penal Code. They were committed to the Sessions Court and not dealt with by the Magistrate himself because they had previous convictions. In the trial in the Sessions Court a man named Rahimbux, who is the present appellant, was produced and examined as a witness for the prosecution. The Sessions Judge came to the conclusion that this witness ought to have been charged as a receiver. He consequently recorded the following order:

"From the evidence recorded by me in the Sessions Case No. 51 of 1933, I find that there is sufficient material before me for trying witness Rahimbux under s. 411, Indian Penal Code. I therefore order him to be arrested and produced before the City Magistrate, Sukkur, to be tried for the same offence. The Public Prosecutor, Sukkur, is requested to conduct the prosecution and give the list of witnesses, etc., there."

The City Magistrate took cognizance of this offence and committed Rahimbux for trial in the Court of Sessions. This trial went on before the same Judge who had made the order for the arrest of Rahimbux and for his production before the City Magistrate to be tried. The trial in the Sessions Court ended in a conviction, and the convict was sentenced to six months' rigorous imprisonment. Against this conviction and sentence he has made the appeal with which we are now concerned. His principal points are two. The first is, that the proceedings against the appellant before the City Magistrate, Sukkur, were not initiated in any manner prescribed by s. 190, Criminal Procedure Code. Section 190, Criminal Procedure Code, provides that a Magistrate may take cognizance of any offence in three different ways. The first of these is "upon receiving a complaint of facts which constitute such offence." Now, the word "complaint" is thus defined:

"Complaint" means the allegation made orally or in writing to Magistrate with a view to his taking action under this Code that some person whether known or unknown has committed an offence."

The order made by the Additional Sessions Judge has already been quoted in full. It will be found to contain all the ingredients which are necessary to constitute a complaint. There is the allegation made in writing to a Magistrate with a view to his taking action under this Code, that Rahimbux has committed an offence punishable under s. 411, Penal Code. In the ordinary course, a Magistrate proposing to initiate proceedings on a complaint shall at once examine the complainant on oath. This requirement is, however, subject to an exception. When the complaint is made in writing, the Code does not require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties.

It would seem, therefore, that the City Magistrate was justified by s. 290, cl. (*a*) in taking cognizance of this offence. If, however, there is any legal irregularity, it would be covered by s. 529 which provides that if any Magistrate not empowered to take cognizance of an offence under s. 190, cl. (*a*) or cl. (*b*) erroneously in good faith does that thing, his proceeding shall not be set aside merely on the ground of his not being so empowered.

Now, in the present case, no imputation upon the good faith of the City Magistrate has been attempted. There seems, therefore no substance in the first objection taken by the appellant. The second objection is in these words: That the appellant has been prejudiced by the fact that he has been prosecuted and judged by the same learned Judge.

Now, this objection rests upon s. 556, Criminal Procedure Code, which lays down that no Judge shall, except with the permission of the Court to which an appeal lies from his Court, try any case to or in which he is a party or personally interested. Now, the Public Prosecutor has justified proceedings taken before the City Magistrate on the allegation that the Judge was the complainant. But a complainant is undoubtedly a party to the proceedings which ensue upon his complaint. The illustration to s. 556 shows that from a purely official connection with the initiation of criminal proceedings, a disqualifying interest may result. It was held in *Sergeant* v. *Dale* (1):

"The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object at all events is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

This rule, as it appears from the section itself, is not to be so interpreted as to make

(1) (1877) 2 Q B D 558; 46 L J Q B 781; 37 L T 153.

insuperable the disqualification of any Judge who may happen to come within the letter of the law. It is provided that the permission of the Court to which an appeal lies would exempt a Judge from the disqualification. In a case such as that with which we are now dealing, we imagine that the Sessions Judge expected the Magistrate to deal with the case himself. It was a charge under s. 411, Penal Code, which was within the competence of the Magistrate, and as the sentence, which was ultimately inflicted did not exceed six months, it would seem probable that the Sessions Judge did not expect the case to be committed to his Court. But if at the initial stage when he first took up the case himself he had requested the permission of this Court to try the case, the disqualification might perhaps have been removed. As it is, we think that the principle concerned is too important to allow us to suffer this conviction to stand. Upon the personal probity of the Judge concerned, no reflection was at any time suggested, nor is any implied by this decision.

On the merits we do not think the appellant has made out any case. It is not upon the merits that we propose to deal with this conviction. There is a technical defect and that is a defect more serious than we think ourselves entitled to overlook. In most cases, when we proceed upon these lines, we should think it proper to order a re-trial. But in the present case we find that out of a sentence of six months, the convict has already served nearly the half and he has presumably earned also a certain amount of remission. Taking these facts into consideration, we do not think that it is necessary that the public funds should be put to the expense of a second trial of this same offence. We, therefore, without making any order as to re-trial quash this conviction and sentence and direct that the prisoner's bail bond be discharged.

O'Sullivan, A. J. C.—I entirely concur in all my learned brother has said and in the order he proposes to make. There is of course absolutely no question as to there being any distrust or suspicion about the impartiality or honesty of the learned Judge, but there must be no relaxation at any time of the very salutary principle *nemo debet esse judex in propria cause.*

D. *Conviction quashed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT

Criminal Revision No. 380 of 1933
September 26, 1934
SUBEDAR, A. J. C.
Sardar DIWAN SINGH MAFTOON —ACCUSED —APPLICANT
versus
EMPEROR AND ANOTHER—COMPLAINANTS —NON-APPLICANTS

Indian States (Protection against Disaffection) Act of 1922, ss. 3 (1), 5—Sanction to prosecute under s. 3 (1)—Sanction regarding prosecution of one offence only—Prosecution for all offences under s. 3 (1)—Proceedings, legality of—Criminal Procedure Code (Act V of 1898), ss. 233, 234, 235, 439—Joinder of charges—Offences under s. 3 (1), Indian States (Protection against Disaffection) Act, whether can be consolidated—Penal Code (Act XLV of 1860), s. 500—Press and Registration of Books Act (XXV of 1867), s. 7—"Publication", meaning of, as used in Penal Code, s. 500 and s. 3 (1), Indian States (Protection against Disaffection) Act—Declaration under s. 7, Press and Registration of Books Act—Presumption—'Same transaction' in s. 235, Criminal Procedure Code—Composing of article, editing and printing at one place, and publishing at different places at different times, if one set of acts—Sanction required under s. 5, States Protection Act accompanying the libellous matter—Proof that the matter in question was the same regarding which the prosecution was authorised—Interpretation of Statutes—Court's duty to examine language of Statute without any reference to English Law—Criminal trial—Power of High Court to interfere with findings of fact in revision—Restrictions in s. 439, Criminal Procedure Code—First trial breaking on account of illegality in conducting it—Re-trial, if can be ordered—Evidence Act (1 of 1872), ss. 114, ill. (e), 58—Documents filed in Court, whether can be presumed to be documents referred to in order of sanction by Governor-General, in absence of prima facie indication that they are annexures to order of sanction—Identity must be proved.

Where the sanction necessary for the prosecution for an offence under s. 3 (1), Indian States (Protection against Disaffection) authorised the prosecution of the accused only "in respect of the publication of an article (of which a copy and translation are hereto annexed)", and the complainant failed to establish that the article referred to in the sanction was the one on which the complaint was lodged :

Held, that the complainant failed to prove that he was authorised by the Governor-General to lodge the complaint in respect of the article. [p. 457, col. 1.]

Section 3 (1), Indian States (Protection against Disaffection) Act, creates four distinct offences in respect of a written matter which brings or is intended to bring into hatred or contempt, or excites or is intended to excite disaffection towards any Prince or Chief or his administration. It hits anyone or more or these four persons, *viz.*, the author, the editor, the printer and the publisher of the libellous matter. Where the sanction of the Governor-General authorises the complainant "to make complaint of an offence under s. 3 of the Act", and very clearly restricts the prosecution to one of the four offences under the section by specifying that it is to be "in respect of the publication" of an article, there is no room for the contention that the prosecution was sanctioned in regard to all the four offences covered by s. 3 (1) of the Act. It follows

then that the trial of the accused in respect of the three distinct offences of his being the editor, the printer and the author of the offending article is clearly illegal for want of sanction and vitiates the whole proceedings. *Queen-Empress* v. *Bal Gangadhar Tilak* (2) and *Barendra Kumar Ghose* v. *Emperor* (3), relied on. [p. 457, col. 2, p. 458, col. 1]

Since being the author, the editor the printer and the publisher are distinct offences under s. 3 (1) of the Indian States (Protection against Disaffection) Act, 1922, they cannot be consolidated for the purpose of holding a joint trial without violation of the mandatory provisions of ss. 233 and 234 of the Criminal Procedure Code. The several acts of the accused in composing the offending article, editing and printing it at a certain place and publishing the same at six different places on different occasions cannot be regarded as "one series of acts so connected together as to form the same transaction" within the meaning of s. 235 of the Criminal Procedure Code. [p. 458, col. 2.]

The word "publisher" appearing in s. 3 (1) of the Indian States (Protection against Disaffection) Act cannot possibly be construed in the narrow sense of the local publisher in which it is apparently used in Act XXV of 1867, but must be given its ordinary meaning. "Publishing" in s. 3 (1) cannot, therefore, be restricted to publishing libellous matters merely turned out of a printing press or be confined to "publishing" by an editor or printer thereof. The section fastens criminal responsibility upon any one or more of the four persons, *viz.*, the editor, the printer, the publisher and the author of any handwritten or printed libellous matter against a Prince. The word "publishing" must then be understood in its ordinary significance of "making known, announcing publicly, or bringing to notice". *Queen-Empress* v. *Bal Gangadhar Tilak* (2), explained. [p. 459, cols. 1 & 2.]

At the trial of a person for publishing a libel contained in a newspaper, the presumption permitted to be raised by s. 7 of Act XXV of 1867, as to his identity with the publisher of the offending matter, on production of the copy of his declaration given under s. 5 (2) *ibid*, is restricted to the *prima facie* proof that he was the publisher only at the place specified in the declaration and does not extend to the proof of the fact that he was also the publisher of the libel at places not specified in the declaration. [p. 460, col. 2.]

In interpreting the statutory provisions of an Indian Act the Courts should examine the language of the Indian Statute itself uninfluenced by any consideration derived from the English Law on which it might have been based. [p. 461, col. 1.]

[Case-law referred to.]

Although the powers of the High Court to interfere with findings of fact in revision are not in any way restricted by s. 439 of the Criminal Procedure Code, in practice they are only exercised in exceptional cases and under exceptional circumstances They are, however, invariably exercised in cases where it is established that the findings of fact reached by the two Courts below are based either on no evidence or on inadmissible evidence or on legally inadequate evidence or are perverse. [p. 464, col. 2.]

When the first trial breaks down on account of any illegality in conducting it, the normal course is a re-trial. *Subrahmania Ayyar* v *Emperor* (4), explained, *Manavala Chetty* v. *Emperor* (17), *Chetto Kalwar* v. *Emperor* (18) and *Gunno* v. *Emperor* (19), relied on. [p. 468, col. 1.]

The Court should not presume that the documents referred to in the order of sanction by the Governor-General were documents in question and that they were only forwarded by the Governor-General and reached the complainant through the usual channel, unless there be any indication on the face of the questioned documents to show that they were the annexures to the order of sanction. In the absence of any such indication it would be a violent presumption to raise that these were the documents mentioned in the order sanctioning prosecution. [p. 456, cols. 1 & 2.]

Cr. R. against an order of the Sessions Judge, Hoshangabad, dated October 30, 1933.

Messrs. *M. Y. Shareef*, *T. J. Kedar*, *B. B. Tawakhley* and *G. V. Moharrir*, for the Applicant.

Sir *Tej Bahadur Sapru*, Sir *C. P. Ramaswami Aiyar* and Sir *Abdur Rahman*, and Messrs. *Hidayathulla*, *J. Sen* and *S. C. Dube*, for the Non-Applicant.

Mr. *V. Bose*, for the Crown.

Order.—The facts necessary for the disposal of the present application for revision are shortly these. The applicant, *Sardar* Diwan Singh Maftoon, was, up to October 20, 1929, the printer and publisher of a weekly newspaper called the *Riyasat* printed in Urdu at Delhi under a declaration given by him to that effect on December 5, 1927, before the District Magistrate, Delhi, under s. 5 (2) of Act XXV of 1867. In this examination as an accused he also admitted that he was the printer, publisher and editor of the paper.

2. In the issue of the aforesaid paper dated August 17, 1929, there appeared two articles (Ex. P-8) of which the translations [Exs. P-8 (*c*) and P-8 (*a*)] are as under:—

[Exhibit P-8(*c*)] "*Pandit Motilal Nehru and Bhopal.*"

"It had been commented upon before as to how the Princes try to suppress the public voice now-a-days in order to continue their oppressions, and the leaders are entertained for this purpose. Now our special correspondent communicates that in inviting *Pandit* Motilal Nehru to Bhopal, he was asked on behalf of the Nawab Sahib to come to give legal advice. Simultaneously with the invitation, Dr. Ansari also pressed the Pandit Sahib to pay this visit. So the Pandit Sahib went, and by way of fees for legal advice, he was paid Rs. 20,000 and a desire was expressed that if ever he feels tired of his tours in British India, he may come to Bhopal for pleasure (*Tafrih*).

The Nawab Sahib of Bhopal would know the complicated problem to solve which this fee for legal advice was paid, and the fact as to which 'privy purse' provided the money would be best known to the Publicity Officer, the Coatman of Bhopal. But we also would have done justice to this generosity and favouring of leaders, if the hidden motive had not been to fool (*ullu banana*) them, and the object of this munificence was not to suppress the voice of helpless subjects. Along with British India, the people in Indian States are also waking up, and if the present rate of progress is maintained, the Indian Princes will have to abandon their shameful despotism in another fifteen or twenty years. The Indian Princes are comparing this awakening to a dangerous flood,

and an effort is being made to win over the leaders for purposes of muzzling the agitation. For this object the Indian Princes are entertaining the leaders. It is our duty to understand this new move in time, and whichever leader accepts the hospitality of the State Guest-house to give him a public warning. Surely the leaders' duty is better performed by frequenting the huts of the poor than by sitting at Royal Tables."

[Exhibit P-8 (*a*)] "*Mahatma Ghandhi will go to Bhopal.*"

"Elsewhere in the present issue of our paper are given the details of *Pandit* Motilal's visit to Bhopal for some legal advice. Our correspondent has now informed us that after (the visit of the) Pandit Sahib, the Nawab of Bhopal is trying by all possible means, to call Mahatma Gandhi there and that Dr. Ansari has also lent his support to the invitation. Mahatma will not accept any "fees for legal advice". It has, therefore, been arranged to have a purse presented to him on behalf of the public of Bhopal on his arrival and in that public purse the Nawab himself will generously participate. Those who know the inner condition of Bhopal and are aware of the qualifications necessary for success in getting employment there as also of other luxuries of the *Shikar* House, can realise what personal regard the Nawab of Bhopal can have for the Mahatmaji and what motives are behind this 'Mahatma worship.' In point of outspokenness, integrity and truthfulness as also with regard to personal character Mahatma Gandhi is an outstanding personality among all the Indian leaders and we are not prepared to believe it for a moment that like *Pandit* Motilal Nehru and Malaviya he is capable of accepting fees for legal advice; we consider it our duty to express our view that to give encouragement to the Ruling Chiefs while their present high-handed policy continues, it is tantamount to using knife on the necks of their subjects and it is expected of Mahatmaji at least, that when he visits Bhopal, he should, instead of residing at the Royal Palaces go and live in the huts of the poor and indigent people and form an estimate of the extent of their calamities, and if possible, to make the Nawab of Bhopal alive to the (vast) difference between the condition of the people in British India and that of the subjects of the Indian States."

3. About a week after the publication of these articles *Pandit* Motilal Nehru got a notice [Ex. P-43 (*a*)] served upon the applicant, through Dr. Katju (P. W. No. 21), drawing his attention to the defamatory matter contained in the said publication and demanding an unconditional apology, both to himself and H. H. the Nawab of Bhopal, on the lines of a draft [Ex. P-43 (*b*)] which accompanied the notice. In response to the above notice, in the issue of the *Riyasat*, dated August 31, 1929, the applicant published a note, the translation of which [Ex. P-14 (*a*)] runs as under :—

"Doctor K. N. Katju, M. A., LL. D., writes to inform us that the allegation made in the *Riyasat* to the effect that *Pandit* Motilal Nehru was paid Rs. 20,000 as fee is incorrect and there is no truth in the news as far as Panditji is concerned. We are sorry that such allegation against Panditji got publication in the '*Riyasat*' and it is our duty as an honest journalist to contradict it."

4. As this short note did not satisfy *Pandit* Motilal Nehru a fresh notice [Ex. P-43 (*d*)] was served on his behalf upon the applicant again demanding an unconditional apology as per draft which had accompanied the first notice. Thereupon the applicant tendered an unconditional apology to *Pandit* Motilal Nehru and published the same in the issue of the *Riyasat* dated October 5, 1929, Ex. P-15), with the exception of the scored out portion of the draft apology [Ex. P-43 (*d*)] of which the translation is as under :—

"We deeply regret that the articles published by us on page 6 of the issue No. 53 of the '*Riyasat*' dated August 17, 1929, under the caption 'Mahatma Gandhi will visit Bhopal' and '*Pandit* Motilal Nehru and Bhopal' contain statements and insinuations relating to *Pandit* Motilal Nehru which are totally baseless and are defamatory of him. In these articles we had in reference to the communication of special correspondent, written that during his recent visit to Bhopal, the Pandit Sahib was paid Rs. 20,000 cash as fees for legal consultation and we had tauntingly put a question as to what was the knotty question for the solution of which the fees were meant and we had said that the Nawab of Bhopal perhaps knew it and that the Publicity Officer of Bhopal who should be called the Coatman of Bhopal was perhaps aware from what private purse the amount came; and that we should ourselves have admired this generosity and the aggrandizement of the leaders if the motive behind it was not to befool the leaders and the object of the generosity was not to stifle the voice of the helpless subjects. In the same connection, after saying that an awakening was taking place among the subjects of the States we had alleged that the Rulers of the States regarded this life of the people as a perilous flood; that attempts were, therefore, being made by them to stop the peoples' voice by winning over the public Leaders and that for this object, the Ruling Chiefs were extending invitations to them; that it was our duty to be forewarned of this new subterfuge and to publicly warn such a leader as accepts the invitations of the States, since the leaders can do their duty by visiting the huts of the poor people rather than by sitting at the Royal Tables.

And in the second paragraph a note relating to the news, that the Nawab Sahib of Bhopal was trying to call Mahatma Gandhi to Bhopal we wrote that the Nawab Sahib realised that like the Panditji the Mahatmaji would not accept the legal consultation fees and we had expressed our opinion, that in point of outspokenness, integrity, and truthfulness as also with regard to personal character, Mahatma Gandhi was an outstanding personality among all the Indian leaders and that we were not prepared to believe it for a moment that the Mahatmaji was capable of accepting legal consultation fees like *Pandit* Motilal and *Pandit* Malviya, yet, as in duty bound, we must say that to give encouragement to the Ruling Chiefs in the existence of their present high-handedness was tantamount to using the knife on the necks of their subjects and that we could expect it at least of Mahatmaji that when he visits Bhopal he should not reside in the Royal Palaces but should live in the huts of the poor and indigent people

and thus form an estimate of their calamities.

Pandit Motilal Nehru has informed us that he did not go to Bhopal to give any legal advice and that he was not paid a single pie by the Nawab Sahib of Bhopal on any pretext whatever and that to say that he was paid anything was totally baseless and false. We sincerely accept this statement of the Pandit Sahib as true and correct and after withdrawing all our previous statements and the insinuations and implications contained therein, we beg to tender our humble and unconditional apology to him and wish to convey our regret that such defamatory statements about him came to be published in the *Riyasat*."

5. In his letter (Ex. P-44) dated September 10, 1929, after informing H. H. the Nawab of Bhopal what action he had taken for himself against the applicant, Panditji wrote as follows :—

"Another point is that the man has evidently laid himself open to attack on at least two more sides, Ansari and yourself. There is no reason why he should be spared. In draft apology I have served on him I have inserted a sentence or two in the nature of an apology to you, but I cannot in law insist on these sentences as I cannot constitute myself a sort of general prosecutor for all persons who have been defamed. I should, therefore, like you to consider some action on your own part preferably under the Princes Protection Act."

6. In his second letter, dated October 1, 1929, (Ex. P-45) Panditji wrote to H. H. the Nawab, in connection with this matter as under.—

"On receipt of my second notice Diwan Singh approached me in Simla and Lucknow through a number of friends to tone down the terms of the draft apology so as to make it less humiliating to him. This I flatly refused to do and insisted on the whole thing going in without the alteration of a comma or a full-stop. I have, however, to yield on two points on which my legal position was not very strong. The first related to the omission of the last sentence which embodied an apology to you. It is obvious that I can only go to Court to defend my own character and cannot in law insist on an apology to others even though they may have been similarly maligned in the course of the same libel I could in no sense represent you in any legal proceedings and my insistence on retaining the last sentence would have considerably weakened the case. The Court would have told me to mind my own business and leave others to look after themselves. I justified the retention of that sentence in the interest of Diwan Singh himself but I was told that he did not mind any action which you might take against him. I was obliged to give in.

* * * * *

The deletion of the sentence referring to you makes it all the more necessary for you to take action under the Princes Protection Act and I hope you will put up with the inconvenience involved in the preliminaries."

7. It was probably on these suggestions that H. H. the Nawab of Bhopal moved the Governor-General in Council for an authority, as required by s. 5 of the Indian States (Protection against Disaffection) Act, 1922, to prosecute the applicant. As the correspondence which passed between the Ruler of Bhopal and the Governor-General, though demanded by the applicant, was not produced by the complainant, it is difficult to say in respect of which of the two aforesaid objectionable articles and with regard to what particular offences under the said Act the sanction was asked for. The sanction, however, was granted, in due course, and is contained in the order (Ex. P-42) which runs as under:—

"NEW DELHI,
November 6, 1929.

ORDER.

"Under the provisions of s. 5 of the Indian States (Protection against Disaffection) Act, 1922, *Khwaja* Mohammad Akram Khan, Chief of Bhopal State Police, is hereby authorised by the Governor-General-in-Council to make a complaint of an offence under s. 3 of the said Act against Diwan Singh Maftoon, Editor of the '*Riyasat*' of Delhi, in respect of the publication in the *Riyasat* in its issue dated August 17, 1929, of an article (of which a copy and translation are hereto annexed) on the ground that it brings or is intended to bring H. H. the Nawab of Bhopal into hatred or contempt or excites or is intended to excite disaffection towards him."

C. WATSON,
Political Secretary to the
Government of India."

8. On the strength of the above authority *Khwaja* Mohammad Akram Khan, on December 4, 1929, lodged a complaint, in the Court of the "Railway Magistrate" Hoshangabad (Mr. Nigam), against the applicant under s. 3 of the Indian States (Protection against Disaffection) Act, 1922, in respect of the first of the two articles published in the *Riyasat* issue of August 17, 1929, within the jurisdiction of that Court. As this allegation was rather vague, the complainant, on February 9, 1930, presented to Mr. Royzada, who had in the meantime succeeded Mr. Nigam, as the Railway Magistrate, what he styled as an "amplification application" para. 3 of which runs as under :—

"That to avoid any misunderstanding it seems necessary to your humble petitioner to amplify the allegation made by him in the complaint and to clearly state that this Court has jurisdiction to try the case since

(*a*) The offending article in the said issue of the *Riyasat* was published at Itarsi Railway Station, at Hoshangabad, and other places within the jurisdiction of this Court.

(*b*) The said article was also published at the Bhopal Railway Station."

Later on, in his statement as the first witness for the prosecution, the complainant, on March 2, 1932, made the following further clear statement showing how

the offence complained of was committed within the jurisdiction of the trying Magistrate.—

"I have been authorised to file this complaint with respect to one offence. My complaint was with respect to publication of the offending article within the jurisdiction of this Court and I treat the publication at Itarsi and Hoshangabad Railway Stations as one offence."

As Mr. Royzada proceeded on leave before finishing the trial, Mr. Syed Ahmad Husain commenced the trial *de novo* as a First Class Magistrate, on October 5, 1931, and concluded it on June 20, 1933.

9. For the prosecution 21 witnesses were examined by the trying Magistrate himself and 2 were examined on commission. The complainant also filed a large number of documents relevant and irrelevant. Most of the important documents as I shall show later on, remained unproved. On the point of the actual publication of the offending article by the applicant within the jurisdiction of the trying Magistrate the prosecution tendered the following evidence:—

(*i*) J. M. Shukla (P. W. No. 2), the Agent of the Wheeler's Bookstall at Itarsi Railway Station, stated that he used to sell the *Riyasat* weekly from his stall and that he sold some copies of the paper which he received on August 18, 1929, presumably of the 17th idem. He did not state from whom he received the copies of the *Riyasat*.

(*ii*) Mukhtar Husain (P. W. No. 4) a resident of Harda stated that on August 19, 1929, he had purchased a copy of the issue of the *Riyasat* dated August 17, 1929, at the Itarsi Railway Bookstall.

(*iii*) *Kunwar* Liaqat Shah (P. W. No. 5) stated that a copy of the *Riyasat* containing the offending article was handed over to him at the Hoshangabad Railway Station by his brother who came from Bhopal and that between Hoshangabad and Itarsi Railway Stations he and Zillul Qadar (P. W. No. 7) read the offending article.

(*iv*) Zillul Qadar (P. W. No. 7) corroborated this witness.

(*v*) Abdul Majid (P. W. No. 9), who is a clerk in the Railway Institute at Itarsi which is outside their Railway Station, stated that the *Riyasat* was one of the papers received in the library from Delhi during the year 1929 and that an issue containing the offending article was received. He also stated that he had written a postcard to the manager of this paper at Delhi complaining of the non-receipt of an issue of the paper prior to October 12, 1929, and received a reply which is Ex. P-74. The witness admitted that he did not know the Urdu language and it is probable that on this account he did not state that he had read the offending article. He did not also state that to his knowledge any person read the offending article in the Railway Institute or elsewhere.

(*vi*) Wali Muhammad (P. W. No. 12), a resident of Harda, stated that he was the Joint Secretary of the Muslim Reading Room at Harda, that the *Riyasat* newspaper used to be received in the said Reading Room in the years 1929 and 1930 and that on a requisition from Abdul Ghafur of the Bhopal State Police Service he had handed to him a copy of the *Riyasat* dated August 17, 1929. The witness did not state that he himself read the offending article or that it was read by anybody to his knowledge or through what agency it reached the Reading Room.

(*vii*) The last witness on the point is Abde Ali (P. W. No. 19). He stated that he subscribed to the *Riyasat* paper from the year 1927 to the year 1930, that he used "to get the paper by post from Delhi" and that he had read "the offending article Ex. P-8". In his cross-examination the witness stated that his subscription used to be realised by V. P. P. but that he had not then in his possession anything to prove that he did receive the paper by post.

It is probable that on the strength of the aforesaid evidence six definite places are mentioned in the charge in respect of the offence or "publishing" the offending article. The charge framed against the applicant runs as under:—

"I, S. Ahmad Husain, Magistrate, 1st Class, hereby charge you, *Sardar* Diwan Singh Maftoon as follows:—

That you on or about August 17, 1929, edited and printed in the issue of that date of the *Riyasat* newspaper or were the author of the article headed '*Pandit* Motilal Nehru and Bhopal' (Ex. P-8) contained in the issue of the paper above and published the same at Itarsi and Hoshangabad Railway Stations between Hoshangabad and Itarsi Railway Stations at Itarsi, Harda and Bankheri, which brings or is intended to bring H. H. the Nawab of Bhopal into hatred or contempt or excites or is intended to excite disaffection towards him and thereby committed an offence punishable under s. 3 of the Indian States (Protection against Disaffection) Act, 1922, and within my cognizance.

And hereby direct that you be tried on the said charge."

It is clear that the applicant was charged with and put upon his trial for nine distinct offences.

11. In his examination as an accused the applicant denied that he was the author or publisher of the offending article or that he supplied the copies of the paper to the Wheeler's Bookstall at Itarsi and

the Indian Railway Institute at Itarsi, and to the searching question as to who supplied these papers he significantly replied that the complainant should be questioned on the point. He was not questioned whether he used to supply the *Riyasat* paper to Abde Ali (P. W. No. 19) or to the Muslim Reading Room at Harda. He admitted that he had published the "Contradiction" Ex. P-14 and the "apology" Ex. P-15. Although considerable matter bearing on the question of the alleged guilt of the applicant was elicited from the several witnesses for the prosecution, no attempt was made by the trying Magistrate to question the applicant on these matters under s. 342 (1) of the Criminal Procedure Code. This is only one of the several grave irregularities which were unfortunately committed by the trying Magistrate in the trial of this case.

12. In a very elaborate, though diffused, judgment the trying Magistrate found the applicant guilty of the offence under s. 3 of the Indian States (Protection against Disaffection) Act and sentenced him to 3 years' rigorous imprisonment (as a Magistrate exercising powers under s. 30 of the Criminal Procedure Code, although the trial was held by him as an ordinary Magistrate of the First Class) without definitely giving any finding in respect of which of the several offences specified in the charge the applicant was guilty. On appeal by the applicant the learned Sessions Judge of Hoshangabad definitely found that the applicant was not only the editor, printer and publisher of the offending article but was also the author of it and was also the proprietor of the paper. The learned Judge overruled almost all the contentions of the applicant as to the illegality of the trial and the merits of his conviction and found him guilty of all the offences stated in the charge. He, therefore, maintained the conviction "under s. 3 of the Act" but reduced the sentence from 3 to one year's rigorous imprisonment. The applicant has now moved this Court in revision challenging the legality and the propriety of his conviction on various grounds.

13. The first ground of the application for revision, that s. 3 of the Indian States (Protection against Disaffection) Act was *ultra vires* of the enacting authority, was expressly abandoned and the other ground relating to the plea of justification was wisely not pressed.

14. The first point pressed by Mr. Kedar for the applicant was that the trying Magistrate had no jurisdiction to proceed to the trial of the present case as it was not proved that the Governor-General-in-Council had authorised the prosecution of the applicant in respect of the publication of the offending article, *viz.*, "*Pandit* Motilal Nehru and Bhopal" of which Exs. P-8 (*b*) and P-8 (*c*) are alleged to be a copy and translation. Although in his earlier statement, as the first witness for the prosecution the complainant stated that both these documents were received along with Ex. P-42 from the Government of India he admitted at a later stage that he could not say whether these were originally forwarded to and received from the Government of India by the State. The witness subsequently made the following definite statement in connection with the documents in question:—

"As far as I remember, the cutting Ex. P-8 (*b*) was received by me along with the G. G.'s authority to initiate this case * * * *

I am unable to say who actually took this cutting Ex. P-8 (*b*). I received it with a forwarding endorsement giving a copy of the Political Secretary's letter from the office of the Member, Law and Justice, Bhopal. * * * * *

I am not able to say who made the translation Ex. P-8 (*c*). Exhibit P-8 (*a*) was made by me. The former came to me along with the Governor-General's authority."

15. It is on record that after the above statement was made, the applicant's Counsel desired

"the witness to produce in Court the copy of Political Secretary, Bhopal's letter endorsed to the witness by the Secretary, Law and Justice and received by the witness along with the Governor-General's authority."

As has already been noticed before, although the applicant's Counsel also pressed for the production of the correspondence which passed between the Bhopal authorities and the Government of India concerning the sanction for the prosecution of the applicant, the prosecuting Counsel objected to the production of this correspondence with the result that it was not produced in Court. If this correspondence was produced, it might possibly have proved that the sanction was given with respect to the offending article. The former documents were, however, produced by the complainant at the next hearing of the case and are marked as Exs. D-41 and D-41 (*a*).

16. Exhibit D-41 is merely an uncertified copy of the letter sent by the Secretary in the Political Department of the Government of Bhopal to the Secretary of the Department of Law and Justice, Bhopal. Exhibit D-41 (*a*) is, however, the original letter forwarding Ex. D-41 to "I. G., Police

for favour of necessary action". There is a note appended to this document stating that the "Enclosures" have been handed over to K. M. Akram Sahib, personally". The enclosures, as appear from Ex. D-41, were "1. Order I. Cutting from *Riyasat* dated August 17, 1929, page 9. 2 pages of English Translation of a leaderette translation in the Weekly *Riyasat*, Delhi".

17. While the authenticity of the order (Ex. P-42) was not disputed for the applicant, it was vehemently contended that, on the materials on the record, it was not proved that Exs. P-8 (*b*) and P-8 (*c*) were the two documents referred to in the order and alleged to have been forwarded by the Governor-General with it. In my opinion this contention is well founded. The complainant has no personal knowledge that as a matter of fact these two documents were received by the Political Secretary to the Government of Bhopal from the Governor-General along with Ex. P-42. The two documents do not bear any seal or endorsement of the Government of India showing their identity with the two documents referred to in Ex. P-42. It was admitted, in the course of the arguments before me, that all correspondence between the State and the Government of India is carried on through the Political Agent, Bhopal, and the Agent to the Governor-General in Central India.

18. There is no proof adduced in the present case to show that the two documents in question were received with Ex. P-42 by the Agent to the Governor-General from the Government of India, that he forwarded them to the Political Agent, Bhopal, and that the latter passed them on to the Political Secretary to the Government of Bhopal. That being the position, even if Ex. D-41 be admitted in evidence, under the provisions of s. 163 of the Indian Evidence Act, it could not be held that the identity of these two documents with those referred to in Ex. P-42 is established under the law. I, however, doubt the applicability of s. 163 of the Indian Evidence Act to the present case. When the applicant demanded a copy of the Political Secretary's letter to the Legal Secretary, Bhopal, he must be deemed to have asked for such a copy as would legally be admissible in evidence according to s. 78 (6) of the Indian Evidence Act and not the one which, on the face of it, was inadmissible in law.

19. For the complainant it was contended by Sir Tej Bahadur Sapru that under s. 114, illustration (*e*), of the Indian Evidence Act, the Court should presume that the two documents referred to in Ex. P-42 were Exs. P-8 (*b*) and P-8 (*c*) and were duly forwarded by the Governor-General and reached the complainant through the usual channel. Reliance was placed in this connection on *Emperor* v. *Diwan Chand* (1) where, on the presumption that all official acts are done in a regular manner, it was held that the sanction in question was not invalid for the reason that the name of the accused was shown on the back of the paper instead of in the body of the sanction because there was not sufficient space left on the front side. The contention of the learned Counsel would certainly have been well founded if there was any indication on the face of the questioned documents to show that they were the annexures to Ex. P-42. In the absence of such an indication it would be a violent presumption to raise that these were the two documents which were forwarded with Ex. P-42. The presumption could only be made that two documents mentioned in Ex. P-42 had accompanied the order: it had nevertheless to be proved that these two documents were Exs. P-8 (*b*) and P-8 (*c*).

20. It was also urged by the learned Advocate for the complainant that since, in the issue of the "*Riyasat*", dated December 14, 1929, [Ex. P-17, translation Ex. P-17 (*a*)] the applicant had published a note under the caption "On what offending article has the case been based" and the offending article was reproduced there, s. 58 of the Indian Evidence Act exempted the prosecution from proving that the sanction was given with respect to the publication of the offending article. Section 58 in question runs as under:—

> "No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings.
>
> Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

21. In the first place Ex. P-17 was not relied on or proved by the prosecution as an agreed admission by the applicant of the fact of the identity of Exs. P-8 (*b*) and P-8 (*c*) with the documents referred to in Ex. P-42. Secondly the article in question

(1) 124 Ind. Cas. 347; A I R 1930 Lah. 81; 31 Cr. L J 692; Ind. Rul. (1930) Lah. 539; (1930) Cr. Cas. 97.

is not in the handwriting of the applicant. Thirdly, there is no admission in the article that the questioned documents formed part of Ex. P-42. Fourthly, no question was put to the applicant by the trying Magistrate with regard to the identity of the questioned documents. For all these reasons I overrule the contention that s. 58 of the Indian Evidence Act relieved the prosecution of the duty or proving the identity of the questioned documents with those referred to in Ex. P-42 in order to invest the trying Magistrate with jurisdiction to hold the trial.

22. It is now well established that where sanction is required for starting a prosecution, its terms must be construed liberally. It was, therefore, argued for the complainant that as the order (Ex- P-42) conveying the sanction in the present case indicates that the prosecution is to be for an offence under s. 3 (1) of the Indian States (Protection against Disaffection) Act of 1922 in respect of a libellous article published in the issue of the *Riyasat*, dated August 17, 1929, it was not necessary for the complainant to prove the identity of Exs. P-8 (*b*) and P-8 (*c*) with the documents referred to in Ex. P-42. For obvious reasons this contention is untenable.

23. It is in evidence that in the issue of the *Riyasat* dated August 17, 1929, two obviously defamatory articles, the translations of which are set out in para. 2 above, were printed simultaneously. It was apparently for this reason that the apology drafted by *Pandit* Motilal Nehru and accepted and published by the applicant, as set out in para. 4 above, also referred to and attempted to explain away the sting of the second article entitled "Mahatma Gandhi will visit Bhopal". The terms of the order (Ex. P-42) are very explicit. It authorises the prosecution of the applicant only in respect of the publication of an article (of which a copy and translation are hereto annexed). It, therefore, follows that the complainant had to establish that the one article referred to in the sanction was the one of which Ex. P-8 (*b*) was a copy and Ex. P-8 (*c*) the translation as alleged by him. My finding then is that the complainant has failed to prove that he was authorised by the Governor-General to lodge the present complaint in respect of the article specified in the charge.

24. It is convenient at this stage to dispose of another contention advanced by the learned Counsel for the complainant in connection with the question of sanction, *viz.*, that the order (Ex. P-42) authorised the prosecution of the applicant for all the offences covered by s. 3 (1) of the Indian States (Protection against Disaffection) Act, 1922. The section in question runs as under:—

"Whoever edits, prints or publishes, or is the author of, any book, newspaper or other document which brings or is intended to bring into hatred or contempt, or excites or is intended to excite disaffection towards any Prince or Chief of a State in India or the Government or Administration established in any such State, shall be punishable with imprisonment which may extend to five years, or with fine, or with both."

25. As I read the section it is clear to me that it creates four distinct offences in respect of a written matter which brings or is intended to bring into hatred or contempt, or excites or is intended to excite disaffection towards any Prince or Chief or his administration. It hits any one or more of these four persons, *viz.*, the author, the editor, the printer and the publisher of the libellous matter. As has already been stated the terms of the order (Ex. P-42) are absolutely unambiguous. It authorises the complainant "to make a complaint of an offence under s. 3 of the Act", and very clearly restricts the prosecution to one of the four offences under the section by specifying that it is to be "*in respect of the publication*" *of an article*. The words underlined (italicised) by me, therefore, leave not the slightest room for the contention that the prosecution was sanctioned in regard to all the four offences covered by s. 3 (1) of the Act. This conclusion is further strengthened by the fact that the complainant himself put such a construction upon the scope and the terms of the order when he made the unequivocal statements quoted in para. 7 above. *Queen-Empress* v. *Bal Gangadhar Tilak* (2), is a clear authority for the proposition that it is open to the authority sanctioning the prosecution in respect of an offence for which sanction is required under the law to make the order comprehensive or restrictive. On an objection that the sanction in that case was bad because it was not specific with regard to the objectionable articles and did not fulfil the requirements of s. 196 of the Criminal Procedure Code, Strachey, J., made the following weighty observations:—

"As to the first point, I am of opinion that the word 'articles' in the order covers and was intended to cover not only articles in the strict sense, but,

(2) 22 B 112 at p. 124.

generally, matter published in the paper which was considered objectionable. As to the second point, if any particular articles or any dates had been specified, the complaint would no doubt have been limited to them, but the effect of no such specification being made is to give him the widest latitude in selecting the matter to be complained of. It is only necessary to see whether the complaint relates to matters falling within the words 'certain articles appearing in the said newspaper,' and it is obvious that it does, and the order is, therefore, complied with. It may be desirable, and I think it is, that orders under s 156 should be expressed with greater particularity, but I cannot read into the section restrictions which are not there"

It follows then that the trial of the applicant in respect of the three distinct offences of his being the editor, the printer and the author of the offending article was clearly illegal for want of sanction and vitiated the whole proceedings: *Barendra Kumar Ghose* v. *Emperor* (3).

26. I now proceed to deal with the next question raised by Mr. Kedar that the trial had further been vitiated on account of the violation of the mandatory provisions of ss. 233 and 234 of the Criminal Procedure Code. Section 233 lays down that for every distinct offence there shall be a separate charge and a separate trial except in cases covered by ss. 234, 235, 236 and 239. Section 234 permits the consolidation at one trial of three offences of the same kind committed within the space of one year. Section 235 permits the joint trial of more offences than one provided they are committed "in one series of acts so connected together as to form the same transaction". I am not discussing the last two sections referred to in s. 233 as they have no bearing upon the question under consideration.

27. Even on the assumption that there was the requisite authority for the prosecution of the applicant in respect of the offences of his being the author, the editor, the printer and the publisher of the offending article, it is clear that since these are distinct offences under s. 3 (1) of the Indian States (Protection against Disaffection) Act, 1922, they could not obviously be consolidated for the purpose of holding the joint trial without violation of the mandatory provisions of ss. 233 and 234 of the Criminal Procedure Code. Reliance was therefore placed, for the complainant, upon s. 235 *ibid* by urging that as the several acts of writing the offending article, editing printing and publishing it were so connected together as to form the same transaction, the joint trial of the applicant for every such offence was legal.

28. It is indeed very difficult to accept this contention in the absence of the citation of any precedent in its support. None of the illustrations appended to s. 235 lends any support, on the contrary, each one of them seems to repel the contention. It is, therefore, not possible to hold that the several acts of the applicant in composing the offending article, editing and printing it at Delhi and publishing the same at six different places in the Hoshangabad District on different occasions could be regarded as "one series of acts so connected together as to form the same transaction" within the meaning of s. 235 of the Criminal Procedure Code. So far I have only discussed the effect of the joint trial of the first three offences with the others relating to the publication of the offending article.

29. I will now deal with the question if the trial could be held valid by the exclusion of the first three offences from the charge on the ground that they could not form the subject of the trial for want of sanction. Even if such a course were adopted, the invalidity of the proceedings, arising out of the holding of the joint trial in respect of the six remaining offences relating to the publication, would still remain. It is not disputed that every publication or circulation of a libel constitutes a fresh and distinct act and therefore a separate offence: Ratanlal's Law of Crimes, 13th Edition, page 1229, Odgers on Libel and Slander, 6th Edition, pages 132, 139 and 380. It follows then that the applicant having been put on his trial for publishing or circulating the offending article at six different places on six different occasions, the proceedings are entirely void and not merely irregular on the principle enunciated by their Lordships of the Privy Council in *Subrahmania Ayyar* v. *Emperor* (4). I, therefore, hold that the trial in the present case is entirely vitiated for the several reasons set forth above.

30. In view of the aforesaid finding as to the illegality of the whole trial, the question whether the trying Magistrate had jurisdiction to hold it assumes secondary importance. Mr. Kedar, however, very candidly admitted in his reply that the objection relating to jurisdiction was raised in the lower Courts and in

(3) 7 Ind. Cas. 359; 37 C 467 at p. 493; 14 C W N 1114; 11 Cr. L J 453

(4) 25 M 61; 11 M L J 233; 3 Bom. L R 540; 28 I A 257; 5 C W N 866; 2 Weir 271; 8 Sar. 160 (P.C).

the opening address here on the erroneous assumption that the authority for prosecuting the applicant was also given with respect to the effence of his having edited the offending article because the word "editor" appears after the name of the applicant in the order (Ex. P-42). On the finding then that the authority did not comprise within its scope the prosecution of the applicant for the first three offences mentioned in the charge it follows that the trying Magistrate had jurisdiction to hold the trial of the offences relating to the publication of the offending article which was said to have taken place within his jurisdiction, because the venue of the offence relating to libel is also laid where it is published or circulated. The trial to this limited extent was, therefore, not in any way irregular and no question of the applicability of s. 531 or ss. 179 or 182 of the Criminal Procedure Code, relied on by the prosecution, arises on this view of the case.

31. I now proceed to consider the soundness or otherwise of the contention of Mr. Kedar that since the offence of "publishing" a libel created by s. 3 (1) of the Indian States (Protection against Disaffection) Act, 1922, is confined to the place of local or initial publication of it as contemplated by the declaration of the printer and publisher given under s. 5 (2) of Act XXV of 1867, the applicant could not be held criminally responsible for the publication of the offending article at any place other than Delhi which was declared by him "as the place of publication" of the paper *Riyasat* in Ex. P-20. In my opinion Sir Tej Bahadur Sapru and the learned Government Advocate rightly characterised this ingenious contention as untenable. They urged that the word "publisher" appearing in s. 3 (1) of the Act could not possibly be construed in the narrow sense of the local publisher in which it is apparently used in Act XXV of 1867 but must be given its ordinary meaning. The contention appears to proceed wholly on the erroneous assumption that the Indian States (Protection against Disaffection) Act, 1922, is a measure directed only against printing presses and persons connected with it, which on the face of it, it does not purport to be. As its preamble shows it is a measure to prevent dissemination of libels against Princes by means of books, newspapers and other documents.

32. Section 2 (*c*) of the said Act says that 'document' includes any painting, drawing, photograph or other visible representation". Under the last category would clearly fall manuscripts. "Publishing" in s. 3 (1) *ibid* cannot, therefore, be restricted to publishing libellous matters merely turned out of a printing press or be confined to "publishing" by an editor or printer thereof. As already stated by me in para. 25 above, the section fastens criminal responsibility upon any one or more of these four persons, *viz.*, the editor, the printer, the publisher and the author of any handwritten or printed libellous matter against a Prince. The word "publishing" must then be understood in its ordinary significance of "making known, announcing publicly, or bringing to notice" which are the meanings assigned to that word in the New Standard Dictionary of the English language.

33. I will give an illustration to further explain the scope of s. 3 (1) of the Indian States (Protection against Disaffection) Act, as I interpret it. If *A* is the author and *B* the editor of a libel which *C* either prints or reproduces on a typewriter or with the hand and *D* publishes it in the sense of making, its contents known to any member of the public, all the four would come within the purview of the section. As the publication of the objectionable matter is the gist of the offence of libel, it is clear that criminal liability would not arise against the first three persons until the libel is published. It is possible that the same person may occupy all the four positions of the author, editor, printer or writer and publisher in connection with a libel, as is alleged to have been the case with the applicant in connection with the offending article in the present proceedings. I have, therefore, no hesitation in overruling the contention.

34. Equally untenable and in a way inconsistent stand was taken up by the learned Counsel for the complainant and the learned Government Advocate by urging that in the case of the prosecution of a person like the applicant for publishing a libel contained in a newspaper, the declaration given by him under s. 5 (2) of Act XXV of 1867 is *prima facie* proof, under s. 7 of that Act, of his having

been the publisher at any place other than the declared place of publication wherever the offending article, subsequent to the initial publication, might be published and that no further proof is legally required to connect the accused with the subsequent publication. In other words the contention was that the declaration with regard to the particular place of initial publication holds good in respect of the subsequent publication at other places. The only case cited by Sir Tej Bahadur Sapru as a direct authority for this proposition, was *Queen Emperor* v. *Bal Gangadhar Tilak* (2), and emphasis was laid on certain observations of Strachey, J., appearing at pages 129 and 130* of the report, which will be set out later. The learned Government Advocate cited *Gathercole* v. *Miall* (5), in support of the same proposition.

35. I may note that this contention was raised only in connection with the question of the responsibility of the applicant for the publication of the offending article at different places in the Hoshangabad District in case the evidence or record was held legally inadequate to connect him with that publication. I further note that Mr. Kedar also relied on the aforesaid observations in refutation of this contention. Before dealing with the merits of the contention it is necessary, in the first instance, to examine and appreciate the provisions of Act XXV of 1867, relating to declarations. As its preamble shows the measure was enacted to provide for the regulation of printing presses and of periodicals containing news, etc. Section 3 lays down that on every book or paper printed within British India "the name of the printer and the place of printing and if the book or paper be published, the name of the publisher and the place of publication" shall be printed legibly on it. Section 5 (2) provides that the printer and the publisher of every such newspaper shall appear before a Magistrate having local jurisdiction and make the following declaration:—

"I, A. B., declare that I am the printer or publisher, or printer and publisher of the newspaper entitled... ...and printed or published, or printed and published, as the case may be at ... ".

The same sub-section further requires that "the last blank in this form of declaration shall be filled up with a true and precise account of the premises where the printing or publication is conducted". Sub-section (3) requires that if "the place of printing or publication is changed, a new declaration shall be necessary".

36. Omitting such words as are not necessary for the determination of the question under consideration, I will reproduce s. 7 of Act XXV of 1867.

"In any legal proceeding whatever, as well civil as criminal, the production of a copy of such declaration as is aforesaid shall be held (unless the contrary be proved) to be sufficient evidence, as against the person whose name shall be subscribed to such declaration; that the said person was publisher of every portion of every newspaper whereof the title shall correspond with the title of the newspaper mentioned in the declaration."

It is to be noted that the provisions of the Act lay special emphasis on the place of the original publication and do not at all refer to places of subsequent publications. The form of the declaration not merely requires the mention of the original place of publication but also the description of the premises where the printing and publishing is to be carried on. That being the position, the presumptive proof of publication raised by s. 7 of the Act must be understood as referring only to the place specified in the declaration and not to places of subsequent publications elsewhere which the declarant could not possibly dream of at the time of making the declaration. It is significant to note that in refuting Mr. Kedar's contention on the point dealt with in paras. 31 to 33 above, it was admitted by the learned Counsel for the complainant that the word "publisher" was used in Act XXV of 1867 only in the limited or narrow sense of the local publisher. It is not permissible, by the rules of interpretation of statutes, to read into the plain words of s. 7 a meaning, which is sought to be placed on them by the learned Counsel but which they do not apparently bear.

37. *Gathercole* v. *Miall* (5), relied on by the learned Government Advocate was decided in 1846. It was an action to recover damages from the defendant who was the printer and publisher of a paper in London. A copy of the said paper containing matter defamatory of the plaintiff reached Chatteris in the Isle of Man where the plaintiff resided and was found placed on the table of the public reading room there. For claiming special damages the plaintiff had to prove that the subsequent publication of the defama-

(5) (1846) 71 R R 679; 15 M & W 319; 15 L J Ex. 179; 10 Jur. 337.

*Pages of 22 B.—[*Ed.*]

tory matter at Chatteris was by or at the instance of the defendant who was the declared publisher of the paper in London. It seems to have been held that because the defendant was the statutory publisher, it was enough to connect him with the publication of the libel at Chatteris and render him liable for enhanced damages. It was admitted by the learned Government Advocate that the Act in force in 1846, when this case was decided was an Act of 1799, *viz.*, 39 George III, C.79 as amended by an Act of 1839, *viz.*, 2 Victoria C. 12. Sections 15 to 33 of the Act of 1839 (39 George III C:79) were admittedly repealed in 1869. In spite of the diligent search by the learned Government Advocate in Law Libraries of Nagpur a copy of the Act which was in force in 1846, and on the basis of which the liability for the subsequent publication at Chatteris was fastened upon the defendant in the case cited was not found available for reference. It is, therefore, impossible to say if the provision of the aforesaid English Statute corresponded in any measure with those of s. 7 of the Indian Act XXV of 1867.

38. Moreover, it is now well settled that in interpreting the statutory provisions of an Indian Act the Courts should examine the language of the Indian Statute itself uninfluenced by any consideration derived from the English Law on which it might have been based. In *Abdul Rahim* v. *Muhammad Barkat Ali* (6), their Lordships of the Privy Council made the following observations on the point:—

"It is a sound rule of interpretation to take the words of a Statute as they stand and to interpret them ordinarily without any reference to the previous state of the law on the subject or the English Law upon which it may be founded but when it is contended that the Legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the Statute can be taken to effect the change that is suggested as intended."

In a case decided about a month earlier *Ramanandi Kuer* v. *Kalawati Kuer* (7), their Lordships had said:—

"It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that Statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state or the law or of the English Law upon which it may be founded."

In *India General Navigation and Railway Co., Ltd.* v. *Dekhari Tea Company, Ltd.* (8) it was observed that when the point to be decided arises under the law of India reference to English Law is unncessary. In *Bijoy Singh Dudhuria* v. *Commissioner of Income-tax, Calcutta* (9), it was observed: "that the invocation of the Imperial Income-tax Code and of decisions pronounced upon it is apt to be very misleading in the interpretation of Indian Income-tax legislation which is framed on other and fortunately much simpler lines."

In *Brojo Lal Banerjee* v. *Sharajubala Debi* (10), Ghose, J. observed:

"It is fruitless to endeavour to interpret the rules relating to procedure under the Indian Act by reference to what has been decided with regard to another statute in English on different considerations even if the language of the two statutes had been the same."

I must, therefore, hold that the English case cited, even if the Act under which it was decided was available for reference, could afford no precedent for the decision of the point under discussion.

39. The observation in the case of *Queen-Empress* v. *Bal Gangadhar Tilak* (2) relied on by the Counsel on both sides, for their respective contentions, are these:

"As to the preliminary question of the connection of the accused with these articles, I will take the case of the prisoner Tilak, first. The *Kesari* is a weekly paper, published in Marathi every Tuesday at Poona. It has a considerable circulation, having six or seven thousand subscribers, not only in Poona, but in many other places, including Bombay. This particular issue of the 15th June contained these two articles, and it was sent by post from the office at Poona to the subscribers in Bombay and elsewhere. So the paper's publication extended to Bombay. I only mention this matter of publication in Bombay, because it gives this Court jurisdiction to try this case. Sending the newspaper by post from the office where it is published to other places constitutes in law the publication in Bombay or any other place to which it is so sent. It is not denied by the defence that there was this particular publication in Bombay. It is in evidence that a copy of the paper containing these articles was sent from the office, and posted at Poona on the 15th, and reached a particlular subscriber at Bombay on June 16. The prisoner Tilak is the propietor and editor of that paper

(6) 108 Ind. Cas. 361; 55 C 519 at pp 527, 528; 9 P L T 65; I L T 40 Cal. 19; A I R 1928 P C 16; 27 L W 339; 32 C W N 482; 26 A L J 464; 54 M L J 609; 30 Bom. L R 774; 48 C L J 55 (P C).

(7) 107 Ind. Cas. 14; A I R 1928 P C 2 at p. 4. 5 O W N 96; I L T 40 Pat. 19; 30 Bom. L R 227; 47 C L J 171; 54 M L J 281; 9 P L T 97; 32 C W N 402; 26 A L J 385; (1928) M W N 282; 7 Pat 221; 27 L W 782 (P C).

(8) 80 Ind Cas. 777; 51 C 301 at p. 310; 22 A L J 98; A I R 1924 P C 28; (1924) M W N 173; 34 M L T 4; 19 L W 437; 26 Bom. L R 579; 29 C W N 45; L R 5 A P C 165.

(9) 143 Ind. Cas. 145; 60 C 1029 at p. 1031; Ind. Rul. (1933) P C 127; A I R 1933 P C 145; 37 L W 775; (1933) A L J 641; 57 C L J 503; 37 C W N 885; (1933) M W N 553; 65 M L J 285; 35 Bom. L R 811; 60 I A 196 (P C).

(10) 84 Ind. Cas. 154; 51 C 745 at p. 759; A I R 1924 Cal. 864.

and he is also the publisher. He has not attempted to dispute that, but has admitted it. He has also, in his statement before the Committing Magistrate, admitted that he was cognisant of the fact that the paper was despatched to various places, including Bombay. It is further in evidence that before any matter is published in the *Kesari*, proofs are submitted to him. Upon the evidence you would be justified in holding that he is the publisher of this paper, and also the publisher of these particular articles in the paper. He has signed a declaration under an Act which the Legislature passed in 1867, and that declaration is in evidence. The Act requires the publisher of every newspaper to make a certain declaration that he is the publisher of it. The declaration in regard to the *Kesari* was made by Tilak some time in 1887. The law says that that may be taken as sufficient *prima facie* evidence that the person signing the declaration is the publisher of every part of any paper bearing a name corresponding to that mentioned in the declaration. And, therefore, under that Act, in the absence of any evidence to the contrary, you will be justified in holding that the prisoner Tilak was the publisher of every article and every word in the *Kesari*. He published it through his servants and it must be taken as a fact, until the contrary is proved, that he authorised them not only to print it, but to give it out to the world and to distribute it in Poona and various other places, among them being Bombay. You will be justified in holding, in the absence of any evidence to the contrary, that Tilak was the publisher, and that he published these particular articles at Bombay by causing the paper containing them to be sent to and distributed in Bombay through his agents on June 15. The prisoner has not disputed but on the other hand has boldly avowed his connection with the paper. He has not attempted to shirk any responsibility which attaches to him in respect of these articles."

40. For a proper appreciation of the aforesaid observations it is necessary, in the first instance, to remember that they were made by the learned Judge in the course of his charge to the Jury which probably accounts for the repetition of the same facts and directions more than once in the quotation. Secondly, it must not be forgotten that the responsibility for the publication or circulation of the seditious article in Bombay was not denied by the accused either in the committal proceedings or at the trial. The learned Judge was thus not called upon to give and, therefore, must not be understood to have given his considered decision on the question of the precise presumptive value of the declaration given by the accused under s. 5 (2) of Act XXV of 1867—a point which has been the subject of so acute a controversy before me.

41. As I analyse the observations cited, the following facts appear to have been proved by the prosecution and the accused did not controvert any of them:—

(*a*) that the accused was the proprietor, editor and publisher of the paper which contained the seditious article;

(*b*) that before any matter was printed in the paper, proofs used to be submitted to him;

(*c*) that he was cognisant of the fact that from the office of the original publication at Poona copies of the paper used to be sent by post to the subscribers at Bombay and other places;

(*d*) that he had made a declaration under Act XXV of 1867 that he was the publisher of the paper,

and (*e*) that he published the paper through his servants.

42. After enumerating the facts in (*a*), (*b*) and (*c*) above, the learned Judge told the jury that they would be justified in holding that the accused "was the publisher of this paper and particular articles in the paper." After this the learned Judge drew the attention of the jury to the fact in (*d*) and explained to them what the law said in respect of the declaration and concluded that in the absence of any evidence to the contrary they would be justified in holding that he was "the publisher of every article and every word in the *Kesari*. The word "publisher" appears to have been used here in the sense of the publisher at the place specified in the declaration. This conclusion of mine derives considerable support from the following observations of the learned Judge appearing on page 132* of the report of the case:—

"But this does not apply to Tilak. He stands in a different position. Tilak was the proprietor and publisher of the paper, and he must be taken as authorising the publication of everything appearing in the paper. No evidence has been called on his part to refute or rebut that position. He must be presumed to have been cognisant of what was published in his paper."

The learned Judge then stated the last fact proved, *viz.*, that the accused "published it through his servants" and evidently asked the jury to presume from this fact that the accused must have authorised his servants not only to publish or circulate the paper in Poona but at other places including Bombay and to return a finding that he had published the offending article in Bombay which invested the Bombay Court with jurisdiction to hold the trial.

43. This was then not a case in which there was no evidence, apart from the declaration, to connect the accused with the publication or circulation of the sedi-

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tious matter in Bombay. The presumption that he published the article in Bombay appears to have been raised solely from the facts proved that he was the proprietor of the paper which was published by him through his servants at places outside the one mentioned in the declaration. The case is, therefore, no authority for the proposition contended for. I am fortified in this conclusion by the fact that Sir Hari Singh Gour also takes the same view of the case. In para. 1241 of his Penal Law of British India, (Volume, I, Fourth Edition), the learned author states as follows:—

"The venue of the offence is laid where the sedition was written or spoken or where it was published by the authority or with the assent of the accused"

and cites *Queen-Empress* v. *Bal Gangadhar Tilak* (2) in support of the proposition. It also appears from paras. 10 and 11 of the learned Sessions Judge's judgment that for the complainant reliance was placed before him on the aforesaid case for the view that as the applicant was proved to have been the proprietor of the paper, in which the offending article was originally published, and copies of which were sent down to different places in the Hoshangabad District at his instance by his employees, he must be deemed to have published the same within the jurisdiction of the trying Magistrate.

44. That absurd results, which could not possibly have been contemplated by the Legislature in enacting s. 7 of Act XXV of 1867, would follow, if the present contention is accepted, can forcibly be illustrated by a simple example:—

Suppose that *A*, who was a passenger from Delhi to Bombay purchased, from the Railway Bookstall at the Delhi Station, a copy of the *Riyasat* paper of August 17, 1929, containing the defamatory article which is the subject-matter of the present prosecution. After reading the paper at his leisure in the train he threw down the copy, on the platform of the Itarsi Railway Station, as a waste-paper unnoticed by anybody. It was subsequently picked up by *B*, a member of the Bhopal State Police, who happened to be on the platform awaiting the train to take him to Bhopal. *B* read the offending article at Itarsi and after reaching his destination handed over the paper to the complainant just to bring to his notice the offending article. We will also assume that this copy was tendered in evidence in the present case and *B* when examined as a witness simply deposed that he found the paper lying on the platform of the Itarsi Railway Station but did not know how it came there. This evidence would undoubtedly prove the publication of the offending article within the jurisdiction of the trying Magistrate. It is obvious that neither the complainant nor the applicant could, under the circumstances, know that *A* was the person responsible for the publication of the libel at Itarsi Railway Station. It is clear that the Court would be doing a manifest injustice in presuming under s. 7 of Act XXV of 1867, merely on production of Ex. P-20, that this publication at Itarsi was by the applicant until the contrary was shown by him.

45. Although the learned Advocate for the complainant was unable to point to any evidence directly connecting the applicant with the sale of the *Riyasat* paper from the Wheeler's Bookstall at Itarsi, the learned Government Advocate asked to presume, that the applicant was responsible for the publication of the paper at Itarsi and five other places specified in the charge, simply from the fact that he was its editor 'because the editor of a newspaper intends that it should have a wide circulation". It appears to me that this proposition was too widely stated. It is common knowledge that in the majority of cases the editor of a newspaper is generally a paid servant of the proprietor drawing a definite sum of money as his remuneration and receives no commission on the sale proceeds of the paper. It is thus the proprietor of the paper and not its editor who may be presumed to intend a wide circulation of the paper and the consequent increase of his income. Neither can such a presumption be drawn against a printer and publisher who have given declarations under s. 5 (2) of Act XXV of 1867 unless it is proved that they have a direct pecuniary interest in the sale of the paper which they were paid only to print and initially publish.

46 (*a*). Neither can a salaried editor, printer or publisher of a newspaper be held constructively responsible for the circulation of the paper at places different from the place specified in the declaration given by him under s. 5 (2) of Act XXV of 1867 on the principle "that a person is presumed to intend the natural consequences of his act" as was also contend-

ed for by the learned Government Advocate. Circulation of a newspaper at places different from the place specified in the statutory declaration cannot be regarded in law as a *natural consequence* of the fact of editing, printing and publishing it at the place specified in the declaration. No case was cited before me, nor could I discover any, in which a paid statutory editor, printer or publisher was held criminally responsible for the circulation of the libel appearing in his paper at places different from the declared place of publication *merely* on the presumption that he must have *intended* to circulate it, or for the only reason that he must be presumed to have intended that the *natural consequence* of his accepting the service he was paid to discharge at a particular place would be the circulation of the libel at places different from that specified in his declaration. I must, therefore, overrule both these contentions as unsound.

46 (*b*). The difficulties and dangers of the application of the doctrine of constructive liability enunciated in *Jhagru Gond* v. *Emperor* (11) on which admittedly this branch of the argument was founded, to the provisions of s. 3 (1) of the Indian States (Protection against Dissaffection) Act, 1922, would better be illustrated by a simple example:

X is a newspaper printed and initially published in Bombay. *A* is the proprietor of *X* and employs in his service, on fixed salaries, *B* as editor, *C* as printer and *D* as the statutory publisher of the paper. *E* a correspondent of *X*, sends to *B* an article containing a libel against a Prince and the article is printed and published in *X*. *X* has a wide circulation and in the ordinary course reaches Delhi where it is sold by *F*, a newspaper agent, to his regular constituent *G*.

46 (*c*). The Prince, against whom the libel is published in *X*, after obtaining the requisite authority from the Governor-General-in-Council under s. 5 of the aforesaid Act, gets a complaint lodged against *B*, *C*, *D* and *E* through his Inspector-General of Police in the Court of the District Magistrate, Delhi, for "publishing" or circulating the libel in Delhi. At the trial no proof is tendered to connect any of the accused with the publication of *X* in Delhi though proof is given that *E* was the author, *B* the editor, *C* the printer and *D* the publisher of *X* in Bombay.

(11) 1 N L R 134.

46 (*d*). Would the trying Magistrate be justified in holding the accused criminally liable for "publishing" the lible in Delhi on the presumption that each of them intended to publish it in Delhi or for the reason that the natural consequence of their several acts respectively of editing, printing and initially "publishing" and composing the lible in Bombay was the "publication" (circulation) of it in Delhi? It is obvious that the answer to the question must be in the negative.

47. For all these reasons I have no hesitation in holding that at the trial of a person for publishing a libel contained in a newspaper, the presumption permitted to be raised by s. 7 of Act XXV of 1867, as to his identity with the publisher of the offending matter, on production of the copy of his declaration given under s. 5 (2) *ibid*, is restricted to the *prima facie* proof that he was the publisher only at the place specified in the declaration and does not extend to the proof of the fact that he was also the publisher of the libel at places not specified in the declaration.

48. I now proceed to consider the contention of the learned Counsel for the applicant that the evidence on record is legally insufficient to sustain the finding reached by the two Courts below that the applicant was responsible for the publication of the offending article at several places within the jurisdiction of the Court. For the prosecution it was urged that since the matter of the applicant's connection with the publication of the offending article is a question of fact and was, upon evidence, found proved, this Court should not interfere with the finding of fact in revision. It is true that although the powers of this Court to interfere with findings of fact in revision are not in any way restricted by s. 439 of the Criminal Procedure Code, in practice, they are only exercised in exceptional cases and under exceptional circumstances. They are, however, invariably exercised in cases where it is established that the findings of fact reached by the two Courts below are based either on no evidence or on inadmissible evidence or on legally inadequate evidence or are perverse. As an instance I may cite the latest case of *Krishna Murari* v. *Emperor*, Criminal Revision No. 360 of 1933 where the learned Judicial Commissioner interfered with a concurrent finding of fact on the sole ground that the residue of the

evidence which was not disbelieved by the two Courts below was legally insufficient to sustain it and the conviction was set aside. I am entirly in agreement with the two Courts below—and the fact was not disputed for the applicant before me—that the evidence set out in para. 9 above is sufficient to prove the publication of the offending article at several places within the jurisdiction of the trying Magistrate. But in my opinion it entirely fails to connect the applicant with that publication as required by law.

49. The learned Sessions Judge has based his finding on the matter of the applicant's connection with the publication solely on the fact, which he held established, that the applicant was the proprietor of the paper and the implications arising out of it. But if the very foundation on which the finding was based is held to be slippery, it follows that the conclusion reached must fall down. The complainant as P. W. No. 1 stated in his examination-in-chief that the applicant was the proprietor of the paper in which the offending article was published. When the Counsel for the applicant desired to cross-examine him by putting the question "Now give details of your information concerning the accused being a proprietor of the paper?" the trying Magistrate ruled it out as irrelevant. The order is worded as follows:—"The question is disallowed as the accused is not being prosecuted as proprietor of the paper and his being a proprietor is not a fact in issue or a relevant fact".

50. It was conceded by Sir Tej Bahadur Sapru that this order was absolutely incorrect and therefore indefencible. Having passed the aforesaid order the trying Magistrate further erred in permitting the Counsel for the complainant to elicit the information, that the applicant was the proprietor of the paper, in the long cross-examination of Gajjan Singh (D. W. No. 4) and Sardar Ali Sabri (D. W. No. 7). The applicant was neither questioned on this point in his examination as an accused nor could he possibly cross-examine his own witnesses, on it. It was evidently upon the evidence of these two witnesses for the defence that the learned Sessions Judge held that the applicant was the proprietor of the paper and based his further finding, on the point of the applicant's connection with the publication at several places in the Hoshangabad District, on the fact that the applicant was the proprietor and had employed managers.

51. This is what the learned Sessions Judge states in paras. 10 and 11 of his judgment:—

"There is also evidence of the witnesses of the accused that Diwan Singh is the proprietor of this paper. He is the owner of the *Riyasat* Press and used to manage everything regarding the publication (see the evidence of D. W. No. 7 Sardar Ali Sabri, the last sentence of his cross-examination).

* * * * *

My finding is that the appellant is the proprietor of *Riyasat* paper and Press and that he employs managers who send his paper to different places as per his instructions."

"Presumption is in favour of the fact on the evidence on record that papers at Indian Railway Institute and Wheeler's Stall are received through the appellant who is the proprietor of the press and this presumption is not rebutted by any cogent and reliable evidence by the accused.

* * * * *

I find that the *Riyasat* issue was sent to Itarsi Railway Institute and Wheeler's Book-stall as per instructions of appellant (proprietor) and that he is responsible for its publication at Itarsi."

52 (*a*). It need hardly be said that the procedure adopted by the learned Judge of basing his finding upon this inadmissible evidence was wholly erroneous, the more so when he notes that the cross-examination of the complainant on this point was wrongly disallowed by the trying Magistrate. It follows then that there is no legal evidence on the record to support the finding of the Sessions Judge that the applicant was the proprietor of the *Riyasat* paper at the time of the publication of the article which is the subject-matter of the charge.

52 (*b*). Having held that the applicant was the proprietor, it was apparently an easy step for the learned Judge to hold that:

"Exhibits P 39 and P 40—a notice in the issue of July 20, 1929, and September 7, 1929—clearly prove that the accused kept the paper for sale at Wheeler's Railway Bookstall at Itarsi and the explanation given to the contrary as given by Gajjan Singh (D. W. No. 4) does not appear convincing to me and I, therefore, discard it."

Gajjan Singh (D. W. No. 4) stated that he was the manager of the *Riyasat* paper, and as such, it was his duty to make arrangements for the sale of the paper directly, through the Railway bookstalls and other agencies. The learned Sessions Judge brushed aside this sworn testimony evidently for no other reason than that the applicant was proved to have been the proprietor. No evidence was pointed out to me by the learned Counsel for the complainant which definitely proved that the applicant kept the paper for sale at the Wheeler's Bookstall or supplied it to the Institute at Itarsi. On the contrary there

is the unrebutted testimony of Gajjan Singh that the firm of Wheelers at Allahabad were the agents and that copies of the paper used to be supplied to the representative of that firm at Delhi. Gajjan Singh (D. W. No. 4) further stated that the postcard (Ex. P-74) produced by Abdul Majid (P. W. No. 9) "was not issued from my office because it bears no number nor my signature". For circulating the paper by post in outlying places Gajjan Singh assumed the sole responsibility upon himself. I may note here that there is admittedly no finding given by the learned Judge on the point of the publication of the offending article by the applicant at Hoshangabad Railway Station, between Hoshangabad and Itarsi Railway Stations, at Harda and at Bankheri (items Nos. 2, 3, 5 and 6 of the charge relating to publication).

53. Although the evidence of Nazir Husain (P. W. No. 15), Ziauddin (P. W. No. 17) and Mubarik Husain (P. W. No. 20), taken together, covers 29 sheets of typewritten matter the learned Sessions Judge has lumped and compressed it in one sentence in para. 10 of his judgment in these words "Notwithstanding this"—alluding to the fact that the cross-examination of the complainant on the point of the proprietorship of the paper was wrongly disallowed by the trying Magistrate—

"there is evidence of witnesses P. W. No 15 Nazir Husain P. W. No. 17 Ziauddin and P. W. No. 20 Mubarik Husain who depose that Diwan Singh was the lessee of Allah or Ittihad Press where the Urdu portion of *Riyasat* used to be published during 1929, that he used to give instructions to manager to send the papers to different places and the paper was being published under his direct instructions and supervision."

54. It is unfortunate that in a case of this magnitude the learned Sessions Judge did not feel the necessity to scrutinise the evidence of these witnesses in any way and contrast it with that of Gajjan Singh (D. W. No. 4) and Sardar Ali Sabri (D. W. No. 7) in order judicially to determine the question of the responsibility of the applicant for the publication of the offending article within the Hoshangabad District. I have read the whole of this evidence very carefully and am definitely of opinion that the testimony of the aforesaid three witnesses for the complainant is too general and indefinite as compared to that of the two defence witnesses on the point under consideration.

55. Nazir Husain (P. W. No. 15) who did the job work of a caligraphist deposed that he had caligraphed the offending article from a manuscript given by the applicant but Azfar Husain (D. W. No. 5) said that he did this work from the manuscript of Sardar Ali Sabri (D. W. No. 7). Nazir Husain (P. W. No. 15) did, however, nowhere state in his evidence, what the learned Sessions Judge says he did, *viz.*, that the applicant used to give instructions to the manager "*to send the papers to different places*". The evidence of Ziauddin (P. W. No. 17) was either badly given or imperfectly recorded and it is therefore difficult to determine if he was really an employee on the staff of the *Riyasat* paper in August 1929 when the offending article was printed. The evidence of this witness on the point of the applicant's connection with the circulation of the paper at places other than Delhi, as quoted below, will speak for itself:—

"During my service as Manager of the Press (Ittihad) I would see the accused on my going to the *Riyasat* office and the accused would occasionally (*Ittifaqia*) come to the Press." (I note that *Ittifaqia* only means casually.) "I do not exactly remember what he used to do in coming to the Press, but he would enquire as to whether work was going on alright and whether work was being received. * * * * The printing of portions of the *Riyasat* Paper at Ittihad Press was done under the instructions of the accused. The *Riyasat* paper used to be published and posted from the office under the accused's instructions. This I saw when I happened to go to the *Riyasat* Office."

The witness was subsequently appointed as the circulation clerk in the *Riyasat* Office under the Manager, Gajjan Singh (D. W. No. 4), and described his duties in these words:—

"My duty as circulation clerk in the office of the paper was to receive copies and to make entries accordingly in the register and also to have printed chits of addresses posted on the wrappers and to write in manuscript when necessary."

He was not questioned if he posted the copies of the *Riyasat* to the prosecution witnesses Nos. 1, 9, 12 and 19 or if these persons subscribed to the paper which were the two essential points to be proved in the case. It is indeed a pity that no better evidence than that of Mubarik Husain (P. W. No. 20), a dismissed peon of the *Riyasat* Office, should have been available to the complainant to prove the several important facts in the case which were sought to be proved by the testimony of this witness. I would say no more about this witness than that his evidence impressed me most unfavourably and left upon me the impression that he was a badly coached up witness. I have, therefore, not the slightest hesitation in holding that the evidence for the prosecution has failed to establish the connection of the

applicant with the publication or circulation of the offending article at any of the six places mentioned in the charge.

56. I must not fail to note here that as the applicant was not questioned on the several points relating to the circulation of the paper deposed to by the prosecution witnesses, Nazir Husain (P. W. No. 15), Zia-uddin (P. W. No. 17) and Mubarik Husain (P. W. No. 20), they should not have been pressed aginst him by the two Courts below in recording his conviction. In *Tani* v. *Emperor* (12), a Bench of this Court accepted the soundness of the view propounded in *Emperor* v. *Katay Kisan* (13), on the scope of the mandatory provisions of s. 342 of the Criminal Procedure Code and ordered a re-trial, on the ground that the accused was not questioned and her explanation obtained on certain points brought out in the prosecution evidence which apparently went against her. In the opinion of the Bench such a defect of procedure had vitiated the whole trial.

57. On the strength of *Abbas Peada* v. *Queen-Empress* (14) it was contended by Mr. Kedar that since the settlement between the applicant and *Pandit* Motilal Nehru in respect of the offending article was in the nature of a compromise of an offence under s. 500, Indian Penal Code, all the evidence relating to it tendered by the complainant at the present trial was irrelevant and should not have been admitted by the trying Magistrate. In my opinion this contention is unsound. There was no compromise by the applicant with *Pandit* Motilal Nehru as contemplated by s. 345 of the Criminal Procedure Code because it is admitted that before the matter went to Court the applicant tendered an unqualified apology which purged him of the charge of defamation against Panditji. Inasmuch as Panditji and H. H. the Nawab were both affected by the offending article with regard to the same matter, it follows that the evidence objected to formed part of the *res gestae* or the main fact and was relevant particularly to prove not only the animus on the part of the applicant in not withdrawing the defamatory allegations against His Highness but also to rebut the plea of justification set up by him.

58. The last point pressed by Mr. Kedar was that other articles appearing in the *Riyasat*, *viz.* Exs. P-2 to P-16, were wrongly used by the two Courts below to prove the intention of the applicant in connection with the offending article when they were not formally proved to have been written by the applicant and *Manomohan Ghose* v. *Emperor* (15) was cited in support of this contention. The learned Counsel did not dispute the proposition that these documents were relevant if it was established that they were in fact written by the applicant. It was conceded by the learned Counsel for the complainant that there is no finding by either of the two lower Courts that these articles were written by the applicant. That being the position it is obvious that the Courts below were wrong in relying upon Exs. P-2 to P-16 to prove the guilty intention of the applicant in respect of the offending article on the assumption that they were proved to have been witten by the applicant.

59. It is estonishing that although the complainant and is the Chief of the Bhopal State Police and had the best experienced lawyers, both local and from outside these provinces, for advice and guidance, the trial of the case was conducted with such laxity as to result in its being declared invalid on more grounds than one. As has already been noticed many of the important documents filed in the case were not proved and documents which would certainly have thrown a good deal of light upon the most vital question in issue, were withheld by the complainant. He indeed started well by declaring that he was authorised to file the complaint "with respect to one offence only" and that his complaint was "with respect to publication of the offending article within the jurisdiction of the Court". But he lapsed later into unnecessarily enlarging the scope of the trial by including in it several offences, for some of which he had apparently no authority to complain, and some of which could not be consolidated at one trial under s. 234 of the Criminal Procedure Code. It was evidently for this reason that what would otherwise have been a simple case was turned into a complicated and cumbrous trial resulting in the introduction—and the consequent waste both of time and money—of a large body of evidence which was irrelevant to the original complaint of the offence of "publication" of the offending article. I, however, attach more blame for this debacle to the trying Magistrate whose was the primary duty to see that the trial was conducted on proper lines.

(12) 1 N L J 129.
(13) 17 C. P L R 113.
(14) 25 Q 736.
(15) 8 Ind. Cas. 531; 38 C 253 at p. 256; 15 C W N 141; 11 Cr. L J 667.

60. The applicant is not altogether free from blame because, in my opinion, he contributed, in no small measure, to the confusion by his failure to raise proper objections in time. He put forward only such pleas as were apparently untenable and thus suffered the trial to run on wrong lines. But under the law he is not estopped from challenging the validity of the trial. The combined result of these acts of commission and omission has indeed been deplorable but is unvoidable. It is to be noted that as the authority to prosecute the applicant was not limited to any particular place of publication of the offending article the complainant could well have laid the complaint at Delhi which was specified by the applicant as the place of original publication of the paper in his declaration (Ex. P-20). I cannot help remarking that in selecting the venue of the trial at Hoshangabad the complainant unnecessarily took upon himself a grave responsibility and a very heavy burden of proving, by unimpeachable evidence, the publication (circulation) of the offending article by the applicant within the Hoshangabad District.

61. My final conclusion then is that the trial in the present case has been invalid in law for the several reasons set forth above. The next point which arises for consideration is the course to be adopted. For the complainant it was pressed that if the case fell under s. 235 of the Criminal Procedure Code, I should adopt the same procedure as was followed in *Radha Nath Karmakar* v. *Emperor* (16), of maintaining the conviction in respect of such charges as to which the trial was not defective and quash the convictions on other charges. But in view of my finding that the present case does not come within the purview of s. 235 *ibid*, the suggestion of the learned Counsel for the complainant cannot obviously be given effect to. On the other hand, on the basis of *Subrahmania Ayyar* v. *Emperor* (4), it was urged by Mr. Kedar that I should simply set aside the conviction if I held that the mode of the trial was illegal. But simply because their Lordships of the Privy Council, in the case cited, did not refer to the question of re-trial, it does not follow that they intended to hold that no re-trial should follow when the first trial breaks down on account of any illegality in conducting it. In such a case the normal course is a re-trial. *Manavala Chetty* v. *Emperor* (17), *Chetto Kalwar* v. *Emperor* (18) and *Gunno* v. *Emperor* (19).

62. I am aware that in *Emperor* v. *Balwantsingh* (20), Stanyon, A. J. C., after holding that the trial was invalid on account of the misjoinder of several offenders in a case not covered by s. 239 of the Criminal Procedure Code, did not order a re-trial but left it open to the Crown to repeat the prosecution. He however accepted the principle laid down in *Liakat Hossein* v. *Emperor* (21), that s. 403 of the Criminal Procedure Code, would not be an obstacle to the fresh prosecution. It would therefore be apparent that the same result follows upon the adoption of the normal course or the one adopted in *Emperor* v. *Balwantsingh* (20), *viz.*, that the applicant must face a fresh trial. The Counsel for the complainant assured me that if a retrial was to be the result the complainant was prepared to conduct it on proper lines.

63. For the reasons set forth above, I accept the application for revision, set aside the conviction of the applicant and order his retrial which would be conducted before such Magistrate of the First Class at Hoshangabad, other than Mr. Syed Ahmad Husain, as the District Magistrate of that place may select. The fresh trial shall, however, be restricted to any three of the six offences of publication which were the subject-matter of the present trial. I have advisedly refrained from expressing an opinion on the merits of the offending article and would enjoin upon the Magistrate who holds the new trial not to be in any way influenced by the opinions expressed by the trying Magistrate or the Sessions Judge on the same point in the present trial. During the course of the new trial, the applicant shall remain on the same bail as before. On fresh bonds being executed the bail bonds given by him and his sureties in this Court shall stand cancelled.

64. I cannot conclude this order without placing on record my high appreciation of the very lucid manner in which the learned Counsel for the applicant and the complainant and the learned Government

(16) 71 Ind. Cas. 120; 50 C 94; 36 C L J 149; A I R 1922 Cal. 573; 24 Cr. L J 72.

(17) 29 M 569.

(18) 71 Ind. Cas. 214; 49 C 555; A I R 1922 Cal. 401; 24 Cr. L J 86.

(19) 149 Ind. Cas. 959; A I R 1934 Oudh 325; 6 R O 605; 11 O W N 731; 35 Cr. L J 1048; (1934) Cr. Cas. 878.

(20) 4 N L R 71.

(21) 12 C W N 246.

Advocate placed before me their respective points of view on the several intricate questions of law which arose for decision in the present case. I also acknowledge the courtesy of Sir Tej Bahadur Sapru in placing at my disposal a set of typewritten paper books which saved me from the labour of going through the bulky and badly scribed record of the case.

D. *Application accepted.*
Fresh trial ordered.

LAHORE HIGH COURT

First Civil Appeal No. 2200 of 1929
July 2, 1934
ADDISON AND BECKETT, JJ.

HASSAN MUHAMMAD AND ANOTHER—DEFENDANTS—APPELLANTS
versus
HUKAM CHAND AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS

Partition—Suit for—Shares of all parties will be decided usually—Preliminary decree by consent, without rights of defendants—Decree not appealed against—Effect.

It is usual in partition suits to decide the shares of all the parties and not merely of the plaintiffs. But where the defendants agree to passing of a preliminary decree in favour of the plaintiff and partition of his share without their rights being decided and the decree so passed is not appealed against, it cannot be contended that their rights *inter se* ought to have been decided.

F. C. A. from an order of the Senior Sub Judge, Ludhiana, dated May 4, 1929.

Mr. *Abdul Haye*, for the Appellants.

Messrs. *Shamair Chand* and *Dina Nath Bhasin*, for the Respondents.

Judgment.—The plaintiff Hukam Chand sued Hassan Muhammad and *Musammat* Sahibulnisa defendants Nos. 1 and 2 and other defendants for possession by partition of two-thirds share in certain shops. The plaintiff had been collecting the rent of these shops and paying one-third to defendants Nos. 1 and 2. He wanted the property partitioned, however, on account of disputes as to rent and other matters. Defendants Nos. 3 to 6 were impleaded as it was alleged that they had certain rights in the remaining one-third share along with defendants Nos. 1 and 2. Defendants Nos. 1 and 2 pleaded that defendants Nos. 3 to 6 had no right in the shops but the latter alleged that they had a share in the one-third along with defendants Nos. 1 and 2. On June 7, 1928, defendants Nos. 3 to 6 admitted the plaintiff's claim. Counsel for defendants Nos. 1 and 2 also made a statement admitting the plaintiff's claim but he contended that the property was not capable of partition. He asked that a preliminary decree might be passed. Accordingly on that date a preliminary decree was passed for the partition of the two-thirds share of the plaintiff and a Commissioner was appointed to report whether the property was capable of partition or not. This decree was not appealed against and is final. It did not ascertain the rights of the defendants *inter se* and this was done with the consent of the defendants as is clear from their statements.

The Commissioner reported that by pulling down walls and building other walls the property might be partitioned. Certain objections were put in as regards his report and the Court itself went to the spot. It recorded a note to the effect that the property could not be partitioned as this would entail demolition of one of the shops endangering the rest of the building as well. It may be mentioned at this stage that defendant No. 1 made a statement before the Commissioner to the effect that defendants Nos. 2 and 3 were ready to take the shops on payment of the amount due by them on account of the plaintiff's share and the value of the shops was then stated to be Rs. 16,000. On July 16, 1928, the plaintiff and all the other defendants, except defendants Nos. 1 and 2 asked that the property should be sold as it was incapable of being partitioned. This was, however, objected to by defendants Nos. 1 and 2, though their Counsel was the first to state on June 7, 1928, on the date when the preliminary decree was passed that the property was not capable of partition and though defendants Nos. 1 and 2 had offered before the Commissioner to pay the plaintiff two-thirds of Rs. 16,000, the alleged value of the shops.

On July 16, 1928, the Court ordered that the property be sold by public auction as it was not capable of being partitioned, and a Pleader was appointed to conduct the sale. This order was appealed against by defendants Nos. 1 and 2, and the appeal was dismissed after this Court had sent for the records and gone into the matter. Thereafter the property was auctioned over a period of three days, bids starting with the reserved bid of Rs. 25,000. The final bid of Rs. 31,000 was given on the last day by the plaintiff who paid one-third of this amount, namely Rs. 10,533-5-4, into Court for the defendants. When this was done the plaintiff was declared owner by the Court on May 4, 1929. The Court also ordered that the sum of Rs. 10,533-5-4 should remain in deposite

until the rights of the defendants *inter se* had been settled by a separate suit. Against this order defendants Nos. 1 and 2 have appealed.

The first ground argued was that the rights of the defendants *inter se* should have been decided. It is usual in partition suits to decide the shares of all the parties but in this case, as already shown the defendants agreed to a preliminary decree being passed in favour of the plaintiffs for partition of his two-third share without their rights being decided. There was no dispute as to the share of the plaintiff. This was embodied in the preliminary decree which was not appealed against and which cannot now be challenged. This disposes of the first contention.

It was next argued that the property was worth more than Rs. 31,000 and that the plaintiff should not have been allowed to get it at this small price especially as he had at one time valued the property in suit at Rs. 36,000. It must, however, be remembered that the defendants Nos. 1 and 2 at one stage seemed to be of opinion that the property was only worth Rs. 16,000 or Rs. 17,000. The sale was held for three days. The reserve price was Rs. 25,000 and ultimately the decree-holder gave the final bid of Rs. 31,000 which after all is not much short of the highest figure ever estimated. There is thus no force in this contention.

It was also contended that the property should have been partitioned and not sold under the Partition Act IV of 1893. This matter, however, has already been before this Court at the instance of defendants Nos. 1 and 2, the present appellants, and cannot be re-opened. As already pointed out it was the defendants Nos. 1 and 2 who first raised this contention. For the reasons given, there is no force in this appeal which is dismissed with costs.

N. *Appeal dismissed.*

PATNA HIGH COURT
Full Bench

Appeal from Appellate Decree No. 992 of 1930

February 7, 1935

WORT, MOHAMMAD NOOR AND AGARWALA, JJ.

SONEY LALL JHA AND ANOTHER —DEFENDANTS—APPELLANTS

versus

DARBDEO NARAIN SINGH AND OTHERS —PLAINTIFFS—RESPONDENTS

Evidence Act (I of 1872), ss. 32, 11, 13, 167—Statement of boundaries in documents of title between third parties—Admissibility in evidence—Improper admission of evidence—Whether ground of itself for reversing decision—Boundaries stated in deed between third parties—Whether necessarily against proprietary interest of person making it.

A statement of boundaries in a document of title between third persons who are dead at the time the statement is sought to be put in evidence is admissible in evidence under s. 32 (3) of the Evidence Act only when it is shown first, that at the time the statement was made, it was contrary to the interests of the maker, and, secondly, that at the time it is sought to be used it is a statement of a relevant fact. *Lalu Singh* v. *Sahdeo Singh* (1), overruled. [p. 477, col. 2.]

[Case-law discussed.]

Under s. 167 of the Evidence Act, the improper admission of evidence is not a ground of itself for reversing any decision if it appears to the Court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. [*ibid.*]

Per *Wort, J.*—As a general question, it cannot be said that boundaries stated in a deed between third parties are necessarily and *prima facie* against the proprietary interest of the person making it. [p. 474, col. 1.]

Per *Mohammad Noor, J.*—If the High Court finds in second appeal that the lower Appellate Court has based its judgment partially upon a piece of evidence which was not admissible, it cannot by that reason alone, reverse that finding or remand the case if it can come to the conclusion that there was sufficient evidence on the record to justify the finding. How the High Court is to satisfy itself about the sufficiency of evidence is a matter which must depend upon the facts of each case. [p 476, cols 1 & 2.]

A. from a decision of the District Judge of Darbhanga, dated April 16, 1930, confirming that of the Munsif of Darbhanga, dated August 23, 1928.

Mr. *Murari Prasad*, for the Appellants.

Messrs. *L. M. Ghosh*, *K. Sahai* and *R. Misra*, for the Respondents.

Wort, J.—This appeal has been referred to this Bench and its decision depends upon the answers to two questions of law which form part of the reference. These questions are:—

1. Whether statements of boundaries in documents of title between third parties are admissible in evidence under s. 32 (3) of the Evidence Act. Are they admissible under any other provision of the Act if the third parties are dead, or outside the jurisdiction of the Court?, and

2. Was the case of *Lalu Singh* v. *Sahdeo Singh* 36 Ind. Cas. 610 (1), correctly decided?

There is another subsidiary question which arises in the appeal. That comes under s. 167 of the Evidence Act and with that I propose to deal in a moment.

The action out of which this appeal arises was for price of timber; and the substantial question in both the Courts below, and the only question in this

(1) 36 Ind. Cas. 610.

Court, was whether the action was barred by limitation. The defendants contended that if the timber had been cut it was cut in the year 1316 *Fasli* about the year 1909, whereas the plaintiffs' case was that it was cut in the year 1331 *Fasli*, about the year 1924. The learned Judges in the Courts below decided this issue as all other issues in favour of the plaintiffs. In coming to their decision they not only placed reliance upon the oral evidence in the case, but also on certain documents amongst which was a sale deed between persons who were not parties to the action relating to a plot which was numbered 159. In the sale deed there was, as usual, description of the boundaries, and the eastern boundary was described as the orchard of Soney Lal Jha who was a defendant in this action.

It was contended, when the case came before Mohammad Noor, J. and Luby, J. that that document was not admissible in evidence, and on that point the matter was referred to this Bench as I have said.

The question of whether recitals in deeds between third parties are admissible under the Evidence Act has been discussed in a number of authorities, and they are conflicting. There have been attempts from time to time to admit such documents under s. 11, s. 13 and s. 32 of the Evidence Act; but in this case the argument is limited to ss. 11 and 32. I think the argument as regards s. 11 can be disposed of in a sentence. Section 11 deals with relevant facts to quote the first part of the section, "facts not otherwise relevant are relevant, if they are inconsistent with any fact in issue or relevant fact." We are not in this case concerned with whether a fact is relevant but whether the method of proof is admissible under any provisions of the Evidence Act. It seems, therefore, in my judgment quite clear that s. 11 of the Evidence Act can have nothing to do with this matter. A greater part of the argument of Mr. Ghosh, who appears on behalf of the plaintiff-respondents, has been with regard to s. 32 (3). As a part of his argument he contended that the recital as regards the boundaries were admissible under s. 32 (3) as being a statement made by a person in the ordinary course of business. That question has been dealt with in the Bombay High Court in the case of *Ningawa* v. *Bharmappa* (2), the decision being against the argument that a recital of the description with which we have to deal, was a statement made in the ordinary course of business. In my judgment there seems to be no answer to the decision of the Judges of the Bombay High Court in this respect; and it is difficult to see how a statement in a deed of sale, which may be an isolated transaction in the course of a person's lifetime, can be described as made by such a person in the ordinary course of business. The latter part of the sub-section in my judgment, although perhaps not governing the earlier part, gives some indication of what the legislature intended by the words used in the earlier part, the latter part of the section being, "and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business". It seems to me quite clear that what was intended by the legislature was a statement by a person whose duty it was to make such a statement or whose business was such that statement of the kind were to be expected in the ordinary course of things. The law in India in this respect is rather wider in this connection than the Common Law in England but with that we have nothing to do.

The most serious part of the argument is, however, as I have indicated, with regard to sub-s. (3) of s. 32 of the Evidence Act. It is contended that the statement of the boundaries of this holding was a statement made against the pecuniary or proprietary interest of the person making it. It seems to me there is a short answer to the argument with regard to the admissibility of the document in this case, an argument which, as far as I can see has been referred to in only one case and that is the case of *Brojo Mohan Das Adhikari* v. *Gaya Prasad Karan* (3). It is to be noticed that s. 32 makes admissible or relevant a statement of relevant facts made by such person and then, to quote the sub-section "which are made against the proprietary interest of the person." Therefore the statement in order to be admissible must be a statement of a relevant fact and must be against the proprietary interest of the person making it. The answer to the admissibility of the document in this particular case seems to me to be that the mention of the nature of the boundaries as being Soney Lal's

(2) 23 B 63

(3) 97 Ind. Cas. 265; 30 C W N 761; A I R 1926 Cal 948; 45 C L J 55.

orchard is not a statement of a relevant fact, and indeed if it is a statement of relevant fact it is not a statement against the proprietary interest of the person making it. It will be seen from the authorities that those cases which have held that recitals of this kind are admissible, have held that they are admissible on the ground that the transaction itself was against the proprietary interest of the persons entering into it and, therefore, the connected statement in which the recital of boundaries was, would also be admissible. To repeat myself I would say that apart from the other considerations to which I shall presently refer, it seems to me that in this case at any rate the document would not be admissible for the reason that the statement which is sought to be proved is not, in the first instance, a statement of relevant facts.

I propose, however, to deal with the general proposition contended in connection with the question put before the Court; "Whether statement of boundaries in documents between third parties are admissible under s. 32 (3)." One of the earlier cases by no means the earliest which dealt with this question, is that of *Abdullah* v. *Kunja Behari Lal* (4), a decision of Mookherjee, J. and Carnduff, J. After a discussion of the point as to whether recitals of this kind were admissible under s. 11 or s. 13 of the Evidence Act, Mookherjee, J., came to the discussion of the question of whether such recitals were admissible under s. 32 (3), having held against a former view held by him that they were admissible under s. 11 or s. 13. The statement of the learned Judge in the course of his judgment was:

"Now the statement in these deeds that the transferor was owner of the land conveyed or mortgaged and that he was either extinguishing his interest in the land by an absolute sale or placing a restriction on it by way of a mortgage, was undoubtedly one against the pecuniary or proprietary interest of the person making it. Consequently the statement as a whole would be admissible in evidence."

"When a person in the position of the vendor, or the mortgagor in the deeds mentioned, transfers the property, and described that the property conveyed or mortgaged is limited by certain boundaries as he makes a statement as to the limited extent of that property."

The learned Judge admits the document on two grounds; one that the transaction itself which was against the proprietary interest of the person making it: and secondly, that the statement of the boundaries being also against the proprietary interest in the sense that it was limited to the property which was the subject-matter of the conveyance. The same learned Judge discussed the question in the case of *Imrit Chamar* v. *Sridhar Panday* (5), but although Mr. Ghosh on behalf of the respondents relied upon that decision in support of his contention, it will be seen by an analysis of the judgment that the real question which was there decided was whether a document in dispute came under s. 90 of the Evidence Act.

We then come to the decisions of the same Court which are against the admissibility of those recitals and against the decisions of Mookherjee, J. to which I have just referred. The first case is that of *Pramatha Nath Chaudhary* v. *Krishna Chandra Bhattacharjee* (6). In this case the decision in *Abdullah* v. *Kunj Behari Lal* (4), was referred to in these words by Greaves, J.:—

"It only remains to refer to a passage in *Abdullah* v. *Kunj Behari Lal* (4), where Mr. Justice Mookherjee seems to think that although such a document is not admissible under the provisions of ss. 11 and 13 of the Indian Evidence Act, it may be admissible under the provisions of s. 32 of that Act. But, with great respect to that learned Judge, the reasoning by which he arrives at this view does not seem to me at all conclusive and I find great difficulty in seeing how a mere description of boundaries in a document between third parties can be said to be a statement against the proprietary interest of the person making it It may well be that for some ulterior purpose boundaries may be correctly described in a document, and if this is so, how a statement of that nature can be said to be against the proprietary interest of the person making it, it is somewhat difficult to ascertain."

Then again in *Brojo Mohan Das Adhikari's case* (3), to which I have already made a passing reference, the learned Judge discussed the matter in some greater detail and the importance of that judgment is, in my opinion, in connection with the point to which I have just made reference, namely, that in order to be admissible a statement must be one of relevant facts. The learned Judge in the course of his judgment has relied upon a judgment of Sir Richard Garth in *Brajeshwar Peshakar* v. *Budhanuddin* (7) where the learned Chief Justice said:

"A recital in a deed or other instrument is no doubt in some cases conclusive, and in all cases evidence, as against the parties who make it; and it is of more or less weight, or more or less con-

(4) 12 Ind. Cas. 149; 16 C W N 252; 14 C L J 467.

(5) 13 Ind. Cas. 120; 17 C W N 108; 15 C L J 7.

(6) 84 Ind. Cas. 420; 28 C W N 1092; A I R 1924 Cal 1067.

(7) 6 C 868; 7 C L R 6.

clusive against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons, than any other statement would be."

The learned Judge also goes on to state that although there had been difference of opinion in the Calcutta High Court as regards the matter, the trend of recent cases was to dissent from the view expressed by Mookherji, J. in the first case which I have quoted. It is unprofitable to mention every case that has dealt with this matter for the reason that some have not discussed in detail the question which arose or that they followed the other decisions in the Court in which they were sitting. However, the Bombay High Court specifically dealt with this question in the case which I have already quoted when referring to s. 32 (2). Although dissenting from the view that such recitals were admissible as statements made in the ordinary course of business under s. 32 (2), they have come to a definite conclusion that they were admissible under s. 32 (3) in *Ningawa's case* (2). The Madras High Court have expressed a view on this matter in the case to which I have made reference on a former occasion when dealing with the point and to which I again wish to make reference, the case of *Karuppanna Konar* v. *Rangaswami Konar* (8) an unofficial report, in which Jackson, J. in dealing with the question of whether the statement of boundaries limited to the property, the subject-matter of the deed, was against the proprietary interest of the person making it, made this observation:

"It is now argued that the documents come under sub-cl. (3) of s. 32.....It cannot be said that a statement of boundaries is against the proprietary interest of the person making it except on the assumption that every person must be presumed to own the universe until he makes a statement circumscribing his title. On the contrary a person may be presumed to own nothing until he brings into existence an effective deed evidencing his title to property and such a deed with the boundaries stated therein, is a document not against but in his proprietary interest".

To revert to the decision of the Calcutta High Court in a later case, the case of *Srimati Kumuda Kumari Dasi* v. *Dilsook Roy* (9) a decision in which Duval and Mitter, JJ. came to the conclusion that such recitals were not admissible under s. 32 (3).

In the case of *Taylor* v. *Witham* (10) the Master of the Rolls deciding that certain entries in the books relating to interest were admissible made this statement:

"I adopt the view of Mr. Bardon Parke in the case of *Reg.* v. *Inhabitants of Lower Hayford* (11) that it must be *prima facie* against his interest, that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it".

I quote that decision not as a decision on the proper interpretation of an Indian Act, but as stating the principle of interpretation which in my judgment must be applied in construing the Evidence Act. A fact to be relevant, or the method of proof to come within any particular section in my judgment must be or do so *prima facie*. Its relevancy must not and cannot depend upon the proof of other facts, and it cannot be such a matter capable of more than one interpretation on the face of it. In this case it may be said that a person may be enlarging his proprietary interest or he may be restricting it, and applying the principle to which I have referred, it does not pass the test. In coming to the decision on the question, apart from the authorities to which I have referred, I think I can do no better than to repeat the language of Jackson, J. of the Madras High Court when he says that such a statement can be construed as against the proprietary interest only on the assumption that there are no boundaries to the property of the person who is the maker of the deed and he is the owner of the universe. There must of necessity be some boundary to a man's land: and the statement that there is a certain boundary of the land which is the subject-matter of the deed, merely circumscribes the interest which he is selling and therefore circumscribes the interest which the purchaser obtains in a sense that the vendor says: 'I sold you this much and no more' and that if that is a true statement of the boundaries, it seems to me it is rather in favour of the person who makes it than against his proprietary interest.

After a careful consideration of the authorities, although as I have already said, I have by no means quoted them all, I have come to the conclusion that the statement of boundaries such as this, is not admissible under s. 32 (3) of the Evidence Act. I do not wish to be understood as stating that in no circumstance can recitals relating to boundaries be inadmissible. Statements as regards boundaries may be couched in such language and relating to such matters as to comply with both the parts of the section to which I have referred—statement of relevant fact, and statement made in such a manner

(8) 107 Ind. Cas. 293; A I R 1928 Mad. 105.
(9) 101 Ind. Cas. 512; 45 C L J 138.
(10) (1876) 3 Ch. D 605,
(11) 3 Sm. L C, 7th Ed., 333,

as to be statement against the proprietary interest of the person making it. But in my judgment, as a general question, it cannot be said that boundaries stated in a deed between third parties are necessarily and *prima facie* against the proprietary interest of the person making it; and for the reasons which I have already stated and do not propose to repeat, in this particular case in any event the statement does not comply with the provisions of s. 32. In those circumstances I would answer the first question which is submitted to this Bench in the negative and the second question also.

There remains, however, for the purposes of the disposal of the appeal the other matter which arises under s. 167 of the Evidence Act, that is to say, whether apart from this inadmissible evidence there was sufficient evidence to justify the finding. On an analysis of the judgment of the learned District Judge in my opinion there was such evidence. The learned Judge in the first instance in addressing himself to the question of limitation sets out the oral and the documentary evidence of both parties; it must be remembered in this connection that the onus was on the defendants to show that the action was barred by limitation. The learned Judge having stated the evidence of the plaintiff then deals with the evidence of the defendants and after dealing with this oral evidence makes this statement "The defendants' case of the trees having been cut in 1316 *Fasli*. has not at all been proved. They have examined three witnesses including defendant No. 2 and they have made most contradictory and inconsistent statements in their evidence." Then the *kebala*, the subject-matter of discussion in this case, was referred to. Then later reference was made again to the plaintiffs' evidence. The learned Judge says:

"The plaintiffs have also examined other witnesses to prove that the defendants sold the trees to Sujaet Ali and others and that they were cut in *Baisakh* 1331 *Fasli*."

Then he refers to another document which went to prove that these trees were actually sold to Sujaet Ali. It seems to me therefore quite clear that these considerations, that there was evidence which quite clearly appears on the face of the judgment of the learned Judge himself, in law justified the conclusion come to, that the plaintiffs' case was a true one that the trees had been cut in the year 1331 *Fasli*.

For these reasons I would hold that the appeal fails and it must be dismissed with costs.

Muhammad Noor, J.—I agree. As a member of the Bench which referred this case to a Full Bench I would like to add a few remarks of my own.

The two questions referred for the decision of this Bench are:

1. Whether statements of boundaries in documents of title between third parties are admissible in evidence under s. 32 (3) of the Evidence Act. Are they admissible under any other provision of the Act if the third parties are dead, or outside the jurisdiction of the Court?

2. Was the case of *Lalu Singh* v. *Sahdeo Singh* 36 Ind. Ca. 610(1) correctly decided?

Evidence Act deals with various topics. Among others it describes what facts are relevant and also how a relevant fact can be proved.

Section 32 of the Act in my opinion describes what class of statements of relevant facts made by persons who cannot be called as witnesses, can be proved. The section says that if a statement of a relevant fact has been made by a man who is dead, or whose evidence cannot be procured under the circumstances of the case, the statement can be used in evidence if it comes under a certain head specified. All the eight clauses of the section are in my opinion based upon the principle that the statements are of such a nature or were made under such circumstance as to guarantee their being true. The section is an exception to the general rule of evidence that statement of a third person is not admissible unless the man is called to give evidence in the case.

Coming now to the question before us, I adhere to the view which I expressed while sending the case to the Full Bench that the statement about the boundaries is not admissible as such under s. 32 (3).

One of the earliest cases in this connection, as my Lord has said is that of *Abdullah* v. *Kunj Behari Lal* (4). I shall confine myself to this case, because the other cases in which it has been held that the statement of boundaries is admissible in evidence are either based upon this case or adopts the same reasoning as was adopted in this case. The learned Judges of the Court there observed:

"Now the statement in these deeds that the transferor was owner of the land conveyed or mortgaged, and that he was either extinguishing his interest in the land by an absolute sale or placing a restriction on it by way of a mortgage, was undoubtedly one

against the pecuniary or proprietary interest of the person making it."

Later on they observed:

"When a person in the position of the vendor or the mortgagor in the deeds mentioned transfers the property, and describes that the property conveyed or mortgaged is limited by certain boundaries he makes a statement as to the limited extent of that property".

It seems, therefore, that the learned Judges of the Calcutta High Court held that the description of the boundaries was admissible under s. 32 (3) of the Evidence Act on two grounds, first, that the sale itself of the property is against the proprietary interest of the maker of the statement; and, secondly, on the ground that when he says that the property which he was selling or mortgaging is circumscribed by certain boundaries, the statement is against his proprietary interest. With my profoundest respect to the learned Judges, I think that neither of these grounds are good.

The statement by a man that he was selling his own property, assuming that it was a statement against his proprietary interest, was not a statement of a relevant fact, and therefore, though complying with one of the conditions of the section, it does not comply with the other, namely, that the statement must be of a relevant fact.

Regarding the second ground, I cannot do better than to quote, as my Lord has done, the observation of Jackson, J., of the Madras High Court that a statement by a man that his land is circumscribed by certain boundaries can only be said to be against his proprietary interest if it can be assumed that he is the master of the whole universe. Every man's land is circumscribed by some boundaries. Everyman has a limit to his land. When he says that a certain person has got land north or south or east or west of his land, he does no more than describe his own land. How it can be said that he is making a statement against his proprietary interest, I cannot comprehend. I do not wish to dilate on this topic any longer as I entirely agree with the view which was taken in the two later cases of the Calcutta High Court itself, namely, those of *Pramatha Nath Chaudhary* v. *Krishna Chandra Bhattacharji* (6), and *Brojo Mohan Das Adhikari* v. *Gaya Prasad Karan* (3). The statement is not admissible under any section. I would therefore answer both the questions in the negative.

Coming to the facts of the present case, the statement about the boundary is made up of two parts. It is said that on the east of the land which was being sold by *Musammat* Makia there was the orchard of Soney Lal Jha. That the land east of the land being sold was that of Soney Lal Jha was not disputed. The only thing in dispute was whether at that time there was an orchard in it. Therefore, assuming for the sake of argument, that the statement in Makia's deed that east of her land was the land of Soney Lal Jha can by any stretch of imagination be treated as one against her proprietary interest, the fact that there was an orchard can in no sense be said to be so. Once she described her land by stating that east of it was the land of Soney Lal Jha it was not against her interest to state whether it was an orchard or uncultivated land or any other kind of land. This did not in any way affect her proprietary interest. The learned Advocate for the appellants referred us to a very old English decision in *Higham* v. *Ridgway* (12), as an authority for the proposition that when portion of a statement is admissible in evidence, the whole of it is admissible; and he has referred us to a decision of this Court in *Sitaram Singh* v. *Khublal Singh* (13), where a statement by a widow to the effect that she had borrowed money from certain persons for legal purposes was held to be admissible though only one part was against the interest of the widow, namely that she owed money to certain persons. In my opinion the English Law in this respect goes much beyond what the Indian law is. Under s. 32 of the Evidence Act a statement, in order to be admissible under any of the sub-clauses of that section, must fulfil two conditions; first that the statement itself should be of a relevant fact; and, secondly, that the statement must come within any one of the eight sub-clauses. In the decision of this Court to which I have just referred, the entire statement was taken in evidence as the question of the taking of the money also was a matter in issue in that suit. I doubt, if a case similar to *Higham* v. *Ridgway* (12), had come before a Court in India, the statement of date of birth would have been held to be admissible under s. 32 (3) of the Evidence Act. Perhaps it may be held to be admissible under s. 32 (3) as a statement made in ordinary course of business in books of account. Therefore

(12) (1808) 10 East 109; 10 R R 235.

(13) 94 Ind. Cas. 13; 5 Pat. 168; A I R 1926 Pat. 255; 7 P L T 573.

I am clearly of the opinion that the statement as to the boundaries in the document in question was not admissible in evidence. I am, however, of opinion that the admission of this document has not vitiated the finding of fact.

The learned Advocate for the appellants has drawn our attention to the case of *Sumitra Kuer* v. *Ram Koir Chowbey* (14), where having held that a certain piece of evidence was not admissible, the learned Judges observed as follows:—

"The second point urged before us was that apart altogether from this document there was sufficient evidence in the case to justify the findings of the lower Appellate Court, and has the document been rejected altogether it would in fact have made no difference to the decision, and that therefore under s. 167 of the Evidence Act we ought not to remand the case for a fresh decision merely on the ground of the improper admission of the evidence. Were we a Court of appeal with a power to go into the evidence and arrive at an independent judgment upon the evidence itself, we would then be in a position to say whether or not the evidence justified the finding of the learned Subordinate Judge, but in second appeal the Court is not in possession of all the evidence or in a position to be able to weigh it and see whether in fact, apart from the objectionable evidence, the lower Court has rightly come to its decision. It is impossible for us here to say exactly how far the mind of the Subordinate Judge was influenced by this document".

It is obvious that it was a piece of evidence which was very largely relied upon by the defendant. The learned Judges say

"We find in the judgment of the Munsif that he states that the defendant relies principally upon the *heba* deed executed by *Musammat* Morha..... "

Now this decision was given in the year 1920. Since then the Code of Civil Procedure has been amended and the powers of the High Court in dealing with second appeals have been enlarged and this Court can now itself determine an issue of fact if it finds that it was wrongly determined on account of any error of law and a remand is not always necessary.

In my opinion s. 167 of the Evidence Act provides that if a Court finds that a certain piece of evidence has been wrongly admitted, the decision need not be reversed on that ground provided that the Court holds that there is sufficient evidence on the record to justify the finding. Therefore in second appeal if this Court finds that the lower Appellate Court has based its judgment partially upon a piece of evidence which was not admissible, it cannot by that reason alone, reverse that finding or remand the case if it can come to the conclusion that there was sufficient evidence on the record to justify the finding. How this Court is to satisfy itself about the sufficiency of evidence is a matter which must depend upon the facts of each case. There may be cases in which this conclusion cannot be arrived at unless the whole of the evidence be gone into, and in that case it will be for the Court to decide whether that evidence should be gone into in this Court or the case should be remanded for a fresh hearing of the appeal to the lower Appellate Court. In this particular case I am satisfied that there was plenty of evidence on the record on which the Court could have come to the same conclusion, namely that the defendants had failed to prove that the orchard was cut by them in the year 1316.

Therefore I agree that the appeal be dismissed with costs.

Agarwala, J.—The landlords, who are the plaintiffs, sued to recover the price of trees alleged to have been cut by their tenants, the defendants, from plot No. 159 in 1331 *Fasli*. The defence was that the trees were not cut in 1331 but in 1316 *Fasli* and that therefore the suit, which was instituted on April 9, 1927, was time-barred.

On the question at issue between the parties the plaintiffs relied *inter alia* on a *kebala* by which a plot adjacent to No. 159 was sold in 1321. In this *kebala* the eastern boundary of the plot sold was described as "The orchard of Soney Lal Jha." Soney Lal Jha is defendant No. 1. This description of the eastern boundary, it was contended by the plaintiffs, proved that in 1321 there were trees standing on the defendants' land, and, therefore, that the defence that the trees had been cut in 1316 was necessarily false.

On this contention two questions arose first, whether the description of the eastern boundary in the *kebala* of 1321 was admissible; and, secondly, if it was admissible, what weight should be attached to it. The lower Appellate Court which was the final Court of fact, held that the description of the boundary was admissible. For my own part, I may say that, even if it were admissible, it was evidence to which very little weight could be attached, for, the mere description of plot No. 159, which is the plot on the eastern boundary of the plot sold in 1914 as the orchard of Soney Lal Jha, is no guarantee that trees were standing on it in 1914. A piece of land is often known by a name which, however, apt it may have been at the time when

(14) 57 Ind. Cas. 561; 5 P L J 410; 1 P L T 702; (1921) Pat. 17.

it first acquired that name, may have long since lost the character indicated by the name. This, however, was a matter for the Court of fact.

The appellants' grievance in the present appeal is that the statement in the *kebala* was altogether inadmissible in evidence. The plaintiff-respondent contends that it was admissible by reason of the provisions of the third clause of s. 32 of the Indian Evidence Act as a statement contrary to the pecuniary or proprietary interest of the person who made it. The cases on the point only serve to show the divergence of opinion which exists. Speaking for myself, I am reluctant to adopt a view of law which results in shutting out evidence which might assist a Court of fact in coming to a correct conclusion, except in these instances in which the Legislature has clearly made a particular matter inadmissible. I therefore propose to examine the contention in the present case strictly in reference to the issue in respect of which the statement was sought to be used.

The issue was, whether the trees were on the defendants' land in 1321 ? If the answer was in affirmative, the defence to the plaintiffs' claim failed. The statement in the sale deed of 1914 which the plaintiffs rely on to refute the defence, is the description given of the eastern boundary, namely, "The orchard of Soney Lal." This description contains two declarations : first, that the eastern boundary was an orchard and second, that the orchard belonged to Soney Lal. Section 32 of the Evidence Act, so far as it is relevant to the present discussion is as follows :

"Statements of relevant facts made by a person who is dead are themselves relevant facts when those statements are against the pecuniary or proprietary interest of the person making it."

It will be observed that the statement relied on must in order to come within the third clause of s. 32, not only be against the pecuniary or proprietary interest of the person making it, but it must also be a statement of relevant facts. In so far as the description of the eastern boundary in the *kebala* of 1914 relates to the proprietorship of Soney Lal, it is irrelevant in the present case, as the ownership of plot No. 159 has no bearing on the matter in dispute and nothing turns on that ownership. The other part of the description, that what was on the eastern boundary was an orchard, is the only part of the description relevant to the present case, and I am unable to appreciate how that statement is against the interest pecuniary, proprietary or otherwise of the person who made it.

I would, therefore, answer the first question referred to us by saying that a statement of boundaries in a document of title between third persons who are dead at the time the statement it sought to be put in evidence is admissible in evidence under s. 32 (3) of the Evidence Act only when, in the particular case, it is shown first, that at the time the statement was made it was contrary to the interests of the maker, and, secondly, that at the time it is sought to be used it is a statement of a relevant fact.

With regard to the second question, the facts of the case of *Lalu Singh* v. *Sahdeo Singh* 36 Ind. Cas. 610 (1), do not appear, from the Report; but if it decides anything contrary to the opinion I have expressed with regard to the first question referred to us, I would say that that case was wrongly decided.

There remains the question : What course should be followed in view of the decision that the *kebala* of 1914 was inadmissible ? Under s. 167 of the Evidence Act the improper admission of evidence is not a ground of itself for reversing any decision if it appears to the Court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. Now, in the present case the lower Appellate Court has set out and discussed at length the evidence on the only material issue of fact which arose, namely, whether the defendants' allegation that the trees were cut in 1316, was true or false. The onus lay on the defendants. The Court was not impressed by the evidence for the defence and disbelieved it. It has referred to the fact that the defendants alleged that the trees were sold in 1316 to one Sujaet Ali. Sujaet Ali was examined as a witness by the plaintiffs and Sujaet Ali deposed that he and his son-in-law Kamluddin purchased the trees from the defendant in 1316, and not in 1331, and that they cut the trees in that year. The evidence of Sujaet Ali was corroborated by his son-in-law Kamluddin and this evidence the lower Appellate Court found itself unable to reject, remarking that defendant No. 1 who had sold the trees to Sujaet Ali, had not come into the witness box to deny the latter's assertion that

the transaction had taken place in 1931. That evidence, if believed, was conclusive as to the falsity of the defence put forward in the case, and, quite apart from the evidence afforded by the statement in the *kebala* (Ex. 1), must have resulted in the decision arrived at in the Court below.

I therefore agree that this appeal must be dismissed with costs.

N. *Appeal dismissed.*

LAHORE HIGH COURT

Criminal Appeal No. 318 of 1934
April 30, 1934
DIN MUHAMMAD, J.
SARDAR AHMAD—ACCUSED—APPELLANT
versus
EMPEROR—OPPOSITE PARTY

Criminal trial—Benefit of doubt—Legally insufficient evidence—Moral certainty, if justifies conviction—Criminal Procedure Code (Act V of 1898), s. 511—Penal Code (Act XLV of 1860), s. 75—Previous conviction—Mere admission, if sufficient—Documentary evidence, necessity of.

There are no better established principles in the administration of Criminal Law in British and British Indian Courts than (1) that a man can be convicted only on legal evidence, and (2) that if there is a reasonable doubt of his guilt on the evidence, he should have the benefit of it. If the evidence is legally insufficient, the gravest suspicion, amounting even to moral certainty, is not enough to sustain a conviction. An accused person is, therefore, entitled to the benefit of these principles.

All previous convictions which are being relied on for the purposes of s. 75, Penal Code, must be proved in accordance with the law. A mere admission of the accused is not sufficient especially when there is nothing on the record to justify the questioning of the accused under s. 342, Criminal Procedure Code, on that point. *Yasin* v. *Emperor* (1), relied on.

Cr. A. from the order of the First Class Magistrate, Lahore, dated December 20, 1933.

Mr. *Nazir Hussain*, for the Respondent.

Judgment.—Sardar Ahmad of Amritsar has been convicted by *Sardar* Narindar Singh, Magistrate, First Class, Lahore, with s. 30 powers under ss. 369 and 379 read with s. 75, Penal Code. He has been sentenced to seven years' rigorous imprisonment under s. 369 and to three years' rigorous imprisonment under s. 379 and further under s. 369 his movements have been restricted under s. 8 of Act V of 1918, for a period of three years after his release from jail. He has appealed through jail and the learned Assistant Legal Remembrancer has appeared for the Crown.

The facts of this case are these: Abdul Karim has two daughters by the name of *Musammat* Fahmeeda, aged about four or five years and *Musammat* Shedan, aged about two. It is alleged that on or about November 19 or 20, 1933, Sardar Ahmad kidnapped these two girls and removed the gold earrings which *Musammat* Shedan was wearing. No report was lodged as Abdul Karim thought that the matter was too trivial to be reported to the Police. Some days after this, the Police was investigating some other case, in the course of which the accused is said to have made certain disclosures relating to this occurrence. He pointed out the shop of Ram Rattan, P. W. No. 4, to whom the earrings had been sold and in consequence of the information thus supplied the earrings were recovered intact. Abdul Karim, P. W. No. 2, was also traced as a result of the information furnished by the accused and the earrings were identified by him as his property which Muhammad Shafi goldsmith, P. W. No. 3, had made for his daughter *Musammat* Shedan a few months before the occurrence.

The case for the prosecution is supported by Abdul Karim, P. W. No. 2, who has related the story as mentioned above, Muhammad Shafi, P. W. No. 3, Ram Rattan, P. W. No. 4 and Fakir Chand, P. W. No. 5 in whose presence the earrings were sold to Ram Rattan, P. W. No. 4, The accused denies his guilt and professes ignorance of all the circumstances that appear in evidence against him. The learned Magistrate on this evidence has remarked that he is satisfied that the accused kidnapped the children with intent to remove ornaments from the person of *Musammat* Shedan and actually committed theft of the earrings and has consequently found the accused guilty under both ss. 379 and 369. Now, so far as the removal of the earrings and their recovery from Ram Rattan is concerned, I have no doubt that the offence has been brought home to the accused. But I fail to understand how the learned Magistrate was in a position to remark that he has been satisfied that the offence of kidnapping has also been established against the accused. There is not an iota of evidence on the record to prove this part of the case. *Musammat* Fahmeeda was produced in Court, but her statement was not recorded as the learned Magistrate considered that she was prevented by tender years from understanding the questions put to her. The

learned Magistrate appears to have been influenced by the fact that the stolen earrings were recovered at the instance of the accused and he thinks he whould be justified in presuming that the accused has committed the other offence also with which he was charged. In my opinion, this is not the right attitude which the Magistrate should assume in dealing with criminal cases. As long ago as 1908, Protul Chandra Chatterji, J., observed as follows:

"Now I think there can be no doubt that there are no better established principles in the administration of Criminal Law in British and British Indian Courts than (1) that a man can be convicted only on legal evidence, and (2) that if there is a reasonable doubt of his guilt on the evidence, he should have the benefit of it. If the evidence is legally insufficient, the gravest suspicion, amounting even to moral certainty, is not enough to sustain a conviction. An accused person is, therefore, entitled to the benefit of these principles."

The learned Assistant Legal Remembrancer has frankly admitted that he is unable to support the appellant's conviction under s. 369 and in view of the evidence led in the case I entirely agree with him. There is another matter also to which I wish to draw the attention of the learned Magistrate and that is the manner in which the previous convictions of the accused have been brought on the record. It is very unfortunate that even Magistrates of long experience do not care to refer to the Criminal Procedure Code to find out the correct procedure laid down by the law in this respect. Section 511, Criminal Procedure Code, is quite explicit on this point and several authorities of this Court as well as of the other High Courts in India have made it clear that all those previous convictions which are being relied on for the purposes of s. 75, Penal Code, must be proved in accordance with the law. A mere admission of the accused is not sufficient especially when there is nothing on the record to justify the questioning of the accused under s. 342, Criminal Procedure Code, on that point. It is laid down in *Yasin* v. *Emperor* (1) that

"in order to support a charge of a previous conviction, there should be on the record a copy of some judgment or extract from a judgment or some other documentary evidence of the fact of such previous conviction, as is required by s. 91, Evidence Act, or s. 511, Criminal Procedure Code. Otherwise the examination by a Magistrate of the accused in respect of such previous conviction is without legal warrant or justification."

I do not however wish to interfere in appeal with the sentence passed upon the accused on this charge in spite of this defect as I am of opinion that even if the accused were not a previous convict his conduct was so reprehensible as to deserve a deterrent sentence in the interest of the protection of infants and also because no failure of justice has been caused by such omission. In view of the above, I quash his conviction under s. 369 and acquit him of that charge, but I confirm his conviction and sentence under s. 379 and reject his appeal to that extent. The order passed against him under Act V of 1918, would be *ipso facto* set aside.

D. *Appeal partly accepted.*

(1) 28 C 689; 5 C W N 670.

LAHORE HIGH COURT

Second Civil Appeal No. 2737 of 1929
June 27, 1934
YOUNG, C. J. AND RANGI LAL, J.

Musammat BALQIS BEGAM—PLAINTIFF—APPELLANT
versus
Shahzada MUHAMMAD HAMDAM AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. III, r. 2—Appeal, if proceeding in suit—Power-of-attorney authorising agent to prosecute claim—Authority to file appeal, if implied.

An appeal is a proceeding in a suit and the prosecution of a suit includes the prosecution of all the proceedings till a final decree is passed. Where a power-of-attorney authorises the agent to prosecute the claim (*pervi dawa*), it confers an implied authority on him to file an appeal.

S. C. A. from the decree of the District Judge, Ludhiana, dated August 21, 1929.

Mr. *Fayaz Hassan Shah*, for the Appellant.

Dr. *Nand Lal*, for the Respondents.

Judgment.—The only point for consideration in this second appeal is whether the special power-of-attorney granted by a *pardahnashin* lady to her brother-in-law included a power to file an appeal before the learned District Judge from the decision of the Subordinate Judge. The learned District Judge who heard the appeal came to the conclusion that the appeal was not competent because the power-of-attorney did not expressly authorise the agent to file an appeal. She has appealed to his Court.

The important words in the document with which we are concerned are those which authorise the agent to prosecute the claim (*pervi dawa*). There is ample authority for holding that an appeal is a proceeding in a suit and that the prosecution of a suit includes the prosecution of all the proceedings till a final decree is passed

It is true that the power-of-attorney enumerates certain powers conferred on the agent, but this enumeration is not exhaustive. In the document it is stated that whatever is done by the agent shall be acceptable to the executant thereof. It can hardly be contended that the agent was authorised to withdraw the suit or to compromise it but was not authorised to file an appeal against the decision of the trial Court. After a careful consideration of the terms of the power-of-attorney together with the surrounding circumstances, we are of opinion that it conferred an authority on the agent to file an appeal. This authority is clearly implied in the words "prosecute the claim."

We, therefore, accept the appeal, set aside the order of the lower Appellate Court and direct it to hear the case on the merits. Appellant's costs to be paid by the respondents in this Court and in the lower Appellate Court. Stamp on appeal to be refunded.

N. *Appeal accepted.*

CALCUTTA HIGH COURT
Full Bench

Full Bench Reference No. 1 of 1934
and
Civil Rule No. 1606 of 1933
January 23, 1935

COSTELLO, LORT-WILLIAMS, JACK, M. C. GHOSE AND NASIM ALI, JJ.

BISWAMBAR BISWAS – PETITIONER
versus
APARNA CHARAN MOHARY AND OTHERS – OPPOSITE PARTIES

Civil Procedure Code (Act V of 1908), s 73—application for rateable distribution—Court, if can inquire as to whether decree is proper or bona fide *one—Remedy of aggrieved judgment-creditor—Evidence Act (I of 1872), s. 44—If has application to proceedings under Civil Procedure Code, s. 73*

The Execution Court is only concerned with those matters which are set out as being the conditions for participation, and so long as a decree is put forward by the holder of that decree, and the holder of the decree satisfies the Court that the money due under that decree has not been paid, then that decree-holder is entitled to come in and claim a proportionate share in the assets of the judgment-debtor. If any part of those assets is paid out to a decree-holder who has obtained a decree by fraud or collusion or by any other improper means, then a remedy is open to the judgment-creditor who has suffered from those circumstances, as provided for in sub-s. (2), s. 73 of the Civil Procedure Code. The dominating factor with regard to this point is this: that the Court concerned with the distribution of the assets is doing something in connection with execution proceedings. The distribution of assets is only one of the acts in the execution proceedings, and the Court is functioning in an administrative and not in a judicial capacity, and no procedure is provided under the provisions of s. 73 of the Act of 1908, and no machinery exists for the holding of an enquiry of the kind involved in the ascertainment as to whether or not the decree is not a *bona fide* or proper decree. *In re, Sunder Das* (1), *Puran Chand Baid* v. *Surendra Narain Singh* (5) and *Peary Lal Das* v. *Peary Lal Dewan* (6), overruled.

[Case-law discussed.]

Per *Jack, J.*—Section 44, Evidence Act, has no application to proceedings under s. 73, Civil Procedure Code. It is only decrees under ss. 40, 41 and 42, Evidence Act which are referred to in s. 44, Evidence Act and such decrees have no application in execution proceedings.

C. R. from the decision of the Munsif, North Raozan, in Miscellaneous Judicial Case No. 85 of 1933.

Messrs. *Narendra Kumar Das* and *Durgesh Prosad Das*, for the Petitioner.

Mr. *Chandra Sekhar Sen*, for the Opposite Parties.

Costello, J.—This matter has been referred to a Full Bench by Jack and Khundkar, JJ. on the short point whether a Court acting under the provisions of s. 73, Civil Procedure Code, 1908, is entitled to inquire as to the validity of a decree put forward as the basis for claiming a share in the distribution of the assets of the judgment-debtor. The question we have to answer is whether that Court can go behind the decree and investigate the question whether that decree has been obtained by fraud or collusion. There are conflicting decisions upon this point. There are decisions of this Court which have laid it down that it is competent for a Court acting under the provisions of s. 73, Civil Procedure Code, to go behind the decree. There is a number of decisions of other High Courts in the contrary sense. In order satisfactorily to determine the question, it is necessary in the first place to examine the actual provisions of s. 73, Civil Procedure Code, 1908. That section in sub-s. (1) provides that:

"Where assets are held by a Court, and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decree for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

Then follow certain provisions as to the method by which distribution is to be effected. It appears therefore that the conditions for rateable distribution are these: (1) the decree-holder claiming to share in the rateable distribution should have applied for execution of his decree to the Court by which the assets

are held; (2) such application should be made prior to the receipt of the assets by the Court, (3) the assets of which a rateable distribution is claimed must be assets held by the Court; (4) the attaching creditor as well as the decree-holder claiming to participate in the assets should be holders of decrees for the payment of money; and (5) such decrees should have been obtained against the same judgment-debtor.

The primary condition to be fulfilled, by a person claiming to participate in the assets of the judgment-debtor, is that he must have a decree for the payment of money, which has been obtained by him against the same judgment-debtor. There are no words of qualification in sub-s. (1) as to the nature or validity in law of the decree which is being put forward. It appears, therefore, that all that is required, in order that a decree-holder shall establish his right to participate, is that he should bring forward a decree which he has obtained against the same judgment-debtor. Thereupon it becomes the duty of the Court by which the assets are held, to allow that decree-holder to participate in the distribution equally with the decree-holder who obtained the decree against the judgment-debtor upon which the execution proceedings were instituted. It has been argued by Mr. Das that if that is the position, a door is open to a vast amount of fraudulent claims being put forward based on decrees obtained against the judgment-debtor by his *benamidars*, or friends, or other persons who have been found willing to lend themselves to a device for defrauding the *bona fide* judgment-creditor. It was upon the footing of some such argument or rather some such consideration, that the decision in the case in *In re Sunder Das* (1), was given by Sir Richard Garth who was then the Chief Justice of this Court. That decision was given in 1884, at a time when the Code of Civil Procedure, 1882, was in force, and the matter fell to be decided under s. 295 of that Code. We find in the judgment of Sir Richard Garth this passage:

"We think that the words 'decree-holders' or 'persons holding decrees for money against the same judgment-debtor' in s. 295 must mean *bona fide* decree-holders against the judgment-debtor; and if in point of fact the decree which the present applicant holds is a sham decree, we think that the Court has a right to inquire into the question, and to exclude him from the distribution of assets. If this were not so, it is obvious that the section would give rise to a great deal of fraud, because any man, who is in difficulties, and likely to have executions issued against him by *bona fide* creditors, might always have a number of sham decrees in readiness against himself, to defeat the claim of any *bona fide* creditor who might put in an execution."

In my opinion with all possible respect to the learned Chief Justice, there was no justification at all for inserting the qualification "*bona fide*" in front of the word 'decree' or 'decree-holder.' It is to be observed, as Sir Richard Garth himself mentioned, that the Court had not the advantage of hearing both sides in that case; in other words, the matter was not fully argued before Sir Richard Garth and Beverly, J. It would, therefore, perhaps not be wrong to come to the conclusion that the judgment was given without due consideration of the precise nature of the then existing section. Unfortunately the judgment of Sir Richard Garth in *In re Sunder Das* (1) has been taken as the foundation for a number of subsequent decisions in this Court, all of them adopting, as far as one can see, the same point of view as that which influenced Sir Richard Garth. The next case in chronological order is one of Bombay, *Chhagan Lal* v. *Fazar Ali* (2). That was a decision of Sir Charles Sargent, the Chief Justice and Nanabhai Haridas, J. The head-note of the case runs thus:

"In distributing the proceeds of execution under s. 295, Civil Procedure Code (Act XIV of 1882), the Court has power to inquire into the *bona fides* of the several decree-holders that apply for rateable distribution, if the same has been called in question and to decide it in the same manner as all other questions that arise in execution. The party aggrieved by such a decision is entitled, under the last clause of the section, to bring a regular suit to compel the successful judgment-creditor in execution to refund."

Sir Charles Sargent in delivering judgment said:

"The question referred to us is not without difficulty, but we are disposed to adopt the ruling of the Calcutta High Court in *In re Sunder Das* (1)."

So even at that early stage doubt was cast upon the correctness of the decision of Sir Richard Garth, and in the year 1897 doubt was again expressed by Sir Francis Maclean when, sitting with Banerjee, J., he delivered judgment in *Raghu Nath* v. *Chatraput Singh* (3). Referring to the case *In re Sunder Das* (1) and to that of *Chhagan Lal* v. *Fazar Ali* (2) Sir Francis said:

'We are invited to say that these cases are not law. If they be law, there is an end of the present

(1) 11 C 42.

(2) 13 B 154.

(3) 1 C W N 633.

situation I must say for myself, that I entertain some doubt as to the soundness of these decisions."

In the year 1901 the matter was raised at any rate indirectly in a case before the Judicial Committee of the Privy Council *Shankar Sarup* v. *Mejo Mal* (4), and the importance of that case is this: that the judgment of their Lordships of the Judicial Committee which was given by Lord Robertson makes it clear that when a Court concerns itself with the distribution of assets under the provisions of s. 295 (as the relevant section then was), the Judge is acting in an administrative rather than in a judicial capacity. Lord Robertson made it clear as appears from the observations at p. 323* of the report that an order for distribution was a step in an execution proceeding. On the previous page His Lordship is reported as saying:

"The scheme of s. 295 is rather to enable the Judge as a matter of administration to distribute the price according to what seems at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by a suit such as the present."

If one takes the view that in distributing the assets under the provisions of s. 295 of the previous Code or rather s. 73 of the present Code, the Court is acting in an administrative capacity, it is very difficult to understand how it can be contended that there can be any proper machinery for holding any kind of inquiry into the *bona fides* of a decree which is put forward as the basis of claim.

Some 11 years after the decision of the Judicial Committee of the Privy Council to which I have just referred, there came a case which is the first of the two cases which are responsible for the present proceedings before us. In the year 1912 the point which we are now considering, came before a Bench consisting of Mookerjee, J. (that is to say, Sir Asutosh Mookerjee) and Beachcroft J., in *Puran Chand Baid* v. *Surendra Narain Singh*, 16 Ind. Cas. 795 (5). By that time of course the present Code of Civil Procedure had been in operation for some years, and, therefore, the matter fell within the provisions of s. 73. The head note of the case says:

"under s. 73, Civil Procedure Code, (1908), it is competent to the Court to investigate whether any of the decree-holders who claim rateable distribution is a *benamidar* for the judgment-debtor or not."

Mookerjee, J., in course of his judgment considered the matter and effect of sub-s. (1), s. 73. He said:

"On behalf of the opposite party, it has been argued that it is incumbent on the Court to ensure that the process of the Court is not abused, and that the Court must, for that purpose, ascertain whether the decree on the basis whereof rateable distribution is claimed is a real decree"

It appears, therefore, that the same kind of argument was put forward before Mookerjee, J., and Beachcroft, J., as had been effective before Sir Richard Garth many years before, and we have had the same kind of argument put before us today. It is remarkable circumstance that Mookerjee, J., himself said:

"The question of the true construction of this section, that is s. 73, is not free from difficulty: but in view of the decision of this Court in *In re Sunder Das* (1) which was followed in *Chhagan Lal* v *Fazar Ali* (2), we must overrule the contention of the petitioner."

The petitioner had contended that the executing Court had no right to inquire into the validity of a decree. Mookerjee, J., really added little or nothing to the decision or to the reasons for the decision given by Sir Richard Garth, except in so far as appears from the concluding passage of his judgment where he said;

"We must bear in mind, however, that since the date of the decision in *In re: Sunder Das* (1) and *Chhagan Lal* v. *Fazar Ali* (2) the Code of Civil Procedure has been revised and re-enacted; if the legislature had been of the opinion, that the view taken by this Court and by the Bombay High Court was erroneous and did not represent the true intention of the framers of the Code, the language of the section might have been suitably altered; but although we find that the provisions of s. 295 have been reproduced with variations in s. 73, the phraseology has not been so modified as to justify an inference that the decision in *In re Sunder Das* (1) is no longer good law. We, therefore, accept the view adopted by Sir Richard Garth and Sir Charles Sargent."

With all possible respect to Mookerjee, J., that seems to me an entirely fallacious argument, because the provisions of s. 295 of the Act of 1882 and those of s. 73 of the present Code are entirely different, from the provisions of s. 272 of the Code of 1859. Under the latter section some sort of machinery was provided for the kind of inquiry which is now sought in the present proceedings. What is still more important is that under the provisions of s. 295 of the Code of 1859 there was no provision for the institution of the suit such as is now contained in sub-

(4) 23 A 313; 28 I A 203; 8 Sar. 72; 3 Bom. L R 713; 5 C W N 649 (P C).

(5) 16 Ind. Cas. 795; 16 C L J 582, 17 C W N 326.

*Page of 23 A.—[*Ed.*

s. (2), s. 73. That sub-section provides that:

"Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets."

That provision would seem to indicate that the intention of the legislature both under the Code of 1882 and under the present Code was to provide that when essential conditions for rateable distribution were fulfilled, there should be rateable distribution without any inquiry at that stage into the validity of any decree, and a right was given to any party aggrieved subsequently to bring a regular suit in order to secure his full share of the assets. If any part of the assets was distributed to a person who was not lawfully entitled to participate, then it was, under the previous Code, and is under the present Code, open to the judgment-creditor who is aggrieved by that distribution to bring a suit claiming a refund. It seems to me that Mookerjee, J., in *Puran Chand Baid* v. *Surendra Narain Singh* (5) did not give sufficient weight to the fact that there was the distinction to which I have just referred between the provisions of the Code in 1859 and those of the two subsequent Codes. *Puran Chand Baid* v. *Surendra Narain Singh*, 16 Ind. Cas. 795 (5) was decided in the year 1912, and in the following year the matter again came before the same Bench in *Peary Lal Das* v. *Peary Lal Dawan*, 22 Ind. Cas. 407 (6) and it is not surprising that Mookerjee and Beachcroft, JJ., then adhered to the opinion which they had expressed in the case which had been before them in the previous year, and so once more they said that an Execution Court has jurisdiction under s. 73 of the Code, to hold a summary inquiry as to the fraudulent character of a decree obtained by one of the decree-holders claiming rateable distribution.

Now it is those two judgments of Mookerjee, J., which have given rise to all the difficulties in the present proceedings, because when the matter was before the Executing Court, the learned Munsif seems to have thought that those two decisions of this High Court were not correct, and he took the view that an Execution Court ought not to go into the question of the validity of a decree put before it for the purpose of claiming a share in the distribution of assets. The learned Munsif who had to deal with the matter apparently took that view, because he was aware of the fact that other High Courts have consistently adopted a view directly contrary to the view expressed by this Court.

We find that only three or four years after the decision given by Mookerjee and Beachcroft, JJ., the Madras High Court came to the conclusion that an inquiry under s. 73, Civil Procedure Code is of a non-judicial character and a Court charged with the distribution of assets under that section has no power to inquire into the validity or the *bona fides* of a decree on the strength of which rateable distribution is claimed, and that the only conditions to be satisfied under s. 73 are that there must have been an application before the assets are realized, and that the decree should not have been satisfied. That was a decision of Ayling and Seshagiri Ayyar, JJ., in *Saravana Pillai* v. *Arunachalam Chettiar* (7). In the judgment delivered by Seshagiri Ayyar, J., we find a very illuminating passage at p. 843*. The learned Judge referring to the case of *Shankar Sarup* v. *Mejo Mal* (4), that is to say, the case decided by the Judicial Committee of the Privy Council says:

"The question before their Lordships related to limitation. It was argued that a suit brought to contest the validity of payments made to one of the decree-holders should have been instituted within a year of the decision under Art. 13, Limitation Act. Their Lordships pointed out that in making a rateable distribution under s. 295, Civil Procedure Code, 1882, the officer was acting departmentally and not as a Court, and that consequently the decision of such an officer was not one which should have been set aside within a year. A comparison of the provisions of the Code of Civil Procedure relating to rateable distribution and to claim proceedings, fully bears out this view. Order XXI, which relates to execution, makes provisions in rr. 58 to 63 for investigating the claims of third parties. There are similar provisions beginning with r. 97 where there is resistance to delivery of possession to the decree-holder. An inquiry is provided for in these rules, and the unsuccessful party is directed to establish his right in a Court of Law, failing which it is declared that the orders passed under the rules shall be final."

Then in the final part of the judgment their Lordships said:

"No such provision is to be found with reference to s. 73. Clause (2) of that section says that a wrongful distribution may be questioned in a regular suit. No procedure is prescribed for ascertaining the legality or otherwise of the decree

(6) 22 Ind. Cas 407; 18 C L J 646; 19 C W N 903.

(7) 38 Ind. Cas. 117; A I R 1918 Mad. 825; 40 M 341; 21 M L T 225; (1917) M W N 280; 5 L W 538; 32 M L J 553.

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under which rateable distribution is sought. The absence of such a provision indicates that the inquiry under s. 73 is non-judicial. It follows from this that an officer distributing the assets can have no power to inquire into the *bona fides* or otherwise of a decree brought to his notice. Section 73 (*c*), cl. (4), does not contemplate any such inquiry."

Then the learned Judge emphasized again what are the fundamental conditions for obtaining a share in the distribution. He said :

"The only conditions to be satisfied are: there must have been an application before the assets are realized and the decree should not have been satisfied. Both these are matters of record which do not necessitate any lengthy investigation We are, therefore, on the construction of the provisions relating to the rateable distribution, of opinion that it is not competent to the District Munsif to inquire into the validity of a decree on the strength of which rateable distribution is claimed."

Then he proceeds to examine the earlier decisions which I have mentioned, and to show why he differs from them. That was a decision of the Madras High Court. There is also a very important and significant decision given by a Full Bench of the Bombay High Court in *Dattatraya Govind Seth* v. *Purshottam Narayan Seth* (8). The decision of the Court was given by Sir Norman Macleod, the then Chief Justice, and at p. 639* we find a passage where the learned Chief Justice after saying that the attention of the Court was drawn to s. 272 in the Code of 1859, proceeded thus :

"Therefore under that Code the Court which was distributing the assets amongst the decree-holders had the power to deal with the question whether any of the decrees passed by itself had been obtained by fraud or other improper means. But this power was not given by s. 295, Act XIV of 1882, nor by s. 73 of the present Code. Section 73 directs that the assets, after deducting the costs of realization, shall be rateably distributed among all such persons as shall have made applications to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor. On general principles the Court, which would be merely a distributing agency would not have any power to deal with the question whether any of the decrees had been obtained by fraud or other improper means just as in an ordinary case of execution the Court which executes the decree cannot go behind the decree."

With great respect I adopt and entirely agree with what is said in that passage of the judgment of Sir Norman Macleod. In my opinion it concisely and correctly gives the proper view of the point which is now under consideration. The passage indicates that the true view of the law is that the Execution Court is only concerned with those matters which I have set out as being the conditions for participation, and so long as a decree is put forward by the holder of that decree, and the holder of the decree satisfies the Court that the money due under that decree has not been paid, then that decree-holder is entitled to come in and claim a proportionate share in the assets of the judgment-debtor. If any part of those assets is paid out to a decree-holder who has obtained a decree by fraud or collusion or by any other improper means, then a remedy is open to the judgment-creditor who has suffered from those circumstances, as provided for in sub-s. (2), s. 73 of the Act of 1908. To my mind the dominating factor with regard to this point is this: that the Court concerned with the distribution of the assets is doing something in connection with execution proceedings. The distribution of assets is only one of the acts in the execution proceedings, and the Court is functioning in an administrative and not in a judicial capacity, and no procedure is provided under the provisions of s. 73 of the Act of 1908, and no machinery exists for the holding of an enquiry of the kind involved in the ascertainment as to whether or not the decree is not a *bona fide* or proper decree.

It would not only be inconvenient but indeed impossible for a Court concerning itself with execution matters to decide in a summary procedure, whether or not a decree is a "*bona fide*," to use the expression of Mookerjee, J., or a "real" decree as said by the other learned Judge in the same case. The last case to which I would refer in order to complete the chronological survey of the authorities is *Uma Habiba* v. *Rasoolan* (9), in which Das and Foster, JJ., relying on *Shankar Sarup* v. *Mejo Mal* (4), decided in definite terms that:

"an Executing Court making a rateable distribution under s. 73, Civil Procedure Code, 1908, has no power to make enquiries into the *bona fides* of the decrees of the rival claimants."

In my judgment the decisions in the Madras, Bombay and Patna High Courts represent the correct view of the law. It follows, therefore, that we must say that the cases of *Puran Chand Baid* v. *Surendra Narain Singh* 16 Ind. Cas. 795 (5), and *Peary Lal Das* v. *Peary Lal Dawan*, 22 Ind. Cas. 407 (6), were not correctly decided. We are unanimously of opinion

(8) 65 Ind. Cas. 600; A I R 1922 Bom. 31; 46 B 635; 24 Bom. L R 1.

*Page of 46 B.—[*Ed.*]

(9) 98 Ind. Cas. 759; A I R 1926 Pat. 497; 5 Pat. 445.

that the Rule No. 1606 of 1933 which was issued on December 15, 1933, must be discharged Each party will bear its own costs in the Rule as well as in this Reference.

Lort-Williams, J.—Section 272, Act VIII of 1859 provided that:

"If it shall appear to the Court, upon the application of a decree-holder, that any other decree under which property has been attached was obtained by fraud or other improper means, the Court may order that the applicant shall be satisfied out of the proceeds of the property attached so far as the same may suffice for the purpose if such other decree be a decree of that Court, or, if it be a decree of another Court, may stay the proceedings to enable the applicant to obtain a similar order from the Court by which the decree was made".

There was no such provision in s. 295, Act XIV of 1882, nor is there any in s. 73, of the present Code of Civil Procedure. But s. 295 provided that

"If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person, to compel him to refund the assets,"

and similar provision is made in s. 73 (2). Nevertheless, in *In re Sunder Das* (1), Sir Richard Garth, C. J., decided that

"a Court is bound, in cases falling within this section, to satisfy itself whether the claimants are *bona fide* decree-holders within the meaning of the section, and where it is unable to satisfy itself as to the *bona fides* of the claim, the Court should exclude such claimant from the distribution of assets".

This is the source and foundation of other decisions in the Calcutta High Court, especially in *Puran Chand Baid* v. *Sundra Narain Singh*, 16 Ind. Cas. 795 (5) and *Peary Lal Das* v. *Peary Lal Dawan* 22 Ind. Cas. 407 (6) and has given rise to the conflict between this and other High Courts on this point. Sir Richard Garth, at p. 44* of the report in the case of *In re Sunder Das* (1), said as follows :

"He contends that, so long as his client holds a decree against the judgment-debtor which is unsatisfied (let that decree be ever so fraudulent), still the Court is bound to give effect to it, and to allow the decree-holder to share in the assets. We cannot adopt that view. We think that the words 'decree-holders' or persons holding decrees for money against the same judgment-debtor in s. 295 must mean *bona fide* decree-holders against the judgment-debtor; and if in point of fact the decree which the present applicant holds is a sham decree, we think that the Court has a right to enquire into the question, and to exclude him from the distribution of assets."

I do not understand the expression a "sham decree". Clearly, the learned Chief Justice did not mean a decree made by a sham Judge or the decree of a sham Court. What he meant was a decree made in respect of a false or fraudulent claim. But that would not make the decree a sham decree. Such a decree would be a good decree and valid, unless and until it was set aside by some competent Court, and as a result of a proper trial. A decree of a competent Court ought not to be set aside as a result merely of some kind of enquiry especially when charges of fraud are involved. Section 73 (2) provides the appropriate remedy in such circumstances. Sir Richard Garth, and other Judges, and Mr. Narendra Kumar Dass, who has ably argued this case, have shown that the remedy given may often turn out to be of little or no value. But that is a result, and probably an inevitable result, of any attempt to make provision for rateable distribution in execution proceedings. Under ss. 270 and 271 of the Code of 1859, the creditor who first attached the property had statutory priority, and, in my opinion, that provision was preferable to the provision for rateable distribution made for the first time in the Code of 1877 and included in the present Code. The function of the Judge under s. 73 is administrative and not judicial. This was decided, with respect to the corresponding s. 295, by their Lordships of the Judicial Committee of the Privy Council in *Shankar Sarup* v. *Mejo Mal* (4), in which Lord Robertson said at p. 322*, of the report:

"The scheme of s. 295 is rather to enable the Judge as matter of administration to distribute the price according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently re-adjusted by a suit such as the present."

Therefore, in my opinion, the decisions in *Saravana Pillai* v. *Arunachalam Chettiar* (7) and *Dattatraya Govind Seth* v. *Purshottam Narayan Seth* (8), are correct, and a Court charged with distribution of assets under s. 73, Civil Procedure Code, has no power to enquire into the validity or the *bona fides* of a decree on the strength of which rateable distribution is claimed. It follows that in my opinion, the cases of *Puran Chand Baid* v. *Surendra Narain Singh*, 16 Ind. Cas. 795 (5) and *Peary Lal Das* v. *Peary Lal Dawan* 22 Ind. Cas. 407 (6), on this point, were wrongly decided, as also was the case of *In re Sunder Das* (1).

Jack, J.—I would only add that s. 44, Evidence Act, to which a reference has been made in supporting the Rule obvi-

* Page of 11 C.—[*Ed.*]

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ously has no application to proceedings under s. 73, Civil Procedure Code. These proceedings are, as held by their Lordships of the Privy Council in *Shankar Sarup* v. *Mejo Mal* (4) a step-in-aid of execution. It is only decrees under ss. 40, 41 and 42, Evidence Act which are referred to in s. 44, Evidence Act and such decrees have no application in execution proceedings. It is well recognised that the Executing Court is not entitled to question the validity of the decree.

The strongest argument which has been advanced in support of the Rule is that it is the duty of the Court to go into the question of fraud or collusion in order to prevent abuse of the process of the Court, but, if that were the case, it must be held that in all execution proceedings the Court would be equally entitled to inquire into such questions. That is obviously not so. The remedy which is open to the parties is laid down by the section itself, and the fact that no procedure is provided in the section for such an inquiry shows that it was never intended that such questions should be inquired into. So long as there is an unsatisfied decree capable of execution and application for rateable distribution has duly been made, the applicant is entitled to a share under s. 73, Civil Procedure Code.

M. C. Ghose, J.—Upon a full consideration of the matter, I am of opinion that the Court making a rateable distribution under s. 73, Civil Procedure Code, is not competent to decide whether a decree is *bona fide*. To hold otherwise would be to introduce complications in the administration of law. A decree may be challenged by an appeal and a second appeal. To allow an Executing Court to set aside a decree on the ground of fraud or collusion would be to establish that Court as a revising Court of decrees and to delay the finality of litigation. The Court making a rateable distribution is not acting in its judicial capacity. The Executing Court cannot go behind the decree. It is complained that the petitioner may be defrauded by false decrees obtained by dishonest people. The answer is that s. 73 (2) provides the remedy. Whenever the petitioner finds that a fraudulent decree is put forward for the purpose of rateable distribution, it is open to him to challenge the decree by instituting a suit in the proper Court for a declaration and he may obtain an injuncution from the Court, staying the distribbution until the matter is decided.

Nasim Ali, J.—I agree. I would like to add a few words with reference to the two cases on which the learned Advocate for the petitioners placed much reliance. In *In re Sunder Das* (1) the main reason given by the learned Chief Justice is that if before the distribution of assets no inquiry in to the *bona fides* of the decree be held, the money may be paid to a creditor who may be a pauper from whom it would be very difficult to realize the money afterwards. But if a certain creditor finds that a person is about to participate in the sale proceeds on the basis of a fraudulent decree, his proper remedy is to institute at once a suit and to get an injunction from the Court restraining him from taking any money from the Court till the disposal of the suit. In *Puran Chand Baid* v. *Surendra Narain Singh* 16 Ind. Cas. 795 (5), Mookerjee, J., followed the decision in *In re Sunder Das* (1). But it appears from the judgment that the learned Judge also gave an additional reason in support of the view which was taken by the Chief Justice in the case reported in *In re Sunder Das* (1) *viz* :

"Since the date of the decisions in *In re Sunder Das* (1) and *Chhagan Lal* v. *Fazar Ali* (2), the Code of Civil Procedure has been revised and re enacted; if the Legislature had been of the opinion that the view taken by this Court and by the Bombay High Court was erroneous and did not represent the true intention of the framers of the Code, the language of the section might have been suitably altered; but although we find that the provisions of s 295 have been reproduced with variations in s. 73, the phraseology has not been so modified as to justify an inference that the decision in *In re Sunder Das* (1) is no longer good law."

But it would appear that in the year 1901 the Judicial Committee in *Shankar Sarup* v. *Mejo Mal* (4), definitely pointed out that the act of the Court under s. 295 of the Code of 1882 was a ministerial Act. Therefore when the Legislature amended the section in the Code in 1908, no change was considered to be necessary. The Legislature in 1908 accepted the view that the distribution of assets by the Court under s. 73 is a ministerial Act, and in case of dispute, the rights of the parties can be subsequently adjudicated by a regular suit.

D. *Reference answered.*

ALLAHABAD HIGH COURT
Full Bench

Privy Council Appeal No. 18 of 1934
January 24, 1935

SULAIMAN, C. J., NIAMAT-ULLAH AND BENNET, JJ.

BENARES BANK LTD., AGRA—PLAINTIFF—APPLICANT

versus

Pandit RAJNATH KUNZRU AND OTHERS—OPPOSITE PARTIES—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 110, O. XLI, r. 35—Two cross-appeals separately disposed of—One allowed but the other dismissed—Effect—Decision in latter, if not one of affirmance—Appeal to Privy Council—Leave, if can be granted — Two cross-appeals, whether like appeal and cross-objection—Distinction between them.

When two cross-appeals are separately disposed of, the matters in controversy in the two appeals are distinct and separate and, therefore, the adjudications of such matters are also distinct and separate. The dismissal of the plaintiff's appeal is, therefore, an affirmance of the adjudication made by the first Court so far as the matter in controversy in the plaintiff's appeal is concerned. Whereas the allowing of the defendants' appeal is a variation of the adjudication of the first Court so far as the matter in controversy in that appeal is concerned. From the mere fact that a cross-appeal has been allowed and the adjudication varied so far as the matter in controversy in that appeal is concerned, it does not follow that the decision in the other appeal which is dismissed is not one of affirmance. Consequently where there are cross-appeals filed in the High Court on behalf of the plaintiff and the defendant and the defendants' appeal is decreed and the decree of the Court below varied, but the plaintiff's appeal is dismissed, the plaintiff cannot be allowed to appeal against the judgment of the High Court reversing the first Court's decree. *Chiranji Lal* v. *Behari Lal* (1), followed and held not affected by *Annapurnabai* v. *Rupriao* (7) and *Tassaduq Rasul Khan* v. *Kanshi Ram* (8) not followed. [p. 489, col. 1]

[Case-law discussed.]

The case of two cross-appeals is not exactly identical with an appeal and a cross-objection. In the case of an appeal and a cross-objection, there is only one judgment delivered and only one decree is prepared by the Court which embodies the adjudication in both the appeal and the cross-objection. On the other hand, under O. XLI, r, 35, the decree of the Appellate Court has to contain the number of the appeal, the names and description of the appellant and the respondent and a clear specification of the relief granted or other adjudication made. If there are two cross-appeals pending in the High Court, two decrees have to be prepared giving all these particulars. [p. 488, col 2.]

Messrs. *P. L. Banerji*, *B. Malik* and *Govind Das*, for the Applicant.

Messrs. *S. K. Dar* and *A. M. Khwaja*, for the Opposite Parties.

Sulaiman, C. J.—This is an application by the plaintiff for leave to appeal to His Majesty in Council. The suit was for recovery of a large sum of money alleged to be due on *hundis* and as money advanced against certain goods which were shipped. The Court of first instance decreed the claim so far as the amount due on the *hundis* was concerned, and as regards the other claim confined the decree to a sum of £579 and dismissed the rest of the claim amounting to about Rs. 20,000. Two separate cross-appeals were filed in the High Court. One on behalf of the plaintiff against the dismissal of his claim and the other by the defendants in respect of that part of the claim which was decreed. These two appeals were separately numbered, but were connected and heard together and disposed of by one judgment. Two separate decrees were prepared in the two cases. The value of the subject-matter in dispute in the defendants' appeal has been found to be in excess of Rs. 10,000 and leave has accordingly been granted. The value of the subject-matter in dispute in the plaintiff's appeal was also more than Rs. 10,000, but the appeal was dismissed.

It is conceded by Counsel for the Bank that no substantial question of law arises in this case and that no appeal would lie unless it can be considered that the decree of the High Court is not one of affirmance or that the appeal is otherwise a fit one to go up to His Majesty in Council. The learned Advocate for the plaintiff Bank contends before us that inasmuch as the decree of the Court below has not been affirmed but has been varied in consequence of the appeal having been allowed, the plaintiff has a right of appeal to His Majesty in Council even as regards the decree dismissing the plaintiff's appeal.

In the case of *Chiranji Lal* v. *Behari Lal* (1), Richards, C. J., and Tudball, J. laid down that where there are cross-appeals filed in the High Court on behalf of the plaintiff and the defendant and the defendants' appeal is decreed and the decree of the Court below varied, but the plaintiff's appeal is dismissed, the plaintiff cannot be allowed to appeal against the judgment of the High Court reversing the first Court's decree.

This case has been followed by the Lahore High Court in *Asa Ram* v. *Kishen Chand* (2). In one case the Madras High Court went a step further and held that even where there is an appeal and a cross-

(1) 48 Ind. Cas. 124; 16 A L J 864.
(2) 123 Ind. Cas. 523; 11 Lah 465; A I R 1930 Lah 554; 31 P L R 236; Ind. Rul. (1930) Lah. 443.

objection and the cross is allowed, the appellant is not entitled to appeal to His Majesty in Council from the decree dismissing his appeal. See *Ramanathan Chetty* v. *Subramanian Chetty*; 97 Ind. Cas 592 (3).

But this view has not been, strictly speaking, followed in a later case of that Court in *Shunmuga Sundara Madaliar* v. *Ratnavelu Mudaliar* (4), where when an appeal and a cross-objection were disposed of together it was considered that there was only one decree which had varied the decree of the first Court.

So fas as the question of an appeal and a cross-objection is concerned, a Full Bench of this Court in the case of *Nathu Lal* v. *Raghubir Singh* (5), has recently laid down that where the cross-objection is allowed, the appellant has a right of appeal to His Majesty in Council because the decree of the Court below is varied and the decision is not one of affirmance. Two members of the Bench were inclined to think that cross-objections stand on a different footing from cross-appeals, and the other learned Judge pointed out that there would be a clear anomaly if such a distinction were recognised.

On the other hand, the Patna High Court in the case of *Jamuna Prasad Singh* v. *Jagarnath Prasad Bhawat* (6), has laid down that where there are two cross-appeals one of which is allowed, there is a right of appeal to His Majesty in Council even in the other cross-appeal. The learned Judges have based their decision principally on the pronouncement of their Lordships of the Privy Council in the case of *Annapurnabai* v. *Ruprao* 86 Ind. Cas. 504 (7).

The question for our consideration is whether the last mentioned Privy Council case has by implication overruled the previous decision of this Court. In *Annapurna Bai's case* (7), the plaintiff, claiming to be the adopted son of the deceased owner, brought a suit for possession against the surviving widow and also another claimant who professed to have been adopted earlier. The defendants denied the plaintiff's adoption, set up the adoption of the defendant No. 2 and the defendant No. 1 further claimed a maintenance allowance with a charge on the estate. The trial Court holding that the plaintiff's adoption was proved and the alleged adoption of the defendant No. 2 not proved, decreed the claim; but allowed maintenance to the defendant No. 1 less than what she had claimed. Both the defendants appealed to the Court of the Judicial Commissioner and the decree of the trial Court was substantially affirmed, but was modified to the extent of increasing the maintenance allowance given to the widow. Both the defendants appealed to their Lordships of the Privy Council and raised the whole question in controversy in the suit. It was held by their Lordships that inasmuch as the decree of the Judicial Commissioner was not one of affirmance of the trial Court, they could appeal as of right. There was only one decree passed by the Judicial Commissioner and that decree had certainly varied the decree of the trial Court, though in favour of the appellants themselves.

The case of two cross-appeals is not exactly identical with an appeal and a cross-objection. In the case of an appeal and a cross-objection there is only one judgment delivered and only one decree is prepared by the Court which embodies the adjudication in both the appeals and the cross-objection. On the other hand, under O. XLVI, r. 35, the decree of the appellate Court has to contain the number of the appeal, the names and description of the appellant and the respondent and a clear specification of the relief granted or other adjudication made. If there are two cross-appeals pending in the High Court two decrees have to be prepared giving all these particulars.

In the leading case of *Tassaduq Rasul Khan* v. *Kanshi Ram* (8), their Lordships have made it clear that the word "decision" in s. 596 of the old Code of Civil Procedure, corresponding to s. 110 of the new Code, has not the same meaning as the word "judgment" as defined, but that it means the decision of the suit by the Court. Obviously, therefore, the word "decision" does not mean the reasoning or the basis of the judgment, but the operative portion of the judgment which is ultimately incorporated in the decree that is prepared. Under s. 2 (2) of the Code a decree is the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the

(3) 97 Ind. Cas. 592; A I R 1926 Mad. 1024; 51 M L J 295; 24 L W 455; (1927) M W N 465.

(4) 121 Ind. Cas. 16; 52 M 521; 29 L W 623; (1929) M W N 304; A I R 1929 Mad. 429; 56 M L J 476; Ind. Rul (1930) Mad. 112.

(5) 135 Ind. Cas. 234; 54 A 146; (1931) A L J 968; A I R 1932 All. 65; Ind. Rul. (1932) All. 58 (F B).

(6) 117 Ind. Cas. 193; A I R 1929 Pat. 561.

(7) 86 Ind. Cas. 504; 51 C 969; A I R 1925 P C 160; 51 I A 319 (P C).

(8) 25 A 109; 30 I A 35; 7 C W N 177; 5 Bom. L R 100; 8 Sar. 337 (P. C.).

parties with regard to all or any of the matters in controversy in the suit. It follows that when two cross-appeals are separately disposed of, the matters in controversy in the two appeals are distinct and separate and, therefore. the adjudications of such matters are also distinct and separate. The dismissal of the plaintiff's appeal was, therefore, an affirmance of the adjudication made by the first Court so far as the matter in controversy in the plaintiff's appeal was concerned. Whereas the allowing of the defendants' appeal was a variation of the adjudication of the first Court so far as the matter in controversy in that appeal was concerned. It is also possible that some times the array of parties in two cross-appeals may not be absolutely identical and the two appeals have, therefore, to be treated as two separate cases. It, therefore, seems to me that from the mere fact that a cross-appeal has been allowed and the adjudication varied so far as the matter in controversy in that appeal is concerned, it does not follow that the decision in the other appeal which is dismissed is not one of affirmance. I am of the opinion that the ruling of their Lordships of the Privy Council in *Annapurnabai* v. *Ruprao* (7), does not, even by implication, overrrule the decision in *Chiranji Lal's case* (1).

It is unnecessary to point out that in some later cases the Calcutta and Bombay High Courts have even expressed the view that in spite the ruling the *Annapurnabai's case* (7), if the variation is not substantial, there is no right of appeal. That view is doubtful, and it is not necessary to express any opinion on it. I would accordingly hold that the applicant is not entitled to appeal to His Majesty in Council as of right. The case is not otherwise a fit one for appeal.

Bennet, J.—I concur with the opinion expressed by the learned Chief Justice.

Niamat-Ullah, J.—I am of the same opinion. The question is whether the decree passed by this Court dismissing the plaintiff's appeal affirmed the "decision" of the trial Court. The 3rd paragraph of s. 110, Civil Procedure Code, in which the word "decision" occurs, also contains the word "decree" in the first line. It is difficult to hold that the Legislature used two different words to convey precisely the same idea. In my opinion the word "decision" on the one hand means something which differs from "judgment" and on the other hand, it does not mean "decree." In *Tassaduq Rasul Khan* v. *Kanshi Ram* (8), their Lordships did not hold that the word "decision" should be taken to be equivalent to "decree". They merely held that 'decision' is not judgment. It seems to have been the view of their Lordships that the word "decision" occurring in the corresponding section of the Code of 1882 means "decision of the suit". There is nothing in *Annapurnabai* v. *Ruprao* (7), to indicate that in that case their Lordships held otherwise. It is true, the contention put forward on behalf of the appellant was that the decree as distinguished from the judgment of the trial Court, was interfered with on appeal by the High Court. The judgment of their Lordships is brief, and in upholding the appellant's contention their Lordships have not made any observation which might show that the word "decision" should be taken in the same sense in which the word "decree" is defined in the Civil Procedure Code. The view taken by this Court in *Chiranji Lal* v. *Behari Lal* (1), does not appear to me to have been in any way affected by the two Privy Council cases referred to above. They did not hold that the word "decision" in s. 110, is equivalent to "judgment". Apparently they took the word in the same sense in which their Lordships used it in the case of *Tassaduq Rasul Khan* v. *Kanshi Ram* (8), In my opinion the decision of the suit, so far as it is the subject-matter of the proposed appeal to the Privy Council, is meant by the word "decision" in s. 110, and not the decision of the whole suit.

It seems to me that, even if the word "decision" be taken to mean "decree", as defined in the Civil Procedure Code, the position is not materially different. A "decree" does not mean the document described as such. It means the "formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." If there are several distinct controversies in the suit and the decision of the Court is embodied in one document, described as a decree, the adjudication with regard to each matter in controversy is a decree in itself. In that sense one document, described as a decree, may contain several adjudications on several distinct matters and may amount to several "decrees". In this view, if the decree of this Court in the plaintiff's appeal affirmed, the trial Court's adjudication in respect

of the controversy relating to certain advances of money against goods shipped to England by Patni should be taken to be a decree, which is distinct from the decree passed by the trial Court as regards the controversy relating to another distinct matter. For these reasons, I am of opinion that the decree against which the applicant proposes to appeal to the Privy Council affirms the decision of the Court below and the applicant is, therefore, not entitled to leave as of right.

By the Court.—In our opinion the applicant is not entitled to appeal to His Majesty in Council as of right.

N. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Criminal Revision Application No. 997 of 1934

January 2, 1935

KENDALL, J.

Sheikh IBN ALI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 476—Order after enquiry that complaint should be made against applicant—Court not expressing in so many words that a prosecution should follow—Order, if rendered illegal—Penal Code (Act XLV of 1860), s. 193.

Where after making an enquiry the Court ordered under s. 476, Criminal Procedure Code, that a complaint should be made against the applicant under s. 193, Penal Code:

Held, that although the Court did not express in so many words that it was expedient that a prosecution should follow, the order was not thereby rendered illegal and that the prosecution for perjury that followed was a perfectly proper proceeding.

Cr. R. App. from an order of the Sessions Judge, Moradabad, dated October 29, 1934.

Mr. *A. M. Khwaja*, for the Applicant.

The Assistant Government Advocate, for the Crown.

Judgment.—This is an application for the revision of an order of the learned Sessions Judge of Moradabad dismissing an appeal against an order passed by the Magistrate under s. 476 of the Criminal Procedure Code, by which it was ordered that a complaint should be made against the applicant under s. 193, Indian Penal Code.

The facts are perfectly simple. The applicant is the editor of a paper in Moradabad, and he prosecuted the editor of another paper for defamation. His case was dismissed. The other editor was accused by him of defaming him by saying that the applicant had persuaded the other editor to write against the Nawab of Rampur and the administration of that State, and the applicant in his evidence stated on oath that he had never persuaded the accused to write against the Rampur State. The accused, however, was able to bring a number of witnesses to testify to hearing the applicant giving instructions to the other editor to write articles against the Rampur State. The witnesses were believed by the Court, which dismissed the applicant's case, and in the present proceedings the Magistrate and, after him, the Sessions Judge have found that this evidence, if it is believed, will be sufficient to convict the applicant of perjury, and for this reason his prosecution has been ordered.

Mr. Khwaja has drawn my attention to the provisions of s. 476 of the Criminal Procedure Code and has asked me to hold that the Courts have not really formed an opinion that "it is expedient in the interests of justice that an enquiry should be made." An enquiry has already been made, and although the Courts have not in so many words expressed the opinion that it is expedient that a prosecution should follow, there can be no doubt that this was the meaning of both, Magistrate and Judge, and in fact the circumstances show clearly that on the face of it the evidence proved that the applicant had told a lie with the object of misleading the Court for purposes of the case that he was prosecuting, so that there can be no question but that the prosecution for perjury is a perfectly proper proceeding. I do not wish to express any opinion as to the value of the evidence on either side, as that is a matter for the Criminal Court to decide. But I cannot hold that the Courts below have acted in a manner that is illegal or improper or incorrect, and that there is any justification for interfering in revision. It has been pointed out that the applicant is an old man of over 50 years and that he has been editing his paper in Moradabad for some 50 years. There are circumstances that may justify lenient treatment of the applicant, if he has erred, but they could not justify the Magistrate in staying his hand on the ground that a prosecution is not expedient in the interests of justice. The application for revision, therefore, fails and is dismissed.

N. *Application dismissed.*

LAHORE HIGH COURT

Second Civil Appeal No. 1870 of 1933
June 27, 1934
BHIDE, J.

FAQIR CHAND—PLAINTIFF—APPELLANT
versus
MUNICIPAL COMMITTEE, LUDHIANA
—DEFENDANT—RESPONDENT

Punjab Municipal Act (III of 1911), ss. 189, 172—Local body, if can give sanction in contravention of bye-laws—Sanction given on penalty—Penalty paid—Committee, if estopped from withdrawing sanction—Order to demolish structure—Legality of—Sanction once given, if can be revoked on ground of mistake

A local body has no power to grant sanction for a building in contravention of its own bye-laws. But where a Municipality has granted the sanction and accepted the required penalty from the applicant, it is estopped from withdrawing it and requiring the applicant to demolish the structure. *Yabbicon* v. *King* (1), followed.

Section 172, Punjab Municipal Act, authorises the Committee to prosecute an offender or demolish a structure only when it is erected without its permission in writing. Where, however, a person applies for permission to construct an overhanging balcony in anticipation of sanction and the Committee grants permission inflicting a penalty and the penalty is paid, s. 172 does not apply even if the sanction be in contravention of the bye-laws of the Committee.

There is no provision in the Punjab Municipal Act enabling the Committee to revoke a sanction once given A sanction to build given by a Committee cannot be revoked on the ground that there had been a mistake *Shahab-ud-din* v. *Fazal Din* (2), *Tullaram* v. *The Corporation of Calcutta* (3) and *Vithal Dhonddev Raikar* v. *Alibag Municipality* (4), relied on.

S. C. A. from the decree of the District Judge, Ludhiana, dated August 29, 1933.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Nazir Hussain*, for the Respondent.

Judgment.—The plaintiff in this case applied to the Municipal Committee of Ludhiana to construct an overhanging balcony in front of his house and proceeded to construct the same in anticipation of sanction. The Committee was at first inclined to disallow the structure but eventually agreed to let it stand and issued the necessary permission to the plaintiff, imposing on him a penalty of Rs. 35 at the same time.

The Deputy Commissioner pointed out to the Committee that the resolution allowing the plaintiff to construct the above structure in front of his house contravened the bye-laws as it projected into the street further than what was permissible under the bye-laws. The Committee found this to be correct and rescinding its sanction issued a notice to the plaintiff under s. 172, Punjab Municipal Act, for demolishing the structure. The plaintiff thereupon instituted the present suit for an injunction to restrain the Committee from taking such action. The trial Court decreed the suit but the learned District Judge has disallowed it on appeal and from this decision a second appeal has been preferred by the plaintiff.

The sole point for decision in appeal is whether the Committee having once granted permission for the overhanging structure could withdraw it on the ground that the structure contravened a bye-law. The learned District Judge was of the opinion that a Corporation being a creature of the law, cannot exceed its statutory powers and the sanction originally given by the Committee was of no effect. The learned Counsel for the appellant has urged that the bye-laws have not the same force as statutory limitations on the Committee's powers contained in the Punjab Municipal Act, and hence the Committee could grant sanction for the overhanging structure even in contravention of a bye-law as the bye-law is made by itself. No authority has been cited in support of this contention and it does not seem to be sound in view of *Yabbicon* v. *King* (1), in which it was held that a local body has no power to grant sanction for a building in contravention of its own bye-laws. But it seems to me that although the Committee had no power to grant the sanction, it would now be estopped from withdrawing it and requiring the plaintiff to demolish the structure. As stated above, the Committee accepted a penalty of Rs. 35 and granted the necessary permission in writing for the structure erected by the plaintiff. This being the case, the Committee had thereafter no power to take action again under s. 172, Punjab Municipal Act; for that section authorises the Committee to prosecute an offender or demolish a structure only when it is erected without its permission in writing. In the present instance such permission having been once granted and a penalty also having been accepted, I do not think the Committee had any power to proceed again under s. 172 and require demolition of the structure. Section 229 empowers the Committee to compound offences on payment of a sum of money and sub-s. (2) of that section lays down that on payment of the money no future proceedings shall be taken in regard to the offence compounded for. There seems to be no provision in the Punjab Municipal Act

(1) (1899) 1 Q B 444; 68 L J Q B 560; 80 L T 159; 47 W R 318; 63 J P 149.

enabling the Committee to revoke a sanction once given. In *Shahab-ud-Din* v. *Fazal Din* (2), it was held that a sanction to build given by a Committee could not be revoked on the ground that there had been a mistake. A similar view was taken in *Tullaram* v. *The Corporation of Calcutta* (3) and *Vithal Dhonddev Raikar* v. *Alibag Municipality* (4). The same principle would, in my opinion, apply to the present case.

I accordingly accept the appeal and setting aside the order of the learned District Judge restore that of the trial Court with costs throughout.

N. *Appeal accepted.*

(2) 52 P R 1902; 89 P L R 1902.
(3) 30 C 317.
(4) 47 Ind. Cas. 145; 42 B 629.

ALLAHABAD HIGH COURT

Criminal Revision Application No. 1069 of 1935
February 11, 1935
KENDALL, J.

SHEONANDAN—APPLICANT
versus
EMPEROR—OPPOSITE PARTY

U. P. Excise Act (IV of 1910), s. 60 (a)—Charge for being in possession of liquor in excess of quantity allowed by law—Conviction under s. 60 (a)—Conviction for possession of liquor not lawfully obtained—Whether can be made.

Where the accused was charged for being in possession of country liquor in excess of the quantity than he was allowed by law and was convicted under s. 60 (*a*), U P. Excise Act of 1910, and it was found on revision that the evidence did not prove that the total quantity in his possession was more than that allowed by law and then the prosecution urged that the conviction was right inasmuch as he was in possession of a bottle of country liquor which was not proved by the accused to have been lawfully obtained :

Held, that the accused could not be convicted for an offence with which he was not charged and hence the conviction was bad and should be set aside.

Cr. R. App. from an oder of the Additional Sessions Judge, Ghazipur, dated November 23, 1934.

Messrs. *K. D. Malaviya* and *K. N. Gupta*, for the Applicant.

The Assistant Government Advocate, for the Crown.

Judgment.—This application is made against a conviction under s. 60 (*a*) of the U. P. Excise Act of 1910. The circumstances of the case are somewhat peculiar. A raiding party went to the house of the applicant and searched it and found that he had in his possession one bottle of liquor. There was also a small quantity of liquor in a tin and it is said that the applicant himself smelt of liquor. He was, therefore, prosecuted under the Act, and was charged by the Magistrate in the following words:

"That you on or about August 11, 1934... in your house were found in possession of country liquor seven bottles (1 gallon plus one bottle) in contravention of r. 39 (*a*) of the Excise Act."

Evidence was brought by the prosecution to prove that the applicant had purchased from Namdeo that day liquor amounting to one gallon in a tin, and it was also in evidence that a tin was found in his house which appeared to contain the remains of some liquor. The case for the prosecution, as it appears from the judgment of the Magistrate as well as from the charge, was that the applicant, although at the time of the raid he was only actually in possession of one bottle of liquor, had recently been in possession of a much larger quantity. The Courts found him guilty on the ground that he was in possession of a quantity larger than he was allowed by law. Rule 39 of the rules framed by the excise authorities and contained in the Excise Manual prescribed the limits of the amounts allowed to be kept for retail sale of various kinds of excisable commodities, and as regards country liquor, prescribes the limit of two bottles or one seer or 4 seers or 1 gallon according to circumstances. Ordinarily plain country spirit can only be sold by retail up to a quantity of one seer, and country fermented liquor up to a quantity of four seers. There is nothing to show what the liquor was of which the applicant was in possession when the raid took place, and which he was suspected of having thrown away. So far as the evidence in this case goes, it may have been country spirit or it may have been country fermented liquor, and in that case it would have been necessary for the prosecution to prove that he had been in possession of more than four seers. But even if it can be said that circumstances point very strongly to the conclusion that the applicant had swallowed or had thrown away a certain amount of liquor, there is nothing to show what amount was so disposed of and if it was country fermented liquor, there is nothing to show that the total quantity in his possession had amounted to more than four seers.

It has been pointed out by Dr. Wali Ullah on behalf of the Crown that under r. 436 it is not only the possession of country liquor in excess of the quantity prescribed in r. 39 that is punishable, but also the possession of country liquor which has not

been lawfully obtained, and it is, therefore, argued that the applicant has been rightly convicted because he was in possession of a bottle of country liquor which he has not proved that he obtained lawfully. The fact is that the applicant was never asked any questions about that particular bottle. His defence was that he only had one bottle in his possession, and he said that he had not purchased it from Namdeo. If he had purchased it from Namdeo in the manner suggested on behalf of the prosecution, his possession would have been unlawful, because Namdeo had no licence to sell liquor on the Ghazipur side of the Ganges. The prosecution witnesses, however, did not prove that the applicant had purchased liquor from Namdeo in the manner that has been set up. They were suspected of having been won over; but the Courts did not find this part of the case proved, nor would they have convicted the applicant, unless they had believed that he had been in possession of more liquor than he was allowed to possess under the provisions of r. 436 read with r. 39 (*a*). I am of opinion, therefore, that the application must be allowed on the ground that the applicant cannot be convicted of an offence with which he has not been charged and which is clearly of a different nature from the one with which he has been charged. I, therefore, set aside the order of conviction and direct that the applicant be acquitted and the fine, if paid, be refunded.

N. *Order set aside.*

PRIVY COUNCIL

Appeal from the Bombay High Court

March 11, 1935

LORD THANKERTON, LORD ALNESS AND SIR SHADI LAL

Thakor VIJAYSINGJI CHHATRASINGJI —APPELLANT

versus

Thakor SHIVSANGJI BHIMSANGJI— RESPONDENT

Hindu Law—Adoption—Widow's power to adopt —Whether depends on the question of vesting or divesting the estate—Natural son adopted in another family—Mother's right to adopt another son to continue the line—Bombay School—Widow having no authority to adopt from her deceased husband—Consent of his kinsmen, if should be obtained.

The power of a Hindu widow to adopt does not depend upon the question of vesting or divesting of the estate. The purpose of an adoption is to secure the continuance of the line, and when the natural son has left no son to continue the line, nor a widow to provide for its continuance by adoption, his mother can make a valid adoption to her deceased husband, although the estate is not vested in her. It is not correct to say that a widow cannot adopt a son to her deceased husband, if by so doing she would defeat an estate other than her own. *Amarendra Man Singh* v. *Sanatan Singh* (1), applied.

Where the natural son with his wife cease, to exist for the purpose of continuing the line in the natural family, as a result of their adoption into another family, his mother is entitled to make an adoption to secure that object. When the adoption so made has served the purpose, it cannot be impeached simply because it would defeat the estate which had vested in some other person.

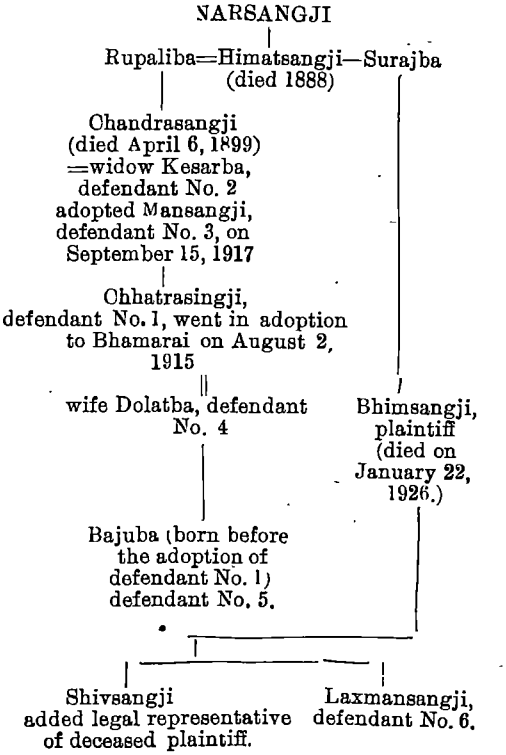
In the Bombay Presidency a widow, who has no authority from her deceased husband, may adopt a son to him, and it is not necessary for her to obtain the consent of his kinsmen. It depends entirely upon her discretion whether she should or should not make an adoption, and her choice in the matter cannot be restricted[1]

Messrs. *W. H. Upjohn*, *K. C.* and *J. M. Parikh*, for the Appellant.

Mr. *P. V. Subba Row*, for the Respondent.

Sir Shadi Lal.—The property, which is the subject matter of the dispute in this appeal, is an impartible *taluqdari* estate called Ahima estate. It is situated in the Kaira District of the Bombay Presidency, and the parties are agreed that the succession to the estate is governed by the rule of lineal primogeniture, and that females are excluded from inheritance.

The relationship of the persons concerned in the dispute is shown in the following pedigree table :—



Himatsangji died in 1888, leaving him surviving two sons, Chandrasangji and Bhimsangji. The elder son, Chandrasangji, inherited the entire impartible estate, while the younger son, Bhimsangji, received only maintenance. In April, 1899, Chandrasangji died, and was succeeded by his son, Chhatrasingji.

On August 2, 1915, Chhatrasingji was adopted by the widow of one Kunwarsahib Bapusahib, the proprietor of the impartible estate of Bhamaria, which is a larger estate than the Ahima estate. Though Chhatrasingji was at that time, a married man of about 33 years of age, his adoption was in accordance with the Hindu Law as recognised in the Bombay Presidency. He consequently became a member of the adoptive family.

Thereupon, Kesarba, the widow of Chandrasangji, adopted Mansangji as a son to her deceased husband; and the *factum* of this adoption, which was made on September 15, 1917, is no longer a matter in controversy between the parties. Its validity, however, raises an important issue which their Lordships have to determine.

The suit, which has led to the present appeal, was commenced on February 9, 1918, by Chhatrasingji's paternal uncle, Bhimsangji, who claimed the Ahima estate on the ground that Chhatrasingji, by reason of his adoption in the Bhamaria family, had forfeited his right in the Ahima estate, which then devolved upon the plaintiff in accordance with the rule of lineal primogeniture. The defence to his claim was two-fold. It was urged that Chhatrasingji, in whom the estate had vested on the death of his natural father, was not divested of that estate when he was adopted in the other family; and that, at any rate, the plaintiff was not entitled to succeed to it in the presence of Mansangji, who, as the adopted son of Chandrasangji, had a prior right of succession.

The High Court, concurring with the Trial Court, have pronounced against the validity of the adoption of Mansangji, and also held that Chhatrasingji, owing to his adoption in the Bhamaria family, ceased to be a member of the Ahima family, and lost his right in the estate of his natural family. They have accordingly decreed the claim in respect of the properties which constitute the impartible estate of Ahima.

Both these questions are again raised on this appeal, but it is argued that, in view of the recent judgment of this Board in *Amarendra Mansingh* v. *Sanatan Singh* (1), the adoption of Mansangji should be held to be valid; and that, as he must take precedence over the plaintiff in the matter of succession, the suit brought by the latter must be dismissed. The High Court declared the adoption to be invalid upon the ground that, though Chhatrasingji with his wife went over to the adoptive family and severed all connection with the natural family, including the heritage and the *gotra* of the latter family, Kesarba could not make an adoption which would have the effect of divesting the estate which had vested in the plaintiff. The learned Judges proceeded upon the principle that a widow cannot adopt a son to her deceased husband, if by so doing she would defeat an estate other than her own. This view cannot now be regarded as a correct exposition of the law. As observed by this Board in *Amarendra Mansingh's case* (1) (*supra*), the power of a widow to adopt does not depend upon the question of vesting or divesting of the estate. The purpose of an adoption is to secure the continuance of the line, and when the natural son has left no son to continue the line, nor a widow to provide for its continuance by adoption, his mother can make a valid adoption to her deceased husband, although the estate is not vested in her. It was on this ground that the adoption in that case which was made by a widow after the death of her natural son without leaving a son or a widow, was found to be valid, though the estate had vested in a collateral of the son. In the present case the natural son with his wife having ceased to exist for the purpose of continuing the line in the Ahima family, his mother was entitled to make an adoption to secure that object. The adoption of Mansangji undoubtedly served the purpose in question, and it cannot be impeached simply because it would defeat the estate which had vested in some other person.

It is, however, contended that the adoption was made by Kesarba not for the spiritual benefit of her husband, but in order to deprive the plaintiff of his inheritance. But there is no evidence to prove any improper motive, and if the

(1) 143 Ind. Cas. 441; 60 I A 242; Ind Rul. (1933) P C 168; A I R 1933 P C 155; 37 C W N 938; (1933) M W N 769; 38 L W 1; 65 M L J 203; 14 P L T 399; (1933) A L J 710; 57 C L J 593; 35 Bom. L R 859; 12 Pat. 642 (P C).

adoption causes harm to the plaintiff, it nevertheless confers spiritual benefit upon the husband. Moreover, the rule is firmly established that in the Bombay Presidency a widow, who was no authority from her deceased husband, may adopt a son to him, and that it is not necessary for her to obtain the consent of his kinsmen. It depends entirely upon her discretion whether she should or should not make an adoption, and her choice in the matter cannot be restricted.

The result is that Mansangji is the adopted son of Chandrasangji, and that his adoption is not open to any valid objection. It is clear that in his presence the plaintiff cannot inherit the estate. In view of the insurmountable obstacle created by this adoption in the way of the plaintiff, it is unnecessary to adjudicate upon the right of Chhatrasingji to retain after his adoption in the Bhamaria family, the estate which he had inherited in the Ahima family.

Accordingly their Lordships will humbly advise His Majesty that this appeal should be allowed, and the suit dismissed with costs throughout.

N. *Appeal allowed.*

Solicitors for the Appellant :—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent :—Messrs. *Hy. S. L. Polak & Co.*

ALLAHABAD HIGH COURT

Execution Second Civil Appeal No. 634 of 1933

December 12, 1934

NIAMAT-ULLAH and ALLSOP, JJ.

Lala BAHAL SINGH—JUDGMENT-DEBTOR —APPELLANT

versus

Musammat CHAMELI—DECREE-HOLDER —RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 4—Preliminary decree—Dismissal of appeal with costs—Application for amendment of final decree to include costs—Order allowing application—Construction.

Where the decree-holder after obtaining a preliminary decree for mortgage under O. XXXIV, r. 4, Civil Procedure Code which was confirmed in appeal, applied that the final decree previously prepared be amended so as to include the costs awarded by the Appellate Court, and the trial Court allowed the amendment as prayed :

Held, that the decree-holder's application asking for amendment and the order of the Court making use of the same word amounted, in substance, respectively to an application and an order for preparation of a fresh final decree, that the order was conclusive, and the final decree passed in pursuance of it was equally so and that that was the only decree capable of execution.

Ex. S. C. A. from a decision of the District Judge, Meerut, dated March 1, 1933.

Mr. *B. Mukerji*, for the Appellant.

Mr. *H. P. Sen* for Mr. *P. L. Banerji*, for the Respondent.

Judgment.—This is a judgment-debtor's appeal from an order passed by the learned District Judge, Meerut, disallowing his objection to an application for execution made by the respondent decree-holder. The only plea on which the application was resisted by the appellant was that it was barred by limitation. The learned District Judge over-ruled the plea. Hence this appeal.

The respondent obtained a preliminary decree on foot of a mortgage on September 12, 1923. The appellant preferred an appeal to the Additional Judge, Meerut, who dismissed it on January 7, 1924. A final decree was prepared on November 4, 1924 on the basis of the decree passed by the Court of Appeal. The appellant preferred a second appeal to this Court, which was dismissed on July 7, 1926. After the decree passed by the High Court in appeal from the preliminary decree an application was made by the respondent that the final decree previously prepared be amended, as after the preparation thereof the High Court had upheld the preliminary decree and further costs had been incurred by the respondent and allowed to her by the decree of the High Court. The trial Court, allowed it and directed the amendment of the final decree as prayed. The final decree was amended so as to be in conformity with the decree of the High Court as regards costs. It is not suggested that the so-called amendment of the decree proceedings were taken behind the back of the appellant or that he had no opportunity of resisting the application for amendment. We must take it that those proceedings were taken between the parties and the order of the Court, if otherwise valid and binding, is conclusive between the parties. The order allowing the amendment was passed on January 14, 1929.

The respondent applied on December 23, 1929, for execution of the final decree, computing the period of limitation from the order directing the amendment of the final decree. The judgment-debtor pleaded that the application for execution was barred by limitation, as it had been made more than three years after the date of the

final decree as originally prepared, *i.e.*, November 4, 1924. It is conceded that, unless the limitation is taken to run from the order of amendment of the final decree, the application is barred. The learned District Judge, who over-ruled the plea of limitation, held that

"After a preliminary decree passed under O. XXXIV, r. 4, has been confirmed in appeal, the decree-holder again has a right to obtain a final decree in the terms of the preliminary decree on appeal. This is what really happened, though instead of saying that a final decree in the terms of the preliminary decree on appeal be prepared it was said that the final decree already passed be amended by addition of the costs awarded by the Appellate Court."

The learned Advocate for the appellant has strenuously contended that the final decree, dated November 4, 1924, had already become barred by limitation when the respondent applied for amendment thereof and when the Court ordered its amendment, and that consequently the decree could not be revived by amendment. He has quoted a number of decided cases which, he claims, support his contention. It is not necessary for us to examine the authorities on which the learned Advocate relies, because in our opinion the view taken by the lower Court, if correct, proceeds on a totally different ground, which is not affected by the contention put forward before us. The learned District Judge construed the action of the Court ordering amendment of the final decree of November 4, 1924, as one tantamount to passing a fresh final decree, taking the High Court's decree as the only subsisting preliminary decree in a mortgage suit. It is clear to us that the final decree of November 4, 1924, could not have been "amended" under any rule of law. The application was not one under ss. 151, 152 or O. XLVII, Civil Procedure Code. Nor can the so-called order of amendment be considered to be one under any of those provisions. To take the order literally would imply that the Court passed an order which it had had no power to pass. If it is possible to construe the action of the Court as legal, such construction should be adopted. In our opinion the learned District Judge has taken a correct view of the order amending the decree. It was, in substance, an order directing the preparation of a fresh final decree on the supposition that the final decree previously prepared on foot a preliminary decree passed by the trial Court had become vacated by the subsequent preliminary decree passed by the High Court, in which the decrees of Subordinate Courts had merged. The Court should be deemed to have proceeded on the view that the only subsisting preliminary decree was the decree of the High Court and that a fresh final decree based on that decree should be prepared. The mortgagee's application asking for amendment and the order of the Court making use of the same word amount, in substance, respectively to an application and an order for preparation of a fresh final decree. The order which is *inter partes* is conclusive and the final decree prepared in pursuance of it is equally so. In this view, the only decree which was capable of execution on the date on which the present application for execution was made was the decree prepared in January 1929, which was less than three years before the application for execution. The order appealed from is right in every respect. This appeal is accordingly dismissed with costs.

N. *Appeal dismissed.*

MADRAS HIGH COURT

Criminal Appeal No. 286 of 1934
September 4, 1934
PANDRANG ROW, J.

THE PUBLIC PROSECUTOR — APPELLANT
versus
SUBRAMANIA SASTRI AND OTHERS — ACCUSED—RESPONDENTS.

Madras Gaming Act (III of 1930), ss 5, 6—Warrant issued under s. 96, Criminal Procedure Code (Act V of 1898)—Presumption of common gaming house, whether arises—Defects in warrant—Remarks in judgment supplying defects, value of.

The presumption referred to in s. 6 of the Madras Gaming Act can only apply to searches conducted in pursuance of a warrant issued under s. 5 of that Act. It does not apply where the warrant is issued under s. 96, Criminal Procedure Code.

The mere fact that reference was made to s 5 of the Gaming Act in the application for a warrant does not show that the Magistrate actually issued the warrant under that section.

The remarks of a Magistrate which are intended to supply the omissions or defects found in a warrant and to vary its terms are not admissible as evidence. The warrant is to be in writing and must contain all the matters that the law requires to be stated therein.

The mere fact that occasionally people used to play cards at a particular place and perhaps for money, does not necessarily make it a common gaming house.

Cr. A. under s. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (accused) by the Sub-Divisional Magistrate of Gobichettipalayam in Criminal Appeal No. 1 of 1934 on his file (C. C. No. 401 of

1933 Stationary "Sub-Magistrate" of Gobichettipalayam).

Messrs. *K. S. Jayama Ayyar* and *M. Doraiswami Iyer*, for the Respondents.

Judgment.—This is an appeal by the Public Prosecutor from the order of acquittal passed by the Sub-Divisional Magistrate of Gobichettipalayam in a case in which 20 persons were charged by the Police with an offence punishable under s. 9 of the Madras Gaming Act, III of 1930. The Sub-Magistrate convicted all the accused, and on appeal all of them were acquitted by the Sub-Divisional Magistrate.

The two questions that arise in this appeal are: (1) whether the presumption referred to in s. 6 of the Gaming Act is available to the prosecution in this case and (2) whether the evidence of P. W. No. 2 which alone refers to the alleged common gaming house, was wrongly disbelieved or discredited by the Appellate Court. As regards the first point, the Appellate Magistrate has relied on the ruling in *Gangadas Banerjee* v. *Emperor* (1) and my attention has not been drawn to any decision pointing the other way. Even apart from the decision relied upon by the Sub-Divisional Magistrate, I am of opinion that the presumption referred to in s. 6 can only apply to searches conducted in pursuance of a warrant issued under s. 5 of the Act. In this particular case the warrant does not purport to have been issued under this section of the Act, but on the contrary purports to have been issued under s. 96 of the Code of Criminal Procedure. There is, moreover, no mention whatever in the warrant itself of the Magistrate who issued it having been satisfied that there was a common gaming house which required to be searched; in fact it is extremely doubtful whether his mind ever dwelt on this question when he signed the warrant. The fact that reference was made to s. 5 in the application for a warrant does not, in my opinion, show that the Magistrate actually issued the warrant under that section. His remarks on this point in his judgment are irrelevant; if as a matter of fact he had satisfied himself that he was issuing the warrant under s. 5 of the Act, he ought not to have tried the case himself but offered to give evidence as a witness in the case. His remarks in the judgment are not entitled to rank as evidence, especially in view of the fact that they attempt to supply the omissions or defects found in the warrant itself, and to vary its terms. The warrant is to be in writing and must contain all the matters that the law requires to be stated therein. Oral statements intended to vary the terms of a warrant required by law to be in writing are not admissible.

As regards the second point, after going through the evidence of P. W. No. 2 I see no reason to differ from the observations of the Appellate Magistrate regarding his evidence, namely, that it is entitled *prima facie* to no weight and that no credit could be given to his uncorroborated testimony. It cannot in my opinion be said with any reason that the Appellate Magistrate was wrong in discrediting him. No doubt the trial Magistrate has expressed the opinion that the witness was a straightforward and honest man, but this is a matter of opinion not connected with the demeanour of the witness, and his evidence does not show that he is particularly honest or particularly straightforward. On the other hand, some portions of his evidence are incredible, especially his statement that every player used to pay one rupee to the gardener on every day the play went on in the *salai* or bungalow. There can be no doubt that once the presumption under s. 6 is found to be not available in this case and the evidence of P. W. No. 2 cannot be relied upon, the correctness of the acquittal of the accused cannot be seriously questioned. Apart from the presumption and the evidence of P. W. No. 2, there is really no evidence to show that the bungalow in question was ever used as a common gaming house. The mere fact that occasionally people used to play cards there, and perhaps, for money, does not necessarily make it a common gaming house. I therefore see no reason to interfere in appeal with the order of acquittal passed by the Sub-Divisional Magistrate.

The appeal is accordingly dismissed under s. 423 of the Code of Criminal Procedure.

A. *Appeal dismissed.*

(1) 126 Ind. Cas. 134; A I R 1930 Cal. 365; 51 C L J 224; Ind. Rul. (1930) Cal. 678; 31 Cr. L J 999; (1930) Cr. Cas. 511.

OUDH CHIEF COURT

First Civil Appeal No. 2 of 1933
March 25, 1935

SRIVASTAVA AND ZIA-UL-HASAN, JJ.

Lala SALIK RAM—PLAINTIFF—APPELLANT

versus

Babu JANGJIT BAHADUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS

Mortgage—Foreclosure—Mortgagee obtaining possession under sale in execution and mortgagee obtaining possession by foreclosure—Difference, if exists—Transfer of Property Act (IV of 1882), s. 101—"Or otherwise than subject thereto", meaning and effect of—Subsequent mortgagee seeking foreclosure—Whether can foreclose and obtain possession subject to charge of prior mortgagee in possession.

There is no difference in principle between a mortgagee who has obtained possession under a sale made in execution of the mortgage decree and one who has obtained possession by foreclosure of his mortgage.

The words 'or otherwise than subject thereto' in s. 101, Transfer of Property Act, refer to the second eventuality mentioned in the section, namely, that of the subsequent mortgagee trying to sell the property and not to that of his seeking foreclosure. No doubt, a subsequent mortgagee who has obtained a decree for sale can avail himself of either of the two alternatives provided for in the section, namely, he can either redeem the prior mortgage or sell the property subject to that mortgage but a subsequent mortgagee seeking foreclosure of the property cannot foreclose and obtain possession of the property subject to the charge of the prior mortgagee who is already in possession on the basis of a prior foreclosure decree. In the latter case the subsequent mortgagee has no alternative but to redeem the prior mortgage.

[Case-law referred to.]

F. C. A. against an order of the Sub-Judge of Barabanki, dated September 16, 1932.

Messrs. *Radha Krishna* and *S. N. Srivastava*, for the Appellant.

Mr. *Hardhian Chandar* and *R. N. Shukla*, for the Respondents.

Zia-ul-Hasan, J.—(*March 23, 1935*)—This is a plaintiff's appeal in a suit for foreclosure. The suit was brought on the basis of three mortgage deeds, Exs. 1, 2 and 3, dated May 28, 1925, September 5, 1925 and November 22, 1927, respectively, executed by Jangjit Bahadur Singh, defendant No. 1, in favour of the plaintiff-appellant. All the other defendants Nos. 2 to 11 were impleaded as subsequent transferees of the mortgaged properties. Interest on all the three mortgages was stipulated at the rate of two per cent. per mensem compound with six monthly rests.

The Court below, the learned Subordinate Judge of Barabanki, decreed the plaintiff's suit but reduced the rate of interest under the Usurious Loans Act to one per cent. per mensem with six monthly rests. The lower Court also held that as defendant No. 10, Ram Phal Singh, had foreclosed part of the mortgaged property in pursuance of a prior mortgage in his favour and had obtained possession of that property, the plaintiff would not be entitled to obtain actual possession over that property unless and until he pays money due to defendant No. 10 under the mortgage deed Ex. F5.

It is on these two points that arguments were addressed to us on behalf of the plaintiff-appellant. One of the grounds of appeal, namely, ground No. 4 was against defendant No. 1 but it was not pressed before us.

The first question for determination, therefore, is whether or not the Court below was justified in reducing the stipulated rate of interest. Reliance was placed on three deeds of mortgage executed by the defendant No. 1 in 1924 in all of which the stipulated rate of interest was two per cent. per mensem compound or even more with six monthly rests. The first is Ex. F2 dated January 4, 1924. This deed provides for interest at 25 per cent. per annum compoundable six monthly. The second is referred to in Ex. 13, copy of a plaint in a suit brought by the mortgagee, Ram Lakhan Lal on the basis of that mortgage. This deed was executed by defendant No. 1 on September 1, 1924, and it provided for interest at 24 per cent per annum with six monthly rests. The third is Ex. F5 dated July 18, 1924. It was executed not only by the defendant No. 1 but also by his brothers and the rate of interest stipulated was 24 per cent. per annum compoundable six monthly. Reference was also made to Ex. 9, judgment in the suit brought by defendant No. 10 on the basis of this mortgage in order to show that the rate of interest was not reduced by the Court in spite of contest by the defendants. It will thus be seen that all the mortgage deeds stipulating a high rate of interest were executed in 1924. On the other hand we find that in a mortgage deed (Ex. F1) executed by defendant No. 1 on July 23, 1921 in favour of defendant No. 10, the rate of interest was twelve annas per cent per mensem simple. Similarly in Ex. G12 which is a copy of a preliminary decree for foreclosure passed by the Additional Subordinate Judge of Fyzabad in a suit brought by a certain *Thakur* Jagdish Singh against *Jangjit* Bahadur Singh on the basis of a mort-

gage deed dated October 7, 1927, simple interest was allowed at the rate of 12 per cent. per annum. Ex. 12 is another decree in favour of one Har Kishore Lal on a mortgage executed by defendant No. 1 on September 27, 1928, and in this case also simple interest was allowed at the rate of 12 per cent. per annum. With regard to the mortgage-deed Ex. F1 it was said that the rate of interest was low as the deed mortgaged properties of great value but there is nothing on the record to show what was the value of those properties. In my opinion, the learned Subordinate Judge was right in considering the rate of interest stipulated for in the three mortgages of the plaintiff-appellant as excessive. It is excessive not only on the face of it but also with regard to other mortgage deeds executed by defendant No. 1. It may also be mentioned that according to the heading of the plaint in this case defendant No. 1 was twenty-five years of age in 1932 so that he must have been a lad of seventeen or eighteen only in 1925 when he executed two of the mortgage deeds in question in favour of the appellant. Further the plaint also shows that he was in jail at the time when the suit was brought and Ex. 3 shows that he borrowed the money by that deed for defending himself in a criminal case. In view of all these circumstances I am of opinion that the Court below was perfectly justified in reducing the rate of interest of 12 per cent. per annum compoundable six monthly. It may be observed that the learned Counsel for the appellant challenged the lower Court's finding about interest in respect to Ex. 3 only and not about Exs. 2 and 3.

The second question in the appeal relates to rights of the plaintiff-appellant and Ram Phal Singh defendant No. 10 between themselves. Ram Phal Singh also held in his favour three mortgages Exs. F1, F2 and F5 dated July 23, 1921, January 4, 1924 and July 18, 1924 respectively. On the basis of the deed Ex. F5, he foreclosed the property in 1928 and obtained possession of it. The learned Subordinate Judge held that as the deed Ex. F5 was prior to the plaintiff's mortgages, the plaintiff should redeem that mortgage before he could take possession of the property which he was seeking to foreclose. This was to my mind a perfectly correct view of the law. As against defendant No. 10, two points were urged on behalf of the appellant. The first was that as defendant No. 10 had not impleaded the present plaintiff in his suit for foreclosure, the decree obtained by him is not binding on the plaintiff-appellant. The second was that the mortgage under which Ram Phal Singh obtained his foreclosure decree being only a non-possessory mortgage, Ram Phal Singh was not entitled to remain in possession of the property against the appellant. Neither of these two contentions appears to me to have any force. In the Full Bench case of *Ram Sanehi Lal* v. *Sital Prasad* (1), it was held that the doctrine of allowing a prior mortgagee who has entered into possession of the mortgaged property as auction-purchaser to set up his prior mortgage as a shield is a doctrine of equity available as a means of defence and on page 1045* of the report, the learned Acting Chief Justice referring to the Privy Council case of *Sukhi* v. *Ghulam Safdar Khan* (2) remarked:

"The question of allowing a prior mortgagee whose mortgage had long since become barred by time but who was in possession of the property under a decree obtained without impleading the subsequent mortgagee, to set up his prior mortgage as a shield, even though the limitation for the mortgage had run out, was prominently before their Lordships; and their Lordships allowed Ghulam Safdar to recover the amount due on his mortgage of 1883. This, to my mind, is a clear authority for the proposition that a prior mortgagee, if he is in possession, can set up in defence a prior mortgage as a shield, although in his suit he had not impleaded the subsequent mortgagee and even though a fresh suit to enforce it would now be barred by time."

In the case of *Mathura Prasad* v. *Ghanshiyam Das* (3) Bisheshwar Nath and Pullan JJ. also held that even though the puisne mortgagee was not a party to the decree obtained by the prior mortgagee, yet it was open to the prior mortgagee when he has obtained possession under a sale made in execution of the decree to set up his rights under the prior mortgage as a shield against the puisne mortgagee. There seems to me no difference in principle between a mortgagee who has obtained possession under a sale made in execution of the mortgage decree and one who has obtained possession by foreclosure of his mortgage.

(1) 134 Ind. Cas. 1; 53 A 1023; (1931) A L J 729; A I R 1931 All. 436; Ind. Rul. (1931) All. 769 (F B).

(2) 65 Ind. Cas. 151; 43 A 469; A I R 1922 P C 11; 48 I A 455 (P C).

(3) 132 Ind. Cas. 767; 8 O W N 179; A I R 1931 Oudh 157; Ind. Rul. (1931) Oudh 319.

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Moreover, the lower Court's order is perfectly in accord with s. 101 of the Transfer of Property Act which is as follows :—

"Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property ; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto."

It was said that this section allowed two alternative courses to the subsequent mortgagee, namely, either to redeem the prior mortgage or to take the property subject to that mortgage. It seems to me that the words "or otherwise than subject thereto" refer to the second eventuality mentioned in the section, namely, that of the subsequent mortgagee trying to sell the property and not to that of his seeking foreclosure. No doubt, a subsequent mortgagee who has obtained a decree for sale can avail himself of either of the two alternatives provided for in the section, namely, he can either redeem the prior mortgage or sell the property subject to that mortgage but I do not see how a subsequent mortgagee seeking foreclosure of the property can foreclose and obtain possession of the property subject to the charge of the prior mortgagee who is already in possession on the basis of a prior foreclosure decree. It is, therefore, clear to my mind that in the latter case the subsequent mortgagee has no alternative but to redeem the prior mortgage and this is what the learned lower Court has held.

The appeal has, in my opinion, no force and I would dismiss it with costs.

Srivastava, J.—I agree.

N. *Appeal dismissed.*

LAHORE HIGH COURT

Civil Revision Petition 573 of 1934
(Formerly Appeal No. 1880 of 1933).
June 27, 1934

ABDUL RASHID, J.

MAM CHAND—DECREE-HOLDER—PETITIONER

versus

ALI MUHAMMAD AND ANOTHER—JUDGMENT-DEBTOR AND DECREE-HOLDER—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 144, 151—Restitution—Power of Court to grant, apart from s. 144—Inherent powers.

The power of the Executing Court to grant restitution is not confined to the cases governed by s. 144. A Court has inherent power to grant restitution apart from the power bestowed by that section. *Gnanda Sundari Mojumdar* v. *Chandra Kumar De* (2), *Amba Lal* v. *Ramgopal Madho Prasad* (3), *Beni Parshad* v. *Kundan Lal* (4) and *Sohnun* v. *Mast Ram* (5), relied on.

C. R. P. from an order of the District Judge, Hissar, dated October 20, 1933.

Mr. *Shamair Chand*, for the Petitioner.

Order.—The facts of the case which has given rise to this appeal have been stated in great detail in the judgment of Abdul Qadir, J., reported as *Mam Chand* v. *Roshan Lal* (1) and it is unnecessary to repeat them at length. Briefly stated the case is that Mam Chand obtained a mortgage decree for Rs. 1,000 against Ali Muhammad on February 6, 1931. Roshan Lal another creditor of Ali Muhammad obtained another decree against him for Rs. 3,800 and applied for its execution on May 4, 1931. The execution of the decree of Mam Chand was proceeding in the Court of the Junior Subordinate Judge while that of Roshan Lal proceeded in the Court of the Senior Subordinate Judge. At the instance of Mam Chand the mortgaged house was sold to Mahabir Parshad for Rs. 1,450 on October 29, 1931. On November 2, 1931, Mam Chand put in an application praying that his decree for Rs. 1,000 should be first satisfied out of the proceeds of the sale in favour of Mahabir Parshad and that the balance should be distributed rateably between him and other creditors. Mam Chand had also another decree for Rs. 400 against Ali Muhammad and claimed a rateable share out of the remaining assets of the judgment-debtor on account of that decree. The Executing Court held that Mam Chand was not entitled to any priority and that the entire proceeds of the house in dispute could be rateably distributed between Roshan Lal and Mam Chand. Against this order a revision was preferred by Mam Chand to this Court and it was held that Mam Chand was entitled to priority and that the Rs. 1,000 due to him on the mortgage decree should be first paid out of the sum realised by the sale of the mortgaged house, and that the balance should be rateably distributed between Mam Chand and Roshan Lal in satisfaction of their respective decrees.

While proceedings were pending in this Court Roshan Lal appears to have obtained

(1) 142 Ind. Cas. 759; 14 Lah. 243; 33 P L R 975; A I R 1933 Lah. 48; Ind. Rul. (1933) Lah. 267.

rateable distribution of the money realised by the sale of the mortgaged property. In order to obtain priority in accordance with the order of Abdul Qadir, J. Mam Chand decree-holder applied to the Executing Court for restitution under ss. 144 and 151, Civil Procedure Code. The Execution Court held that s. 144 was not applicable to the facts of the present case, as it only applied to cases in which a decree was varied or reversed and that an order regarding priority could not be regarded as a decree. It further held that s. 151 could not be resorted to in the circumstances of the present case as Mam Chand could institute a regular suit for refund of the money that had been wrongly paid to Roshan Lal. On these findings the application for restitution made by Mam Chand was dismissed. Mam Chand, decree-holder, appealed to the learned District Judge, who held that the order of the Executing Court dismissing the application of Mam Chand was not appealable. Against this order Mam Chand has preferred a second appeal to this Court.

The learned Counsel for the appellant contended that a second appeal was competent and relied on *Gnanda Sundari Mojumdar* v. *Chandra Kumar De* (2), which lays down that where an order is made under the provisions of s. 151, but in fact in exercise, by analogy of the jurisdiction under s. 144, Civil Procedure Code, an appeal does lie from the order. It was next urged that if no appeal lay the present appeal may be treated as a petition for revision. I will deal with this case as if the memorandum of appeal were a petition for revision as it is doubtful whether a second appeal is competent.

It was conceded by the learned Counsel for the appellant that the present case did not fall within the purview of s. 144, Civil Procedure Code. It was, however, strenuously urged that the Court has inherent power under s. 151, Civil Procedure Code, to order restitution in the interests of justice. Reliance was placed in this connection on *Amba Lal* v. *Ramgopal Madho Prasad* (3), where it was held that s. 144 does not exhaustively deal with the powers of Courts to grant restitution, and the jurisdiction of a Court to grant restitution in appropriate cases is not confined only to cases coming within the purview of that section, but is inherent in the general jurisdiction of the Court to pass an order for restitution, independently of the provisions of that section, with a view to secure complete justice between the parties concerned. The provisions of s. 151 were invoked for the purposes of restitution. It was further laid down in *Beni Parshad* v. *Kundan Lal* (4) that the power of the Executing Court to grant restitution is not confined to the cases governed by s. 144. A Court has inherent power to grant restitution apart from the power bestowed by that section. To the same effect are *Sohnun* v. *Mast Ram* (5) and *Moti Singh* v. *Harbhajan Singh* (6). I am, therefore, of the opinion, that apart from the provisions of s. 144, Civil Procedure Code, the Court had ample power under s. 151 to order restitution, in the peculiar circumstances of the present case.

The net result of the judgments of the lower Courts is that the directions given by Abdul Qadir, J., in *Mam Chand* v. *Roshan Lal* (1), whereby he ordered that the decree of Mam Chand for Rs. 1,000 should be first satisfied out of the sum realised by the sale of the mortgaged house have not been carried into effect. I, therefore, accept this petition for revision, set aside the orders of the Courts below and remand the case to the Executing Court with a direction that it should exercise its inherent powers under s. 151, Civil Procedure Code, and secure priority for Mam Chand's mortgage decree of Rs. 1,000 by ordering Roshan Lal to restore whatever amount may be found due from him in the light of the observations made above. The parties will bear their own costs in this Court.

N. *Petition accepted.*

(2) 100 Ind. Cas. 735; A I R 1927 Cal. 235; 31 C W N 290.

(3) 144 Ind. Cas. 492; 55 A 221; (1933) A L J 60; A I R 1933 All 218; Ind. Rul. (1933) All. 438.

(4) 159 Ind. Cas. 924; A I R 1934 Lah. 322; 7 R L 34.

(5) 118 Ind. Cas. 389; A I R 1929 Lah. 657; Ind. Rul. (1929) Lah. 741.

(6) 103 Ind. Cas. 657; A I R 1927 Lah. 635.

OUDH CHIEF COURT

Civil Revision Application No. 6 of 1935

March 8, 1935

SRIVASTAVA AND NANAVUTTY, JJ.

Babu ANANDPAL SINGH AND OTHERS —PLAINTIFFS—APPLICANTS

versus

Rai Sahib Babu RAM CHARAN—DEFENDANT—OPPOSITE PARTY

Oudh Courts Act (IV of 1925), s. 31 (1)—Application for grant of probate transferred to Subordinate

Judge—Jurisdiction of Subordinate Judge, if confined to non-contentious cases—Probate.

Where an application for grant of probate is transferred to a Subordinate Judge by an order of the District Judge, the test is whether the Subordinate Judge was acting in his capacity as a district delegate or in the capacity of a Subordinate Judge to whom a case has been transferred by an order of the District Judge. If he is seised of the case in the capacity of a district delegate, his jurisdiction ceases, as soon as the proceedings become contentious. If, on the other hand, he is trying the case as a Subordinate Judge, to whom the case has been transferred by the District Judge, there is no provision either in the Succession Act or in the Oudh Civil Rules confining his jurisdiction to non-contentious cases. It makes no difference in principle whether the proceedings at the time of the transfer had already become contentious or whether they become contentious afterwards. In the absence of any provision taking away the case from the jurisdiction of the Subordinate Judge, when the proceedings before him become contentious, it must be held that the Subordinate Judge is entitled to deal with the case, whether contentious or non-contentious. *Kalloo* v *Noor Jehan* (1), followed. *Ram Kishore* v. *Nand Kumar* (2), distinguished.

C. R. App. against the order of the Subordinate Judge, Malihabad, Lucknow, dated January 9, 1935.

Mr. *Mohammad Ayub*, for the Applicants.

Messrs. *Naziruddin Siddiqi* and *S. D. Singh*, for the Opposite Party.

Judgment.—The facts of the case which have given rise to this application for revision are that the learned District Judge of Lucknow transferred an application for grant of probate to the Subordinate Judge of Malihabad for disposal. In the Court of the Subordinate Judge a caveat was lodged whereupon the applicant raised the objection that the proceedings having become contentious the Subordinate Judge had ceased to have jurisdiction to proceed with the case. The learned Subordinate Judge relying upon the decision of a Bench of this Court, to which one of us was a party, in *Kalloo* v. *Noor Jehan* (1), disallowed the contention. It is this order of the learned Subordinate Judge which is sought to be revised by the present application.

We are of opinion that the decision of the learned Subordinate Judge is correct and ought to be upheld. In *Kaloo* v. *Noor Jehan* (1) the distinction between proceedings before a District delegate and before the Subordinate Judge to whom the proceeding has been transferred by an order of the District Judge has been clearly pointed out. The test in each case must be whether the Subordinate Judge was acting in his capacity as a district delegate or in the capacity of a Subordinate Judge to whom a case has been transferred by an order of the District Judge. If he is seised of the case in the capacity of a district delegate, his jurisdiction ceases, as soon as the proceedings become contentious. If, on the other hand, he is trying the case as a Subordinate Judge to whom the case has been transferred by the District Judge, there is no provision either in the Indian Succession Act or in the Oudh Civil Rules confining his jurisdiction to non-contentious cases. It has been argued that in *Kalloo* v *Noor Jehan* (1) the proceedings had already become contentious before the order of transfer was made by the learned District Judge, whereas in the present case no contention had arisen before the order of transfer was passed by the District Judge. We do not think that this difference in the facts of the two cases in any way affects the position. Whereas in the case of a district delegate s. 265 of the Indian Succession Act and r. 239 of the Oudh Civil Rules clearly show that their powers are confined to non-contentious cases, there is no corresponding provision either in the Indian Succession Act or in the Oudh Civil Rules so limiting the jurisdiction of the Subordinate Judge to whom as such proceedings have been transferred by the District Judge. On the contrary, s. 31 cl. (*i*) of the Oudh Courts Act clearly authorises a District Judge to transfer to any Subordinate Judge proceedings under the Indian Succession Act and the Probate and Administration Act, which cannot be disposed of by the district delegates. In our opinion it makes no difference in principle, whether the proceedings at the time of the transfer had already become contentious or whether they become contentious afterwards. In the absence of any provision taking away the case from the jurisdiction of the Subordinate Judge, when the proceedings before him become contentious, it must be held that the Subordinate Judge is entitled to deal with the case, whether contentious or non-contentious. Reliance has also been placed by the applicants on an earlier decision of another Bench to which also one of us was a party in *Ram Kishore* v. *Nand Kumar* (2). This case was decided on

(1) 152 Ind. Cas. 876; 11 O W N 1481; 7 R O 248; A I R 1935 Oudh 38.

(2) 151 Ind. Cas. 843; 11 O W N 1301; 7 R O A I R 1934 Oudh 442.

the footing which was rightly or wrongly accepted by Counsel for both the parties that the Subordinate Judge was dealing with the case in his capacity as a district delegate. The decision in that case proceeded upon the basis of the provisions contained in s. 265 of the Indian Succession Act and r 239 of the Oudh Civil Rules. No reference was made to the provisions of s. 31 of the Oudh Courts Act, because as we have just stated the Subordinate Judge was treated as having been dealing with the case in his capacity of a district delegate. We are, therefore, of opinion that the order of the Subordinate Judge is correct. The application fails and is dismissed with costs.

The *ad interim* order of stay passed on Civil Miscellaneous Application No. 28 of 1935 will be discharged.

N. *Application dismissed.*

LAHORE HIGH COURT

Miscellaneous Second Civil Appeal
No. 1466 of 1932
February 22, 1934
BRIDE, J.
KASHMIRI LAL—APPELLANT
versus
CHUNI LAL AND ANOTHER—JUDGMENT-DEBTOR AND SURETY—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 115, 151, 145—Execution application dismissed for default—Restoration application also dismissed—Revision from former order, if lies—Order under s. 151, if appealable—Surety for appearance of judgment-debtor—Execution application dismissed for default of decree-holder and surety discharged—Restoration of execution petition—Liability of surety, if revived—On dismissal of restoration application, appeal from order discharging surety—Extension of time spent in application for restoration, if to be allowed—Limitation Act (IX of 1908), s 5.

Where an execution petition is dismissed in default of a decree-holder and an application to restore it is also dismissed, revision from the order of dismissal of execution petition does not lie.

No appeal from the order passed in the exercise of inherent jurisdiction under s. 151, Civil Procedure Code is competent.

Where a judgment-debtor who has been arrested in execution of a decree is released on a surety furnishing security for his appearance but due to the default of the decree-holder to appear on the due date the execution petition is dismissed and the surety is also discharged, the liability of the surety does not automatically revive by the mere restoration of the execution petition. *Kali Ram* v. *Umrao Singh* (3), relied on.

Upon the dismissal of the application to restore the execution petition, the decree-holder is not entitled to extension of time for an appeal from the order discharging the surety, in respect of the time spent in the application for restoration. Such a application cannot be considered to be proper alternative remedy for getting the order of discharge of surety set aside, as the liability of the surety is not automatically revived on the restoration of the application. *Brij Inder Singh* v. *Kanshi Ram* (1) and *Rajendra Nath* v. *Kamal Krishna* (2), referred to.

Messrs. *J. N. Aggarwal* and *Asa Ram Aggarwal*, for the Appellant.

Messrs. *Badri Das*, *J. L. Kapur* and *Achhru Ram*, for the Respondents.

Judgment.—Civil Appeal No. 1466 and Civil Revision No. 582 of 1932, are connected and will be disposed of together. These arise out of execution proceedings in respect of a decree. The judgment-debtor had been arrested in execution and had been released on furnishing security for his appearance during the execution proceedings. The judgment-debtor thereafter absented himself and the surety was asked to produce him on April 30, 1931. On the latter date the decree-holder was absent. The Court, therefore, dismissed the execution petition in default and the surety who was present on that date was also discharged from his bond.

An application for restoration of the execution petition in the exercise of its inherent jurisdiction was made to the Court the same day, but it was dismissed on February 15, 1932, the Court holding that no sufficient ground had been made out for restoration of the petition. The decree-holder then presented two appeals to the District Judge on March 4, 1932, one from the order refusing to restore the execution petition and the other from the order discharging the surety. The former appeal was held to be incompetent and the latter was held to be time-barred. Both the appeals were accordingly dismissed. The plaintiff has now preferred a second appeal in connection with the order discharging the surety and has also filed a petition for revision of the order of the Subordinate Judge dated April 30, 1931, dismissing the execution petition.

So far as the revision petition is concerned, it seems clear that the petition must fail. The petition purports to be for revision of the order of the learned Subordinate Judge, dated April 30, 1931. On that day the execution petition was dismissed in default as the decree-holder was absent and it cannot be said that the Court has acted illegally or with any material irregularity in the exercise of its jurisdiction. The petitioner should have challenged and perhaps meant to challenge the subsequent order dated February 15

1932 refusing to restore the execution petition to the pending file. But the petition as it stands is for revision of the order dated April 30, 1931. This is reiterated in a note below the grounds of revision and only a copy of the order dated April 30, 1931, has been produced with the petition for revision. In the circumstances, this petition must be dismissed.

Coming now to Civil Appeal No. 1466 of 1932, as has been already stated, there were two appeals before the learned District Judge, *viz.* : (1) from the order of the Executing Court refusing to set aside the dismissal of the execution petition, and (2) from the order discharging the surety from his bond. The first order had been passed in the exercise of inherent jurisdiction under s. 151, Civil Procedure Code, and consequently the learned District Judge rightly held that no appeal was competent. This decision is not being challenged. As regards the other appeal in connection with the discharge of the surety the learned District Judge has held it to be time-barred. The appellant prayed that the time spent in prosecuting the application for restoration of the execution petition should be deducted, but the learned District Judge rejected this prayer and dismissed the appeal as time-barred as stated above. It is from this decision that a second appeal has been preferred.

The learned Counsel for the appellant has urged that the learned District Judge has erred in law in holding that the appellant could not be allowed any extension of time in respect of the period during which he was prosecuting his application for restoration of the execution petition and in support of this contention has relied mainly on *Brij Inder Singh* v. *Kanshi Ram* (1). The learned Counsel for the respondent has questioned the applicability of that ruling to the circumstances of the present case and has cited *Rajendra Nath* v. *Kamal Krishna* (2), but assuming that extension of time is permissible under s. 5, Limitation Act, in respect of time spent *bona fide* in pursuing an alternative remedy on the principles laid down in *Brij Inder Singh* v. *Kanshi Ram* (1), the question still remains whether an application for restoration of the execution petition was such a remedy. It is of course true, that the surety was discharged as a result of the dismissal of the execution petition : but the question is whether even if the execution petition had been restored to file, the liability of the surety would have been thereby necessarily revived. The appellant himself realized that the dismissal of the execution petition and the discharge of the surety were really separate orders (although these were incorporated in one and the same order dated April 30, 1931), and had preferred separate appeals to the District Judge in respect of the same. I am of opinion that the surety having been once discharged his liability could not be automatically revived by the mere restoration of the execution petition. The bond, it may be noted, was merely for the appearance of the judgment-debtor during the execution proceedings which were pending at the time and his liability consequently came to an end when those proceedings terminated and he was discharged. I do not see how his liability could be revived in the circumstances without his consent merely by the execution petition being restored. I had occasion to consider this very question in *Kali Ram* v. *Umrao Singh* (3), and have held for reasons given in my judgment therein that the liability of a surety is not automatically revived in such circumstances.

It follows from the above that the application for restoration of the execution petition could not in itself be considered to be a proper remedy for the purpose of getting the order as to the discharge of the surety set aside. The appellant did not admittedly make any application for review etc., praying for the setting aside of the order of discharge of the surety and I am therefore of opinion that it cannot be said that any time was spent *bona fide* in pursuing an alternative remedy. There is another aspect of the question also. The dismissal of the execution petition has now become final, as the application for restoration was dismissed, and the appeal therefrom and the petition for revision have also failed. If the dismissal of the execution petition must stand, no question of the setting aside of the order of the discharge of the surety can now arise as the proceedings in which the bond was taken have finally terminated.

(1) 42 Ind. Cas. 43; A I R 1917 P C 156; 45 C 94; 33 M L J 486; 22 M L T 362; 6 L W 592; 126 P W R 1917; 15 A L J 777; 19 Bom. L R 866; 3 P L W 313; 26 C L J 572; 104 P R 1917; (1917) M W N 811; 22 C W N 169; 127 P L R 1917 (P C).

(2) 138 Ind. Cas. 748; A I R 1932 Cal. 553; 59 C 057; 35 C W N 352; Ind. Rul. (1932) Cal. 507.

(3) 148 Ind. Cas. 570; A I R 1934 Lah. 92; 6 R L 579.

I accordingly dismiss the appeal as well as the petition with costs.

D. *Appeal dismissed.*

OUDH CHIEF COURT

Civil Revision Application No. 19 of 1934
March 22, 1935
KING, C. J.
KHUSHI RAM—JUDGMENT-DEBTOR—APPLICANT
versus
RAM SUMER—DECREE-HOLDER—OPPOSITE PARTY

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Decree obtained in Small Cause Court—Suit in Munsif's Court for declaration that property of judgment-debtor is attachable in execution of decree—Decree not transferred to Munsif's Court before filing of plaint—Plaint, if step-in-aid—Munsif's Court, if 'proper Court' within meaning of Art. 182—Plaint, if saves limitation for execution.

Where a decree is obtained in a Small Cause Court and subsequently a plaint is filed in a Munsif's Court for a declaration that certain property of the judgment-debtor is attachable in execution of the above decree, although the plaint can be treated as a step-in-aid, yet when the decree has not been transferred to the Munsif's Court for execution before the plaint is filed, that Court cannot be held to be the 'proper Court' within the meaning of Art. 182, Limitation Act and cl. (5) of the Article will not apply for the purpose of saving limitation.

C. R. App. against the order of the Sub-Judge, as Judge of Small Cause Court, Partabgarh, dated November 1, 1933.

Mr. *Ramapat Ram*, for the Applicant.

Mr. *Radha Krishna*, for the Opposite Party.

Judgment.—This is a judgment-debtor's appeal arising out of an order passed in execution proceedings. The decree-holder obtained his decree in the Court of the Subordinate Judge of Partabgarh sitting as a Judge of a Court of Small Causes. The decree-holder's last application for execution was consigned to record on February 25, 1930, after a certain sum had been received. On April 9, 1932, the decree-holder instituted a suit in the Court of the Munsif of Kunda for a declaration that a deed executed by the judgment-debtor in favour of his grandson in respect of certain immoveable property was fictitious and that the decree-holder was entitled to attach and sell the property in execution of his decree. On September 23, 1932, the declaratory suit was decreed. On June 1, 1933, the decree-holder applied for execution of his decree and was met with the objection that the application was barred by limitation as more than three years had elapsed since the last application was consigned to the records on February 25, 1930. The question was whether the plaint filed by the decree-holder on April 9, 1932, in the suit for the declaration mentioned above can be treated as "an application made in accordance with law to the proper Court to take some step-in-aid of execution of the decree" within the meaning of Art. 182, cl. (5) of the First Schedule to the Limitation Act. If this question be answered in the affirmative then the application for execution made on June 1, 1933, will be within time as it was made within three years from the date when the plaint was filed.

The executing Court held that limitation was saved by the filing of the plaint. The Court further held that the decree-holder could rely upon s. 14, sub-s. (2) of the Limitation Act for the purpose of saving limitation.

The judgment-debtor contends that even though the plaint filed in the Munsif's Court may be held to be an application made in accordance with law to take some step-in-aid of execution nevertheless limitation will not be saved by cl. (5) of Art. 182 because the application was not made to the proper Court.

The case of *Sheo Ram* v. *Ram Bharosey* (1) is an authority for holding that the plaint filed in the Munsif's Court for a declaration that the property was attachable in execution of the decree can be treated as an application to take some step-in-aid of execution of the decree within the meaning of cl. (5) of Art. 182. To that extent the ruling is clearly in the respondent's favour and that point is not contested. The question before me is whether the plaint can be treated as an application made to the proper Court within the meaning of Art. 182. The Court below has held that the application should be treated as having been made "to the proper Court" as the suit was within the pecuniary jurisdiction of the Munsif of Kunda and, therefore, the suit could not have been entertained by the Court of the Subordinate Judge of Partabgarh. In that sense no doubt the plaint was filed in the "proper Court" but the expression "proper Court" has been defined in Art. 182 as meaning "the Court whose duty it is to execute

(1) 69 Ind. Cas. 630; 26 O C 71; 9 O L J 444; 4 U P L R (O) 97; A I R 1923 Oudh 9.

the decree." At the time when the plaint was filed in the Court of the Munsif of Kunda the decree had not been transferred for execution to that Court and was still pending for execution purposes in the Court of the Subordinate Judge of Partabgarh in the capacity of a Judge of a Court of Small Causes. It is argued that a Court of Small Causes cannot execute a decree against immovable property and therefor if the execution is sought against immovable property the decree has to be transferred for execution to some Court on the regular side. If the decree in question had been transferred to the Court of the Munsif of Kunda for execution against the immovable property in dispute before the plaint was filed in the Court of the Munsif of Kunda then there would have been no difficulty and the ruling in *Sheo Ram* v. *Ram Bharosey* (1) would have been fully applicable. The difficulty is that at the time when the plaint was filed in the Munsif's Court the decree had not been transferred to that Court for execution and it is difficult to hold that in such circumstances the Munsif's Court was the Court whose duty it was to execute the decree. It has been argued that (as a decree can?) only be executed by a regular Court, the duty of executing the decree in that respect is cast upon the regular Courts even before the decree has been transferred to them for execution. It is difficult to accept this view. A judgment-debtor may have immovable property in six different districts. It seems impossible to hold that the Civil Courts of each of these six districts are under a duty to execute the decree even before it has been transferred to them for execution. In my opinion the Court of the Munsif of Kunda cannot be held to be the Court whose duty it was to execute the decree unless and until the decree had been transferred to that Court for execution. On this view the Court of the Munsif of Kunda cannot be held to be the "proper Court" within the meaning of Art. 182 of the Limitation Act and cl. (5) of that article will not apply for the purpose of saving limitation.

The Court below has also relied upon s. 14 sub-s. (2) of the Limitation Act for the purpose of saving limitation but this provision does not seem to be applicable to the facts of this case and the learned Advocate for the respondent does not put any reliance upon it.

I, therefore, allow the appeal and set aside the order of the Court below with costs in both Courts.

N. *Appeal allowed.*

CALCUTTA HIGH COURT

Civil Appeal No. 383 of 1932

June 27, 1934

MITTER AND PATTERSON, JJ.

MAHAMMAD ALI FAKIR —DEFENDANT— APPELLANT

versus

KARAM ALI TALUQDAR AND OTHERS —RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XLI, r. 23, O. XLIII, r. 1—Remand of suit to determine it finally—Appeal to High Court, if permissible—Landlord and tenant—Lump rental tenancy—Landlord deliberately and forcibly expelling tenant from part of demised premises—Tenant, if can suspend entire payment of rent.

Although the provisions of O. XLI, r. 23, Civil Procedure Code, might not strictly apply where the Court of appeal has remanded the suit to the first Court which has been asked to determine finally the suit by the order of remand, an appeal to the High Court is permissible under the provisions of O XLIII, r. 1, Civil Procedure Code. *Basumati* v. *Taritbasini* (2), *Prasanna* v. *Baidyanath* (3) and *Kayem* v. *Bahadur Khan* (4), relied on, *Jagat Hari Saha* v. *Medun Bardhan* (1), not followed. [p. 502, col. 2.]

Where the rent is a lump rental and the case one of deliberate and forcible expulsion of a tenant from a part of the demised premises, no question of equity to an apportionment can possibly arise, and the tenant is entitled to entire suspension of rent till he is restored to possession of the dispossessed portion. *Jogesh Chandra* v. *Emdad Meah* (12), distinguished. *Susil Kumar* v. *Rajani Kanta* (8), not followed. [p. 508, col. 2.]

[Case-law reviewed.]

O. A. from an appellate order of the Sub-Judge, Bogra, dated May 30, 1932.

Messrs. *Radhabenode Pal*, *Shamapada Mazumdar* and *Holiram Deka*, for the Appellant.

Mr. *Syed Farhat Ali*, for the Respondents.

Mitter, J.—This is an appeal by the defendant against the decision of the Subordinate Judge of Bogra dated May 30, 1932, reversing the decision of the Munsiff of Bogra dated March 31, 1931. The suit in which this appeal has arisen is a suit brought by the plaintiffs now respondents for recovery of arrears of rent for the years 1333 to 1336 for two *jamas* one of Rs. 39-14-2 and the other of Rs. 3-12-0. The defence to the suit was that the landlord had dispossessed the defendant of a portion of the holding and that the rent should be suspended. The tenancy being one indivisible with a lump rental of Rs. 45 both the Courts below have come

to a concurrent conclusion that the land now in possession of one Jahiruddin was at one time a part of the defendant's tenancy and further that it was abundantly clear from the evidence that the dispossession was by the landlord and that the dispossession was a forcible dispossession seeing that there was a regular fight at the time of the dispossession and the *gomastha* of the landlord was wounded. The Subordinate Judge says that he agrees with the learned Munsif that the defendant was dispossessed in the year 1324 *B. S.* of a portion of the tenancy. The tenancy was originally admittedly of Rs. 45. A portion of the land was found to be a *diara* land and for this portion a separate *khatian* was made and the rent of Rs. 3-12-0 was settled for this *khatian* under s. 104, Bengal Tenancy Act. In respect of the other land there has been one *khatian* with a rent of Rs. 39-14-2. Both the Courts proceeded on the footing that the rent is a lump rent and not at so much per *bigha*. The Munsif gave effect to the defence of the defendant and dismissed the plaintiff's suit. The Subordinate Judge on appeal was of opinion that no case had been made for suspension of the entire rent but that there should be a proportionate abatement; and for that purpose he remanded the suit to the trial Court for re-admitting it under its original number and for determining what rent should be abated for the land from which the defendant had been dispossessed and then passing a decree in accordance with the observations made in the judgment.

Against this order of remand the present appeal has been brought by the tenant-defendant. A preliminary objection has been taken to the hearing of this appeal on the ground that the order could not have been passed properly under the provisions of O. XLI r. 23, Civil Procedure Code, as the trial Court did not decide the suit on a preliminary point. Consequently no appeal from the order of remand lies to this Court. One decision has been cited which lays down that cases of this kind must be treated as cases in which a remand is made under the provisions of O. XLI, r. 25, Civil Procedure Code, as if the appeal was being kept in the file of an Appellate Court and the Appellate Court was merely setting aside the finding of the first Court on a particular issue which had been sent down. There is no doubt a decision of Page and Graham, JJ., to that effect in *Jagat Hari Saha* v. *Medun Bardhan* (1). We have examined that decision and we find that on a review of all other authorities, *viz.*, *Basumati* v. *Taritbasini* (2), *Prasanna* v. *Baidyanath* (3) and *Kayem* v. *Bahadur Khan* (4), that that decision is one of the two cases which takes a view different from the view taken consistently by the several Benches of this Court which have held that although the provisions of O. XLI, r. 23, might not strictly apply where the Court of appeal has remanded the suit to the first Court which has been asked to determine finally the suit by the order of remand, an appeal to this Court is permissible under the provisions of O. XLIII, r. 1, Civil Procedure Code. We, therefore, do not think that there is any substance in the preliminary objection which must be overruled.

The real question in controversy before us is as to whether, when the rental is a lump rental as in the present case and the tenants have been dispossessed and forcibly dispossessed from a part of the demised premises—in this case about one-tenth of the demised area—there should be a total suspension of rent or a proportionate abatement. The appellant contends upon the authorities that there should be a total suspension. On the contrary the learned Advocate for the respondents, supporting the judgment of the Subordinate Judge contend that there should be a proportionate abatement and not total suspension. The question as to whether in the case of a lump rental where there has been dispossession from a part of the demised premises, there should be a total suspension of rent did come before their Lordships of the Judicial Committee of the Privy Council in *Katyayani Debi* v. *Udoy Kumar Das* (5). Their Lordships observed thus:—

"The doctrine of suspension of payment of rent where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case when the stipulated rent is so much per acre or *bigha*."

Reliance has been placed on behalf of the appellant in support of the contention th a there should be a total suspension of re n

(1) 104 Ind. Cas. 422; A I R 1927 Cal. 642; 31 C W N 878.

(2) 57 Ind Cas. 929; A I R 1920 Cal. 539; 24 C W N 856; 21 Cr. L J 689.

(3) 56 Ind. Cas. 516; A I R 1920 Cal. 124; 31 C W N 360; 24 C W N 708.

(4) 89 Ind. Cas 744; A I R 1925 Cal. 1258; 42 C L J 22; 30 C W N 41.

(5) 88 Ind. Cas. 110; A I R 1925 P C 97; 52 I A 160; 52 C 417; 23 A L J 751; L R 6 A (P C) 140; 30 C W N 1 (P C).

not only on this decision, but onseveral decisions of this Court which have interpreted the decision of their Lordships of the Judicial Committee to mean that in the case of lump rental where there is a dispossession of a part of the demised premises, there should be a total suspension of rent until the tenant is restored to possession. To some of these decisions I was a party. Reference may be made to the case of *Mahim Chandra* v. *Karamali* (6), which is a decision of mine sitting singly. In that decision the view contended for by the appellant was taken. There was an appeal in this case under s. 15, Letters Patent, from my decision and that appeal was dismissed by C. C. Ghose and Mallik, JJ. summarily. The next decision is that of Jack, J., and I was also a party to that decision. This is the decision in *Abhoya Charan* v. *Hem Chandra* (7), where cases both of the English and Indian Courts from the very earliest times were reviewed and it was pointed out that all the earlier cases with the exception of a single case to which reference has been made in the judgment of the Appellate Court in the present case took the view that in the case of a tenancy with lump rental where there has been dispossession by a landlord of tenant from a part of a demised premises there should not be a proportionate abatement of rent but the entire rent should be suspended. The reasons for this view are given with great fullness in my decision in *Abhoya Charan* v. *Hem Chandra* (7), and it is not necessary to reproduce these reasons here again. It is to be noticed that in *Susil Kumar* v. *Rajani Kanta* (8), B. B. Ghose and Roy, JJ. expressed the opinion that the observations of their Lordships of the Judicial Committee in *Katyayani Debi* v. *Udoy Kumar Das* (5), were no authority for the proposition that there should be any apportionment in every case of dispossession by the landlord of the tenant from a part of the demised premises where the rent was a lump rental. It was further pointed out in *Abhoya Charan* v. *Hem Chandra* (7), that it is difficult to read the decision of the Judicial Committee in the same way as the learned Judges in *Susil Kumar* v. *Rajani Kanta* (8), seem to have read it. The true rule is that which was laid down by the Sir George Claus Rankin, C. J., in *Sajjad Ahmad* v. *Trailokhya Nath* (9), referred to in *Abhoya Charan* v. *Hem Chandra* (7),

"that the doctrine of suspension of rent depends solely on this that the rent due is an entire sum in respect of the land demised. If, therefore, the tenant is not given occupation of the whole of the land demised, the landlord has no right to the entire rent, and unless he has a right or some equity to an apportionment, he can recover nothing on the contract. But the whole basis of the doctrine is that the rent due is one entire sum."

That there is no difference between the English and the Indian law on the subject was pointed out in the earlier decisions of this Court to which reference has been made in my decision in *Abhoya Charan* v. *Hem Chandra* (7). B. B. Ghose, J., took a different view. But the observations of the learned Judges in that case were of the nature of *obiter dictum*. Apparently the view taken in *Abaya Charan* v. *Hem Chandra* (7) is the view contended by the appellant. The decision in *Abhoya Charan* v. *Hem Chandra* (7) has been followed by Suhrawardy and Graham, JJ., in *Krishna Chandra* v. *Surendra Nath* (10). The learned Judges agreeing with the view taken in *Abhoya Charan* v. *Hem Chandra* (7) already referred to and dissenting from the view taken by B. B. Ghose, J., in *Susil Kumar* v. *Rajani Kanta* (8) observed "that it is not profitable to discuss the question whether in some cases total suspension should not be allowed and effort should be made to apportion rent, for the consensus of authorities commencing almost from *Gopanund Jha* v. *Govinda Persad* (11) is that where the lessor enters forcibly into part of the land, the lessee is discharged from payment of the whole rent till he is restored to possession of the whole, because it is the duty of the lessor to protect and defend the lessee and not to disturb him in his possession. It may be that where the lessor commits an honest mistake about the extent of the property leased, including in it some portion over which he had no disposing power, or was the innocent cause of the dispossession of the lease by a third party from a portion of the lease-hold or otherwise acts *bona fide*, he is entitled to some relief."

The case before us being a case of deliberate and forcible expulsion of a tenant from a part of the demised premises no question of equity to an apportionment can possibly arise, and the tenant is entitled to entire suspension of rent till he is restored to possession of the dispossessed portion.

The Subordinate Judge, however, inclines to the view that a later decision of their Lordships of the Judicial Committee

(6) 119 Ind. Cas. 132; A I R 1929 Cal. 516; 33 C W N 501; Ind. Rul (1929) Cal. 710.

(7) 123 Ind. Cas. 653; A I R 1929 Cal. 568; 33 C W N 715; 49 C L J 595; Ind. Rul. (1930) Cal. 349; 57 C 137.

(8) 101 Ind. Cas. 775; A I R 1927 Cal. 737; 31 C W N 990.

(9) 116 Ind. Cas. 375; A I R 1928 Cal. 479; 55 C 464; 32 C W N 472.

(10) 137 Ind. Cas. 693; A I R 1932 Cal. 335; 54 C L J 479; 36 C W N 72; Ind. Rul. (1932) Cal. 365.

(11) 12 W R 109.

of the Privy Council in *Jogesh Chandra* v. *Emdad Meah* (12) has modified considerably the doctrine of total suspension of rent in case of dispossession by landlord from a part of the tenancy with a lump rent.

It becomes necessary therefore to examine closely and critically the decision of their Lordships of the Judicial Committee of the Privy Council in this recent case. The facts, when examined, show that it was not a case of dispossession of the tenant by the landlord at all but it was a case of landlord not being able to put the tenant in possession of a part of the tenancy by reason of title paramount in a third person. Briefly stated the position was this: There was a tenancy of one Homer Ali under the appellant Jogesh Chandra Roy. In 1910 the appellant before their Lordships instituted a suit for possession of Jote No. 83 against Homer Ali's widow and the respondent before their Lordships Emdad Ali obtained a decree in his favour in 1912. He executed the decree in 1913. In 1916 the appellant brought a similar suit for possession of Jote No. 98 against not only the widow and the respondent before their Lordships, Emdad, but also against Homer Ali's four daughters as well. In October 1917, this suit was compromised as between the appellant before their Lordships and Hamer Ali's widow and the respondent, the daughters being first excluded from the category of defendants on the petition of the appellant before their Lordships Jogesh Chandra Roy; a *solenama* was then executed by the appellant, the widow and the respondent under which out of the 20 drones odd of which the holding consisted, the widow and the respondent Emdad were to hold 11 drones odd under the appellant at a rent thereby fixed and the appellant Jogesh Chandra Roy was to get *khas* possession of the balance of 8 drones odd. The respondent Emdad further agreed to pay a sum of Rs. 1,400 in respect of the appellant's costs and mesne profits by instalments and executed a mortgage therefor. It was a part of the settlement of that suit, which related to Suit No. 98, that the respondent Emdad should execute the *kabuliyat* relative to Jote No. 83, dated October 11, 1917, which formed the basis of the suit in which the appeal before their Lordships had arisen. By that *kabuliyat* the respondent Emdad took a *bekaemi* or non-permanent settlement as a yearly tenant of 10 drones odd land out of 14 drones odd at a certain yearly rental. In January 1920, the respondent's sisters, that is the daughters of Homer Ali, brought a suit against Jogesh, the landlord, and Emdad for a declaration of their right and confirmation of their possession to the extent of their share as co-heirs of Homer Ali in Jote No. 83. That suit was ultimately decreed and it was held that the sisters' share which amounted to 9 as 4 *gandas* in Jote No. 83 was not affected by the previous decrees and sales.

The result was that Jogesh the landlord had failed to put the respondent Emdad in possession of the entire subject which was the land covered by the *kabuliyat* of October 11, 1917. The Courts in India dismissed the suit of Jogesh Chandra Roy, but before their Lordships of the Judicial Committee a plea was taken for the first time that the suit should not have been dismissed in its entirety, but a decree for a proportionately abated rent should have been given it being taken into account that the respondent Emdad's sisters are entitled to 9 as. 4 p. share under the decree of 1928. This is not a case like the case before their Lordships of the Judicial Committee as the latter case was not a case of forcible dispossession by the landlord from a portion of the tenancy in which the tenant had already been put into possession. This case before their Lordships was a case where the landlord could not put the lessee in possession of a portion of the demised premises because the possession was not available to him by reason of the title to a certain share of the tenancy being not in the plaintiff landlord, but in some of the heirs of the original tenant, whose rights had not been extinguished by the sale by the landlord. The case we are considering is a very different case. The title of the landlord and his power to give possession to the tenant in the present case was undoubted. After granting a lease to the defendant in the present case the plaintiff put the defendant in possession and included a portion of the tenancy in a subsequent lease to one Jahiruddin and on the strength of that subsequent lease and with the assistance of the landlord Jahiruddin dispossessed the present defendant from a portion of the demised premises.

(12) 136 Ind. Cas. 398; A I R 1932 P C 28; 59 I A 29; 59 C 1012; 9 O W N 119; 36 C W N 221; 16 R 95; 55 C L J 72; (1932) M W N 275; 34 Bom. L R 4 22 M L J 336; Ind. Rul. (1932) P C 94; L R 13 A 71 (P C).

The case before the Privy Council was a case when the landlord by reason of a paramount title to a portion of the demised premises in the original tenancy could not get possession of a certain share of the said premises and could not put the tenant with whom he had leased the Jote No. 83 in October 11, 1917, in possession of that share. This decision in our view does not affect the principle laid down by their Lordships of the Judicial Committee in *Katyayani Debi* v. *Udoy Kumar* (5), referred to above. A careful examination of the facts to which we have referred shows that the case of *Jogesh Chandra* v. *Emdad Meah* (12), relates to a very different state of facts and circumstances which cannot affect the previous decision in *Katyayani's case* (5). And we are strengthened in our conclusion by the following further examination of the case. In support of the contention that the landlord Jogesh Chandra Roy should have been given a decree for proportionate part of rent, Mr. Pringle who was appearing for the landlord appellant before the Privy Council referred to *Imambundi* v. *Kamaleswar* (13) which was a case of the landlord not putting the lessee in possession by reason of eviction by title paramount and Mr. Pringle's contention succeeded. In *Imambundi* v. *Kamaleswar* (13), their Lordships make the following observations which will make it clear that they were not dealing with a case of dispossession by the landlord after the tenant was put into possession, but was dealing with a case where the tenant could not obtain possession by reason of the landlord being evicted by title paramount. Their Lordships say: "As Imambundi did not prove that she entered into possession under the leases and was then dispossessed there was not an eviction in the proper sense of the word. But when Imambundi was alleged to bring a suit to obtain possession and succeeded in obtaining a part of what was granted in *mokarrari* and was precluded by the result of the suit from having possession of a substantial and a longer part, she was in a similar position to having been evicted from that part and there is same equity to an apportionment as in the case of eviction". Here the eviction was not by landlord, but by title paramount. In such a case there must be proportionate abatement. For as Foa points out in his Law of Landlord and Tenant, Edn. 6, p. 195, where the eviction by title paramount is only from a part of the demised premises, the effect (unlike that in the case of eviction by lessor himself) is not to suspend the whole rent, but to render the tenant liable to have it apportioned. *Jogesh Chandra* v. *Emdad Meah* (12), cannot govern the case of forcible dispossession by the landlord where the tenant having been put into possession has been forcibly dispossessed from a part of demised premises after this. This Court almost unanimously with the single exception of the decision of B. B. Ghose, J., held in favour of the contention raised by the appellant.

The result, therefore, is that this appeal must be allowed. The judgment and decree of the Subordinate Judge must be set aside and those of the Munsif restored with costs in all Courts. It remains to notice the case which has been cited on behalf of the respondents. This is a decision of my learned brother Mukerji, J., in *Sakhisona Dasi* v. *Pran Krishna Das* (14) and requires serious consideration. The learned Judge observed this:

"My view is that the mere fact that the tenancy is governed by one lease and so in law may be regarded as one tenure is not enough, what has to be seen is whether in fact, the parcels are such that deprivation from one necessarily interferes with the due enjoyment of the others."

Previous to this remark the learned Judge referred to the decision of Page, J., in *Dhirendra Nath Roy* v. *Bhabatarini Debi* (15,) which took the view that there should be total suspension in case of dispossession from part. Mookerji, J., refers to the following observation of Page, J.:

"Was it one indivisible tenancy and was there interference by the landlord with the due enjoyment of the previous or any part of them ?"

I do not think, however, in order to decide the present case one need consider whether the tenancy consists of separate *mouzas*, that is properties rented separately or whether the tenancy in effect in law is indivisible or divisible. Towards the end of the judgment Mukerji J., refers with approval to the following observation of Page, J., as he then was:

"It is not possible for the landlords to assert that any portion of the rent is payable in respect of any portion of the premises for in law every pice of rent is payable out of every portion of the premises demised."

Applying this principle to the present case there is no question of the tenancy consisting of several parcels of land separately assessed to rent and consequently

(13) 21 C 1005; 21 I A 118; 6 Sar. 446 (P. C.).

(14) 146 Ind. Cas. 398; A I R 1933 Cal. 566; 37 C W N 301; 6 R C 213.

(15) 119 Ind. Cas. 297; A I R 1929 Cal. 395; 33 C W N 367; Ind. Rul. (1929) Cal. 777.

total suspension must be the result. We are, therefore, of opinion that this decision does not help the respondent. On the other hand the remark just quoted goes against him.

Patterson, J.—I agree.

D. *Appeal allowed.*

RANGOON HIGH COURT

Second Civil Appeal No. 125 of 1934
August 16, 1934
MACKNEY, J.
DAW MIN BAW—APPELLANT
versus
A. V. P. L. N. CHETTYAR FIRM AND ANOTHER—RESPONDENTS

Registration — Security bond filed in Court—No person named as obligee — Registration — Civil Procedure Code (Act V of 1908), ss. 47, 145, O XLI, r. 27 —Surety for performance of decree, if a party—Order against him in respect of execution of decree, if appealable—O. XLI, r. 27, scope of—Practice—Appellate Court—Credibility of witness—Appellate Court, if can differ from original Court.

Where in a security bond filed in Court no person is named as the obligee, the bond is given to the Judge of the Court and therefore, if not presented by the obligors, ought to be presented by the Judge or by a person holding a duly authenticated power of attorney from him. *Ma Shwe Mya* v. *Maung Ho Hnaung* (2), referred to.

A person who is liable as a surety for the performance of the decree shall, under s. 145, Civil Procedure Code, be deemed to be a party within the meaning of s. 47, Civil Procedure Code. An appeal would lie from an order against him in regard to the execution of the decree by the sale of his property. [p. 512, col. 2]

Order XLI, r. 27, Civil Procedure Code, cannot be used to test the evidence of a witness. It is intended to obtain additional evidence.

It is dangerous for an Appellate Court to differ from an original Court on the question of the credibility of witnesses and basing its opposite decision on mere inferences from the statements which the witnesses are recorded to have made which an Appellate Court cannot make with such certitude as can the Court which originally heard the witnesses.

S. C. A. against the decree of the District Judge, Hanthawaddy, in Civil Miscellaneous Appeal No. 18 of 1934.

Mr. *P. B. Sen*, for the Appellant.

Mr. *Chari*, for the Respondents.

Judgment.— In Execution Case No. 9 of 1931 of the Sub-Divisional Court of Kyauktan the appellant, Daw Min Baw, is alleged to have given security together with her daughter Ma Ein Myaung on the order of the Court, for the payment by a certain date of the amount due by Ma Ein Myaung, her husband Mg. Hla Maung and other judgment-debtors under a decree of the Sub-Divisional Court in Civil Regular No. 128 of 1930 in favour of the respondent A. V. P. L. N. Firm. Under the bond she would appear to have mortgaged certain property as security which, it is alleged, she jointly holds with her daughter Ma Ein Myaung. The decretal amount was not paid on the date fixed and the A. V. P. L. N. Firm proceeded to apply to the Court to enforce the security bond. This was on April 18, 1931. Ultimately the property was sold by the order of the Court. The second respondent the A. M. P. A. L. A. Firm is the auction-purchaser. Thereafter much litigation ensued. I do not propose here to repeat in detail the events of that litigation. They are set out in the judgment in *Daw Min Baw* v. *A. V. P. L. N. Chettyar Firm* (1) of this Court and again in the judgment of the lower Appellate Court. By the order of this Court in Civil Revision No. 171 of 1932 the trial Court was directed to issue the notices which should have been issued in April 1931, under s. 145 to Daw Min Baw, which were not issued, and give her opportunity of showing cause why her interest in the land should not be sold. This has now been done.

Daw Min Baw claims that she neither offered to give security nor did she execute the security bond nor authorize anybody to do so for her. Daw Min Baw is an aged lady of 67 years. For many years her daughter Ma Ein Myaung and the latter's husband Maung Hla Maung lived with her and looked after her affairs, in which she appears to have taken little interest. She had at one time given Maung Hla Maung a power of attorney to enable him to conduct the management of her affairs, but this power did not confer on him authority to appear before the Court and offer security on behalf of others. When the Court allowed Ma Ein Myaung and Maung Hla Maung to furnish security for the payment of the decretal amount in Civil Regular Suit No. 128 of 1930, Maung Hla Maung at first offered as security the land which was ultimately accepted as security under the bond now in question. He stated that the land was standing in the name of Ma Ein Myaung. On inquiry it was found that the land stood in the joint names of Ma Ein Myaung and her mother Daw Min Baw. The Court required affidavits to be filed that the land was free from encumbrances. Maung Hla Maung then filed affidavits

(1) 144 Ind. Cas. 163; A I R 1933 Rang. 64; 11 R 134; Ind. Rul. (1933) Rang. 86.

purporting to be signed one by Ma Ein Myaung and the other by Daw Min Baw. They are worded similarly and each states that :

"Maung Hla Maung is my agent and I authorized him to execute also the security bonds in connection with the above case".

Daw Min Baw's affidavit is signed with a cross-mark and Maung Hla Maung himself identified the person swearing the affidavit before Maung Pu, the Commissioner for Oaths. Daw Min Baw herself did not appear. It is admitted that the place in which she lived was not far away from Court and it is clear that she is not so old and feeble that she could not have attended the Court herself. The Court accepted the security and a bond was filed which purported to be signed by Ma Ein Myaung on February 11, 1931, and was signed by Maung Hla Maung describing himself as agent of Daw Min Baw. The bond was attested by two witnesses, but these persons apparently are not now available. The document was not registered as it should have been, but on May 8, 1931, the Court directed that it should be registered. The document was ultimately registered on the order of the Registrar on presentation by the A. V. P. L. N. Firm. There is an endorsement by the Sub-Registrar that the Registrar had satisfied himself that "Maung Hla Maung" and Ma Ein Myaung had executed the document.

The point was raised for the first time in this appeal that the document had not been registered in accordance with law because it was not presented for registration by a properly authorized person. This contention is, in my opinion, correct. In *Ma Shwe Mya* v. *Maung Ho Hnaung* (2), their Lordships of the Privy Council in connection with a similar security bond, where no person was named as the obligee, seem to have considered that the bond was given to the Judge of the Court and therefore, if not presented by the obligors, ought to have been presented by the Judge or by a person holding a duly authenticated power of attorney from him. In view however of the finding to which I find it necessary to come to in this case, this point will not be of importance.

On inquiry the Sub-Divisional Court found that Daw Min Baw did not sign the affidavit and did not offer to give security, that Maung Hla Maung was not authorized to execute the sercurity bond on her behalf and that she was not bound thereby. On appeal to the District Court the learned District Judge after further examining the Commissioner for Oaths, came to the finding that although there was no direct evidence to show that Daw Min Baw had signed the affidavit yet the circumstances indicated that she had done so. He, therefore, allowed the appeal and set aside the order of the Sub-Divisional Court. Daw Min Baw has now appealed to this Court under s. 11, Burma Courts Act. As she is a person liable as a surety for the performance of the decree she shall, under s. 145, Civil Procedure Code, be deemed to be a party within the meaning of s. 47, Civil Procedure Code. An appeal would lie from an order against her in regard to the execution of the decree by the sale of her property. A point has been taken that the learned District Judge had not the authority under O. XLI, r. 27, Civil Procedure Code, to call up Maung Pu, the Commissioner for Oaths before him and cross-examine him. The learned Judge recorded an order that:

"the circumstances of the swearing of the affidavit have not been sufficiently inquired into. The bailiff (*i. e.*, Commissioner of Oaths) is now assistant bailiff of this Court and I will take his evidence myself."

It seems to me that it would be difficult for this Court to hold that the learned District Judge had no (?) authority to do this. It seems to me that if he felt that there was a gap in the evidence and that additional evidence was required, he was entitled to make an order to that effect. Nevertheless a perusal of the evidence given by Maung Pu before the District Court seems to show that he was merely subject to cross-examination on his previous statements and that the real object of recalling him was to test his evidence and not to obtain additional evidence. I do not think that this is a desirable procedure or one that was intended by r. 27, O. XLI.

It may be said at once that in face of her denial it was incumbent upon the respondents to prove that Daw Min Baw had actually consented to give security and authorized the execution of the security bond. The affidavit and the security bond do not by themselves prove that. It may be further said that there is not a shred of evidence that Daw Min Baw did sign the affidavit or authorize Maung Hla Maung to sign the security bond. As I have already remarked, the circumstances

(2) 70 Ind. Cas. 937; A I R 1922 P C 359; 49 I A 95; 50 C 166; 31 M L T 304; 17 L W 213; 37 C L J 343; 27 C W N 533; 44 M L J 732; 2 Bur. L J 264 (P. C.).

in which this affidavit was produced and the bond signed were most suspicious considering that Daw Min Baw was perfectly capable of appearing in Court herself, and that it was Maung Hla Maung one of the judgment-debtors who was to benefit by Daw Min Baw's giving security who identified her before the Commissioner for Oaths. The latter states that he does not think that the woman who appeared before him and was identified as Daw Min Baw was Daw Min Baw. Of course it must be difficult for Maung Pu to be certain after this period of time, but at any rate his evidence is of no help to the respondents. Notices in regard to the sale of the property were issued during May and sale took place on July 4, 1931. It seems very probable that Daw Min Baw was aware that this property was being sold yet it was not until August 3, 1931, that she applied to have the sale set aside. It has to be remembered that Maung Hla Maung and Ma Ein Myaung her only daughter, were living with Daw Min Baw and were in difficulties. We do not know what passed between them but it is at least conceivable that they may have thrown themselves on her mercy and induced her to put off the day of reckoning. The one theory is at least as probable as the other, namely, that she did not earlier raise any objection because she had in fact consented to the giving of security. It is to be noted that in Execution Case No. 54 of 1931, of the Sub-Divisional Court of Kyauktan when the A. L. S. P. P. L. Firm, another decree-holder, attached this property in execution of a decree against Daw Min Baw, her daughter and son-in-law, the A. V. P. L. N. Firm drew the attention of the Court to the fact that the property was secured towards payment of their decree. The A. L. S. P. P. L. Firm on July 20, 1931 stated that they were informed and verily believed that the mortgage bond was not executed by Daw Min Baw or by her duly constituted agent and attorney and was fraudulently executed by Maung Hla Maung and was not enforceable so that it is clear that it must have been rumoured some time before that the bond was not a genuine one.

Some reliance has been placed on the evidence of headmen Maung Po Myit and Maung Gaw Ya. Maung Po Myit is admittedly not on good terms with Daw Min Baw and Maung Gaw Ya is his father. Nevertheless even at the best their statements amount to no more than this that sometime between April and July when they went to demand revenue due on the land Daw Min Baw stated that the land was in dispute with the Chettyar and had been offered as security in Court and that she could not pay the land revenue. I cannot see that this is not precisely what she would have stated if her present case were true. Such remark in no wise amounts to an admission that she had offered her land as security. In fact Maung Gaw Ya puts it more definitely. He stated that that Daw Min Baw told him: "my daughter and my son-in-law have mortgaged lands with the Chettyar; ask the revenue from the Chettyar."

She told him that the land was offered as security on account of a case. Maung Hla Maung and Ma Ein Myaung have now vanished although they have left their child with Daw Min Baw and Daw Min Baw professes not to know where they are. It seems that up to quite recently they were living with her. Nevertheless I do not see how even that would show that Daw Min Baw did in fact execute the security bond. Allowance must be made for natural love and affection even in a person so deeply wronged as Daw Min Baw.

Great stress has been laid both by the learned District Judge and by the learned Advocate for the respondents on the fact that Daw Min Baw appears to have been most reluctant to say outright that the affidavit is a forgery. She has all along maintained that she did not sign the affidavit. What inference is to be drawn from the fact that she is so reluctant to accuse her son-in-law definitely of forgery? I think the obvious inference is that although she maintains that she did not sign the affidavit she does not wish to condemn Maung Hla Maung. She is content if the effect of that affidavit is obliterated and her property set free from the mortgage. If she is perjuring herself by saying that she did not sign the affidavit it appears to me that she would not have hesitated to go further and admit the obvious inference that Maung Hla Maung forged the affidavit. On the other hand if it is true that she did not sign the affidavit it may quite well be that she does not want to be a party to the condemnation of her son in-law. It has to be remembered that she is an old lady not very acute and possibly somewhat obstinate. In the course of her cross-examination she showed herself most unwilling to answer the questions of

the cross-examining Advocate:, who would say she "did not remember," she "did not know" and so forth. Nevertheless in the circumstances I cannot see that this shows that she is a perjurer.

In my opinion this is undoubtedly a case which illustrates the danger of an Appellate Court differing from an original Court on the question of the credibility of witnesses and basing its opposite decision on mere inferences from the statements which the witnesses are recorded to have made which an Appellate Court cannot make with such certitude as can the Court which originally heard the witnesses. The learned District Judge has, it seems to me, overlooked the fact that the Sub-Divisional Judge had Daw Min Baw before him for a considerable time and must be in a better position than he to decide as to her veracity. For these reasons this appeal is allowed, the decree of the lower Appellate Court is set aside and the decree of the Sub-Divisional Court restored with costs throughout in accordance with the order of this Court in Civil Revision No. 171 of 1932.

D. *Appeal allowed.*

LAHORE HIGH COURT

Miscellaneous First Civil Appeal No. 917 of 1933

March 8, 1934

HILTON, J.

HUKAM CHAND—PLAINTIFF—APPELLANT

versus

MANI SHIBRAT DASS AND ANOTHER—DECREE-HOLDER AND JUDGMENT-DEBTOR—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. VIII, rr. 8, 9, O. IX, r. 3—Clerk of Court fixing date in absence of presiding Judge—Failure to appear on such date—Whether justifies dismissal in default.

In the absence of the presiding Judge, the clerk of the Court has no power to fix a date. Failure to appear on the date so fixed does not justify dismissal in default. *Jowala Sahai-Dhera Shah* v. *Maya Das* (1), relied on.

Misc. F. C. A. from an order of the Additional District Judge, Karnal, dated February 20, 1933.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Parkash Chand*, for the Respondents.

Judgment.—Hukam Chand's appeal against Mani Shibrat Das and Hussaina was pending in the Court of the Additional District Judge. The Judge issued notice to both parties for January 7, 1933, but on that date the Judge was absent and in his absence and also in the absence of the appellant the clerk of Court fixed February 2, 1933. On February 2, 1933, the appellant was absent and the appeal was dismissed in default. The Additional District Judge dismissed an application to restore the appeal and Hukam Chand appeals against that order. It has been contended here that the clerk of Court had no powor to fix the date and that the failure to appear on a date so fixed did not justify dismissal in default. This contention is supported by the authority of *Jowala Sahai-Dhera Shah* v. *Maya Das* (1), with which I can see no reason for not agreeing.

It is urged on the other side that this point was not raised before the Additional District Judge, but in the petition for restoration it had been said that the petitioner did not know of the date (February 2, 1933), having been fixed and the question is whether he ought to have known of it. As it was not fixed by the Judge himself, this must be answered in the negative. Moreover, the defect is one that is patent on the face of the record. It is also argued that the appellant was guilty of negligence, but his omission to appear on a date that was not fixed by the Judge cannot be called negligence. I accept the appeal and set aside the order of the Additional District Judge dismissing the appeal. I direct that it be restored and disposed of according to law. Parties are to bear their own costs here.

N. *Appeal accepted.*

(1) 33 P L R 804.

LAHORE HIGH COURT

First Civil Appeal No. 87 of 1927

March 14, 1934

BHIDE AND RANGI LAL, JJ.

KARAM CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LOKOO RAM AND OTHERS—DEFENDANTS—RESPONDENTS

Custom (Punjab)—Shamilat *land—Succession—Whether same rule prevails as for* khewat *land.*

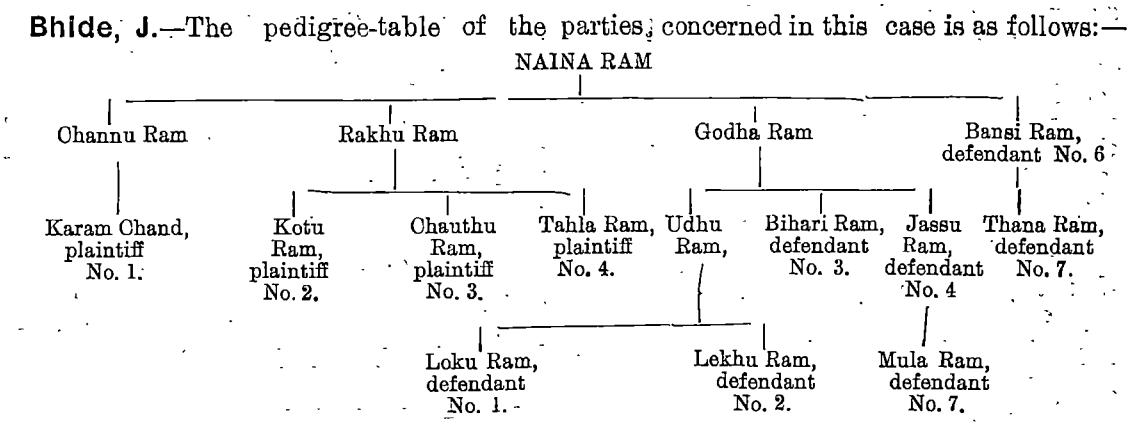
Ordinarily *shamilat* land is governed by the same rule of inheritance as the *khewat* land.

F. C. A. from a decree of the Senior Sub-Judge, Mianwali, dated December 10, 1926.

Messrs. *J. N. Aggarwal, M. C. Sud* and *M. L. Batra*, for the Appellants.

Messrs. *Badri Das* and *Nawal Kishore*, for the Respondents.

Bhide, J.—The pedigree-table of the parties concerned in this case is as follows:—



The plaintiffs are the descendants of Channu Ram and Rakhu Ram two of the sons of Naina Ram, while the defendants are descendants of the other three sons of Naina Ram.

On the death of Naina Ram, his property was divided into six shares, two shares being allotted to Channu Ram and Rakhu Ram, while four were allotted to the other three sons. According to the ordinary rule of succession all the sons shall have shared the land equally, but an extra share was alleged to have been given to Godha Ram, Bansi Ram and Mula Ram as Naina Ram was living with them and on his death they had performed his funeral ceremonies. Mutation was sanctioned accordingly on March 5, 1896, with the consent of all the sons of Naina Ram. The mutation, however, said nothing about the "*Shamilat*" land to which Naina Ram was entitled. Later on, the question of the division of the *Shamilat* land arose during partition proceedings and plaintiffs thereupon contended that the sons of Naina Ram were entitled to share the *Shamilat* land equally. This contention not having been accepted by the Revenue Authorities they instituted the present suit for a declaration as to their rights. The learned Judge of the trial Court has dismissed the suit and from this decision plaintiffs have appealed.

The sole point for decision in appeal is whether the plaintiffs have succeeded in proving that the sons of Naina Ram had equal shares in the "*Shamilat*" land although the "*khewat*" land was divided unequally as stated above. In arriving at his finding in favour of the defendants, the learned Subordinate Judge has relied on certain instances of usage in the family according to which an extra share is given to the son or sons, with whom the father may be living. It was urged that no such usage had been pleaded and that there was no issue on the point. But it appears from the *Jawab-i-dawa* (see para. 3) that the usage in question was relied on by the defendants and the issue framed was also comprehensive enough to cover it. There is, therefore, no reason whatever to suppose that the plaintiffs have been in any way prejudiced. It was next urged that the extra share was really sold to three of the sons of Naina Ram merely in view of the funeral expenses borne by them. But there is no evidence to support this allegation. The report of the *patwari* on the mutation sanctioned in 1896 no doubt mentions that the sons had borne the funeral expenses, but there is nothing in the report to show what these expenses amounted to and whether the extra share was given to these three sons by way of sale in lieu of the funeral expenses. There was no mention of these expenses before the Revenue Officer who sanctioned the mutation and all the sons of Naina Ram admitted that they were entitled to succeed to his land according to the shares as shown in the new entries in the mutation. The mutation was sanctioned as one of inheritance and not of sale and there is nothing in the mutation proceedings to indicate that the rule of inheritance, which was accepted in the case of the *khewat* land was not to apply to *shamilat* land. As the *shamilat* land ordinarily goes to the proprietors according to their shares in the *khewat* land no separate mutation was needed with respect to "*shamilat*" land. The absence of any mutation in respect of that land does not therefore help the plaintiffs in any way.

There is nothing on the record to support the plaintiffs' contention that the *shamilat* land was to be inherited equally by the sons of Naina Ram, except the oral statements of a few witnesses. But these

statements cannot be attached any importance in view of the mutation proceedings referred to above. The learned Counsel for the appellants had to concede that ordinarily *shamilat* land is governed by the same rule of inheritance as the *khewat* land. I feel no hesitation in agreeing with the trial Court that the plaintiffs have failed to prove that there is any justification for departure from this rule in respect of the *shamilat* land in dispute in the circumstances of the present case.

No other grounds were pressed. I would accordingly dismiss the appeal with costs.

Rangi Lal, J.—I agree.

N. *Appeal dismissed.*

BOMBAY HIGH COURT

Letters Patent Appeal No. 13 of 1932
March 12, 1934

BROOMFIELD AND N. J. WADIA, JJ.

RACHOTAPPA ISHVARAPPA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KONHER ANNARAO DESHPANDE —PLAINTIFF—RESPONDENT

Landlord and tenant—Forfeiture—Tenancies before Transfer of Property Act and those excepted from its operation—Applicability of English Law—Forfeiture by matter in pais of English Law—Applicability in India—Disclaimer in cases not covered by Transfer of Property Act—Forfeiture, when works—Denial of landlord's title—Forfeiture—Principles—Power of Court to relieve against forfeiture—Manager of joint Hindu family—Disclaimer, whether binding on members—Hindu Law—Joint family—Manager.

The principles of English Law as to forfeiture apply both to tenancies created before the Act came into force and to those excepted from its operation. [p. 517, col 1.]

The English Law as to forfeiture by matter in *pais* does not apply in India at all. [p. 518, col. 2.]

There can be no forfeiture by disclaimer in cases not covered by the Transfer of Property Act unless the disclaimer is in matter of record. [p. 519, col. 1.]

The principle underlying the rule that disclaimer of the landlord's title by his tenant works a forfeiture of the tenancy is the principle of estoppel or the principle that a man cannot approbate and reprobate. *Kally Das Ahiri* v. *Manmohini Dassee* (3) and *Ambu Nair* v. *Kelu Nair* (9), referred to. [p. 520, col. 1.]

A person who has lawfully come into possession of land as tenant cannot, by setting up, during the continuance of such relation, any title adverse to that of the landlord, inconsistent with the real legal relation between them, acquire by the operation of the law of limitation, title as owner or any other title inconsistent with that under which he was let into possession. *Seshamma Shettati* v. *Chickaya Hegada* (14) and *Muhammad Mumtaz Ali Khan* v. *Mohan Singh* (15), referred to. [p. 520, col. 2; p. 521, col. 1.]

The power of the Courts in India to relieve against forfeiture arising by disclaimer on grounds of justice, equity and good conscience is not necessarily limited to the cases where the tenant establishes that the denial was occasioned by fraud, mistake or accident on the part of the landlord, and the tenant was neither careless nor negligent. [p. 521, col. 2.]

A disclaimer by the manager of joint Hindu family which is effective as forfeiture, is binding on the other members in the absence of anything to suggest the contrary. *Guruvayya* v. *Dattatraya* (18) and *Lingangowda* v. *Basangowda* (19), applied. [p. 522, col. 1.]

L. P. A. against the decision of Mr. Justice Baker, in S. A. No. 1078 of 1928.

Mr. *G. P. Murdeshwar*, for the Appellants.

Mr. *A. G. Desai*, for the Respondent.

Broomfield, J.—The appellants are the present representatives of a family, the Pattars, which has for a long period been in occupation of certain lands at Kurankop in the Dharwar District under a permanent tenancy. Some of these lands belong to the respondent Konher Annarao Deshpande as representative of the Deshpande family. The rest are *devasthan* lands held by the Deshpandes under a permanent tenancy and sub-let by them to the Pattars. As long ago as 1865 there was litigation between the predecessors of the parties in which it was settled by a compromise decree that the lands should be allowed to continue permanently in the occupation of the Pattars on payment of the assessment as fixed by Government from time to time. In 1923 the respondent brought two suits against Ishvarappa, the father of appellant Rachotappa, and Rachotappa himself, claiming to evict them as being merely annual tenants. In one suit, No. 58 of 1923, which related to those lands covered by the 1865 decree which belonged to the Deshpandes, the defendants Ishvarappa and Rachotappa pleaded and proved their permanent tenancy, and the suit was dismissed on December 12, 1923. On February 27, 1924, Ishvarappa made an application to the *Mamlatdar* to have his name entered in the Record of Rights as owner of the lands which had been the subject-matter of that suit. The application, Ex. 36, was in these terms:

"The *Khata* of survey Nos. 30, 31, 33 of Kurankop stands in the name of Konherrao Annarao Deshpande. But he is not the owner thereof, and I am not the permanent tenant. He is now and then harassing me by suits taking advantage of the entry in the records. The *Khata* should be entered in my name instead of in the name of Konherrao. Notice has been given to him of this."

The order below the application issued to the village officers of Kurankop was,

"We cannot interfere in a matter of this civil nature. If he has a decree of the Civil Court he may take possession accordingly. Applicant may be informed of this and this may be filed as disposed of."

In the other Suit No. 106 of 1923, which related to the *devasthan* lands, the defendants denied both that Konherrao was a permanent tenant of the lands and that they were tenants under him and they set up title in themselves by adverse possession. That was on August 9, 1923. On March 11, 1924, the respondent withdrew the suit. In December 1925, he brought the two suits, which have given rise to these Letters Patent appeals, to recover possession of the lands on the ground that the tenancy had been forfeited by the disclaimer of title, in one case in the application to the *Mamlatdar* already referred to, and in the other in the pleadings in the former suit. Ishvarappa who was made the sole defendant,—he was the only tenant shown in the revenue records, being the head of the family—died pending the hearing and his son, appellant No. 1, and nephew, appellant No. 2, were brought on record as his heirs. The trial Court allowed the claim in each case, and the decrees have been confirmed in first and second appeals. There are Letters Patent appeals from the judgment of Baker, J. Letters Patent Appeal No. 12 relates to the *devasthan* lands, and Letters Patent Appeal No. 13 to the other lands. Three points have been argued by the learned Advocate for the appellants: (1) that the disclaimer of title was not such as to work a forfeiture; (2) that the appellants are not affected thereby; (3) that, even if there has been a forfeiture, the Court can and should relieve against it.

The appeals involve important and difficult questions of law for the solution of which the Transfer of Property Act affords no direct assistance, since we are concerned with agricultural leases to which the provisions of the Act do not apply. However, the Act largely reproduces the English Law, and it has been held in the cases to which Baker, J., has referred, that the principles of English Law as to forfeiture apply both to tenancies created before the Act came into force and to those excepted from its operation. The definition of "disclaimer" in s. 111 (*g*) of the Act—renunciation by the lessee of his character as such by setting up a title in a third person or by claiming title in himself—is taken from an English case, the judgment of Tindal, C. J., in *Doe dem. Williams and Jeffery* v. *Cooper* (1). The cases cited by Baker, J., further show that the repudiation of the landlord's title must be clear and unequivocal and made to the knowledge of the landlord. So far there is no room for dispute.

The first question for consideration, therefore, is, whether the disclaimers, on which the respondent relies, fulfil these elementary requirements. So far as Ishvarappa's application (Ex. 36) is concerned, I think there is no difficulty. Mr. Murdeshwar for the appellants did indeed suggest that, as the Pattars are permanent tenants who pay no rent to the landlord, but merely assessment and local fund to Government, they may be regarded as owners for all practical purposes, and that the application to the *Mamlatdar* may have been made merely with the object of putting an end to harassing litigation without any intention of repudiating the landlord's nominal title. In that connection reference may be made to *Amarsangji* v. *Ranchhod* (2). There might have been some force in this argument if the entries in the Record of Rights had not already made it clear that the Pattars are permanent tenants liable to pay the Government assessment only, but the entries do state that perfectly clearly, and Ishvarappa's application can only mean that he claimed to be full owner and wished to be entered as such. Since it is settled law that under certain circumstances even a permanent tenancy can be forfeited, it would be useless to pretend that the difference between permanent tenant and owner is merely nominal, even though, as appears to be the case here, the tenant pays no rent to the landlord but only the Government assessment. As pointed out in *Kally Dass Ahiri* v. *Manmohini Dassee* (3), (page 447*),

"Before the lease the owner had the right to enjoy the possession of the land and by the lease he excludes himself during its currency from that right, but the determination of the lease is a removal of that barrier, and there is nothing to prevent the enjoyment from which he had been excluded by the lease."

The nature of this particular tenancy may be material for the purpose of determining whether the disclaimer works a forfeiture or whether the forfeiture should be relieved against, but that there has in fact been a

(1) (1840) 1 Man & G 135.

(2) 91 Ind. Cas. 265; A I R 1925 Bom. 294; 27 Bom. L R 267.

(3) 24 C 440; 1 C W N 321.

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disclaimer cannot, I think, be gainsaid. In the case of the *devasthan* lands, Mr. Murdeshwar's suggestion is that the denial of respondent's title was due to a misunderstanding. He says the Pattars were misled by the fact that the Record of Rights mentions, not respondent Konherrao Annarao, but Ramrao Venkatrao, another member of the Deshpande family, as the *wahivatdar* of the *devasthan* and holder of the lands, and also by the fact that the present numbers of the lands do not tally with those in the decree of 1865. There is not much in the latter point. Ishvarappa was aware of the decree. He referred to it in his written statement in the suit relating to the other lands, and in the case of those lands also the numbers were not the same. But the position with regard to the *devasthan* lands was rather peculiar. The Deshpandes were not the owners but themselves only permanent tenants, and by virtue of some arrangement, as to the origin of which there is no evidence but which is recorded in the Record of Rights, the Pattars perform the worship of the deity (apparently in lieu of the assessment, which the decree of 1865 made them liable to pay) and pay only local fund to Government. It does not appear that the decree was produced or referred to in Suit No. 106 of 1923, and it certainly seems significant that on the very day, November 16, 1926, when respondent in the subsequent suit relating to the *devasthan* lands produced an extract from the Survey Records, Ex. 24, showing the corresponding numbers and making it clear that the numbers mentioned in the decree included the numbers of the *devasthan* lands, the appellants put in an application, Ex. 22, giving up their contentions about adverse possession and limitation and admitting that they held the lands as permanent tenants of the Deshpandes. It is possible of course that this was merely due to the advice of their Pleaders, but it may not have been so. The possibility of a genuine misunderstanding can hardly be ruled out. It is difficult to see why the Pattars should admit the tenancy in one case and deny it in the other, if they realize that the decree of 1865 applied equally to both sets of lands.

One of the main arguments put forward on behalf of the appellants is that Ishvarappa's application to the Revenue Authorities would not under English Law be regarded as working a forfeiture in the circumstances of this case, and cannot do so therefore in this country. The argument is founded mainly on the judgment of the Privy Council in *Maharaja of Jeypore* v. *Rukmini Pattamahdevi* (4) where their Lordships had to consider the effect of an alleged disclaimer of title contained in a letter written by a tenant to his landlord in a case not governed by the provisions of the Transfer of Property Act. Baker, J., has discussed this case very briefly and distinguishes it on the facts. He says:

"The tenant did not deny his landlord's title *in toto*, but what he claimed was that he was not holding his estate on service tenure and he was only liable to pay Rs. 2,200 as rent instead of Rs. 15,000, and he was not required or liable to attend the *Dasara Durbar* with 500 soldiers as required by the Maharaja and it was held by the Privy Council that this was not such a denial of his landlord's title as to create a a forfeiture. That is a very different matter from the present case. The present denial is of the landlord's title *in toto*."

But, with deference, I do not think the learned Judge has sufficiently considered what was decided, or the implications of what was decided, in the case. The tenancy was alleged to have been forfeited on two quite distinct grounds, denial of title and refusal of service. We are not concerned with the judgment so far as it deals with the latter point. The question of forfeiture by denial of the landlord's title is discussed by Lord Phillimore at pp. 589 to 600*. He points out that the rules of English Law as to forfeiture of tenancy have been held to be consonant with the principles of justice, equity and good conscience and to be applicable to India, and he states the rule of English Law to be:

"that a tenant will forfeit his holding if he denies his landlord's title in clear unmistakable terms, whether by matter of record, or by certain matters in *pais*."

He goes on to say that their Lordships did not think it necessary to decide in that case whether there had been a clear and unmistakable denial, because there was neither any denial by matter of record before the suit nor by matter in *pais*. The effect of the observations at p. 599* appears to be that the English Law as to forfeiture by matter in *pais* does not apply in India at all. Lord Phillimore further points out that some confusion has arisen from a misunderstanding of the reason why a tenant from year to year

(4) 50 Ind. Cas. 631; A I R 1919 P C 1; 40 I A 109; 42 M 589; 36 M L J 543; 17 A L J 552; 29 C L J 528; 21 Bom. L R 655; (1919) M W N 271; 23 C W N 889; 26 M L T 16; 10 L W 381 (P C).

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may, when he has denied his landlord's title, be ejected without notice. It is not, he says, because the denial or disclaimer works a forfeiture, and he cites Platt on Leases, Vol. 2, Part 7, s. 2, p. 496:

"The holding being from year to year, subject to the mutual will of landlord and tenant to determine it on giving the usual six months' notice;.....evidence of a disclaimer ... is evidence of his election to put an end to the tenancy, and supersedes the necessity for such notice; .....Hence, verbal or written denials of a tenancy have rendered a notice to quit unnecessary; but it does not appear that they have effected a forfeiture of the term."

So that two propositions appear to follow from the judgment of their Lordships in this case: that there can be no forfeiture by disclaimer in cases not covered by the Transfer of Property Act unless the disclaimer is in matter of record, see in that connection *Vidyavardhak Sangh Co.*v. *Ayyappa* (5), that cases dealing with disclaimer in tenancies from year to year cannot be regarded as authorities on the subject of forfeiture. It is at least a remarkable coincidence that practically all the cases on which Baker, J., has relied for the proposition that Ishvarappa's application to the *Mamlatdar* was sufficient to work a forfeiture are either cases where the denial of title was in proceedings in a Civil Court or cases of tenancies from year to year. The one exception is *Padmanabhaya* v. *Ranga* (6) and the denial of title in that case, which was contained in a letter by the tenant to the landlord, would apparently not work a forfeiture on the principles laid down in the Privy Council case. For a convenient statement of the English Law on the subject of forfeiture by disclaimer, Lord Phillimore in his judgment referred to Bacon's Abridgment, 'Leases,' T. 2. The passage is in Vol. 4, p. 219, and is as follows:

"Here it is to be observed, that any act of the lessee by which he disaffirms or impugns the title of his lessor occasions a forfeiture of his lease. For to every lease the law tacitly annexeth a condition that if the lessee do anything that may affect the interest of his lessor, the lease shall be void, and the lessor may re-enter. Besides, every such act necessarily determines the relations of landlord and tenant; since to claim under another, and at the same time to controvert his title; to affect to hold under a lease, and at the same time to destroy that interest out of which the lease ariseth, would be the most palpable inconsistency."

"A lessee may thus incur a forfeiture of his estate by act in *pais*, or by matter of record. By matter of record—where he sues out a writ, or resorts to a remedy, which claims or supposeth a right to the freehold; or where in an action by his lessor grounded upon the lease he resists the demand under the grant of a higher interest in the land; or where he acknowledges the fee to be in a stranger; for having thus solemnly protested against the right of his lessor, he is estopped by the record from claiming an interest under him. By act in *pais* as where he alienates the estate in fee."

Woodfall, Landlord and Tenant, at p. 383, cites this passage word for word, with the comment, as to matter of record, "but anything of this sort can seldom if ever now happen, real actions having been abolished."

Mr. Murdeshwar also refers to Vol. 2 of Bacon's Abridgment at p. 570, a passage which was cited in the argument in *Doe dem. Graves* v. *Wells* (7), a leading authority on the English law of forfeiture. There is, in my opinion, great force in the contention that there is something decidedly technical about the English Law on this subject and that matter of record means more than a document of a formal or solemn character and will not necessarily include, as Baker, J., suggests,

"a denial made in a written application to the Revenue Authorities with the object of setting the law in motion, that is, by causing the name of the defendant to be entered in the revenue records instead of the name of the plaintiff."

Mr. Desai evidently saw the force of the argument that the denial to be effective must be in some form of judicial proceeding, for he made a strenuous effort to show that proceedings in connection with the Record of Rights should be regarded as such. In this I do not think he has succeeded. He refers to s. 196, Bombay Land Revenue Code, according to which formal or summary inquiries under the Code are deemed to be judicial proceedings under the Penal Code and the Officer conducting the inquiry is deemed to be a Civil Court. But, according to the judgment of Shah, J., in *Emperor* v. *Narayan* (8), s. 196 does not apply to inquiries under the rules relating to the Record of Rights. In any case there was here no proceeding nor inquiry. The *Mamlatdar* said that it was a matter for the Civil Courts. It was for the plaintiff to show that under the English Law a statement made in an application of this kind should be regarded as working a forfeiture. In my opinion he has not succeeded in doing so. But there are other considerations which appear to me to affect not only Ishvarappa's application to the Revenue Authorities but also the

(5) 90 Ind. Cas. 614; A I R 1925 Bom. 524; 49 B 842; 27 Bom. L R 1152.

(6) 6 Ind. Cas. 447; 34 M 161; 8 M L T 110; (1910) M W N 462; 20 M L J 930.

(7) (1839) 10 Ad. & El. 427.

(8) 27 Ind. Cas. 147; A I R 1914 Bom. 232; 16 Cr. L J 99; 39 B 310; 16 Bom. L R 678.

disclaimer in the written statement in suit No. 106 of 1923, which was undoubtedly matter of record. What is the principle underlying the rule that disclaimer of the landlord's title works a forfeiture of the tenancy? The passages cited from Bacon's Abridgment and from Woodfall suggest that the principle is estoppel. The expressions "matter of record" and "in *pais*" themselves savour of estoppel. In *Kally Dass Ahiri* v. *Manmohini Dassee* (3) the principle was stated to be that a man cannot approbate and reprobate, and that is the principle on which Baker, J., has relied. But, of course, the rule that a man may not approbate and reprobate does not simply mean that he may not contradict himself. It means that he may not assume a certain position and take the benefits arising therefrom and then set up a contrary position so as to have it both ways. The rule is explained in this sense in *Ambu Nair* v. *Kelu Nair* (9), where the observations of Honyman, J., in *Smith* v. *Baker* (10) are cited (p. 811*):

[He cannot] "at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage."

Judging from the authorities which have been placed before us, wherever denial of a landlord's title by a tenant has been held effective as a forfeiture, the elements of an estoppel have always been present (a change of position has been brought about or the bar of *res judicata* has arisen) or the rule that a man cannot approbate and reprobate applies. When, as in *Kally Dass Ahiri* v. *Manmohini Dassee* (3), the tenant denies the landlord's title in a suit for rent, the result is that the landlord cannot recover the rent and the tenant escapes liability to pay it. So in the other cases cited in the argument, *Mahipat* v. *Lakshman* (11), *Gopal Ram* v. *Dhakeshwar Pershad* (12) and *Padmanabhaya* v. *Ranga* (6), the tenant obtained some advantage by his disclaimer and the position of the landlord was prejudiced. But in the present case, it does not appear that there is any estoppel or bar of *res judicata*, nor is there really any question of the tenant enjoying the advantages of two inconsistent positions. It is here that the peculiar character of this tenancy becomes important. Not only it is a tenancy in perpetuity a thing unknown to the English Law, but it is a tenancy from which the landlord derives no benefit as long as it subsists. There is no rent reserved in the ordinary sense: The tenant pays the Government assessment only (in the case of the *devasthan* lands apparently only the local fund), and, though the compromise decree of 1865 provides that it is to be paid to the landlord, that only meant apparently that it was to be paid to Government through him, in practice it is probably paid direct to the village officers. No claim for arrears of rent or assessment was made in Suit No. 58 of 1923, and though arrears of rent were claimed in the other suit, there appears to have been no justification for the claim. We can only go by the decree of 1865 and the entries in the Record of Rights in the absence of any evidence to contradict them. These are the materials upon which respondent wishes the Court to pronounce that the tenancy is forfeited. Upon this basis when the respondent filed his suits in 1923 against his tenants he was putting forward a completely unsustainable claim. His assertion that they were annual tenants was untrue. It was a permanent tenancy, the terms of which gave him no right to make any claim against the tenants of any kind as long as they paid the assessment, and as far as the record shows there was no question of their having failed to pay the assessment to Government. Therefore, the the disclaimer of title has not resulted in any advantage to the tenants to which they were not entitled under their tenancy, nor has it deprived the landlord of any advantage to which he was entitled as owner.

In *Komalukboti* v. *Muhammad* (13), Napier, J., suggested a different criterion, *viz.*, whether the assertion of the tenant would operate as a starting point for adverse possession against the landlord. But it has been frequently held that a person who has lawfully come into possession of land as tenant cannot by setting up, during the continuance of such relation, any title adverse to that of the landlord, inconsisten, with the real legal relation between them

(9) 143 Ind. Cas. 433; A I R 1933 P C 167; 60 I A 266; 56 M 736; Ind. Rul. (1933) P C 165; 37 C W N 797; 35 Bom. L R 807; 57 C L J 454; (1933) M W N 739; 65 M L J 103; 38 L W 29 (P C).

(10) (1873) 8 C P 350.

(11) 24 B 426; 2 Bom. L R 228.

(12) 35 C 807; 7 C L J 483.

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(13) 45 Ind. Cas. 743; A I R 1919 Mad. 1106; 41 M 629; (1918) M W N 200; 34 M L J 170; 23 M L T 178; 7 L W 291.

acquire by the operation of the law of limitation title as owner, or any other title inconsistent with that under which he was let into possession: see *Seshamma Shettati* v. *Chickaya Hegade* (14), and the cases cited there, also *Muhammad Mumtaz Ali Khan* v. *Mohan Singh* (15). In the latter case their Lordships of the Privy Council said (p. 298*):

"The Board are unable to hold that the simple assertion of a proprietary right in a judicial proceeding in connection with the land in dispute which *ex hypothesi* was unfounded at the date when it was made, can, by the mere lapse of six or twelve years, convert what was an occupancy or tenant title into that of an under-proprietor."

On these authorities it appears that neither Ishvarappa's application nor even the written statement in suit No. 106 of 1923 would be sufficient to make the possession of the Pattars adverse to the landlord. On principle then I feel considerable difficulty in holding that the English law, which is admittedly the law to be applied so far as it is applicable to India, requires us to hold, as a matter of justice, equity and good conscience, that there has been an effective forfeiture in the circumstances present here. I think there is good deal to be said for the view that where the Transfer of Property Act does not apply, the disclaimer of the landlord's title, even though clear and unequivocal and even though made in a judicial proceeding would not operate as a forfeiture of the tenancy unless it amounts to an estoppel or comes within the mischief of the rule that a man may not approbate and reprobate, or is made in such circumstances that it would render the tenant's possession adverse to the landlord.

I am not prepared on the materials placed before us to commit myself to that proposition, nor is it necessary, because, assuming that what I may call a bare disclaimer in matter of record is legally sufficient to work a forfeiture, I hold that anyhow the Courts have the power to relieve against it. I will deal with this part of the case next. Only two authorities have been referred to in this connection, *viz.*, *Mallappa Venkatesh* v. *Janardan Govind* (16) and *Komalukboti* v. *Muhammad* (13). In the former case, where a tenant had contravened a stipulation in the lease against alienation, it was held that, although the lease contained a proviso for re-entry, the Court had equitable power to relieve against the forfeiture. It was argued that the Court had no power to relieve except for non-payment of rent, but Macleod, C. J., said (p. 452*):

" . . . section 111, Transfer of Property Act, and the other sections of Chap. V do not by virtue of s. 117 apply to leases for agricultural purposes; and there is no other restriction that I know of against the Court exercising its equitable powers by relieving against forfeiture in a proper case."

That therefore was not a case of a forfeiture by disclaimer; but the language used by the learned Chief Justice is quite general. In *Komalukboti* v. *Muhammad* (13), Seshagiri Ayyar, J., expressed the view that the Courts acting upon the principles of the English Law would have no power to relieve against forfeiture where there has been a denial of title, unless the tenant proves that the denial was occasioned by the fraud, mistake or accident of the landlord, and that the tenant himself was neither careless nor negligent. He referred to and dissented from the opinion of Sadasiva Ayyar, J., in an earlier case *Abakka* v. *Seshamma* (17). That learned Judge had been inclined to the view that all cases of forfeiture can be relieved against in India. Napier, J., the other Judge who decided *Komalukboti* v. *Muhammad* (13), has not dealt with that aspect of the case.

As I have already pointed out, the possibility of a *bona fide* mistake cannot be excluded in the case of the *devasthan* lands; but, apart from that, I am not convinced that the power of the Courts in India to relieve against forfeiture arising by disclaimer on grounds of justice, equity and good conscience must necessarily be limited to the cases mentioned by Seshagiri Ayyar, J. It may well be that English Courts of Equity never gave relief on any other ground but I doubt very much whether they ever had to deal with an analogous case. Suppose there was a lease for 999 years under which the tenant's only liability was to pay the land-tax, and he had never failed to discharge this liability, but under stress of an unfounded claim by the landlord to treat him as an annual tenant and evict him as such had denied the landlord's title, can it be said with confidence that an English Court of Equity would feel itself compelled to maintain the forfeiture? I

(14) 25 M 507; 12 M L J 119.

(15) 74 Ind. Cas. 476; A I R 1923 P C 118; 50 I A 202; 45 A 419; 21 A L J 757; 26 O C 231; 45 M L J 623; 9 O & A L R 901; 10 O L J 383; 19 L W 283; 39 C L J 295; 28 C W N 840 (P C).

(16) 94 Ind. Cas. 1054; A I R 1926 Bom. 304; 50 B 450; 28 Bom. L R 527.

(17) 25 Ind. Cas. 944; A I R 1915 Mad. 85; 16 M L T 442; (1914) M W N 915.

*Page of 50 I. A.—[*Ed.*]

*Pages of 50 B—[*Ed.*]

am not satisfied that it would, and that being so, I see no reason why the Courts in India should deny themselves the power to relieve in a case of this peculiar character.

I do not think that there is any force in appellants' contention that Ishvarappa's disclaimer, if it be effective as a forfeiture, would not be binding upon them. He was the manager of the joint family and, in the absence of anything to suggest the contrary, must be held to have represented the family. The principle laid down in such cases as *Guruvayya* v. *Dattatraya* (18) and *Lingangowda* v. *Basangowda* (19) will apply. It is not a case of alienation of joint family property. The cases relied on by Mr. Murdeshwar, *Birendra Kishore* v. *Bhubaneswari* (20) and *Srimati Farman Bibi* v. *Sheikh Tasha Haddal Hasain* (21) do not help him, since it does not appear that the point of representation by the manager of a joint family arose at all. Nevertheless, the fact that Ishvarappa is dead and that his heirs, the appellants, do not dispute the title of the respondent is a matter which may be taken into consideration in deciding whether the Court should grant relief.

To sum up my conclusions, I find that there has been no forfeiture in the case from which Letters Patent Appeal No. 13 arises as there has been no disclaimer by matter of record before the suit. In the other case the permanent tenancy may have been technically forfeited, but the Court has power to grant and should grant relief against it. The appeals must therefore be allowed and the suits dismissed. We think, however, that as Ishvarappa's conduct in disclaiming the tenancy was not justified and must be held to have been largely responsible for this litigation, the appellants are not entitled to their costs from the other party even in Letters Patent Appeal No. 13. So far as that case is concerned, we order that the parties do pay their own costs throughout. In Letters Patent Appeal No. 12, in which the appellants have to seek the indulgence of the Court to relieve against the forfeiture of the tenancy, we direct that the appellants must pay their own costs and the costs of the respondent throughout.

D. *Appeals allowed.*

(18) 28 B 11; 5 Bom. L R 618.

(19) 101 Ind. Cas. 44; A I R 1927 P C 56; 54 I A 122; 51 B 450; 52 M L J 472; 25 A L J 319; 4 O W N 424; (1927) M W N 352; 34 C W N 570; 29 Bom. L R 818; 25 L W 789; 8 P L T 462 (P C).

(20) 15 Ind. Cas. 620; 39 C 903.

(21) 12 C W N 587; 7 C L J 648.

OUDH CHIEF COURT

First Civil Appeal No. 41 of 1933

March 1, 1935

SRIVASTAVA AND THOMAS, JJ.

NIHAL CHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SHANTI LAL—PLAINTIFF—RESPONDENT

Arbitrator—Civil Procedure Code (Act V of 1908), Sch. II, para 15, cl. 1—Relationship of arbitrator with one defendant—Arbitrator having monetary dealings with another defendant—Non-disclosure of facts to plaintiff at time of agreement—Fraudulent concealment, if constituted—Plaintiff not conscious of right to revoke submission—Consequent failure to lodge protest—Whether constitutes waiver—Arbitrator dictating part of award to junior—Contents of award leaking out before pronouncement—Defendant not taken into confidence—Judicial misconduct, if made out.

Where the arbitrator is related to one of the defendants and has monetary dealings with the other, both of which facts ought to have been disclosed but were not disclosed to the plaintiff when he entered into the agreement, the concealment of the relationship must be considered fraudulent and the award should be set aside. As there can be no question of waiver without full knowledge of one's legal rights, where the plaintiff thought that he had no right to revoke the submission, his failure to lodge an unequivocal protest against the arbitrator acting as such, will not operate as a waiver.

The writing of a part of the award by the junior of the arbitrator at the latter's dictation is an act of a ministerial character which can be delegated to a third person and does not constitute judicial misconduct. *Buta* v. *Municipal Committee of Lahore* (3), referred to. [p. 525, col. 2]

In the absence of any evidence showing that the arbitrator in any way took the defendant into his confidence, no misconduct can be attributed to him by reason of the contents of the award having leaked out before it was pronounced. Any help given by the defendant in the preparation of the copy of the award sent to the plaintiff cannot also affect the award itself. These circumstances, though raising some suspicion against the arbitrator, are not sufficient to establish a charge of misconduct. [*ibid*]

F. C. A. against the order of the Subordinate Judge of Unao, dated March 28, 1933.

Messrs. *Radha Krishna* and *S. N. Srivastava*, for the Appellants.

Messrs. *Ali Zaheer* and *S. S. Saraf*, for the Respondent.

Judgment.—This appeal arises out of a suit for rendition of accounts. The original plaintiff *Lala* Jai Ram Das, who died during the pendency of the appeal in this Court and is represented by his son Shanti Lal who is now the respondent in the appeal before us, was the proprietor of the Unao Sugar Works. On January 11, 1926, he entered into an agreement, (Ex. A-1), with the two defendants, *Lala* Nihal Chand and *Lala* Jagannath,

whereby the sugar mill was leased out to the defendants for a period of three years from January 15, 1926, to December 31, 1928. The defendants were to work the mill under their own management, and the profits were to be divided between the parties according to the terms and conditions laid down in the agreement. The agreement further provided that in case of any dispute in respect of it, the matter in dispute was to be settled by reference to arbitration. Admittedly actual possession of the mill was delivered by the plaintiff to the defendants on January 18, 1926, and the defendants began forthwith to make arrangements for working the mill. It is also common ground between the parties that the manufacture of sugar was stopped by the defendants from August 9, 1926, and work was not resumed till January 1927. This led to disputes between the parties in respect of the amount of profits for 1926. So in terms of the agreement the dispute was referred to *Lala* Bhana Ram, the arbitrator named therein. *Lala* Bhana Ram after he had carried on the proceeding for sometime declined to proceed with the arbitration on March 8, 1927, the agreement Ex. A-1 provided that in case *Lala* Bhana Ram is unable to decide the matters in dispute then in his place *Lala* Makund Lal was to be appointed arbitrator, therefore, in accordance with this condition of the agreement the matter was entrusted to *Lala* Makund Lal for decision. He gave an award on May 8, 1927, but the plaintiff was not satisfied with it. He thereupon instituted the present suit in the Court of the Subordinate Judge of Unao on November 6, 1928, asking for rendition of accounts and claiming his share of profits for 1926, and 1927 and damages for breach of certain terms of the agreement. He also impugned the award of *Lala* Makund Lal on various grounds, and pleaded that he was not bound by it.

The learned Subordinate Judge framed two preliminary issues. His finding in respect of them was that the plaintiff was bound to refer his disputes as regards the affairs of 1927 to arbitration. As regards the award dated May 8, 1927, he found that Makund Lal was closely related to Jagannath, defendant No. 2, and that the plaintiff was not aware of the relationship at the time of the agreement. He further held that the plaintiff did not waive his right to object against Makund Lal acting as arbitrator after the plaintiff had become aware of the relationships. He was also of opinion that the arbitrator was guilty of judicial misconduct. He accordingly held that the award was invalid and was not binding on the plaintiff. In result he decided to proceed with the suit so far as it related to the claim for profits and damages for 1926. In pursuance of this the plaintiff with the permission of the Court, amended the plaint confining his claim to the disputes relating to the working of the mill in 1926. The defendants also filed an amended written statement, and on these revised pleadings of the parties, the Subordinate Judge framed ten issues which were as follows:

1. (*a*) Were the defendants justified in stopping the manufacture of the sugar since August 9, 1926, as alleged?

(*b*) Did the defendants close the workshop in August 1926, as alleged?

(*c*) If so, what loss was caused to the factory on that account?

2. Were the defendants entitled to claim the entire sum of Rs. 70,000 as their share of the profits for the first year, or the year 1926?

3. Were not the defendants bound to deposit the profits, accruing to the plaintiff, in the Punjab National Bank to the credit of the plaintiff as agreed under the terms of the agreement in suit?

4. Did the plaintiff take advances in cash and kind aggregating to a sum of Rs. 48,167-8-0?

5. To what damages is the plaintiff entitled on account of the items mentioned in para. 6 of the plaint?

6. Is the question of the plaintiff's profits *res judicata*?

7. Are the defendants entitled to a sum of Rs. 17,387-10-3 from the plaintiff as alleged?

8. Is that claim of the defendants barred by time?

9. To what profits, if any, is the plaintiff entitled?

10. Is not the plaintiff liable for the items shown in the defendants 'Balance Sheet' excepting the items as alleged at p. 92 of these proceedings?

Parts (*a*) and (*b*) of Issue No. 1 and Issues Nos. 2 and 3 were decided against the defendants and in favour of the plaintiff. Issue No. 6 was not pressed and was also decided against the defendants. As regards Issue No. 7 it was held that the

defendants were not entitled to make the claim in question in the present suit. In view of the finding on Issue No. 7, Issus No. 8 was left undecided. Under Issue No. 10 it was held that the plaintiff was not liable for the amounts claimed by the defendants under the heads of law charges, miscellaneous expenses, general charges, *hundian* account, brokerage, motor expenses, post and telegrams, stationery and travelling expenses. It was also held that the items claimed by the defendants in respect of *gur* and coal should be reduced by two per cent. and five per cent. respectively. Lastly a few items were left over for determination in proceedings for the final decree. Under Issue No. 4, the Subordinate Judge noted the plaintiff's admission of having received a sum of Rs. 22,000 for the profits of the year 1926. For the rest the determination of the issue was postponed till the time of the final settling of accounts. As regards Issue No. 5 and Issue No. 1 (*c*), the Subordinate Judge held that the plaintiff is entitled to damages for the loss suffered by him owing to the stopping of the factory in August 1926, and laid down the method to be followed in determining the amount of the said damages on the sum found due to him as profits for damages. He also held that the plaintiff should be allowed interest at 9 per cent. per annum as the period ending August 10, 1926, from August 11, 1926, till date of realization, and interest at the same rate on the balance of the profits from January 1, 1927, till realization. Under Issue No. 9 he decreed the plaintiff's suit for profits but left the exact amount of the profits for determination in the proceedings for the final decree in accordance with the directions recorded in his findings under Issues Nos. 5 and 10.

The defendants have preferred this appeal against this preliminary decree of the Subordinate Judge. They have in the first place contended that the arbitrator's award is valid and binding on the plaintiff. As stated before the learned Subordinate Judge has set aside the award on two grounds (1) concealment of relationship between the arbitrator Makund Lal and Jagannath, defendant No. 2, and (2) judicial misconduct.

1.—*Concealment of relationship.*

Lala Makund Lal had a paternal uncle *Lala* Gopal Das. The latter had a grandson Narsingh Das who was married to the sister of the defendant *Lala* Jagannath. This relationship is not disputed. We agree with the learned Subordinate Judge that according to the notions of Hindus, amongst whom the existence of joint families is a normal feature, the said relationship is a comparatively close one. The only question is whether the plaintiff was not aware of this relationship at the time when he agreed to the appointment of Makund Lal as an arbitrator. The oral evidence on the point is very conflicting P. W. No. 1 stated that prior to March 9, 1927, when Jai Ram Das wrote Ex. P. W. 1-2, E. A-2 inquiring from him whether he will take up the arbitration he at the house of *Lala* Kotu Ram had a talk with Jai Ram Das in which the latter told him that he knew of his relationship with *Lala* Jagannath. D. W. No. 1 *Lala* Kotu Ram does not make any mention of this conversation at his house but says that Jai Ram Das had told him that he had full confidence in *Lala* Makund Lal in spite of his relationship with *Lala* Jagannath. The defendant Nihal Chand deposes that the plaintiff knew the relationship between Makund Lal and Jagannath years before the arbitration. *Lala* Jai Ram Das on the other hand swore that at the time of the execution of the agreement he did not know that Makund Lal was related to Jagannath. The learned Subordinate Judge has believed Jai Ram Das on this point. We see no sufficient reason to disagree with the Subordinate Judge. In Ex. A-3, which is a copy of a letter dated March 10, 1927, written to *Lala* Jai Ram Das by Makund Lal, the latter wrote as follows:

"and also say if you know that *Lala* Jagannath is related to me and you would like the arbitration to be done by me".

Lala Jai Ram Das in his letter Ex. 87 of the same date replied as follows:

"You were kind enough to inform me of your relationship with Mr. Jagannath Syal who is a party in the matter of the dispute. Of course I never knew of it before but I should think that you can be the best Judge under the circumstances to determine the position for yourself. The deed does not give me any option, and as such, I have to abide by what you order me."

It is difficult to think that a leading lawyer of the position of *Lala* Makund Lal should have written in the terms of Ex. A-3 if he knew that Jai Ram Das was aware of the relationship between him and Jagannath. The statement in *Lala* Makund Lal's letter, Ex. A-5, written eight days after Jai Ram Das had approached him to do the arbitration, telling him that he already knew of the

relationship seems to us quite inconsistent with his earlier letter Ex. A-3. It is clearly an after thought and seems cunningly to have been introduced to avoid objection against his acting as an arbitrator, when he had made up his mind to take up the arbitration. Jai Ram Das's affirmation of his want of knowledge of the relationship in Ex. 87 written immediately after his receipt of Ex. A-3 also strongly supports his statement in the witness box. It is no doubt true that *Lala* Makund Lal was known to Jai Ram Das as had been for many years and that Jai Ram Das had been on terms of intimate friendship with both the defendants, but there being no relationship between Jai Ram Das and Jagannath, it cannot be expected that he should be aware of the marriage connections of Jagannath's relations. We must, therefore, uphold the Subordinate Judge's finding that the plaintiff Jai Ram Das did not know of the relationship in question at the time when he entered into the agreement Ex. A-1.

One of the grounds laid down in r. 15, cl. (*i*), sub-cl. (*b*) of Sch. II of the Code of Civil Procedure for setting aside an award is fraudulent concealment by either party of any matter which he ought to have disclosed. We think that this relationship of Jagannath with Makund Lal was a matter which ought to have been disclosed to Jai Ram Das at the time of the agreement. It is in the highest degree unlikely that Jai Ram Das should have agreed to accept Makund Lal as an arbitrator if he should have been made aware of this relationship. The concealment of the relationship must under the circumstances be considered fraudulent.

It has, however, been argued that the plaintiff having been apprised of the relationship by Makund Lal before his entering upon the arbitration and the plaintiff having allowed Makund Lal to carry on the arbitration without any objection or protest, he must be deemed to have waived the objection. The argument proceeded that the plaintiff wanted to take the chance of a decision being given by the arbitrator in his favour and under the circumstances he cannot be allowed to turn round and question the award on this ground, when the award has been given against him. The following passage in Russell on Arbitration and Award, 12th Edition, p. 436 has been referred to in this connection:

"In proceedings before an arbitrator the practical question is: What form of protest is sufficient or what line of conduct should be followed to avoid the loss of a party's rights?

"The strongest line of conduct and the strongest form of protest for a party to adopt or make is to retire from the proceedings, but such a course when a party is brought before or tied to a particular tribunal, is obviously extremely dangerous, because he may ultimately find, when he has moved to set aside the award made against him, that the irregularity of which he complains is not sufficient to upset the award. The obvious course, therefore, is for a party complaining of irregularity to protest against the irregularity, and to continue to conduct his case in the proceedings, before the arbitrator under such protest".

No doubt the plaintiff on becoming aware of the relationship did not refuse to have the arbitration carried out by Makund Lal. Our reading of the plaintiff's letter Ex. 87 is that when he came to know of the relationship he did not relish Makund Lal acting as arbitrator, but wished Makund Lal himself to decline to carry out the arbitration because of the relationship. At any rate, it cannot be regarded as a deliberate and free acceptance of Makund Lal as arbitrator. "A waiver must be an intentional act with knowledge" [per Lord Chelmsford in *Darnley (Earl)* v. *London, Chatham & Dover Rail Co.* (1). There can, in our opinion, be no waiver without full knowledge of one's legal rights. There could be no waiver in this case unless the plaintiff had a consciousness of his right to revoke the submission. This appears to be clearly negatived by Ex. 87 where he says that the deed does not give him any option, and as such, he must abide by Makund Lal's orders. Thus it seems clear that rightly or wrongly Jai Ram Das at the time believed that having executed the agreement Ex. A-1, he was bound by its terms and could not discard *Lala* Makund Lal who had been nominated as an arbitrator in the agreement. Being in this state of mind, his failure to lodge an unequivocal protest against *Lala* Makund Lal acting as arbitrator does not in our opinion operate as a waiver.

Next there is the question of the indebtedness of *Lala* Nihal Chand to *Lala* Makund Lal. It was admitted in the lower Court that there were monetary dealings between *Lala* Nihal Chand and *Lala* Makund Lal. We accept the Subordinate Judge's finding which has not been seriously disputed before us that the plaintiff was not aware of these monetary relations at the time when he entered into the agreement. But it has

(1) (1867 2 H L 57.

been argued that the money transactions between them were of a small amount and not of such a nature as to disqualify *Lala* Makund Lal from acting as arbitrator. This view seems to have found favour with the learned Subordinate Judge, but we are not inclined to agree with him on this point. *Lala* Makund Lal has not produced his accounts to show the extent of his monetary dealings with *Lala* Nihal Chand. The cross-examination of *Lala* Nihal Chand, D. W. No. 2, shows that they used to deal in large sums of money. We think that it was the duty of the defendants to disclose to the plaintiff at the time of the agreement the monetary dealings and business relations which existed between Makund Lal and *Lala* Nihal Chand. In a case of arbitration where the parties entrust their fate into the hands of an arbitrator, it is essential that there must be abundant good faith. The arbitrator must be absolutely disinterested and impartial. In *Mahamed Wahidud Din* v. *Hakiman* (2), it was held that if an arbitrator is indebted to one of the parties at the time of the reference or becomes so indebted after the reference, and in either case does not disclose the fact to the other party, such party would be entitled to revoke the reference upon discovery of fact, and any award made by such arbitrator would be invalid on the ground of judicial misconduct. We are, therefore, of opinion that as the arbitrator *Lala* Makund Lal was related to one of the defendants and had monetary dealings with the other, both of which facts ought to have been disclosed and were not disclosed to the plaintiff at the time when he entered into the agreement, the award has rightly been set aside.

2.—*Judicial misconduct.*

As regards the ground of judicial misconduct, the only facts which have been made out are that *Babu* Lachhman Das, who works with *Lala* Makund Lal as his junior, wrote some portion of the award at the dictation of *Lala* Makund Lal, that *Lala* Nihal Chand remained all along at Ferozepore during the time that the award was under preparation, that he had an inkling into the award being in his favour before it had been delivered and that he filled in his handwriting a blank space in the copy of the award which was sent to the plaintiff with a quotation from the agreement in Urdu. There is nothing to show that the arbitrator did not exercise his own judgment on the matters referred to him. The writing of a part of the award by Lachhman Das at the dictation of the arbitrator was an act of a ministerial character which could be delegated to a third party, *Buta* v. *Municipal Committee of Lahore* (3). In the absence of any evidence showing that the arbitrator in any way took the defendant into his confidence, no misconduct can be attributed to him by reason of the contents of the award having leaked out before it was pronounced. Any help given by the defendant in the preparation of the copy of the award sent to the plaintiff cannot also affect the award itself. We are, therefore, of opinion that these circumstances relied on by the learned Subordinate Judge, though raising some suspicion against the arbitrator, are not sufficient to establish a charge of misconduct.

[The rest of this judgment is not material for the purposes of this report —*Ed.*]

N. *Order accordingly.*

(2) 29 C 278; 6 C W N 235.

(3) 29 I A 168; 29 C 854; 87 P R 1902; 7 C W N 82; 4 Bom. L R 673; 8 Sar. 327 (P C).

LAHORE HIGH COURT

Miscellaneous Civil Appeal No. 655 of 1933

June 26, 1934

ADDISON AND SALE, JJ.

JAMNA DHAR POTDAR & Co., LYALLPUR—PETITIONER

versus

COMMISSIONER OF INCOME-TAX, PUNJAB—RESPONDENT

Income Tax Act (XI of 1922), ss. 66 (3), 22 (2)—Notice demanding return of income—Legality of notice, if a question of law—Thirty days' time to furnish return essential—Question not raised before Assistant Commissioner—Right to demand reference.

Under s. 22 (2), Income Tax Act, the Income Tax Officer must give the proposed assessee at least thirty days' time within which to furnish his return. If this minimum is denied, the notice becomes entirely illegal and no subsequent extension of time will cure the defect that initially lay in the notice issued. *In the matter of Kajori Mal-Kalyan Mal* (1), followed.

The question whether a notice demanding return of income, is illegal for not giving thirty days' time is a question of law within s. 22 (2), Income Tax Act.

The assessee has no right to demand that the Commissioner of Income Tax should refer to the High Court the question which he had not raised before the Assistant Commissioner.

Misc. C. A. from an order of the Commissioner of Income Tax, Punjab.

Messrs. *Shiv Dutt Jhingan, Shamair Chand* and *Qabul Chand*, for the Petitioner.

Mr. *J. N. Aggarwal*, for the Respondent.

Order.—An application was made under s. 66 (2), Income Tax Act, asking the Commissioner of Income-tax to state a case on certain points alleged to be questions of law arising out of the assessment of the petitioner Jamna Dhar Potdar and Co., Lyallpur. Two of these questions which were asked to be referred were: (*a*) Was not the notice under s. 22 (2) served on August 31, 1931, demanding the return of income on or before September 26, 1931, *ab initio* illegal as not giving the statutory thirty days' time required under s. 22 (2), Income Tax Act? and (*b*) Was not the Income Tax Officer bound to decide the preliminary question as to the legality of the constitution of the firm under s. 239, Contract Act, before proceeding to make an assessment? It is not necessary to set out the other questions as it was not contended before us that they should be referred. The Commissioner refused to state a case and to refer the questions for the decision of this Court and the petitioner has applied for a mandamus.

As regards the first question it seems to us that a question of law is involved. It was not disputed before us that the notice under s. 22 (2) was not served till August 31, 1931, or that it only gave time up to September 26, 1931, for the putting in of the return. Apparently this notice is illegal as it would seem that under s. 22 (2) of the Act, thirty clear days must be given for the furnishing of the return from the date of service. It was held in *Kajori Mal Kalyan Mal, In the matter of* (1), that under s. 22 (2) the Income Tax Officer must give the proposed assessee at least thirty days' time within which to furnish his return. If this minimum is denied, the notice becomes entirely illegal and no subsequent extension of time will cure the defect that initially lay in the notice issued.

As regards the second question, it may also be the case that a question of law is involved, but this question was not raised in the appeal to the Assistant Commissioner and, therefore, does not arise out of the order under s. 31. The petitioner, therefore, had no right to demand that the Commissioner of Income-tax should refer this question. This apparently will not be very important if he finally succeeds on the question arising as to the legality of the notice; for if a fresh notice has to issue, it would seem that it will be open to the assessee to agitate this matter again. For the reasons given we direct the Commissioner of Income-tax to state a case as to the legality of the notice served on the assessee on August 31, 1931, under s. 22 (2) of the Act and to refer it for decision to this Court. We make no order as to costs as many other questions were raised which, however, have not been pressed before us.

D. *Petition accepted.*

(1) 122 Ind. Cas. 741; A I R 1930 All. 209; (1930) A L J 78; Ind. Rul. (1930) All. 293.

OUDH CHIEF COURT

Criminal Appeals Nos. 2, 7 and 8 of 1935

March 18, 1935

NANAVUTTY AND ZIA-UL-HASAN, JJ.

MATHURA—APPELLANT

versus

EMPEROR—COMPLAINANT—RESPONDENT

Criminal trial—Confession—Retracted confession of accused—Whether can be used in evidence against his co-accused—Confession of crime by accused—Conviction, if can be based on it even if it is retracted—Motive—Crime brought home to accused—Motive, if should be proved.

The retracted confession of an accused has really little or no evidential value against a co-accused but it can be taken into consideration along with the other evidence against that accused, especially when the Court considers that the confession was both voluntary and true. [p. 532, col. 2.]

When a grown-up man in the full possession of his senses chooses to confess his crime, then he can be legally convicted on his own confession even if it be subsequently retracted. [*ibid.*]

If upon the evidence of the prosecution witnesses the crime of the accused has been brought home to him, then the question of the motive with which the crime was committed becomes a matter of secondary importance. The prosecution is seldom able to pry deep into the secrets of unhallowed lives, or to explain the workings of evil minds or the secret desires and passions of a wicked heart. [p. 530, col. 1.]

Cr. A. against an order of the Sessions Judge, Sitapur, dated December 18, 1934.

Mr. *E. R. Kidwai*, for the Appellant.

Mr. *H. S. Gupta*, Government Advocate, for the Crown.

Judgment.—These are three connected jail appeals filed by Mathura, Badlu and Sripal against a judgment of the learned Sessions Judge of Sitapur convicting Mathura of an offence under s. 302 of the Indian Penal Code and sentencing him to death and convicting Badlu and Sripal of an offence under s. 302 of the Indian Penal Code and sentencing each of them to transportation for life. The reference in confirmation of the sentence of death

is also before us. As Mathura has been sentenced to death, a Counsel was engaged on his behalf by the Crown to defend him and this Counsel has argued not only on behalf of Mathura but also on behalf of Badlu and Sripal, and has discharged his duties in a most efficient manner.

The story of the prosecution is rather lengthy and is as follows:—

On the morning of August 13, 1934, Pragi Pasi who lives in Isharwara came to Ratan *chaukidar* of Hirapur at about 10 or 11 A.M. and informed him that the headless trunk of a man was lying in the grove known as "Khaggan-*ka-bagh*" to the north of the village. Ratan *chaukidar* thereupon went to the spot accompanied by several persons and saw the corpse. A pool of blood was lying near it. The corpse had a *sabri* or instrument of burglary in its right hand and a *janeo* or sacred thread across its shoulder, raising a *prima facie* presumption that the corpse was that of a Hindu male. A shirt, a *dhoti* and an *angocha* were also found on the corpse. There were wounds on the right shoulder. The corpse appeared to be that of a young man of 24 or 25 years of age, who apparently had been murdered the previous night. Being a headless trunk, no one could identify whose corpse it was. Ratan *chaukidar* (P. W. No. 1) made a report of the discovery of the corpse at *Thana* Sadarpur at 2 P.M. on the afternoon of August 13, 1934. A case of wilful murder under s. 302 of the Indian Penal Code was registered at Police Station Sadarpur against some unknown persons. The *Thana* Moharrir, Head Constable Safir Muhammad Khan (P. W. No. 3) went with Ratan *chaukidar* to the scene of the occurrence and arrived there at 9 P.M. the same day; he examined the corpse and prepared a *panchayatnama* or inquest report (Ex. 6) in which he noted amongst other injuries those that he found on both testicles of the murdered man. He also noted the fact that the skin had peeled off and that there were 9 or 10 scratches upon those parts showing that those who had murdered the unknown Hindu bore special resentment against him for some great real or fancied sexual wrong or offence committed by him.

The corpse was then sent in the custody of Constable Hafiz-ur-Rahman (P. W. No. 2) and *chaukidar* Sita Ram to headquarters for *post mortem* examination. The Civil Surgeon of Sitapur performed the *post mortem* examination on the body of the unknown Hindu at 9-55 A.M. on the morning of August 15, 1934. While the Civil Surgeon was conducting the *post mortem* examination, the head and neck of the corpse were brought in before him, and the Civil Surgeon has stated in his *post mortem* report that after the arrival of the head and neck, the body was identified as that of Bhagwan Din Ahir by Dayal, a relation of the murdered man. Dayal (P. W. No. 13) has deposed in the Court of Session that the deceased Bhagwan Din was his uncle being the step-brother of his father. Dayal not only identified the clothes which the deceased had on his person at the time he was murdered, but he identified the corpse because of the diseased condition of the right thumb of Bhagwan Din, the first phalanx of which was enlarged and inflamed with chronic suppuration. This diseased condition was noted by the *Thana Munshi* when he prepared his inquest report (Ex. 6), as also by the Civil Surgeon who preserved the right thumb because of the scar on it (see Ex. 9). The head was identified by Dayal as that of Bhagwan Din and the Civil Surgeon has deposed in Court that it fitted perfectly with the trunk, showing that the head and trunk formed part of one human body and belonged to one another.

The Police investigation revealed that on the evening before the commission of the murder, the deceased Bhagwan Din had gone to Sarai Bazar in the company of *Musammat* Sukhdei Pasin (P. W. No. 6). *Musammat* Bilasa (P. W. No. 11), wife of the deceased Bhagwan Din, Ishar Din *Brahman* (P. W. No. 4), Bhagwan Din Pasi (P. W. No. 12) and Shiam Bihari *Brahman* (P. W. No. 14) deposed that they saw the murdered man for the last time in the Sarai Bazar and some deposed that they saw him in the company of *Musammat* Sukhdei, the wife of Parbhu Pasi. *Musammat* Sukhdei (P. W. No. 6) has herself sworn to this fact. Early in the course of his inquiries, the Investigating Police Officer discovered that there was enmity between Mathura Ahir and the deceased Bhagwan Din because the latter had some years ago run away with the daughter of the former. This enmity is proved by the evidence of *Musammat* Bilasa (P. W. No. 11), wife of the deceased, Dayal (P. W. No. 13), nephew of the deceased and Jhingur Kurmi (P. W. No. 16).

The suspicions of the Investigating Police Officer, Sub-Inspector Jamil-ur-Rahman (P. W. No. 15) having been aroused, he got the house of Mathura and of Badlu, his

cousin, searched. Mathura and Badlu both live in the same house but in different parts of it. A blood-stained *chaddar* (Ex. 8) was recovered from the possession of Mathura and a blood-stained *dhoti* (Ex. 9) from Badlu. The Investigating Police Officer prepared the usual recovery list and then arrested Mathura because of his proved enmity with the deceased Bhagwan Din, but he did not think it advisable to arrest Badlu just then. He then took Mathura with him to Isharwara, the place where the headless trunk was first found, and by means of adroit questioning, and after perhaps a good deal of persuasion, he induced Mathura to point out the well into which the head of the murdered man had been thrown. In the presence of a number of people, the head of the murdered man Bhagwan Din Ahir was recovered from the well pointed out by Mathura accused, and a recovery list (Ex. 4) was prepared. Jagdeo *Brahman* (P. W. No. 17) and Sub-Inspector Jamil-ur-Rahman (P. W. No. 15) prove that the head of the murdered Bhagwan Din was recovered with the help of Mahngu Lonia from the well pointed out by Mathura, and the head was identified to be that of Bhagwan Din not only by Mathura but also by the relations of the murdered man.

At this juncture, fortune favoured the Police investigation. Sub-Inspector Riasat Ali (P. W. No. 18) officer in charge of *Thana* Sadarpur was on August 14, 1934, in the Magistrate's Court at Sitapur in connection with a theft case in which certain men belonging to village Chandpur were on their trial. In the afternoon of this very day, August 14, 1934, Sub-Inspector Riasat Ali received information that a headless trunk had been found at Isharwara and had been sent to Sadar for *post mortem* examination. That very day he also received information through a Police constable that Bhagwan Din Ahir of Chandpur had been missing for two days, and it so happened that on that very day judgment was pronounced by the Magistrate of Biswan in a theft case in which the accused who were men from village Chandpur were acquitted. Amongst those who were acquitted were Sripal, the appellant before us in this case, and Mullu, brother of *Musammat* Sukhdei (P. W. No. 6). A bright idea occurred to Sub-Inspector Riasat Ali that he might make use of these accused who had been acquitted and see if they could identify the trunk or the head of the unknown murdered man which had been sent to the mortuary at Sitapur for *post mortem* examination. Accordingly these persons were taken to the mortuary and Madan Mohan, Sripal appellant before us, Sri Ram and Mullu, brother of *Musammat* Sukhdei, identified the head shown to them in the mortuary as that of Bhagwan Din of Chandpur. Sub-Inspector Riasat Ali learnt from constable Jalesar Singh that *Musammat* Sukhdei, sister of Mullu, who had been acquitted in the theft case had gone with the murdered Bhagwan Din to Sarai Bazar a day before his headless body was found. The Police Officer thereupon told *Musammat* Sukhdei, Sripal and Mullu when they alighted at Biswan Railway Station that he wanted them all to go with him to Isharwara and he deputed constable Sitla Bakhsh Singh to bring these persons with him to Isharwara. Then Sub-Inspector Riasat Ali mounted his horse and reached Isharwara at 10 P. M. that very night, and met his second officer Sub-Inspector Jamil-ur Rahman and Head Constable Safir Muhammad Khan, and took over charge of the investigation of this murder case and spent the night at Isharwara. Next morning, he went to Chandpur and there the constable produced before him *Musammat* Sukhdei, Sripal and Mullu. In consequence of the information supplied by *Musammat* Sukhdei, Sub-Inspector Riasat Ali (P. W. No. 18) arrested Badlu and Sripal. Sripal was taken to Isharwara to the grove where the corpse of Bhagwan Din had been found and then Sripal took the Police to a pond, a couple of furlongs to the north of Isharwara and from this pond he recovered the umbrella (Ex. VI), which he said belonged to the deceased Bhagwan Din. A *danda* or stick (Ex. VII) belonging to the deceased Bhagwan Din was handed over to the Police by Parbhu who had found it to the south of the grove where the headless trunk had been found. Sripal made incriminating statements before the Police and he was sent to headquarters to have his confession recorded by a Magistrate. Sripal's confession was recorded by a Magistrate on August 16, 1934; and then after completing his investigation, Sub-Inspector Riasat Ali prosecuted all three accused, Mathura Badlu and Sripal on a charge of murder under s. 302 of the Indian Penal Code. All three accused were committed by the Joint Magistrate of Sitapur to the Court of Session to stand their trial on the said

charge, and the learned Sessions Judge has found them all guilty of the offence charged and has sentenced Mathura to death and Badlu and Sripal to transportation for life.

The first point for determination in this case is whether the headless trunk and the head formed part of the body of the murdered man Bhagwan Din. In our opinion the evidence adduced on behalf of the prosecution leaves no room for doubt that the headless trunk upon which the Civil Surgeon performed his *post mortem* examination was the body of the murdered man Bhagwan Din. Indeed, the learned Counsel for the appellants who has argued the case on their behalf with great ability is not prepared to deny that the headless trunk was the body of the murdered Bhagwan Din. The next point for determination is whether in respect of the death of Bhagwan Din an offence of wilful murder punishable under s. 302 of the Indian Penal Code has or has not been committed. The evidence of the Civil Surgeon and the fact that Bhagwan Din had been decapitated leave no room for doubt that Bhagwan Din was most brutally murdered by some person or persons. There remains then the principal question whether the evidence of the prosecution witnesses brings home the charge of murder against the three appellants or not. The learned Counsel for the appellant has argued that the enmity alleged between Mathura and the deceased Bhagwan Din is rather far-fetched and is not a sufficient motive for the accused Mathura committing this murder. In our opinion the question for consideration is not whether the accused had or had not an adequate motive for committing the crime of murder. The real question for determination is whether the evidence on the record fully proves the guilt of the accused or not. If upon the evidence of the prosecution witnesses the crime of the accused has been brought home to him, then the question of the motive with which the crime was committed becomes a matter of secondary importance. The prosecution is seldom able to pry deep into the secrets of unhallowed lives, or to explain the workings of evil minds or the secret desires and passions of a wicked heart. For aught we know, Mathura may have been actuated in killing Bhagwan Din by some sinister motive other than the alleged motive that he wished to revenge himself on the murdered man because some years ago he had enticed away the daughter of Mathura. It may be that Bhagwan Din's wife herself preferred Mathura to her husband and may have been instrumental in circumventing the murder of her husband. It is, however, quite idle and unnecessary to speculate as to the motive which may or may not have actuated Mathura and the other accused in committing this murder, if the fact of their having committed the murder is brought home to them beyond any reasonable doubt. That the deceased went in fear of his life and looked upon Mathura as his mortal enemy is clear from an entry made by him as Secretary of the Co-operative Society at Kalnepur and Bhadarpur of which Chandpur is a hamlet. In the proceedings of this Co-operative Society, dated March 5, 1934 (See Ex. 12) Bhagwan Din made a note at the foot of the proceedings that the meeting commenced at 9 P. M. and closed at 10-30 P. M. and that he was proceeding to his house at 11 P. M. in the night and that if anything happened to him on the way, no one except Mathura, son of Makka Ahir of Chandpur would have been the author of that harm to him. It is, therefore, clear that as early as March 1934, 5 months before his actual murder; Bhagwan Din had a presentiment and a lurking fear that sometime or other Mathura would find his opportunity and kill him. The genuineness of this entry cannot be disputed. Shiam Bihari (P. W. No. 14), Supervisor of the Co-operative Bank at Biswan has proved this entry and its genuineness is beyond dispute. This entry in the proceedings book of the Co-operative Society at Kalnepur fully supports the evidence of the other prosecution witnesses who deposed to the existence of bitter enmity between the deceased and Mathura. *Musammat* Bilasa (P. W. No. 11) the young widow of the murdered Bhagwan Din has deposed to an incident which happened three years ago when Mathura tried to rape her in her own house and how she rushed up to the roof of her house and so frustrated the evil designs of Mathura. Dayal (P. W. No. 13) corroborates the story told by *Musammat* Bilasa and so does Jhingur Kurmi (P. W. No. 16). The learned Sessions Judge who had the unestimable advantage of hearing the evidence of the prosecution witnesses and of noting their demeanour in the witness-box has arrived at the conclusion that there

was undoubtedly ill-feeling between the accused Mathura and the deceased Bhagwan Din. We are of opinion that the learned Sessions Judge has arrived at a correct conclusion on this point, and whether the enmity be deemed adequate or not, the fact remains that bad blood did exist between the murdered man and the accused. We need not labour this point any further. The case against Mathura rests primarily upon the evidence of *Musammat* Sukhdei (P. W. No. 6). The learned Counsel for the appellant has argued with great ingenuity and forensic skill that *Musammat* Sukhdei is a tutored witness and that she has been compelled by the Police to give false evidence under threat of her brother Mullu being prosecuted for *Badmashi* or for some criminal offence under the Penal Code. The learned Counsel has tried to create grave doubts and suspicions in our minds as regards the evidence of *Musammat* Sukhdei, but in the dry light of reason all these doubts and suspicions vanish into thin air like morning mist before the rising sun. In our opinion the conduct of the Investigating Police Officer has been quite straightforward and above board, and *Musammat* Sukhdei has given her evidence in a very straightforward manner. No doubt, *Musammat* Sukhdei at first did not like to get herself involved in this brutal murder, and the threats held out by the accused against her may also have served to silence her mouth, but when the Police came to know that she was the last person to be seen with the murdered man and that she had accompanied the murdered man to Sarai Bazar, they plied her with questions and ultimately got out from her the true story of how Bhagwan Din was done to death. The evidence of *Musammat* Sukhdei has not been shaken in cross examination. It has been read over to us and we see no reason to mistrust it. It gives a very clear and straightforward account of what she saw. It has been argued on behalf of the accused that *Musammat* Sukhdei does not mention that she saw the *bhojali* and *sabri* in the hands of Mathura, but the *bhojali* and *sabri* were not used by the accused when they attempted to strangle Bhagwan Din with a rope tied round his neck. What *Musammat* Sukhdei has deposed to is that Mathura tied a rope round Bhagwan Din's neck, Sripal held his legs and Badlu caught hold of his hands and then Mathura strangled Bhagwan Din with the rope and he also stuffed a cloth in the mouth of Bhagwan Din in order to prevent him from raising an alarm, and after Mathura had strangled Bhagwan Din with the rope, the three accused carried the corpse to the "*Munjhwaja*" grove and then they told *Musammat* Sukhdei to go away and threatened to kill her if she breathed a word about what she had seen. No question was asked of *Musammat* Sukhdei as to whether she saw any other weapon in the hands of Mathura at the time when Mathura was busy in tying the rope round Bhagwan Din's neck and strangling him thereby. It is obvious that the *bhojali* must have been left just then in the sugar-cane field from which the accused suddenly came out and pounced upon Bhagwan Din. We, therefore, attach no importance to the fact that *Musammat* Sukhdei makes no mention of any *bhojali* and *sabri*. In fact her very omission to mention these weapons seems to us a sign of her truthfulness. Had she been a tutored witness, she would have mentioned not only that Mathura had a *bhojali* and a *sabri* but she would have also mentioned the fact that she had seen Bindra Ahir of Chandpur who has been named by Sripal in his confession before the Magistrate.

The learned Counsel for the appellant has also ingeniously argued that even if the evidence of *Musammat* Sukhdei be accepted as true, still her evidence does not prove that Mathura murdered Bhagwan Din because the evidence of the Civil Surgeon is to the effect that when the head was severed from the trunk, Bhagwan Din was perhaps alive. We are not prepared to accept this contention. In the first place the Civil Surgeon of Sitapur has given no scientific data for his halting expression of opinion that perhaps the neck was severed from the trunk while the deceased was alive. In the second place the *post mortem* examination on the body of Bhagwan Din was performed two days after the murder of Bhagwan Din and the Civil Surgeon has himself shown in his *post mortem* report that the body was in a very decomposed condition and that maggots half an inch long were present and the skin was peeling off and the body was distended with gas. When the body was in this decomposed condition, it is hardly conceivable that there would be on the corpse any *post mortem* appearances justifying the Civil Surgeon in his half-hearted belief that

the neck was perhaps severed from the trunk when Bhagwan Din was alive. The Civil Surgeon has himself deposed that the injuries could not be ascertained owing to advanced decomposition. We are, therefore, not disposed to accept the '*excathedra*' opinion of the Civil Surgeon on this point in the absence of any proved facts upon which such an opinion could be based. Even if it be assumed that life was not extinct when Mathura cut off the head of Bhagwan Din with a *bhojali*, still there are other circumstances from which the guilt of the appellants is fully brought home to them. Mathura when he was taken to the spot where the headless trunk was found, was somehow moved to unbosom himself and to point out the well into which he had thrown the head of Bhagwan Din. It has been argued on behalf of the accused that his alleged recovery of the head from a well through the instrumentality of Mathura accused is a pure fabrication on the part of the Police, and that it was the Police themselves who somehow recovered the head from the well and then prepared this bogus recovery list (Ex. 4). In our opinion, there is no force in this contention. Mathura was asked by the learned Committing Magistrate when he was examined under s. 364 of the Code of Criminal Procedure if he took out the head of Bhagwan Din from a well in village Isharwara and handed it over to the Police, and his reply was that he did not know how and where Bhagwan Din's head was recovered. He has not alleged that the Police fabricated the recovery list and that Jagdeo (P. W. No. 17) and Sub-Inspector Jamil-ur-Rahman had given false evidence when they stated that he pointed out the well from which the head of Bhagwan Din was recovered. It has been argued on behalf of Mathura by his learned Counsel that there was no reason for Mathura to implicate himself and to point out the well into which he had thrown the head of the murdered man. The psychology of a murderer's mind is not easy to understand. There is a good old English saying :— "Murder will out". The same idea is to be found in the lines of the Urdu poet :— "*Aghar chup rahegi zaban-e-khanjar lohu pukarega astin ka*". Whatever may have been the motives which induced Mathura to admit partially his guilt and to point out the well into which he had thrown the head of the murdered man, the fact remains that in the presence of various villagers and of the Sub-Inspector of Police he pointed out the well from which Mahngo Lonia brought out the head of Bhagwan Din and that head was identified by Mathura himself and by various other persons as the head of Bhagwan Din. In our opinion, the recovery of the head of the murdered Bhagwan Din from a well at the instance of the accused Mathura is a strong piece of circumstantial evidence incriminating Mathura in the commission of the murder of Bhagwan Din. It goes to strengthen the deposition of *Musammat* Sukhdei if any corroboration of her deposition was necessary.

Lastly, there is the retracted confession of Sripal. The retracted confession of an accused has really little or no evidential value against a co-accused but it can be taken into consideration along with the other evidence against that accused. In the first place we consider that the confession of Sripal was both voluntary and true. Sripal's confession (Ex. 8) was recorded by a Magistrate of the first class at Sitapur on August 16, 1934. He was carefully warned by the Magistrate that he was not bound to make a confession or any statement before him. He was also warned not to make any statement at the instance or under the influence of any body. At that time Sripal stated that no one had beaten him nor had any one held out any temptation or offer of pardon nor had any one threatened him. Sripal was also warned that whatever he stated in his confession would be used in evidence against him and so cause him harm. He was asked whether he made the statement under the influence of any drug or on account of illness and whether he felt that he was in the full possession of his senses and he replied that he had not taken any intoxicant nor was he ill but that he was in a sound state of health. It has been held by this Court more than once that when a grown up man in the full possession of his senses chooses to confess his crime, then he could be legally convicted on his own confession even if it be subsequently retracted. The confession of Sripal strikes us as true. There is a natural ring of truth about it. He has given his statement in a straightforward manner. He states that he joined in the commission of this murder willingly because he was rather afraid that if he did not do so, he would incur the displeasure of Mathura who had only recently given

evidence on his behalf and saved him from a charge of theft. It is true that he had no personal animus or grudge against the murdered man but because Mathura wanted his help, he gave it freely. He knew that Mathura had killed his (Sripal's) uncle Ram Dayal some 15 or 16 years ago and he feared that if he did not accede to the wishes of Mathura, he might be dealt with in the same manner as Mathura had dealt with his uncle Ram Dayal. Not only does the confession of Sripal strike us as genuine but we note that the confession tallies absolutely with the evidence given by *Musammat* Sukhdei. The confession of Sripal is corroborated by the recovery of the umbrella of Bhagwan Din from the pond by Sripal in the presence of witnesses. Sripal in his examination before the Committing Magistrate and in the Court of Session has made wild allegations against the Police but he has adduced not an iota of evidence in support of those allegations. We believe that the confession of Sripal is both voluntary and true and we think that upon his retracted confession corroborated by the evidence of *Musammat* Sukhdei and his recovery of the umbrella from the pond, his conviction for an offence under s. 302 of the Indian Penal Code is legally justified. The confession of Sripal which we consider to be both voluntary and true can be used in evidence against his co-accused Mathura and Badlu.

Against Badlu accused, there is not only the evidence of *Musammat* Sukhdei but also the recovery of a blood-stained *dhoti* from his possession (Ex. IX recovery list Ex. 3). The accused denies that this *dhoti* is his but he has adduced no evidence in his defence. He has alleged that Sripal was on bad terms with him but he has also adduced no evidence in support of that fact. The evidence of Jhingur Kurmi (P. W. No. 16) shows that the *dhoti* was recovered from the house of Badlu. Badlu alleged that he was on bad terms with Jhingur but he has adduced no evidence to corroborate that statement. The accused Badlu is the son of Debi Din Ahir, a cousin of Mathura, and is apparently under the influence of Mathura who is a much stronger character than himself. As, however, he helped Mathura in tying the rope round the neck of Bhagwan Din and so strangling him and as he also helped Mathura in carrying the dead body to the grove where Mathura chopped off the head of Bhagwan Din and threw it into the well, he is clearly guilty of an offence under s. 302 of the Indian Penal Code read with s. 114 of the Indian Penal Code. Since he as well as Sripal took a minor part in the commission of this murder, the learned Sessions Judge has very properly not inflicted capital punishment on these two accused. After a very careful consideration of the entire evidence on the record, we are clearly of opinion, that the guilt of all three accused has been proved beyond any reasonable doubt. Mathura appears to have taken a leading part in the commission of this murder and has been rightly sentenced to capital punishment. We affirm the conviction and sentence passed upon Mathura by the learned Sessions Judge and direct that Mathura be hanged by the neck till he be dead. We also uphold the convictions and sentences passed upon Sripal and Badlu and dismiss their appeals, as well as the appeal of Mathura.

N. *Appeals dismissed.*

LAHORE HIGH COURT

Civil Revision Petition No. 465 of 1934
(Formerly Appeal No. 1592 of 1933)
June 19, 1934

BHIDE, J.

KRISHNA CHAMBER OF COMMERCE, LTD.—PETITIONER

versus

FIRM L. PREM SINGH-KISHEN CHAND AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 115—Error of law not raising any question of jurisdiction—If a good ground for revision—Punjab Courts Act (VI of 1918), s. 44.

A mere error of law which does not raise any question affecting jurisdiction is no good ground for interference in revision. *Sant Singh* v. *Mubarik Singh* (1), referred to.

C. R. P. from a decree of the Additional District Judge, Ferozepore, dated May 11, 1933.

Messrs. *J. N. Aggarwal* and *Krishna Swarup*, for the Petitioner.

Mr. *Shamair Chand*, for the Respondents.

Judgment.—A preliminary objection is raised that no appeal is competent. The learned Counsel for the appellant concedes the force of this objection in view of *Punjab Marwari Chamber of Commerce, Ltd., Delhi* v. *Firm Ram Mal-Lilu Shah* (1), and requests that this appeal be treated as a petition for revision. It seems to me, however, that there is no good ground for

(1) 132 Ind. Cas. 850; 13 Lah. 59; 33 P L R 887; Ind. Rul. (1931) Lah. 690; A I R 1931 Lah. 644.

interference in revision under s. 44, Punjab Courts Act. The only ground on which the learned Counsel has laid stress is that the learned Judge of the Court below was wrong in thinking that the award was invalid as the arbitrators were directors of the petitioning Company and consequently interested parties. In support of this argument the learned Counsel has referred to *Burma Oil Co.* v. *Narain Das-Dayal Singh* (2) and *Ives & Barker* v. *Williams* (3). But assuming that this is so, the learned Judge can at the most be said to have committed an error of law. There is ample authority for the proposition that a mere error of this kind which does not raise any question affecting jurisdiction is no good ground for interference in revision : see *Sant Singh* v. *Mubarik Singh* (4).

I must, therefore, dismiss this petition, but in view of all the circumstances, I leave the parties to bear their costs.

D. *Petition dismissed.*

(2) 104 Ind. Cas. 185: A I R 1927 Sind 253.

(3) (1894) 2 Ch. 478; 63 L J Ch. 521; 42 W R 483; 70 L T 674.

(4) 106 Ind. Cas 901; 29 P L R 42; 10 Lah. L J 51; A I R 1928 Lah. 140.

OUDH CHIEF COURT

Second Civil Appeal No. 190 of 1933

March 8, 1935

NANAVUTTY, J.

BHABHUTI PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

Thakurain PARBATI KUAR —PLAINTIFF AND OTHERS DEFENDANTS - RESPONDENTS

Contract Act (IX of 1872), s. 62—Land alleged to be held as brit zar kharidi*—Opposite party asserting transaction to be mortgage—Compromise that party in possession should give up possession on payment of money—Decree—Construction—Novation—Mortgage, if created by decree—Subsequent suit to redeem mortgage—Maintainability.*

The essence of a novation of a contract lies not in the dissimilarity of the terms between the old and the new contract, but in the intention of the parties to supersede the old by the new.

In a previous suit filed by the predecessor-in-interest of the defendants against the predecessor-in-interest of the plaintiff, the former pleaded that he held a certain land as *brit zar kharidi* under a deed of 1241 *Fasli* while the latter pleaded that the deed was a mortgage. A compromise was entered into and it was agreed that whenever the latter paid a sum of money, the former would gave up possession of the property. The suit was decreed accordingly. The plaintiff filed a suit for redemption :

Held, that by the compromise the parties was created a fresh mortgage in respect of the land and the mortgage could be redeemed. *Baldeo* v. *Sher Bahadur Singh* (1) and *Kshetranath Sikdar* v. *Harasukdas Balkrishendas* (2), referred to.

S. C. A. against an order of the Additional Sub-Judge of Gonda, dated February 25, 1933, upholding the decree passed by the Munsif, Tarabganj at Gonda, dated August 22, 1932.

Mr. *H. Husain*, for the Appellants.

Mr. *M. Wasim*, for the Respondents.

Judgment.—These are two connected appeals filed by certain defendants against the appellate judgments and decree of the Court to the 1st Additional Subordinate Judge of Gonda, upholding the judgments and decrees of the Munsif of Tarabganj decreeing the plaintiff's suit.

The facts out of which these two appeals arise are briefly as follows:—

Thakurain Parbati Kuar filed two suits for redemption in the Court of the Munsif of Tarabganj, one in respect of 21-41 acres of land and the other in respect of 22-95 acres of land as detailed in the plaints on the basis of two Settlement Court decrees, both dated March 11, 1872. In the suit out of which Appeal No. 190 arises, she claimed redemption on payment of Rs. 400 and in the suit out of which Appeal No. 191 of 1933 arises, she claimed redemption on payment of Rs. 356. The defendants in both the suits contended that they were holding the land under an irredeemable mortgage of 1241 *Fasli*, and that the Settlement Court decree relied upon by the plaintiff did not create any mortgage. The learned Munsif of Tarabganj held that the plaintiff could claim redemption on the basis of the Settlement Court decrees in favour of Naipal Singh and that they evidenced a new contract of mortgage, the defendants holding the land in suit under this mortgage, which was intended to be substituted in place of the old mortgages set up by Naipal Singh. He accordingly decreed the two suits of the plaintiff for possession by redemption and he directed the plaintiff to deposit in Court the sum of Rs. 400 plus defendants' costs in one case and the sum of Rs. 356 plus defendants' costs in the other suit, and he directed that if these payments were made as ordered, the mortgages shall stand redeemed. In default of payment of the redemption money, the defendants would be at liberty to apply for a final decree for sale.

The learned Subordinate Judge has up-

held the finding of the trial Court and has dismissed the appeal of the defendant with costs.

Dissatisfied with the judgments of the lower Appellate Court the defendants have filed these second appeals.

The main question for determination in these two connected appeals is to decide what is the effect of decrees of 1872 in favour of the plaintiff's predecessors-in-interest. The contention on behalf of the plaintiff-respondent is that these decrees create mortgages which can be redeemed. The contention on behalf of the defendants is that these decrees do not create any new mortgage but merely enforce the earlier mortgages which have now become irredeemable.

One Ram Charan, the predecessor-in-interest of the present defendants, filed a suit against Naipal Singh, the predecessor-in-interest of the plaintiff *Musammat* Parbati. Exhibit C-2 is the deposition on oath of Ram Charan to the effect that he had 125 *bighas* under a deed executed by Naipal in 1241 *Fasli* for Rs. 500 in favour of Hardayal, the cousin of Ram Charan. He described these 125 *bighas* as *brit zar kharidi*. In Syke's Compendium relating to the Taluqdars of Oudh p. 173, there is an account of *brit* rights in Oudh, and it is as follows:

"*Brit* is another under-proprietary right created by the *taluqdar* or proprietor and prevails chiefly in the Districts of Gonda, Bahraich and Fyzabad ..... Anyway the true *brit* is that known as the *bai brit*, created by the *taluqdar* or proprietor for money paid".

It is clear that Ram Charan, the predecessor-in-interest of the present appellants, claimed these 125 *bighas* as his *brit* or under-proprietary tenure, and not as land mortgaged to him. On the other hand Ex. C-3 is the statement of Mahabir the general agent of Naipal Singh, the defendant in the suit brought by Ram Charan, in 1872. In this deposition recorded on January 16, 1872, Mahabir Singh stated that a hundred *bighas* were mortgaged to Har Dayal, a cousin of Ram Charan for Rs. 400 by *Thakur* Kirat Singh in the month of *Asar* of 1251 *Fasli*, and that possession of the mortgaged land was with the plaintiff who paid rent and that one condition of the mortgage was that whenever the money was paid back the land would be redeemed. It is thus clear that it was the defendant *taluqdar* on whose behalf the contention was raised that the land in dispute in Ram Charan's suit was land that had been mortgaged by Kirat Singh to Har Dayal for Rs. 400 in the Hindi month of *Asar* of 1251 *Fasli*, whereas the plaintiff Ram Charan claimed the land in suit as his *brit* or under-proprietary tenure, and not as land mortgaged to him. This suit of 1872 was compromised by the parties, and the compromise dated March 9, 1872, is Ex. 1. It may be mentioned here that Naipal Singh was *Taluqdar* of Paska in the Gonda District, and the compromise was to the effect that as soon as the defendant *taluqdar* paid Rs. 400 to the plaintiff Ram Charan, the latter and his heirs would give up the land and have nothing to do with the property. The compromise in the other suit was to the same effect, and therein it was stated that as soon as the defendant *taluqdar* paid Rs. 356, the plaintiff Ram Charan and his heirs would give up possession over the land and have nothing to do with it in future. Exhibit C-1, (same as Ex. 2), is the decree of the Settlement Court giving effect to the terms of the compromise Ex. 1. In Ex. C-1 *Munshi* Dhanpat Rai, Settlement *Sadar Munsarim*, stated the contentions of the two parties in the suit brought by Ram Charan against Naipal Singh, and set forth the issues that were involved in the suit, and then held that as the parties had come to a compromise, he would pass an order in accordance therewith. This judgment of *Munshi* Danpat Rai shows clearly the respective contentions of the parties. On the one hand the plaintiff claimed that the land in suit was his *brit* which had been purchased for Rs. 500 (and Rs. 356 in the other case) from Kirat Singh by his cousin Har Dayal. The defence was that the land was not the *brit* of the plaintiff Ram Charan but that it was mortgaged by Kirat Singh to Har Dayal for Rs. 400 (and Rs. 356 in the other case). In the judgment of the Settlement Court, which embodies the terms of the compromise, it was decided that the land in suit was land which had been mortgaged to the plaintiff Ram Charan, and it was agreed that whenever the *zemindar* Naipal Singh, paid Rs. 400, (or Rs. 356 in the other case) the mortgage would be redeemed, and the plaintiff would give over possession to the *taluqdar*. It is thus clear that the compromise, as well as the judgment of *M.* Dhanpat Rai, created a mortgage and that since the date of this judgment Ram Charan was in the position of a mortgagee, and that being the case, I am clearly of opinion that the plaintiff in the present suits, namely, *Thakurain* Parbati

Kuar, is entitled to redeem the mortgages created by the Settlement Court decree of March 11, 1872.

The learned Counsel for the appellants has argued that under s. 37 of Act XIII of 1879, which is now embodied in s. 48 of the Oudh Courts Act of 1925, mortgages executed before 1844 are irredeemable. To my mind this contention is based upon the assumption that there were mortgages executed by Kirat Singh in favour of Har Dayal in 1241 and 1251 *Fasli*, but as I have shown above, Ram Charan, the predecessor of the present defendants-appellants, has himself clearly deposed that he sued not on any mortgage executed in 1241 or 1251 *Fasli*, but that he claimed *brit* rights in the land in suit which he claimed to have purchased from the *zemindar* on payment of Rs. 500 and Rs. 356, respectively. In my opinion the lower Courts have correctly construed the Settlement Court decree, and the plaintiff's suit is, therefore, obviously not barred by limitation.

Even if it was held that Naipal Singh had, through his general agent Mahabir Singh, stated in the Settlement Court in 1872 that Ram Charan held under a mortgage executed by Kirat Singh in favour of Har Dayal, the cousin of Ram Charan, still that mortgage was denied by Ram Charan, and the parties entered into a compromise which was given effect to by the decree of the Settlemeent Court, and there was thus a novation of contract, and under s. 62 of the Indian Contract Act, if the parties to a contract agree to substitute a new contract for it, the original contract need not be performed. The Settlement Court decree of March 11, 1872, will, therefore, have to be substituted in place of the old mortgages alleged on behalf of the defendant Naipal Singh in the suit of 1872. The decree of 1872 does not lay down any conditions other than those which Naipal Singh himself had stated through his general agent Mahabir Singh and it is to be noted that Naipal Singh had always claimed the right to acquire the land by paying off the sums borrowed by Kirat Singh from Har Dayal.

Exhibit 3 is the extract of the *fard intikhab tasfia lagan*, and the date of the decree, namely, March 11, 1872, is treated as the date of mortgage in the column of remarks. Exhibit 4 of the Second Settlement has similar entries and the date of the mortgage is also shown therein as March 11, 1872. Exhibit 5 is the *Khewat Karkhas* prepared in 1885, and the date of the mortgage is shown therein as March 11, 1872.

The learned Counsel for the plaintiff-respondent invited my attention to a ruling of the late Court of the Judicial Commissioner of Oudh reported in *Baldeo* v. *Sher Bahadur Singh*, 74 Ind. Cas. 42 (1), in which it was held that the essence of a novation of a contract lay not in the dissimilarity of the terms between the old and the new contract, but in the intention of the parties to supersede the old by the new.

In *Kshetranath Sikdar* v. *Harasukdas Balkishendas* (2), a learned Judge of the Calcutta High Court made the following observation :—

" It is argued that a new contract was substituted in this case. The answer to this contention is that whether or there was an agreement to substitute a new contract is a question of fact depending on the intention of the parties. The true rule seems to me that one should look to the substance of the matter and not to mere form."

Applying that *dictum* to the present case, it is clear that the parties by the compromise, and the judgment of the Settlement Court which gave effect to that compromise, created a fresh mortgage in respect of the land in suit.

In my opinion the judgments and decrees of the lower Appellate Court are correct. The appeals, therefore fail, and are dismissed with costs.

N. *Appeals dismissed.*

(1) 74 Ind. Cas. 42; 9 O & A L R 761; A I R 1924 Oudh 169.

(2) 102 Ind. Cas. 871; 31 C W N 703 at p. 710; 45 C. L J 233; A I R 1927 Cal. 538.

LAHORE HIGH COURT

Petition No. 19 of 1934

January 18, 1935

TEK CHAND, J.

In the Matter of the INDIAN COMPANIES ACT VII OF 1913 AND THE ALL-INDIA CATTLE INSURANCE COMPANY, LIMITED (IN LIQUIDATION) —PETITIONER

Companies Act (VII of 1913), s. 86—Directors allotting shares in meeting—Directors not paying allotment money themselves—Resolution allotting shares—Validity of.

Even though none of the Directors of a Company had paid the allotment money on the shares held by them, all acts done by them as such Directors are valid. Where therefore, in a meeting called for the purpose, they allot the shares to the shareholders, the allotment is proper.

Petition under s. 186 read with s. 215 of the Indian Companies Act for an order directing payment of debt due by

contributories on account of unpaid calls of share-money.

Mr. *Amin Chand Mehta*, for the Petitioner.

Messrs. *Shiv Diyal* and *Shamair Chand*, for some of the Contibutories.

Order.—This is an application under s. 186, read with s. 215 of the Indian Companies Act presented by the Liquidator of the All-India Cattle Insurance Company, Limited (which has gone into voluntary liquidation), praying that payment orders for unpaid calls of share money be passed against certain contributories of the Company, whose names are given in the annexure to the application. All the contributories were duly served. Many of them did not appear and proceedings are *ex parte* against them. Others are represented by Counsel who filed written statement raising numerous objections. At the hearing to-day Mr. Shamair Chand made a statement withdrawing most of the objections, as his clients had not produced evidence to support them.

The only objection seriously pressed before me was that the objectors should not have been placed on the list of contributories as there had been no proper allotment of shares to them. It was conceded that they had applied for shares in the Company and that allotment letters had been received by them. It was, however, urged that there had been no proper allotment as none of the three Directors of the Company who purported to make the allotment at the meeting of the Board of Directors held on February 16, 1931, was qualified to act as a Director as none of them had paid the allotment money on the share held by him, and that the resolution passed on February 16, 1931, allotting the shares to the objectors was not confirmed at the next meeting of the Board of the Directors held on March 29. 1931, as is clear from the proceedings book.

In my opinion neither of these objections has any force. Assuming that the facts are as alleged by Mr. Shamair Chand, s. 86 of the Indian Companies Act is a complete answer to the objection. Even if Messrs. Ram Lal Anand, Chuni Lal Manchanda and H. C. Bannerji who were present at the meeting of the Board on February 16, 1931, and allotted the shares to the objectors did not hold the necessary share qualification, all acts done by them as such Directors are valid. See also para. 134 of the Articles of Association of the Company which is equally clear.

Further, as laid down by the Privy Council in *Hansraj Gupta* v. *N. P. Asthana* (1) the objection is not open to the objectors after the Company has gone into liquidation. There is no substance in the other point as the proceedings were duly confirmed by the Chairman of the meeting. I, therefore, overrule the objection and hold that the objectors, as well as the other respondents against whom proceedings are *ex parte*, had been properly placed on the list of contributories.

It is not denied that if the respondents are legally liable as contributories the amount claimed by the Liquidator has not been correctly calculated.

I, therefore, grant this application and pass an order directing the contributories mentioned in the list attached to the application to pay the sums noted against their respective names.

I see no reason to allow instalments except in the case of Lala Shiv Dayal, from whom a large sum, *i. e.*, Rs. 1,600, has been found due. I allow Lala Shiv Diyal to pay the amount in eleven monthly instalments, the first ten instalments shall be for Rs. 150 each and the last Rs. 100. The first instalment shall be paid on March 1, 1935. In case of default of two successive instalments, the whole amount shall become due.

The Liquidator's costs of these proceedings shall be paid out of the assets of the Company. The objectors shall bear their own costs.

D. *Application allowed.*

(1) 139 Ind. Cas. 552; 54 A 827; Ind. Rul. (1932 P C 291; 9 O W N 839; A I R 1932 P C 240; 36 L W 529; (1932) M W N 1141; 63 M L J 859; 35 Bom L R 312 (P C).

CALCUTTA HIGH COURT

Criminal Revision No. 1064 of 1934

November 26, 1934

S. K. GHOSE AND HENDERSON, JJ.

SANTABIR LAMA SANTALAL LAMA AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY

Extradition Act (XV of 1903), ss. 10, 7, 9, 23—Construction should be in favour of subject—Surrender of fugitive criminals—Warrant, necessity of—S. 23, applicability of—Criminal Procedure Code (Act V of 1898), s. 54 (7).

The provisions of the Extradition Act are meant to ensure that the arrest and the detention of persons, who are alleged to have committed an offence

outside British territory, should be in accordance with a certain procedure, and the sections of the Act with reference to that procedure should be construed strictly in favour of the subject. [p. 539, col. 1.]

When a warrant has been received in respect of an extradition offence the procedure should be as under s. 7, Extradition Act. When a requisition is received in respect of any offence the procedure should be as under s. 9, Extradition Act. But when neither a warrant nor a requisition has been received, the Magistrate is empowered to issue a warrant as under s. 10, Extradition Act. It is an essential ingredient of this procedure that there should be a warrant.

Section 23, Extradition Act, refers to the case of persons arrested under s. 54 clause seventh of the Code of Criminal Procedure, that is to say, when a person has been arrested not only without a warrant but also without an order from a Magistrate. Section 54, Criminal Procedure Code, is intended to cover those cases where the Police Officer acts on his own responsibility, that is to say, on suspicion or information as based on facts which the Police Officer has considered for himself. On the other hand where the arrest is made in pursuance of an order of a Magistrate it is that order which must determine the legality or otherwise of the arrest. *In re Charu Chandra Majumdar* (1), relied on.

Mr. *S. K. Sen* (with him Mr. *Dinesh Chandra Roy*), for the Petitioner No. 1.

Mr. *T. C. Moore* (with him Mr. *Haridas Gupta*), for the Petitioner No. 2.

Mr. *Probodh Chandra Chatterjee*, for the Crown.

S. K. Ghose, J.—The two petitioners have filed an application under s. 491, Criminal Procedure Code and obtained a Rule in their favour in terms of a writ of *Habeas Corpus* upon the authorities concerned to show cause why the petitioner should not be set at liberty. It appears that there is an allegation that these two petitioners together with three others forcibly seized within British territory a sepoy of Pashupatinagore Court of Nepal territory, took him into Nepal territory and there assaulted him and took away some money and certain letters which he was carrying. On September 2, 1934, an information was lodged at Sakiapokra *Thana* in British territory of an offence under s. 341, Indian Penal Code but in this matter a final report "*true*" was submitted for lack of evidence. Subsequently the Lieutenant Hakim of Illam Amin, a Court in Nepal territory, addressed letter No. 16 and bearing the date August 16, 1934 to the Deputy Commissioner of Darjeeling to the effect that the five accused persons, including the present two petitioners, had come into Nepal territory, and assaulted and robbed the aforesaid sepoy. The Hakim requested that the men should be arrested and put in jail pending action for their surrender. It also appears that the sepoy was brought to Victoria Hospital, Darjeeling, where he made a statement on August 8, which was recorded by a Sub-Inspector and that the man died on August 28. Subsequently, another letter bearing the date of September 19, 1934 was received from the Lieutenant Hakim of Illam Court intimating to the Deputy Commissioner that the accused were charged with robbery and murder. The Deputy Commissioner ordered the Police on August 27, to arrest the accused, and in pursuance of this order the present two petitioners were arrested in Calcutta on September 17. They were produced before the Darjeeling Court on September 19, and then remanded to jail custody. Their application for release was rejected by the Magistrate by his order dated September 29. In the course of that order the learned Deputy Commissioner stated that he,

"as Deputy Commissioner ordered the Police to arrest the accused on August 27, 1934, and his instructions were carried out".

He considered that the action taken by him was

"of a purely executive nature under s. 10 and s. 23 of the (Indian Extradition) Act,"

and that he was

"definitely debarred from allowing bail".

He also doubted if the prisoners need be produced after fortnightly intervals, but he directed that the papers should be put up before him after such intervals or on receipt of the necessary requisition from the authorities of Nepal. It does not appear if the fact of the arrest was reported to the Nepal Court. A motion was taken before the learned Sessions Judge of Darjeeling and he, in the course of an order bearing the date the October 6, pointed out that the learned Deputy Commissioner, if he had purported to act under s. 10 of the Indian Extradition Act, should have issued a warrant as contemplated in cl. (1) and that he had overlooked provisions of cl. (4) with regard to the granting of bail. But on the merits the learned Judge held that no case had been made out for the release of the prisoners on bail. Thereupon the present petition was filed in this Court and on October 10, 1934 the present Rule was issued as mentioned above. In showing cause against the Rule the learned Deputy Commissioner of Darjeeling wrote to say that he had moved the Legal Remembrancer to take steps to represent the Crown and to show cause why the prisoners not be set at liberty. I am

constrained to mention that it would have been much better if the learned Deputy Commissioner had followed the rule prescribed by this Court and furnished a proper explanation stating the facts and the grounds on which he relied, so that the petitioners could have the opportunity of examining them.

The contention on behalf of the petitioners and upon which the present Rule was issued is to the effect that the arrest and the detention of the petitioners are not in accordance with law and in particular with the provisions of the Indian Extradition Act, XV of 1903. The question whether the petitioners are British Indian or Nepalese subjects is of no importance. The provisions of the Extradition Act are meant to ensure that the arrest and the detention of persons, who are alleged to have committed an offence outside British territory, should be in accordance with a certain procedure, and it has been held that the sections of the Act with reference to that procedure should be construed strictly in favour of the subject. Chapter III describes how the surrender of fugitive criminals in case of States other than Foreign States is to be effected. When a warrant has been received in respect of an extradition offence the procedure should be as under s. 7. When a requisition is received in respect of any offence, the procedure should be as under s. 9. But when neither a warrant nor a requisition has been received, the Magistrate is empowered to issue a warrant as under s. 10. It is an essential ingredient of this procedure that there should be warrant, because the provision is that the issue of the warrant is to be reported forthwith and there is a time limit of two months for the detention of the persons arrested. In the present case the procedure was clearly not under s. 10. But it is contended that it is covered by s. 23. This argument cannot be supported because that section refers to the case of persons arrested under s. 54 clause seventh of the Code of Criminal Procedure, that is to say, when a person has been arrested not only without a warrant but also without an order from a Magistrate. Section 54 is intended to cover those cases where the Police Officer acts on his own responsibility, that is to say, on suspicion or information as based on facts which the Police Officer has considered for himself. This was pointed out by Choudhuri, J., in the case of *In re Charu Chandra Majumdar* (1) and indeed it is apparent from the terms of s. 54 itself. On the other hand, where the arrest is made in pursuance of an order of a Magistrate it is that order which must determine the legality or otherwise of the arrest. Mr. Chatterjee for the Crown has contended that, merely because the Magistrate has given an order, the case is not taken out of s. 54 where the Police Officer himself has received credible information or has conceived a reasonable suspicion. But this does not seem to be the case here. The learned Magistrate in his order of September 29, expressly says that he as Deputy Commissioner ordered the Police to arrest the accused on August 27, and that he considered that the action taken by him was purely of an executive nature. Mr. Chatterjee has drawn our attention to a certified copy of an application filed by one Syed Hossein on September 13, 1934, but we are not satisfied that the Police in this case effected the arrest on anything except the order of the Deputy Commissioner. Nor does it appear that even if the arrest were by the Police on their own responsibility, the latter provision in s. 23 of the Indian Extradition Act was followed and the detention of the prisoner was made subject to the restrictions as under s. 10 of the Act. In these circumstances it seems to us that the arrest and the detention of petitioners were not in accordance with the provisions of the Extradition Act, and therefore we must direct that the prisoners be released.

It has been brought to our notice by Mr. Chatterjee that subsequent to the issue of this Rule, a warrant was received by the Deputy Commissioner on October 13, 1934, and another warrant was received by the Chief Presidency Magistrate on October 24, 1934. We understand that neither of these warrants has yet been executed. It is open to the Magistrate to take action with reference to s. 7 and to the subsequent sections, including s. 18 of the Act and the treaty provisions relating to the surrender of prisoners. In so far as the present proceedings on which this Rule is based are concerned, we direct that the petitioners be released.

Henderson, J.—I agree.

D. *Petitioners released.*

(1) 37 Ind. Cas 57; 20 C W N 1233; A I R 1917 Cal. 253; 18 Cr. L J 73; 44 C 76.

ALLAHABAD HIGH COURT

Criminal Revision Application No. 38 of 1934
March 7, 1934
BAJPAI, J.
DIP CHAND—APPLICANT
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 358—Accused using criminal force on grave and sudden provocation—Conviction under s. 358—Propriety of—Criminal Procedure Code (Act V of 1898), s. 237—Charge under s. 353, Penal Code—Conviction under s. 323—Legality of—Quaere.

Where the accused uses criminal force on grave and sudden provocation given by the patrol who had abused the accused the conviction ought to be under s 358, Penal Code.

Quære—Whether a man who has been charged under s. 323, Penal Code, cannot be convicted on the failure of the prosecution to prove that the person against whom the criminal force was used was a public servant, under s. 323, Penal Code, because the latter is not a minor offence as compared to the former.

Mr. *B. S. Darbari*, for the Applicant.

The Assistant Government Advocate, for the Crown.

Order.—The accused, Dip Chand, was charged under s. 353, Penal Code, the allegation being that he gave two or three slaps to a canal patrol. The facts are that the Naib Tahsildar had gone to village Malikpur to make collections of land revenue and canal dues. Certain persons including the accused represented to the Naib Tahsildar that the entries regarding the canal dues were incorrect. The Tahsildar sent for the canal patrol who started explaining the entries. Dip Chand and others objected and said that they were incorrect. Upon this the canal patrol abused Dip Chand and Dip Chand gave him two or three slaps.

The learned Magistrate came to the conclusion that the patrol was not a public servant in the execution of his duty at that moment. He, therefore, did not convict Dip Chand under s. 353, Penal Code, but convicted him under s. 323, Penal Code, and sentenced him to pay a fine of Rs. 100. This conviction has been upheld by the learned Judge who has also maintained the sentence.

In revision it is argued that a man who has been charged under s. 323, Penal Code, cannot be convicted on the failure of the prosecution to prove that the person against whom the criminal force was used was a public servant, under s. 323, Penal Code, because the latter is not a minor offence as compared to the former. It is argued that s. 353, Penal Code, comprises only assault or criminal force whereas s. 323, Penal Code, comprises hurt which implies causing bodily pain, disease or infirmity. It is contended that assault is mere gesture and criminal force is mere motion whereas hurt implies the giving of bodily pain The maximum punishment provided under s. 352, Penal Code, the maximum may extend to Rs. 1,000 whereas under s. 352, Penal Code, the maximum punishment is three months' and the fine may extend to Rs. 500. This, it is said, also shows that the man who is said to cause assault or use criminal force alone is deemed to commit a minor offence as compared to the man who caused hurt. It is not necessary for me to give an authoritative decision on this point although I am inclined to think that there is considerable force in the argument of learned Counsel for the applicant. The accused, however, can be convicted under s. 352, Penal Code, for having assaulted or used criminal force to the canal patrol. It is said that the accused used criminal force on grave and sudden provocation given by the patrol who had abused the accused and, therefore, the conviction ought to be under s. 358, Penal Code. I agree with this contention. The finding of the learned Magistrate which has not been set aside by the Judge is that the patrol abused Dip Chand. Dip Chand thus had received grave and sudden provocation and no wonder he lost his temper and gave the patrol two or three slaps. Under the circumstances it is contended that the sentence of Rs. 100 fine is too severe. I agree with this submission.

The result is that I change the conviction of the accused to one under s. 358, Penal Code, and sentence him to a fine of Rs. 15. The fine, if paid, will be refunded to the extent of Rs. 85.

N. *Sentence reduced.*

LAHORE HIGH COURT

Second Civil Appeal No. 233 of 1934
July 10, 1934
BECKETT, J.
SHIV NARAIN SINGH—JUDGMENT-DEBTOR—APPELLANT
versus
MUNI LAL—DECREE-HOLDER—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 60 (1) (g)—Ala jagirs in Ambala District—Whether political pensions—Exemption from attachment.

Jagirs known as "*ala jagirs*" in the Ambala District, should be treated as political pensions and

so exempt from attachment in execution of decrees within the meaning of s. 60 (1), Civil Procedure Code. *Secretary of State* v *Khem Chand-Jey Chand* (1), referred to.

S. C. A. from an order of the District Judge, Ambala, dated November 23, 1933.

Messrs. *Nanak Chand* and *Tek Chand*, for the Appellant.

Messrs. *Amar Nath Chona* and *Faqir Chand*, for the Respondent.

Judgment.—The only question for decision in these three second appeals (C. A. Nos. 233, 234 and 235 of 1934), is, whether the *jagirs* known as "*ala jagirs*' in the Ambala District, should be treated as political pensions and so exempt from attachment in execution of decrees. The history of these *jagirs* is fully given in the judgment of the learned District Judge and need only be summarised here. According to his findings these *jagirs* were assigned to a number of small independent rulers, who had shared between them the sovereignty of Cis-Sutlej States prior to the British accession in 1849. These States had already been brought under protection in 1809 when a guarantee was given that they would remain in the exercise of the same authority that they had previously enjoyed. In arriving at a decision on the nature of these assignments, the learned District Judge has accepted the definition laid down by a Full Bench of the High Court of Bombay in *Secretary of State* v. *Khem Chand Jey Chand* (1), which runs as follows:

"A fixed periodical allowance or stipend granted, not in respect of any right, privilege, perquisite, or office, but on account of past services or particular merits, or as compensation to dethroned princes, their families, and dependants."

He has found that these assignments are in the nature of fixed periodical allowances, but has held that they were not granted by the British Government and cannot be taken as "compensation to dethroned princes." The *jagirs* in question have accordingly been held to be liable to attachment. There is no dispute as to the facts, and the only question is whether the test given above has been properly applied by the learned District Judge to these facts. The two points on which he has held that the other *jagirs* of the Ambala District failed to comply with the definition have been given above. Firstly it has been held that they cannot be considered compensation to dethroned princes. The chiefs to whom the assignments were originally granted are described as independent rulers and there are frequent references in the authorities on which the lower Court relies to their exercise of sovereign powers. These sovereign powers were taken away from them in 1849 and there is no doubt that they must be regarded as dethroned princes. Secondly, it has been held that the assignments of land revenue were not granted by the British Government and that the *jagirdars* merely continued in enjoyment of the privilege which they had previously enjoyed. Here there seems to be some confusion. What had been previously enjoyed by the chiefs was the rights of raising revenue by any means they pleased. This right was taken away from them and in place thereof they were granted a fixed proportion of the land revenue assessed and collected by the Collectors of the new sovereign authority. This seems to me to be as clear an example of compensation for the loss of sovereign rights as could be found anywhere.

There are three connected appeals. In two of these objection has been taken that the memorandum of appeal is not properly accompanied by copies of the judgment since the final order under appeal was written in the case which was first decided. Each memorandum of appeal contains a note referring to the detailed order which may be taken as a prayer for exemption and I see no reason why such exemption should not be granted. The result is that I accept all the three appeals, holding that the *jagirs* in question are exempt from attachment as political pensions, and return the proceedings to the lower Court with this finding. As the learned District Judge states the question involved is one of difficulty and I leave the parties to bear their own costs throughout.

N. *Appeals accepted.*

(1) 4 B 432.

ALLAHABAD HIGH COURT

Criminal Revision No. 951 of 1934

December 18, 1934

BENNET, J.

GANGA SINGH AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 537—Cross-cases—Joint trial—Irregularity, if cured by s. 537, when no prejudice is caused to accused—Penal Code (Act XLV of 1860), s. 452—Trespass into complainant's house to overawe him so as not to employ a person as priest—Interference with religion—Offence not to be treated lightly.

Although the joint trial of two cross-cases, the prosecution evidence in one of which constitutes the

defence evidence in the other, is an irregularity, it can be cured under s. 537, Criminal Procedure Code, if no prejudice has thereby been caused to the accused. *Sukhai Ahir* v. *Emperor* (2) and *Madat Khan* v *Emperor* (4), relied on. *Allu* v. *Emperor* (1), dissented from.

An interference with religion by preventing a person from employing another as his priest by forcibly entering the former's house to overawe him is not to be treated lightly. A fine of Rs. 50 is not excessive.

Cr. R. from an order of the Sessions Judge, Kumaun, dated September 18, 1934.

Mr. *H. P. Sen*, for the Applicants.

The Assistant Government Advocate, for the Crown.

Judgment.—This is an application in Criminal Revision on behalf of six persons who were sentenced by a Magistrate under ss. 147 and 452, Indian Penal Code to 3 months' rigorous imprisonment and Rs. 50, fine. On appeal the lower Court altered the conviction to one under s. 143, Indian Penal Code, and set aside the sentence of imprisonment and maintained the sentences of fine. The case for the prosecution was that the accused objected to the complainant, Udai Singh, employing a Brahman called Khiali Ram as his priest and because they had out-casted Khiali Ram, the accused in a body forcibly entered the house of the complainant in order to overawe the complainant and threatened to beat the complainant and complainant ran away. The first ground which is argued was No. 3 in revision that the joint trial of the applicants along with the accused in the cross-case filed by Ganga Singh was illegal as prosecution evidence in one constituted the defence evidence in the other. There were these two cross-complaints before the Magistrate, one by Udai Singh and the other by Ganga Singh. The Magistrate has stated that the prosecution in the one case is the defence in the other. The evidence produced by the parties does both for the prosecution in one and defence in the other case excepting that Udai Singh, etc., have examined three more witnesses in defence besides the nine witnesses examined as prosecution witnesses. Ganga Singh and others have examined six witnesses both for the prosecution purposes and in their defence. The Counsel in each case agreed to this course. It is not alleged for the applicants in revision that there was any irregularity in the recording of the prosecution evidence in the present case or that there was any defence evidence which they desired to produce and which was not allowed. Their objection merely is a technical one. Learned Counsel relied on the case of *Allu* v. *Emperor* (1), where it was held that any irregularity of this nature could not be cured under s. 537, Criminal Procedure Code. No other ruling was produced in support of the contention. On the other hand it has been held by a Bench of this Court in *Sukhai Ahir* v. *Emperor* (2), in a similar case that it was not necessary for the Court to interfere unless it were shown that the accused were prejudiced by the procedure. Similar rulings were given in *Queen-Empress* v. *Chandra Bhiniya* (3). There was also a case reported in *Madat Khan* v. *Emperor* (4), in which there were two trials but the evidence for the prosecution was similar to a substantial extent in each case and each party was a witness against the other. The High Court of Lahore gave one judgment and the Sessions Court had also given one judgment. Their Lordships of the Privy Council found that although technically it might have been better to keep the evidence entirely distinct and to have delivered two separate judgments, no injustice has followed from what was done. Therefore, there was no interference. Following this ruling, I consider that it has not been shown in the present case that there was any prejudice to the case for the accused. I consider that no ground for interference in revision has been made out on this point.

The next point which was argued was in regard to the charge which is as follows:—

"That you on or about May 19, 1934, at village Pastora War with the common object or overawing Udai Singh who had sent for and employed Khialiram a Brahman against your wishes at *Puja* that he offered that day, forcibly entered the house of Udai Singh and there created a riot and thereby committed an offence punishable under ss. 147 and 452, of the Indian Penal Code, and within my cognizance."

The learned Sessions Judge was under the impression that the Magistrate intended to make charges under two sections and he made comments on the form of the charge. The ground of revision is No. 4 that the charge did not disclose the common object. In s. 141 (*third*) Indian Penal Code, it is laid down that a common object of an unlawful assembly may be to commit any mischief or criminal trespass or other

(1) 75 Ind. Cas. 980; A I R 1924 Lah. 104; 4 Lah. 376; 6 Lah. L J 103; 25 Cr. L J 68.

(2) 114 Ind. Cas. 721; 26 A L J 176; L R 9 A 16 Cr; 9 A I Cr. R 122; 50 A 457; A I R 1928 All. 593; 30 Cr. L J 337.

(3) 20 C 537.

(4) 100 Ind. Cas. 126; 8 Lah. 193; A I R 1927 P C 26; (1927) M W N 68; 31 C W N 393; 28 P L R 167; 52 M L J 441; 28 Cr. L J 254; 25 L W 724; 29 Bom. L R 784; 7 A I Cr. R 350.

offence. The prosecution evidence shows that there was a common object of the accused persons to commit the offence of s. 452, Indian Penal Code—house trespass—after preparation for hurt or assault. I consider that the charge sheet is intended to show that the offence of riot was committed with a common object of committing the offence of s. 452, Indian Penal Code. I do not consider that the charge sheet is in any way defective. I do not think that the Magistrate intended to frame separate charges under each section and he has not in fact framed separate charges. Some further comments were made by the Sessions Judge on the use of word 'overawe' and he considers that the word 'overawe' can only be applied to s. 141 (*first*) where the overawing is of certain branches of Government, etc. But the word 'overawe' is tantamount to the word 'intimidate' which enters into the definition in s. 441, Indian Penal Code of the offence of criminal trespass which is involved in the offence of s. 452, Indian Penal Code. The use of the word, therefore, was correct, I find nothing in this ground.

The next ground argued was ground No. 5 that the Magistrate, having disbelieved the prosecution evidence in material particulars, ought to have discredited the entire evidence and acquitted the applicants. The alleged disbelief is contained in a passage which says:

"It is possible that there has been some exaggeration as there often is in these cases, and the story that the appellants, or some of them entered the complainant's house and threatened his son and daughter-in-law may not be altogether reliable."

In s. 3 of the Indian Evidence Act there are definitions of 'proved', 'disproved' and 'not proved'. The finding of the learned Sessions Judge clearly means merely 'not proved'. The ground of revision turns this round into an allegation of 'disproved.' This is incorrect. The ground as stated does not correspond to the judgment. I, therefore, consider this ground has nothing in it.

Ground No. 6 argued that the fines of Rs. 50 on each accused were severe as no force was used. But the accused are found to have committed the offence of s. 143, Indian Penal Code, being members of an unlawful assembly the punishment for which may extend to 6 months' rigorous imprisonment and it has also been found that the common object of the unlawful assembly was to prevent Udai Singh from employing Khiali Ram as his priest. An interference in this manner with religion is not to be treated lightly. Accordingly I do not think that the amount of fine is excessive.

The last point argued was ground No. 2 of the revision which states that the refusal of the trying Magistrate to supply the defence after the framing of the charge sheet with even such copies of the statements of witnesses to the Police as had been examined for the prosecution resulted in failure of justice. No such point was taken in the grounds of appeal to the lower Court. The judgment of the lower Court on page 3 shows that an objection was orally made to the lower Court that a general application was made before the trial commenced for copies of all statements made by witnesses from whom the Police had enquired and that the application was refused. The Court said that it would have been better, if the Magistrate had allowed the request. But that application was not one which could come under s. 162 as it had not been made when the witnesses were called for the prosecution. Learned Counsel has not been able to find the application mentioned to the lower Court but he finds an application of August 2 which was the date when the prosecution evidence was heard and when the charge sheet was framed. That application asks for copies of the statements of such prosecution witnesses whose evidence has been recorded. The order of the Magistrate was that the diary should be sent for and it would then be seen of which witnesses statements had been recorded. There was thus no refusal by the Magistrate on the application in question. Learned Counsel has not been able to find any further reference in the record to this matter. It is possible that when the statements were produced, they proved to be of no use to the defence and copies were not required. There is nothing to show that when the diary came, the Magistrate made any refusal. I consider that no ground for revision has been made out. In the result I dismiss this application in revision.

N. *Appeal dismissed.*

MADRAS HIGH COURT
Special Bench

Civil Revision Petition No. 1026 of 1931
December 19, 1934
BEASLEY, C. J.
RAMESAM AND KING, JJ.

CHAVA RAMANAYUDU—PLAINTIFF—PETITIONER
versus
SURYADEVARA SEETHARAMYYA AND OTHERS—DEFENDANTS—RESPONDENTS

Madras Abkari Act (I of 1886)—Abkari license—Clauses 27, 37—Partnership to carry on abkari business standing in another's name—Sanction of Collector not obtained—Suit to recover money advanced to licensee—Maintainability—Legality of partnership.

The effect of cl. 27 of the General Sales Notification issued under the Madras Abkari Act is that a partnership in an *abkari* business is prohibited unless the previous permission of the Collector has been obtained.

The first defendant successfully bid a toddy shop at an auction on July 30, 1927, and the license was issued in his name on October 1, 1927. Meanwhile on August 17, 1927, the plaintiff advanced a sum of money to the first defendant on a promissory note under an agreement to work as partners. No application was ever made for the issue of the license in the name of the partners nor was the permission of the Collector obtained;

Held, that the object with which the money was lent being for the purpose of carrying on a business in contravention of the law and opposed to public policy, the plaintiff was not entitled to recover on the note. *Nalan Padmanabhan* v. *Badrinadh Sarda* (1), *Marudamuthu Pillai* v. *Rangaswami Mooppan* (2), *Behari Lall Shah* v. *Jagadish Chunder Saha* (3) and *Raghunath Lalman* v. *Nathu Hirje Bhata* (4), relied on. *Appadurai Mudali* v. *Murugappa Mudali* (5), *Nanna Vazhmuni Mudali* v. *Nathamuni* (6) and *Narayanamurthy* v. *Subramanyam* (7), distinguished.

C. R. P. under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, Tenali, in S. C. S. No. 63 of 1930, dated December 22, 1930.

Mr. *V. Govindarajachari*, for the Petitioner.

Messrs. *V. V. Choudhury* and *G. S. Venkatarama Iyer*, for the Respondents.

Beasley, C. J.—This was a suit on a promissory note. The plaintiff was one Chava Ramanayudu and there were four defendants. The amount claimed was Rs. 907-13-0. The 1st defendant admitted the claim but pleaded non-liability on the ground that the plaintiff exonerated him. The 3rd defendant was *ex parte*. Defendants Nos. 2 and 4 pleaded that the suit promissory note was for advances to be made by the plaintiff for carrying on a toddy shop which they (the defendants and the plaintiff) agreed to work as partners after the 1st defendant had already become the successful bidder for the year 1927-28 and that the partnership was an illegal partnership. The learned Subordinate Judge finds as a fact that the promissory note was executed for advances to be made by the plaintiff for the partnership, that the plaintiff was a partner and that the 1st defendant who obtained the license was not shown to have obtained the Collector's permission to work the shop in partnership. In view of these findings he dismissed the suit.

The question before the learned Subordinate Judge was and before us is, whether the partnership was formed for the purpose of doing something which was either illegal or opposed to public policy. The General Sales Notification issued annually by the Commissioner of Excise under the Abkari Act, laying down the general conditions applicable to all *abkari* and opium licenses, by cl. 27 provides:

"No privilege of supply or vend shall be sold, transferred or sub-rented without the Collector's previous permission. Nor, if the Collector so orders, shall any agent be appointed for the management of any such privilege without his previous approval".

This condition is of one those which is set out in the Abkari license. Clause 37 provides for the penalties to be inflicted on the infraction of any of the conditions of the license by a licensee or by any person in his employment. The effect of cl. 27 is that a partnership in an *abkari* business is prohibited unless the previous permission of the Collector has been obtained. In *Nalan Padmanabhan* v. *Badrinadh Sarda* (1), the facts were that *A* and *B* were farmers of opium revenue under Government. They obtained a license from the Collector for the sale of opium subject to the condition, among others, that they should not sell, transfer or sub-rent their privileges without the permission of the Collector (similar to cl. 27 in this case). *A* and *B*, without the sanction of the Collector, entered into an agreement with *C* by which they admitted him as a partner in the opium business. *C* having brought a suit for dissolution and winding-up of the business, it was held that the agreement was void and the suit was not maintainable, the effect of the agreement between *A* and *B* on the one hand and *C* on the other being to enable *C* to sell opium without a license, an act directly forbidden by the

(1) 10 Ind. Cas. 126; 35 M 582; 9 M L T 459; 21 M L J 425; (1911) 1 M W N 371.

Opium Act and made penal by it, that the contract being intended to enable *C* to do what was forbidden by law was unlawful and void, that the provisions of the Abkari and Opium Acts are not intended merely to protect public revenue but the prohibitions contained in them are based on public policy and that the agreement was also illegal as it amounted to a transfer by *A* and *B* of their privilege to *C* in violation of the condition against transfer subject to which the license was granted. In the course of the judgment, reference was made to *Marudamuthu Pillai* v. *Rangaswami Mooppan* (2),

"The provisions of the Abkari Act, as whole, show clearly that every person carrying on *abkari* business as a principal must be licensed".

and

"to hold that a person who has not got a license could still be a partner with one who has a license, and as such partner, carry on the business with or without the other would enable the unlicensed partner to evade the liabilities intended by the law to be cast on persons carrying on *abkari* business".

Other cases in point are *Behari Lall Shah* v. *Jagadish Chunder Saha* (3), and *Raghunath Lalman* v. *Nathu Hirje Bhate* (4). For the petitioner, however, reliance was placed upon the following cases, *viz.*, *Appadurai Mudali* v. *Murugappa Mudali* (5) *Nanna Vazhmuni Mudali* v. *Nathamuni* 122 Ind. Cas. 342. (6), *Narayanamurthy* v. *Subramanyam* 114 Ind. Cas. 655 (7). In the first case, which is a decision of Odgers and Madhavan Nair, JJ., the plaintiff lent a sum of money on a promissory note to a partnership. The partnership consisted of defendants Nos. 1 to 3 and took a contract of sale of *arrack* in certain shops and borrowed money from the plaintiff for the purpose of that business. First of all, in the opinion of Odgers, J., the business was not an illegal one on the ground that there was no sufficient material for the Court to so decide and, even on the supposition that the condition of the license was that all the names of of the licensees or persons concerned in that particular business by way of partnership must appear on the face of the license, it was a question whether on the evidence of the plaintiff he could be said to be *particeps criminis* in the carrying on of the illegal trade because, assuming that there was a prohibition in the terms of the license, there was no evidence that the plaintiff ever knew of it. The important distinguishing feature in that case is that the plaintiff was not a member of the partnership but was a stranger lending money to it. In the present case, the plaintiff was a partner and, if the partnership had for its object the carrying on of an illegal business, the plaintiff as a member of that partnership cannot be heard to deny that he had guilty knowledge. In the second case, which is a decision of Anantakrishna Ayyar, J., the plaintiff was a partner and sued for the taking of the partnership accounts between him and defendants Nos. 1 and 2 and for the recovery of the amount to be found due to him on the taking of the accounts. The suit was decreed but on appeal the Subordinate Judge reversed that decree and remanded the suit to the District Munsif for a fresh trial and whilst doing so suggested that the District Munsif might at the re-trial consider a new ground pressed before him, namely, that the partnership was illegal. At the re-trial, the 1st defendant put in an additional written statement contending that the partnership in question was illegal and opposed to public policy. The District Munsif found that the contract of partnership was illegal and opposed to public policy. The District Judge on appeal reversed the decision and the case came up on second appeal before Anantakrishna Ayyar, J. The facts were that the 1st defendant held a license to sell toddy in a shop and according to him took the plaintiff as a partner in respect of that business. The license was not produced by the 1st defendant. The District Judge held that, since the license relating to the year in question had not been produced, there were no grounds for saying that the contract of partnership was illegal. The license, however, was produced in second appeal and was sought to be admitted in evidence, but Anantakrishna Ayyar, J. refused to allow it to be admitted in evidence at that stage. Anantakrishna Ayyar, J. held that it was essential that the license granted to the 1st defendant should be produced and that the view of the District Judge was correct in stating that at the time the partnership was formed the 1st defendant had not begun to trade in toddy and had no stock which he made the joint property of all the three partners.

(2) 24 M 401.
(3) 31 C 798; 8 C W N 635.
(4) 19 B 626.
(5) 96 Ind. Cas. 91; 23 L W 709; 51 M L J 12; A I R 1926 Mad. 772.
(6) 122 Ind. Cas. 342; Ind. Rul. (1930) Mad. 310; A I R 1930 Mad. 361.
(7) 114 Ind. Cas. 655; A I R 1928 Mad. 1197.

In his view the partnership could not be held to be illegal as there was nothing *prima facie* illegal in such a partnership under the Abkari Act. The decision in this case appears to me to have turned on the absence of proof that the partnership was entered into for an illegal purpose. In the last case, which is a decision of Reilly, J., it was held that although a partnership entered into in contravention of a license or of any rule under the Abkari Act is void and the licensee of a toddy or *arrack* shop cannot legally take a partner without sanction, yet it is not illegal for several persons to enter into a partnership for the purposes of bidding at a toddy shop auction and if successful in the auction of obtaining a license and of carrying on a toddy shop business. Reilly, J., holds that it is not illegal for persons to enter into a partnership for the purpose of carrying on a toddy shop business or one for which they hope at a future date to obtain a license. That is quite true if it is intended at a future date to get a license in the names of all the partners. That is not the fact here as a few dates will show. The 1st defendant was a successful bidder at the auction on July 30, 1927, and it was in his name that the license was issued on October 1, 1927. The promissory note is dated August 17, 1927, and the money was, therefore, lent to the partnership after the 1st defendant had become the successful bidder at the auction and was the person in whose name the license would be issued. The 1st defendant in his evidence said that the two months' deposit of Rs. 140, was paid by him about August 20. After the license was issued, it is plain from the evidence that the partnership carried on the business. The permission of the Collector required by cl. 27 of the General Sales Notification was neither obtained nor applied for and there is evidence that the plaintiff himself was collecting the money of the business and keeping accounts. One thing, therefore, is perfectly clear, namely, that an illegal partnership was actually being carried on but it is contended that at the date of the commencement of the partnership it has not been shown that it was formed for an illegal purpose. The plaintiff in his evidence did not say that it was intended to apply for the Collector's permission for a transfer of the license or to carry on the business in partnership nor was there any cross-examination of the defence witness with regard to this point. The question is whether the learned trial Judge was right in drawing the inference from the facts that it was the intention of the partnership to carry on the business in the name of the 1st defendant alone. In my view, that is the only fair inference. The partnership was formed after the 1st defendant had become the successful bidder. The license would, therefore, be issued in his name. No application had been made for the issue of the license in the names of the partners. In fact no such license was ever asked for nor was the permission of the Collector obtained and the fair inference is that the object of the partnership was to do that which it did in fact do, namely, carry on the business in contravention of cl. 27. On the facts of this case, I am satisfied that the District Munsif properly decided this case: and in the result this Civil Revision Petition must be dismissed with costs.

Ramesam, J.—I agree.

King, J.—I agree.

A. *Petition dismissed.*

ALLAHABAD HIGH COURT

First Civil Appeal No. 139 of 1933

February 18, 1935

THOM AND IQBAL AHMAD, JJ.

ISHWAR DAYAL *alias* NAND LAL, MINOR, THROUH HIS MOTHER *Musammat* SHARBATI—PLAINTIFF - APPELLANT

versus

Seth AMBA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS

Court Fees Act (VII of 1870), Sch. II, Art. 17 (iii)—Suit for declaration that hypothecation bond was not enforceable and family property mortgaged was not saleable in execution of mortgage decree—Prayer, if merely for declaratory decree—Court-fee payable.

Where a suit was brought for a declaration that a hypothecation bond executed by the plaintiff's father in favour of the defendant was unenforceable and that the family property mortgaged by that deed was not saleable in execution of an *ex parte* decree for sale obtained by defendant on the basis of the said mortgage deed:

Held, that the relief for a declaration that the family property was not saleable in execution of the decree was a declaratory relief and not a consequential relief and as the plaintiff merely prayed for a declaratory decree, for purposes of court-fee, the case was governed by Art. 17 (*iii*), Sch. II, Court Fees Act. *Kalu Ram* v. *Babu Lal* (1), distinguished.

[Case-law discussed.]

F. C. A. from the decision of the Subordinate Judge, Bulandshahr, dated February 14, 1933.

Mr. *Chandra Bhan Agarwalla*, for the Appellant.

Dr. *N. C. Vaish*, for the Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiff-appellant for a declaration that the hypothecation bond, dated January 2, 1925, executed by defendant No. 2, the father of the plaintiff, in favour of defendant No. 1, was unenforceable and that the family property mortgaged by that deed was not saleable in execution of an *ex parte* decree for sale obtained by defendant No. 1 on the basis of the said mortgage deed. The plaintiff also prayed for a declaration that the purchase made by defendant No. 3 in execution of simple money decree ..is null and void as against the plaintiff and the property in dispute."

The plaintiff valued the suit for the purpose of jurisdiction at Rs. 10,000 and paid a court-fee of Rs. 20. The plaintiff's case was that there was no legal necessity for the execution of the mortgage deed by defendant No. 2, and the amount, if any, borrowed by defendant No. 2 was spent by him on "improper acts and immoral purposes". It was recited in the plaint that defendant No. 1 obtained an *ex parte* decree on the basis of the mortgage deed without impleading the plaintiff The relief as against defendant No. 3 mentioned above was based on the allegation that the purchase made by her was in execution of a simple money decree with respect to a debt that was taken by defendant No. 2 for immoral purposes.

Defendant No. 1, alone contested the suit and one of the pleas raised by him was that *ad valorem* court-fee on Rs. 10,000 was payable and the plaint was insufficiently stamped. The learned Subordinate Judge relying on the Full Bench decision in the case of *Kalu Ram* v. *Babu Lal* (1) accepted the contention of the defendants and called upon the plaintiff to pay *ad valorem* court-fee on Rs. 10,000. He granted time to the plaintiff for making good the deficiency in the Court-fee, but as the plaintiff failed to make good the deficiency, he dismissed the suit with costs.

The plaintiff has come up in appeal to this Court and it is contended on his behalf that the court-fee paid on the plaint was sufficient and the view taken by the Court below was erroneous. In our judgment this contention is well-founded.

The question whether the court-fee paid is or is not sufficient must be decided with reference to the relief prayed for in the plaint irrespective of the fact whether the omission of the plaintiff to ask for some further or consequential relief would or would not entail the dismissal of the suit in view of some statutory provision, *e. g.*, the provisions of s. 42 of the Specific Relief Act. At the stage at which the consideration of the question of court-fee arises the Court is not concerned with the question as to what reliefs should have been prayed for by the plaintiff. It has to confine its attention to the reliefs contained in the plaint and to see whether the court-fee paid by the plaintiff is or is not sufficient in accordance with the provision of the Court Fees Act. Further, in the decision of the question of court-fee the Court has to bear in mind the principle that a fiscal enactment is to be strictly construed and in favour of the subject.

It is contended on behalf of the plaintiff-appellant that as the plaintiff merely prayed for a declaratory decree, the case fell within the purview of Art. 17 (*iii*) of the Second Schedule to the Court Fees Act, which provides a fixed court-fee of Rs. 10 for a plaint "to obtain a declaratory decree where no consequential relief is prayed". It is contended, on the other hand, on behalf of the defendant respondents that the prayer contained in the plaint was not only for a declaratory decree but also for a consequential relief and the plaintiff was therefore, liable to pay *ad valorem* court-fee on the amount (Rs. 10,000) in accordance with s. 7 (*iv*) (*c*) of the Court Fees Act that provides about court-fee in suits to obtain a declaratory decree or order where consequential relief is prayed.

The Full Bench decision in *Kalu Ram* v *Babu Lal* (1) mentioned above has no application to the case before us. In that case the relief prayed for in the plaint was for the cancellation of an instrument and also for the cancellation of the compromise, the preliminary decree and the final decree in a certain suit and it was held by this Court that the court-fee payable was under the residuary articles, Sch. I, Art. I of the Court Fees Act. We are not concerned in the present case with any prayer for the cancellation of any instrument or for the cancellation of any decree. The only question that we have to consider is whether the reliefs sought by the plaintiff were mere declarator reliefs or there was also a consequ-

(1) 139 Ind. Cas. 32; (1932) A L J 684; A I R 1932 All. 485; Ind. Rul. (1932) All. 518; 54 A 812 (F B).

ential relief prayed for by the plaintiff. In the Full Bench case mentioned above it was observed that the words "consequential relief" in s. 7 (*iv*) (c) mean some relief which follows directly from the declaration given and "cannot be claimed independently of the declaration as a substantive relief". Similarly in *Mirza Hyder Ali Sahib* v. *Hussain Raza Sahib* 24 Ind. Cas. 316 (2) it was held that consequential relief means a subatantial and immediate remedy in accordance with the title that the Court has been asked to declare. In short, consequential relief means some relief which is a necessary corollary to the principal declaratory relief prayed for by the plaintiff. Instances of consequential relief within the meaning of s. 7 (*iv*) (c) of the Court Fees Act, are furnished by cases in which, over and above the prayer for declaration of his title, the plaintiff asks for some relief by way of injunction, or possession, or appointment of receiver, or for partition of his share, etc. Such cases must be distinguished from cases in which two or more declaratory reliefs are prayed for by the plaintiff. It may be that one of such declaratory reliefs can in one sense be said to follow from the other declaratory relief claimed by the plaintiff but this fact alone cannot make a declaratory relief a consequential relief within the meaning of s. 7 (*iv*) (c) of the Court Fees Act. Instances of suits in which more than one declaratory relief were prayed for and each of the reliefs was held to be an independent declaratory relief, are furnished by the decisions of this Court in *Brij Gopal* v. *Suraj Karan* (3), *Lakshmi Narain Rai* v. *Dip Narain Rai* (4) and *Abdul Samad Khan* v. *Anjuman Islamia, Gorakhpur* (5). In the last mentioned case the plaintiff prayed for a declaration that a deed of gift executed by a certain person in favour of the defendant was illegal and inaffectual as against the plaintiff and that the defendant had no right to interfere with the possession of the plaintiff. It was held that a court-fee of Rs. 20 paid on the plaint was sufficient as the relief claimed in the plaint involved two declarations.

In the case before us the declaratory relief prayed for by the plaintiff that the hypothecation bond was unenforceable and that the family property was not saleable in execution of the decree obtained by defendant No. 1, was really only one declaratory relief for the simple reason that on the date of the suit the hypothecation bond had merged in the decree and had ceased to exist, and it was the apprehension of the family property being sold in execution of the decree that led the plaintiff to institute the suit and to claim the relief noted above. Indeed, if he had simply asked for a declaration that the property was not saleable in execution of the decree, that relief could, on proof of the facts alleged by the plaintiff, have been granted to him. The relief for a declaration that the family property was not saleable in execution of the decree was, therefore, a declaratory relief and not a consequential relief. The plaint was, therefore, sufficiently stamped and the Court below was wrong in dismissing the suit.

For the reasons given above we allow this appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit it to its original number and to try and dispose it of according to law. Costs here and hitherto shall be costs in the cause and shall abide the result.

N. *Appeal allowed.*

(2) 24 Ind. Cas. 316.

(3) 141 Ind. Cas. 112; (1932) A L J 466; A I R 1932 All. 560; Ind. Rul. (1933) All. 45.

(4) 148 Ind. Cas. 152; (1933) A L J 311; A I R 1933 All. 350; 55 A 274; 6 R A 650.

(5) 149 Ind. Cas. 802; (1933) A L J 1537; A I R 1934 All. 56; 6 R A 978.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Criminal Revision No. 105 of 1934

May 30, 1934

MIR AHMAD, A. J. C.

WAJID ALI SHAH AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY

Punjab Municipal Act (III of 1911), s 221—Bona fide dispute of ownership—Obstruction offered to contractor—Held, no offence committed.

Where there exists a *bona fide* dispute regarding the ownership of a plot of land between the Municipal Committee and the accused and it is doubtful whether the Committee could direct its contractor to pave the disputed land and thus constitute him a person legally authorised under s. 221, Punjab Municipal Act, the accused will not be guilty of offence under s. 221 of the Act, if he, on the contractor proceeding to pave the site, tells the contractor that the property belonged to him and should not be paved.

Cr. R. from an order of the Additional Sessions Judge, Peshawar, dated December 5, 1933.

Mr. *Nur Elahi*, for the Municipal Committee.

Mr. *S. Raja Singh*, for the Crown.

Judgment.—On February 8, 1933, Municipal Committee, Peshawar, filed a complaint against S. Wajidalishah and Sajjadalishah under s. 221, Punjab Municipal Act. This was filed by the "*perokar*" of the Municipal Committee whose name is Zahirali. He stated that a plot of land shown in the plan in red was the property of the Municipal Committee and that the Municipality had ordered it to be paved by Bhola Khan contractor. The accused obstructed the contractor in the discharge of his functions and have, therefore, committed an offence under the foregoing section. He requested that they should be punished. The plan attached to this complaint shows in red a trapezodical piece of land in front of the house of the accused which abuts on what is shown in the plan to be a lane on three sides. There was no allegation in the complaint that it is the part of the lane itself.

Zahirali appeared personally as a witness at the trial and Bhola Khan also gave evidence as such. It is significant in Bhola's statement that the obstruction offered to him consisted only of the assertion by the accused that the property belonged to them. Bhola has not definitely stated that he was physically obstructed or anything else was done to deter him from carrying out his duties. The impression one gets from his statement is that directly the accused objected to the pavement being made on their ground, the contactor ceased to continue his work. Hiralal, Municipal draftsman, proved the plan. Sarbiland Shah, an enemy of the accused with whom a third brother of the accused has been bound down, was produced to prove that the land belonged to the Municipality. The accused have produced Akbarali Khan, retired D. S. P. and S. Abdull Shah, Municipal Commissioner. Both of them have averred that the land in dispute is a raised platform which had always been in the possession of the accused and their father.

The Magistrate convicted both the accused and sentenced them to pay a fine of Rs. 4 each. The accused went up in revision to the Sessions Court. The Second Additional Sessions Judge rejected the revision and they have now petitioned this Court against the order of the Magistrate. The petition was admitted on the ground that there was a *bona fide* dispute between the Municipal Ccmmittee and the petitioners as regards the ownership of the site in question, and it was doubtful whether in the circumstances, the Committee could direct the contractor to pave the disputed land and thus constitute him a person legally authorized under s. 221. I have heard the Counsel for the Municipal Committee and the learned Government Advocate has been kind enough to assist me by giving his views which he put very ably before me.

After giving my careful consideration to the arguments at the bar and the facts of the case, I have come to the conclusion that the convictions of the accused cannot stand. All that the Municipal Committee can say in its favour is that the site in question is entered in the Municipal plan. Abdulla Shah, a respectable Municipal Commissioner, has stated before the Court that the Municipal plan had many a time been found to be incorrect and that lands, which were entered in it were often admitted to be the property of the members of public by the Committee. No act of ownership or possession has ever been exercised by the Municipality on this land so far as the record goes. On the other hand, I have no reasen whatsoever to reject the weighty evidence of Haji Akbar Ali Khan, D. S. P. and of S. Abdulla Shah that this is a raised platfrom and has been used by the accused and their father for a very long time. The very face that the Committee has not shown it in the plan to be a part of the street convinces me that the evidence of the two defence witnesses is reliable and true.

The learned Government Advocate has very ingeniously suggested that this is an open space and therefore under s. 3 (13) (*a*) and (*b*) it should be taken to be a public street. He then proceeded to argue that under s. 56 (*g*) the Municipality had every right to pave this street and when in exercising that right it ordered the contractor to do so, the accused in obstructing that contractor were guilty of the offence under s. 221, Punjab Municipal Act. I am of opinion that this is not a public street, and the Municipal Committee had no jurisdiction over it. So far as this record goes, this raised platform has been in the possession of the accused and there is a *bona fide* dispute between the Municipality and the accused over its proprietorship. The fact that the accused applied to the Municipality for permission and were refused does not *per se* create any

equities in favour of the Committee. To my mind it is clear that the Municipal Committee has attempted, just like a private individual, to vindicate its right to this plot of land by sending a contractor to forcibly pave it. In the circumstances there was nothing wrong in the accused telling the contractor that it was their property and should not be paved. It is doubtful whether this statement in itself was enough to constitute obstruction, but in view of my finding as regards the nature of the accused's possession and the *locus standi* of the Committee to order pavement, this point does not necessarily arise. The reasoning of their Lordships of the Bombay High Court in *Emperor* v. *Shivdas Onkar*, 19 Ind. Cas. 507 (1) applies to this case. I therefore, set aside the convictions of the accused and direct that the fines, if paid, should be refunded.

I must note that there is nothing on this record to show that the Municipal "*perokar*" was personally authorized by the Municipality to file the complaint. There is no document on the file to show me that it had been done. I have brought it to the notice of the Municipal Counsel. He states that there is some authority, although the statement of "*perokar*" that only the Secretary authorized him to prosecute the accused indicates the contrary. If the "*perokar*" was not personally authorized to prosecute these accused, the complaint did not lie under s. 228, Punjab Municipal Act.

D. *Petition allowed.*

(1) 19 Ind. Cas. 507; 14 Cr. L J 251

ALLAHABAD HIGH COURT

Civil Revision Application No. 520 of 1934

January 24, 1935

NIAMAT-ULLAH, J.

Musammat HUMELA—DEFENDANT—APPLICANT

versus

ORI SAHOO—PLAINTIFF AND ANOTHER—DEFENDANT—OPPOSITE PARTIES

Contract—Plaintiff's debtor executing bona in favour of defendant—Money left with defendant to pay plaintiff—Suit on failure to pay—Agreement to lend—Enforceability of—Decree against defendant, if can be passed.

Where a person who was indebted to the plaintiff executed a bond in favour of the defendant leaving the entire amount with the latter for payment to the plaintiff and on not receiving payment, the plaintiff instituted a suit on the basis of the bond :

Held, that in substance the plaintiff's case, so far as it was based on the bond, amounted to a claim for enforcement of the defendant's promise to advance money in future, and as an agreement to lend money not being specifically enforceable, no decree could be passed against the defendant. *Dwarkanath* v. *Piya Nath* (1), distinguished.

C. R. A. against the decree of the Small Cause Court Judge of Gorakhpur, dated February 5, 1934.

Mr. *Shiva Prasad Sinha*, for the Applicant.

Mr. *K. Verma*, for the Opposite Parties.

Judgment.—This revision has arisen from a Small Cause Court suit, brought by the plaintiff-respondent against Ram Raj, defendant No. 1, and *Musammat* Humela Kunwar, defendant No. 2, for recovery of Rs. 516-14-0 principal and interest. The lower Court decreed it against defendant No. 2, who has applied in revision.

Defendant No. 1 owed Rs. 1,473 to the plaintiff. On July 4, 1930, he satisfied his liability by handing over some cattle delivering some grain and by executing a mortgage deed for Rs. 977. There remained a balance of Rs. 350, for which he executed a bond in favour of defendant No. 2, leaving the entire amount with the latter for payment to the plaintiff. The plaintiff's case is that defendant No. 2 did not make any payment.

The suit was not contested by defendant No. 1. The defendant No. 2, however, filed a written statement in which it was pleaded that there was no privity of contract between her and the plaintiff and a suit for enforcement of the bond, executed in favour of defendant No. 1, could not be maintained against her. There was also a plea of payment. This plea has not been accepted by the lower Court whose finding on this point has not been impeached before me.

As regards the principal question, the lower Court found in favour of the plaintiff. His case was that defendant No. 2 had personally undertaken to pay to him Rs. 350, for which defendant No. 1 executed a bond in her favour, and that relying on her assurance the plaintiff returned certain bonds, duly endorsed, to defendant No. 1. The only evidence in the case consisted of the testimony of the plaintiff and the husband of defendant No. 2. The latter, who is said to be a '*pardanashin*' lady, did not give her own evidence. The plaintiff supported his case in its entirety and deposed that the transaction was carried through at one sitting, at which the plaintiff-defendant No. 1, defendant No. 2 and her husband were

present. Defendant No. 2's husband, Ram Kumar, contradicted the plaintiff so far as the presence of his wife was concerned. He said that he represented his wife on that occasion and she was not present. The lower Court has given no finding on the question of fact whether defendant No. 2 was present and gave the assurance relied on by the plaintiff. The learned Judge apparently thought that the lady has effectively represented by her husband. He observed:

"Whether the defendant No. 2 was present at the time of the settlement or she was represented at that time by her husband, it is clear that the plaintiff and defendant No. 1 and *Musammat* Humela or her husband all took part in the settlement and it was expressly agreed by *Musammat* Humela or her husband to pay Rs. 350 to the plaintiff."

If *Musammat* Humela had been present and had given an undertaking to the plaintiff for the payment of Rs. 350, for which she took a bond from defendant No. 1, and acting on that undertaking the plaintiff had given a discharge to defendant No. 1 returning certain bonds that were at that time outstanding, a case of estoppel might have been made out against defendant No. 2. The lower Court has not given any finding as to whether defendant No. 2 gave such an undertaking to the plaintiff.

The same result will undoubtedly be arrived at if her husband had the requisite authority to act on her behalf and gave an undertaking to the plaintiff. If the plaintiff's evidence that defendant No. 2 was herself present be discarded, there is no evidence on the record to prove that defendant No. 2 had authorised her husband not only to take a bond from defendant No. 1 but also to enter into a collateral arrangement with the plaintiff undertaking to pay to him the sum of Rs. 350, for which defendant No. 1 was to execute a bond in her favour. In the absence of such evidence it is impossible to hold defendant No. 2 liable for the consequences of any verbal undertaking given by her husband on her behalf. This controversy narrows down to the simple question whether defendant No. 2 was personally present, as is alleged by the plaintiff. It is a case of oath against oath: and as the plaintiff is highly interested in the result of this suit, I do not think it safe to accept his uncorroborated testimony on this point. The lower Court apparently felt the same hesitation and therefore did not definitely find that defendant No. 2 was present. In these circumstances, I hold that so far as the plaintiff's case is based on the undertaking alleged to have been given by defendant No. 2, it must fail.

As regards defendant No. 2's liability to the plaintiff arising from the bond executed by defendant No. 1 in favour of defendant No. 2, I think the plaintiff cannot succeed. Defendant No. 2 did not advance anything at the time when the bond in question was executed. She promised to pay it in future. In substance, the claim is to enforce a promise to advance money. It has been held in numerous cases that an agreement to lend money is not specifically enforcible. In substance, the plaintiff's case, so far as it is based on the bond, amounts to a claim for enforcement of defendant No. 2's promise to advance money in future. The lower Court has relied upon *Dwarkanath* v. *Piya Nath* 36 Ind. Cas. 792 (1). That case is clearly distinguishable as it was a transaction of sale of immovable property. Money was left in the hands of the purchaser for payment to a third person. It was held that the purchaser was, to that extent, a trustee and, therefore, the third person, who should be regarded as a beneficiary, was entitled to enforce payment. It was not a case which could be considered to be one for enforcement of an agreement to lend.

The plaintiff claimed the sum in suit from both the defendants. The lower Court decreed it against defendant No. 2 only. In view of the findings which I have recorded, no decree can be passed against defendant No. 2; but the plaintiff is undoubtedly entitled to a decree against defendant No. 1 who in turn can sue defendant No. 2 for damages for breach of promise to lend. Accordingly I allow this application, set aside the decree of the lower Court and decree the plaintiff's suit against defendant No. 1, who is a respondent in this case but has not entered appearance. I am clearly of opinion that in circumstances like those appearing in this case, a decree can be passed against defendant No. 1 under O. XXI, r. 33, Civil Procedure Code. The plaintiff shall have his costs from defendant No. 1 in both Courts. Defendant No. 2 shall bear her own costs in both Courts.

N. *Application allowed.*

(1) 36 Ind. Cas. 792; 22 O W N 279; 27 O L J 483.

LAHORE HIGH COURT

First Civil Appeal No. 218 of 1932
January 14, 1935.
TEK CHAND AND SKEMP, JJ.
KARAM SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
Musammat RAM KAUR AND OTHERS
—DEFENDANTS AND OTHERS—PLAINTIFFS
—RESPONDENTS

Custom (Punjab)—Succession—Gujranwala District—Non-ancestral property of father—Daughters and collaterals of 7th degree—Preferential heir.

A daughter is entitled to succeed to the non-ancestral property of her father in preference to collaterals of the 7th degree and collaterals of the 7th degree cannot possibly be regarded as "near male kindred." C. A. No. 1518 of 1931 decided on November 29, 1934, followed

First Appeal from the decree of the Senior Subordinate Judge, Gujranwala, dated November 7, 1931.

Messrs. *N. C. Mehra* and *L. M. Datta*, for the Appellants.

Messrs. *Vishnu Datta*, *Shamair Chand* and *Qabul Chand*, for the Respondents.

Skemp, J.—On April 10, 1924, *Musammat* Ram Kaur, a widow gifted the property in dispute to her daughters in the following shares:—

Musammat Nihal Kaur one half; *Musammat* Ishar Kaur and *Musammat* Harnam Kaur one-half in equal shares.

The plaintiffs who are collaterals in the 7th degree of *Musammat* Ram Kaur's deceased husband Sham Singh, brought the present suit for a declaration that *Musammat* Ram Kaur had no right to give the property to her daughters and that the gift would not affect the plaintiffs' reversionary rights. The Senior Subordinate Judge of Gujranwala has dismissed the suit on the findings: (1) that the property in suit is non-ancestral, and (2) that the rights of collaterals in the 7th degree as heirs are postponed to those of daughters.

It should be explained that *Musammat* Ram Kaur was married twice, first to Teja Singh by whom she had *Musammat* Nihal Kaur and *Musammat* Ishar Kaur and secondly to Sham Singh who is the father of *Musammat* Harnam Kaur. It is not clear on the record whether she has alienated the property both of Teja Singh and Sham Singh or the property of Sham Singh only, but this fact is not material for the decision of the present dispute, because, in any event, the question is whether collaterals in the 7th degree are to be preferred to daughters because the gift is an acceleration of the right of succession of daughters.

Mr. Mehra the appellants' Counsel attacks the finding of the learned Senior Subordinate Judge on the ground that the property in suit is ancestral; and he has invited our attention to a statement made by *Musammat* Harnam Kaur one of the defendants on November 8, 1930, that the land in dispute is ancestral. But she also stated that the plaintiffs were not collaterals of her father and therefore did not mean to admit that the land was ancestral *qua* the plaintiffs but used the term, loosely meaning that her father had not bought the land. For the rest the plaintiffs never asserted even in their plaint that the land was ancestral; and on the other hand, its ancestral character was denied in the written statements of all the defendants. Beyond this the appellants' Counsel was unable to show us anything on the record leading to the conclusion that the land in dispute was ancestral.

On the second question Mr. Mehra relies on the answer to question No. 47 in the Customary Law of the Gujranwala district. The question is:—

"Under what circumstances are daughters entitled to inherit:

(1) the immovable or ancestral

(2) the movable or acquired property of their father.

Do they inherit in the presence of sons or widow, or near male kindred of the deceased ? If so, then to what extent and for how many generations is the right of near male kindred superior to that of daughter?

Answer. In no case can daughters inherit. "Then there are qualifications that among certain tribes male descendants and collaterals have preferential treatment up to the fourth degree.

This question and answer have very recently been the subject of consideration by a Division Bench in Civil Appeal No. 1518 of 1931, decided on November 29, 1934. In this ruling which also dealt with a case between collaterals of the 7th degree and daughters, it was held after careful consideration that a daughter was entitled to succeed to the non-ancestral property of her father in preference to collaterals of the 7th degree and it was pointed out that collaterals of the 7th degree could not possibly be regarded as "near male kindred". The previous rulings of this Court and judgments of Judges in the Gujranwala district were considered and with that judgment I am, with respect, in entire agreement. No evidence was led in the present case to show that collaterals of

the 7th degree have a better right to succeed to non-ancestral property than daughters and I am of opinion that the judgment and decree of the learned Senior Subordinate Judge should be maintained and that this appeal should be dismissed with costs.

Tek Chand, J.—I agree.

D. *Appeal dismissed.*

MADRAS HIGH COURT
Special Bench

Referred Case No. 1 of 1933
December 10, 1934
BEASLEY, C. J., RAMESAM AND KING, JJ.

RAI (BARI) STREE—PETITIONER
versus
RASSINGA NAIK BISSINGH STREE
—COUNTER-PETITIONER.

Divorce—Desertion—Husband bringing concubine into family house—Wife leaving house—Husband, whether guilty of desertion.

In order to constitute desertion, there must be a cessation of cohabitation but there is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation and does so by leaving his wife and that of a husband who with a like intent obliges his wife to separate from him.

Where the husband brought a concubine into the house where his wife was living with him and the wife had accordingly to leave the house:

Held, that the conduct of the husband amounted to desertion. *Dickinson* v. *Dickinson* (1) and *Sickert* v. *Sickert* (2), followed.

Case referred by the Agent to the Governor, Ganjam, at Chatrapur in his letter Ref. No. O. P. No. 1-32 dated February 17, 1933, under s. 9 of the Indian Divorce Act for decision of the High Court (M. C. No. 1 of 1929, on the file of the Court of the Sub-Divisional 1st Class Magistrate and Special Assistant Agent, Ballinguda Division).

Mr. *C.P. Connell*, Counsel, *Amicus Curiae.*

Order:—This case has been referred to us by the Agent to the Governor in Ganjam. It relates to a petition for divorce on the grounds of adultery and desertion under s. 10 of the Indian Divorce Act. The facts of the case are that the petitioner separated herself from her husband on account of his adultery with a concubine in his house. On these grounds she was awarded maintenance by a Criminal Court on July 29, 1929, at the rate of Rs. 2 a month. This order the respondent failed to comply with only paying Rs. 13-3-0 to the petitioner from that date and no more. The learned Agent to the Governor says that, although for judicial separation adultery or desertion may form a reasonable cause, both these facts have to exist before a dissolution can be ordered but he is of the opinion that the husband's living in adultery does not imply that he deserted the petitioner but that the fact that he failed to maintain her even after a decision of a competent Court may imply desertion. In his opinion it does do so. The decision of the High Court is requested upon this latter point. The learned Agent to the Governor has, if I may say so, overlooked the real point or the point of importance which is whether the conduct of the husband brought about a cessation of cohabitation between himself and his wife. If it did, then in law that is desertion. In the present case, the husband brought a concubine into the house where his wife was living with him and she had accordingly to leave the house. There is clear authority in English decisions that such conduct as that by a husband amounts to desertion. The first of these decisions is *Dickinson* v. *Dickinson* (1), a case exactly in point. There a wife petitioned for the dissolution of her marriage on the grounds of adultery and desertion. The parties were married in 1866 and in 1872 the husband brought to the house a woman with whom he had immoral relations. The wife refused to admit her, but the husband insisted. The wife remained a short time in the house and then told her husband that either she or the woman must leave the house. The husband told her that she might do as she liked, but that the woman would remain. The wife thereupon left, and never afterwards cohabited with her husband. It was held that the husband was guilty of deserting his wife. Another case is *Sickert* v. *Sickert* (2). In that case the observations of Gorell Barnes, J., on p. 282* are very much in point. He there says.

"In order to constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other. In most cases of desertion the guilty party actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end

(1) (1890) 62 L T 330.
(2) (1899) P D 278; 68 L J P 114; 81 L T 495; 48 W R 268.

*Page of (1899) P. D.—[*Ed.*]

to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him". In view of these two decisions the real question here must be answered by saying that the petitioner has proved that the respondent, her husband, deserted her. The case must, therefore, be sent back to the Agent to the Governor at Ganjam to be disposed of in the light of the opinion which we have given. We are very much obliged to Mr. Connell for the valuable assistance he has given us as *amicus curiae*.

A. *Case sent back.*

LAHORE HIGH COURT

First Civil Appeal No. 2234 of 1928
February 20, 1934
ADDISON AND AGHA HAIDAR, JJ.
RAGHUNATH DAS—DEFENDANT—APPELLANT
versus
GAJPAT RAI AND OTHERS—PLAINTIFFS—RESPONDENTS

Record of Rights—Entry of the name of mahant *in column of owner, whether a proof that property is his private property—Religious endowment.*

The Revenue Authorities can only function through a human agency. They cannot enter into any transaction with a legal entity like an idol installed in a *thakardwara*. The name of the *mahant* or trustee is, therefore, generally entered in the column of owner, so that the Revenue Authorities may have dealings with him in all those matters which concern the *thakardwara* or the religious institution in question. Therefore, the mere entry of the name of the *mahant* in the column of owner does not prove that the property was his private and exclusive property. *Court of Wards* v. *Illahi Bakhsh* (1), relied on.

F. C. A. from the decree of the Senior Sub-Judge, Hoshiarpur, dated July 19, 1928.

Messrs. *Badri Das* and *Basant Krishen*, for the Appellant.

Messrs. *J. N. Aggarwal* and *J. L. Kapur*, for the Respondents.

Agha Haidar, J.—This is a defendant's appeal arising out of a suit instituted under the provisions of s. 92, Civil Procedure Code. The Senior Subordinate Judge, Hoshiarpur, substantially decreed the plaintiffs' suit. The defendant has come up to this Court in appeal. In the village Pur Hiran, District Hoshiarpur, there is a *thakardwara* to to which are attached certain buildings, vacant sites, lands and occupancy rights. The original founder of this *thakardwara* was one Dhanna Ram Bairagi who lived somewhere at the end of the 18th century. He had one son, namely, Baldev Das, who was also his disciple. Bhagwan Das and Brahm Das were Dhanna Ram's two other disciples. On the death of Dhanna Ram, Bhagwan Das became *mahant*. Bhagwan Das was succeeded by his *Chela* Bajrang Das on whose death the defendant Raghu Nath Das succeeded as *mahant*.

The plaintiff' case was that the *thakardwara* was a public trust of a religious nature, that the defendant was not a man of good character, that he had unlawfuly alienated certain houses and lands appertaining to the *thakardwara*, that he did not look after the *thakardwara* properly, with the result that the building had fallen down for want of repairs and that in other respects the institution was being neglected on account of the incompetency of the present *mahant*, namely, the defendant. They therefore, as worshippers of the said *thakardwara*, asked the Court (1) to remove the present *mahant* from the *thakardwara*, *smadhs*, lands and houses attached to it, (*ii*) to appoint a new *mahant*, (*iii*) to take accounts from the defendant and to make over the property to the new *mahant*, and (*iv*) also to draw up a scheme for future administration and governance of the *thakardwara*. The pleas raised in defence by the defendant, Raghu Nath Das, briefly were that the *thakardwara* was not a public religious trust, that the temple had been built by Bhagwan Das for his personal use and the plaintiffs had no right or interest in the same. As regards the lands attached to the *thakardwara* the defendants' case was that they were the personal property of his predecessors and he could do whatever he liked with them. He therefore pleaded that the suit should be dismissed as the plaintiffs had no *locus standi* to assail his position as the *mahant* of the institution.

Verious issues were framed and evidence was led by the parties. The Senior Subordinate Judge recorded the following findings: (1) that Dhanna Ram orginally installed the idols in a *kacha* room and called it a temple; (2) that Bhagwan Das made the temple *pakka* and acquired lands by means of subscriptions which he managed to collect from his disciples and benefactors, and (3) that the *thakardwara* was a public religious institution and the members of the public had every right to go there for the purpose of their devotions. The allegations in the plaint that the defendant was a man of bad character were not accepted by the Senior Subordinate Judge who gave the defendant an

opportunity of continuing as a *mahant* of the institution on condition that he gave security for a sum of Rs. 500 for keeping proper accounts and looking after the institution in an efficient manner. The defendant, however, failed to give security, with the result that he was removed and a Committee was appointed with authority to nominate a *mahant*.

The learned Counsel for the defendant-appellant argued that the institution was not a public religious trust, but that it was the private and the exclusive property of the defendant and his predecessors-in-interest. There is, however, abundant evidence on the record to show that Dhanna Ram who was originally an ordinary *zemindar* became a *bairagi* and built a modest *kacha thakardwara* many years ago. But the *mahant* who considerably improved the old *thakardwara* and raised it to its present position of importance was Bhagwan Das. He used to travel extensively in foreign parts and bring home sums of money with which he built the present *thakardwara* and his devotees later on endowed lands for the benefit of the institution. The *thakardwara* is open to all pious Hindus who believe in idol worship and they can freely enter it in order to perform their religious exercises and devotions. A certain amount of criticism was directed by the learned Counsel to the evidence of some of the witnesses for the plaintiffs who differed as to the exact names of the idols which are to be found installed in the *thakardwara*. This criticism is not of much importance because, in my judgment, a Hindu who believes in idol-worship, enters a *thakardwara* where there are *thakars* or idols installed and performs his devotions there without being an authority on the Hindu pantheon.

Apart from the plaintiffs' oral evidence, which cannot be ignored in the present case, there are some important admissions by Bhagwan Das which put the defendant completely out of Court. As already mentioned, Bhagwan Das used to go out to southern India and his absence from the *thakardwara* used to be fairly prolonged on these occasions. In the year 1879 when he returned to the village Pur Hiran, he found that his co-disciple Brahm Das in his absence had transferred certain lands in favour of one Imam Bakhsh. In fact Imam Bakhsh instituted a suit for possession of the land which had been transferred to him by Brahm Das. Bhagwan Das was impleaded as a defendant. In his written statement (Ex. P-11), Bhagwan Das, pleaded that Brahm Das was his co-disciple and that he (Bhagwan Das) was the *mahant* at *Mauza* Pur Hiran. He further pleaded that Brahm Das or his disciple was not competent to alienate the land in his presence, he being the *mahant*, that the land did not belong to him and was not his personal property and that therefore, he (the *mahant*) had no power to alienate it. According to him the *mahant*, who served the temple, could only enjoy the income of the property. In his statement before the Court he reiterated the allegations contained in his written statement by stating that the land in question was attached to the *thakardwara* at Pur Hiran and that Brahm Das, to whom he had entrusted the management of the *thakardwara* when going away on pilgrimage, had no authority to make any alienation. The case was tried by an Extra Assistant Commissioner and his finding was that the land was in reality attached to the *thakardwara*, that the defendants were *bairagi fakirs* and that Bhagwan Das was the *mahant*. This judgment (Ex. P-7), though not *inter parties*, is an important piece of evidence under the provisions of s. 13, Evidence Act. But the real importance of this litigation lies in the clear and unambiguous admissions made by Bhagwan Das, the predecessor-in-title of the defendant and the *mahant* for the time being, who stated that the lands belonged to the *thakardwara* and that his co-disciple Brahm Das had no right whatsoever to transfer it. This is not a mere statement lightly made without giving any serious thought to it. It was an admission embodied in a formal and solemn document like a written statement and, therefore, great weight attaches to it.

On May 29, 1880, Bhagwan Das instituted a suit for possession of a certain land which had been transferred by Brahm Das, his co-*chela*, while he had gone to Madras on a pilgrimage. In the petition of plaint (Ex. P-6), Bhagwan Das again clearly alleged that the land was *dharmarth* property attached to the *thakardwara* and was, therefore, inalienable. He made the position clear that even the *mahant* was not competent to alienate such a property. There was a similar suit instituted at the same time by Bhagwan Das for the possession of another parcel of land. In his petition of plaint. (Ex. P-10) in that suit Bhagwan Das made similar allegations. Both these suits were compro-

mised. The importance, as already mentioned, of these suits lies in the fact that Bhagwan Das made clear admissions against his own interests as regards the character and status of the institution and the lands attached to it.

The defendant led a certain amount of rebutting evidence and his learned Counsel invited the attention of the Court to various portions of it. This evidence so far as it purports to prove the private character of the *thakardwara* is, to say the least, decidedly of an inferior type and reliance cannot be placed upon it. The evidence that no one either from Pur Hiran or the neighbouring villages comes to worship in the *thakardwara* cannot be accepted for a moment and the further evidence that the sole congregation of the *thakardwara* consists of two or three families living in the village Jhaj, which is 12 miles away, is too absurd to be believed. The defendant also placed reliance upon certain Revenue Records. It may be mentioned in this connection, that the landed property attached to the *thakardwara* is situate in three villages. The land of which the *thakardwara* is the proprietor lies in the village, Pur Hiran, while there are some occupancy rights in the villages of Dholanwal and Shergarh. Exhibit D-99 is an extract from the annual *jamabandi* papers for 1876 *Fasli* relating to *Mauza* Pur Hiran. The headings in this document are missing and, therefore, it is impossible to attach any value to the entries which are to be found in column 3 and on which reliance is placed.

At p. 143 of the paper book there is an extract from the *Khewat Khatauni* papers attached to the Settlement Record of 1884 relating to *Mauza* Pur Hiran. This relates to the second regular settlement and the name of Bhagwan Das is undoubtedly entered in the column of owner. But this entry, having regard to the history of the institution as disclosed by the evidence on the record, is not of much importance. The Revenue Authorities can only function through a human agency. They cannot enter into any transaction with a legal entity like an idol installed in a *thakardwara*. The name of the *mahant* or trustee is, therefore, generally entered in the column of owner, so that the Revenue Authorities may have dealings with him in all those matters which concern the *thakardwara* or the religious institution in question. An identical point was raised in *Court of Wards* v. *Ilahi Bakhsh* (1), where their Lordships at p. 305* observe as follows :

"In the ownership column Mukhdum Hussain Bakhsh now represented by the Court of Wards is entered as owner. It would seem that he was properly entered as owner, being trustee and custodian of the shrine of the said Mai Pak Daman."

Therefore, the mere entry of the name of Bhagwan Das in the column of owner does not prove that the property was his private and exclusive property. The same remark applies to the entries relating to the other two villages, namely Dholanwal and Shergarh. Reliance was placed upon a certain *muafi* grant which is to be found at pp. 162 and 163 of the printed record. They show that somewhere in the year 1847 certain *muafi* lands were granted to Brahm Das, *chela* of Dhanna Ram, by one *Sardar* Dayal Singh. The area covered by these grants was 7 *ghumaons*. Now, the area in suit is 27 *ghumaons* and it is impossible, on the record as it stands, to trace these 7 *ghumaons* to the 27 *ghumaons*. It is an admitted fact that the defendant, during the course of his management, has alienated certain lands and houses and it is quite possible that this area of 7 *ghumaons* might have been transferred by him. On this point, however, it is impossible to express any decisive opinion and all that is necessary to observe is that the defendant-appellant has failed to show as to what happened to these 7 *ghumaons* which form the subject-matter of the *muafi* grant of 1847. This is all the evidence on the record.

In my judgment, the learned Senior Subordinate Judge was justified in his findings and I would accordingly affirm his decree and dismiss this appeal with costs throughout.

Addison, J.—I agree.

D. *Appeal dismissed.*

(1) 17 Ind. Cas. 744; 40 O 297; 40 I A 13; 27 P R 1913; 1 P W R 1913; 11 A L J 265; 13 M L T 318; (1913) M W N 270; 17 C L J 360; 83 P L R 1913; 15 Bom. L R 436; 25 M L J 61 (P C).

*Page of 40 O.—[*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT

Criminal Revision Application No. 410 of 1934
January 22, 1935
NIYOGI, A. J. C.
BADE *alias* BASORE—APPLICANT
versus
EMPEROR—NON-APPLICANT

C. P. Land Revenue Act (II of 1917), s. 201—Proceedings under, by Revenue Court—Affidavit in evidence accepted—Legality—Applicability of Civil Procedure Code to Revenue proceedings—Civil Procedure Code (Act V of 1908), Pre-amble, O. XLI, O. XIX, r. 2.

Revenue Courts are Courts of civil judicature in matters arising under the Land Revenue Act.

Any application made under s. 201 of the C. P. Land Revenue Act is an original proceeding which must be governed by the procedure laid down in the Civil Procedure Code. Similarly the provisions of O XLI, of the Civil Procedure Code apply to the proceedings in appeal before any Revenue Court. Under O. XIX, r. 2, it is permissible for any party to give evidence upon any application by affidavit, although the Court may at the instance of either party, order the attendance for cross-examination of the deponent. Thus as the Revenue Court is a Court of civil judicature it is authorised to receive affidavits in evidence.

[Case-law referred to].

Cr. Rev. App. against an order of the Sessions Judge, Jubbulpore, dated August 20, 1934.

Mr. *W. Datta*, for the Applicant.

Mr. *Vivian Bose* Standing Counsel, for the non-Applicant.

Order.—The applicant Bade *alias* Basore was convicted for the offence of filing a false affidavit in the course of a revenue appeal before the Deputy Commissioner by the City Magistrate, Jubbulpore, and was sentenced to three months' rigorous imprisonment and a fine of Rs. 50 under s. 199, Indian Penal Code. His appeal before the Sessions Judge, Jubbulpore, was dismissed. He moves this Court in revision.

The false affidavit which he had filed in the Court of the Deputy Commissioner in Revenue Appeal No. 27 of 1933-34 had been sworn by him before Mr. Kunte, First Class Magistrate, and the appeal before the Deputy Commissioner had arisen out of proceedings under s. 201 of the C. P. Land Revenue Act. The question that is mainly argued before me in this revision is that the Revenue Court was not authorised by law to receive the affidavit as evidence, as the Civil Procedure Code did not apply to the proceedings. I cannot accede to this contention since the preamble to the Civil Procedure Code itself purports to lay down the procedure for all the Courts of civil judicature. Revenue Courts are undoubtedly Courts of civil judicature in matters arising under the Land Revenue Act. In numerous cases it has been held that the procedure of the Revenue Courts must be governed by the Civil Procedure Code: see *Nilmoni Singh Deo* v. *Taranath Mukerjee* (1), *Chaitan Patgosi Mahapatra* v. *Kunja Behari Patnaik* (2), *Madho Prakash Singh* v. *Murli Manohar* (3), and *Veeraswamy* v. *Manager, Pittapur Estate* (4). Section 141 of the Civil Procedure Code, 1908, itself lays down that the procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. As far back as 1895 their Lordships of the Privy Council ruled that the proceedings spoken of in this section, which was then s. 447 of the Code of 1882, referred to original matters in the nature of suits such as proceedings in probate, guardianship and so forth. Any application made under s. 201 of the C. P. Land Revenue Act is an original proceeding which must be governed by the procedure laid down in the Civil Procedure Code, Similarly the provisions of O. XLI of the Civil Procedure Code would apply to the proceedings in appeal before any Revenue Court. Under O. XIX, r. 2, it is permissible for any party to give evidence upon any application by affidavit, although the Court may at the instance of either party, order the attendance for cross-examination of the deponent. Thus it appears to me clear that as the Revenue Court is a Court of civil judicature, it is authorised to receive affidavit.

The conviction under s. 199, Indian Penal Code, is, therefore, perfectly in order. The sentence is by no means severe.

The application is dismissed.

D. *Application dismissed.*

(1) 9 C 295.
(2) 11 Ind. Cas. 207; 38 C 832; 15 C W N 863; 14 C L J 284
(3) 5 A 406.
(4) 26 M 518.

LAHORE HIGH COURT

Second Civil Appeal No. 1715 of 1931
March 29, 1934
HILTON, J.

FATEH SINGH AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

MAUJ RAI AND OTHERS—DEFENDANTS —RESPONDENTS

Court Fees Act (VII of 1870), Sch. I, Art. 1—Costs—Appeal against order for costs—Court-fee, if payable—Civil Procedure Code (Act V of 1908), s. 100—Discretion as to costs exercised by lower Court—No legal principle involved—Second appeal, competency of.

Ordinarily no court-fee is payable upon costs entered in the decree against which an appeal is presented, but where apart from and independently of any other relief which the appellant seeks, he seeks distinct relief on the ground that by the decree under appeal the costs of the parties have not been properly assessed or apportioned, the value of such distinct relief should be reckoned as part of the subject-matter in dispute for the purpose of the First Schedule of the Court Fees Act *Kewal Singh* v. *Makrand Singh* (1), relied on.

Where the Courts below have exercised their discretion and no legal point or matter of principle is involved, the High Court will not interfere in second appeal.

S. C. A. from the decree of the District Judge, Montgomery, dated May 23, 1931.

Mr. *Nawal Kishore*, for the Appellants.

Mr. *Anant Ram Khosla*, for the Respondents.

Judgment.—Tulsi Das and Nand Lal defendants Nos. 19 and 20, appealed to the District Judge by appeal No. 145 of 1930 on two grounds, namely, (1) that the decision of the trial Court as against them was wrong in respect of the disputed *kothris* and (2) that the costs of Rs. 404-2-0 awarded against them should be reduced by being calculated on a value of Rs. 200 instead of on a value of Rs. 2,300. The District Judge dismissed the appeal in respect of the first prayer but accepted it in respect of the second prayer and reduced the costs payable by Tulsi Ram and Nand Lal from Rs. 404-2-0 to Rs. 35-2-3.

Tulsi Ram and Nand Lal, however, had not paid court-fees on the amount of the relief sought in respect of costs and it is urged in this second appeal on behalf of the plaintiff that they could not on this account be given this relief by the District Judge. I think this contention is correct. As held in *Kewal Singh* v. *Makrand Singh* 3 Ind. Cas. 584 (1), ordinarily no court fee is payable upon costs entered in the decree against which an appeal is presented, but where apart from and independently of any other relief which the appellant seeks, he seeks distinct relief on the ground that by the decree under appeal the costs of the parties have not been properly assessed or apportioned, the value of such distinct relief should be reckoned as part of the subject-mater in dispute for the purpose Sch. I, Court Fees Act. The present case seems to fall clearly under the latter portion of the above dictum. It follows that defendants Nos. 19 and 20 could not be granted relief in respect of their costs not having paid court-fee on that part of the subject-matter.

The plaintiff also requests that the other defendants should have been made to share in the responsibility for paying his his costs but this matter was in the discretion of the Courts below and no legal point or matter of principle is involved and I will not interfere on second appeal.

The plaintiff also contends that his own appeal No. 7 of 1931 should not have been rejected by the District Judge with costs, as he declares that it was not contested by the other side. This appears to be correct. The costs awarded against him in this connection are Rs. 20 for Pleader's fee but it is not denied before me that no Pleader appeared to argue that appeal against the plaintiff. This error should, therefore, now be rectified.

Accordingly, I accept this second appeal of the plaintiff and setting aside the judgment and decree of the District Judge, dated May 23, 1931, in appeal No. 145 of 1930, I restore the judgment and decree of the Senior Subordinate Judge, Montgomery, dated November 17, 1930. Costs of appeal No. 145 of 1900 in the District Judge's Court to be borne by the parties. I also modify the decree of the District Judge dated May 23, 1931, in appeal No. 7 of 1931 and direct that the parties to that appeal should pay their own costs. The costs of the appellant in this Court will be borne by the respondents Tulsi Ram and Nand Lal, defendants Nos. 19 and 20.

N. *Order accordingly.*

(1) 3 Ind. Cas. 584; 12 O C 171.

MADRAS HIGH COURT
Special Bench
Referred Case No. 11 of 1932
December 13, 1934
BEASLEY, C. J., RAMESAM AND KING, JJ.
KALAPATI PEDA PITCHAMMA
AND ANOTHER - PETITIONERS
versus
CHIRUVELLA PEDAMUNEYYA
(MINOR) AND ANOTHER—RESPONDENTS

Court Fees Act (VII of 1870), Sch. II, Art 6—Provincial Small Cause Courts Act (IX of 1887), s. 17—Security bond furnished for setting aside ex parte decree in Small Cause suit—Proper stamp duty.

A security bond furnished under the proviso to s. 17 of the Provincial Small Cause Courts Act, falls within Art. 6 of Sch. II of the Court Fees Act and requires a stamp of eight annas only.

An order setting aside an *ex parte* decree in a Small Cause suit is an order made under the Civil Procedure Code and even in cases where the petitioner tenders a security along with the very first application without a previous order of the Court the security bond falls within Art 6 of Sch II of the Court Fees Act. *In re District Munsif of Tiruvellur* (1), *Amirthammal* v. *Maddala Karan* (2) and *In re: Reference from the Munsif, Fourth Court, Habibganj* (3), referred to.

R. C. stated under Art. 6 of Sch. II of the Court Fees Act by the Additional District Munsif of Nellore *re* security bond filed in the application to set aside the *ex parte* decree in S. C. S. No. 56 of 1932.

Mr. *Kasthuri Seshagiri Rao*, *Amicus Curiae*.

Ramesam, J.—This matter comes up on reference by the Additional District Munsif of Nellore on account of a difference of opinion between him and the Court-fee Examiner.

The facts out of which this reference arises are these. A Small Cause decree was passed *ex parte* for Rs. 155-10-0. The defendant then put in a petition to set aside the *ex parte* decree and filed along with it a security bond executed by a surety for the performance of the decree. It looks as if the security bond was not originally stamped at all, but, when the petition came before the Court, the Court ordered the petitioner to affix the usual court-fee stamp of 8 annas to the security bond which was the practice of that Court. The decree has been set aside and the suit restored.

The Court-fee Examiner now thinks that the stamp to be affixed to the security bond is not 8 annas stamp under Art. 6 of the Sch. II of the Court Fees Act but a stamp of Rs. 1-4-0 under Art. 15 of the Stamp Act. Now Art. 15 of the Stamp Act does not apply if the Court Fees Act applies. So we have first to see whether Art. 6 of Sch. II of the Court Fees Act applies or not. For the Court Fees Act to apply, two conditions must be satisfied: (1) the order setting aside the *ex parte* decree must be an order passed under the Code of Civil Procedure, and (2) the bond must be given in pursuance of an order made by a Court. It is true that the order was passed under s. 17 of the Provincial Small Causes Courts Act but it seems to me that nevertheless it is also an order passed under the Civil Procedure Code. The Civil Procedure Code is a general Act of procedure applicable to the Civil Courts in India. The Provincial Small Causes Courts Act is a kind of supplemental Act indicating the special procedure to be followed in Small Cause Courts which are Civil Courts. Order L, Civil Procedure Code, gives a list of certain provisions of that Code which are not applicable to Provincial Small Causes Courts. This indicates two things: first that the Civil Procedure Code itself governs the procedure of Small Causes Courts to some extent, and secondly, that the provisions not included in the list apply to Small Cause Courts and one of them is O. IX, r. 13. So, when a Small Cause Court sets aside an *ex parte* decree, it is really under O. IX, r. 13, Civil Procedure Code. Again s. 17 of the Provincial Small Causes Courts Act itself makes the procedure under the Civil Procedure Code applicable to Small Cause Courts. Either way we come to the conclusion that the Provincial Small Causes Courts Act is supplemental to the Civil Procedure Code. But it is said by the Court-fee Examiner that this order is under the proviso to s. 17 and not under the first part of the section. The proviso does not add to the section but only cuts down the very wide discretion which Courts have under O. IX, r. 13, Civil Procedure Code, in setting aside an *ex parte* decree, and in imposing terms upon the petitioner. Under the proviso the petitioner should either deposit the decree amount or give security. No other alternative such as that no condition need be imposed at all is allowed.

I am, therefore, clearly of opinion that the order passed is an order under the Civil Procedure Code.

On account of the somewhat inconsistent and therefore obsecure language of s. 17 of the Provincial Causes Courts Act, there is some difficulty as to the exact procedure to be followed by a petitioner. This obscurity has been caused by the words

"shall at the time of presenting his application, either deposit in Court.....as the Court may direct".

The section contemplates some direction of the Court and the petitioner obeying that direction. The earlier part says that the petitioner shall deposit money or give security at the time of presenting the application. There is an apparent difficulty in obeying both these directions. This obscurity has been noticed by most Courts which deal with this section and deserves being cleared up by the Legislature. Most Courts have attempted a practical solution. It is unnecessary to discuss this matter at great length in this case but it seems to me that when a party applies to set aside an *ex parte* decree it may be regarded as consisting of two parts; first a preliminary application to get a direction of the Court with a view to get the *ex parte* decree set aside, and secondly, after obeying the direction of the Court the actual application to set aside the *ex parte* decree. The second part follows only after obeying the directions of the Court. Looked at in this way the party first applies. Where he deposits money, there is no further difficulty; but where he is unable to do so, he seeks the direction of the Court. The Court may now direct the party either to deposit money or to give security in some form. He should now obey the direction and when the matter again comes up before the Court it is then we have the actual application to set aside the decree and it may be said that he has either deposited money or given security with the application. However, in whatever form the Court's direction is obtained and complied with, the bond would be in pursuance of an order made by Court within the meaning of Art. 6 of Sch. II of the Court Fees Act.

I have indicated the general construction of the Article without reference to the particular facts of the case. In this particular case it would appear that the Court actually asked the petitioner to supply a court-fee stamp of 8 annas. That would certainly be an order of the Court. Even in cases where the petitioner tenders a security along with the very first application without a previous order of the Court, if the Court orders notice on it to the opposite party and passes final orders setting aside the *ex parte* decree having found sufficient cause, it amounts to an order of Court. The acceptance by the Court of a bond previously furnished is equivalent to an order of the Court followed by compliance with it.

In my opinion, therefore, Art. 6 of Sch. II of the Court Fees Act applies to the case and the bond should be stamped with an 8 annas stamp.

So far I have arrived at the conclusion without referring to any decision. My conclusion is in accordance with the Full Bench decision in *In re The District Munsif of Tiruvallur* (1) where it was held that a bond given in pursuance of rules made under the Code should be deemed to be given in pursuance of an order made by the Court. The conclusion in *Amirthammal* v. *Maddala Karan* (2) is also similar so far as the Court Fees Act is concerned. The question of the application of Art. 40 of the Stamp Act does not arise in the present case. The conclusion in *In re Reference from the Munsif, Fourth Court, Habibganj* (3) is also similar. But no question now arises with reference to Art. 57 of the Stamp Act. There is a circular of the Madras High Court (P. Dis. 365 of 1929 dated March 23, 1929) which practically adopts the above conclusion. This must have been overlooked by the Court-fee Examiner. I answer the reference accordingly.

Beasley, C. J.—I agree.

King, J.—I agree.

A. *Reference answered accordingly.*

(1) 20 Ind. Cas. 775; 37 M 17; 24 M L J 637.

(2) 57 Ind. Cas. 184; 43 M 363; (1920) M W N 245; 38 M L J 503; 12 L W 537.

(3) 89 Ind. Cas. 289; 53 C 101; 29 C W N 851; 42 C L J 5; A I R 1925 Cal. 906 (F. B.).

ALLAHABAD HIGH COURT

Criminal Appeal No. 788 of 1934

December 13, 1934

KENDALL, AG. C. J. AND HARRIES, J.

BHAGWAN DAS AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 304, 302, 149—Accused acting without premeditation and on grave and sudden provocation—Accused beating complainant's party—Actual person causing fatal injury not known—Death—Offence—All are liable for offence—Criminal Procedure Code (Act V of 1898), s. 162—Statement of accused to Police during investigation—Whether can be used to discredit accused on account of any contradiction.

Where without premeditation but on grave and sudden provocation, the accused, more than five in number, attacked the complainant's party and beat them and as a result of the injuries received, one of the latter died, and while it was not known who of the

accused party caused the fatal injuries, it was found that though they were not acting in self-defence, they did not take undue advantage or act in a cruel or unusual manner:

Held, that all the accused were responsible for the injuries inflicted but the offence committed was not murder but culpable homicide not amounting to murder and were punishable under ss. 304-149, Pena Code.

It is not proper that the Sessions Judge should cross-examine the accused with a view to confronting them with the statements which they made to the Investigating Officer. Statements made even by witnesses to a Police Officer in the course of an investigation are not permitted to be used in evidence for any purpose, except as provided in s. 162 of the Criminal Procedure Code, that is to say, on the request of the accused the Court shall refer to the written statement and direct that the accused be furnished with a copy of it in order that the witness may be contradicted by the use of this statement. It was certainly never intended that an accused person when being examined by the Court for the purpose of explaining anything in evidence against him should be confronted with the statement which he had made to the Police for the purpose of being discredited on account of any contradiction.

Cr. A. from an order of the Sessions Judge, Budaun, dated September 12, 1934.

Mr. *L. N. Gupta*, for the Appellants.

The Government Advocate, for the Crown.

Judgment.—The seven appellants have been convicted by the learned Sessions Judge of Budaun of an offence under s. 302 of the Indian Penal Code, and Bhagwan Das has been sentenced to death and the other six appellants to transportation for life. They have also been convicted of offences under ss. 147, 325 and 323 of the Indian Penal Code and sentenced to rigorous imprisonment for two years and one year, respectively, under those sections. They have all appealed against their convictions and sentences, and the record has been forwarded by the Sessions Judge for confirmation of the sentence of death passed on Bhagwan Das.

The incident in the course of which Chhote Lal was killed on May 26, 1934, has been described by the witnesses as follows. Chet Ram, in the course of executing a decree against Kallu, his judgment-debtor, attached a house, and Mullu filed an objection to this attachment which was to have been heard in the Court of the Munsif of Budaun on May 26. On that date the decree-holder, Chet Ram, Chhote Lal, the deceased, Ram Chander and Kallu Ahir, with a Civil Court peon, Gulzari, and the *Patwari*, Ram Chander, were going from their village to Court. All of them were seated in a bullock cart, except the *Patwari* who is said to have been walking behind the cart. It was early in the morning, and as they went along they saw a bullock cart on the road in front of them and eight persons standing beside it. The bullock cart is described as going along very slowly. Among the persons who were with the bullock cart in front of them were Mullu, the objector in the execution case, and Kallu, the judgment-debtor.

As to what happened after this, we have two different accounts from the prosecution witnesses: the story told by Chet Ram, Ram Chander *Brahiman* and Kallu Ahir, which is the least favourable to the defence, and the story told by Nur Muhammad and Rafi Uddin, who were undoubtedly in the bullock cart which was accompanied by the accused persons, and who have given a version of the story which in most respects supports the story for the prosecution. According to Chet Ram's story, when he saw the bullock cart of the opposite party in the way he told the driver, Kallu Ahir, to give that cart a wide margin in passing. When his cart drew abreast of the other cart, the appellant Bhagwan Das without any provocation whatever struck a *lathi* blow on Chhote Lal's head, on which the other accused persons attacked all those who were in Chet Ram's bullock cart. The *Patwari* and the peon ran away, but Chet Ram, Kallu Ahir and Ram Chander, son of Moti, were all beaten. Chhote Lal was killed on the spot, and a report was made in the *thana* some five miles away at 9 A.M. This report was made by Chet Ram, and agrees with the evidence which he afterwards gave in Court. The story told by Nur Muhammad and Rafi Uddin, however, is that when Chet Ram's cart drew abreast of the other cart, Chhote Lal told his servant, Kallu Ahir, to give that cart a wide berth, and he also told the accused with an abusive implication to get out of the way, on which Kallu *Brahman*, appellant, also abused Chhote Lal. Chet Ram and Chhote Lal then told their driver, Kallu Ahir, to beat the accused, and a *lathi* fight started. Neither Nur Muhammad nor Rafi Uddin stated in examination-in-chief in the Sessions Court that Kallu Ahir actually struck the accused when Chhote Lal told him to do so; but in cross-examination each of them stated that the first blow in the fight was delivered by Kallu Ahir.

As regards the fight that followed, we have already stated that Chhote Lal appears to have been killed on the spot. The evidence of the Civil Surgeon who conducted

the *post mortem* examination on the evening of the same day shows that Chhote Lal had received eleven injuries and that his skull had been smashed to pieces. Chet Ram and Ram Chander *Brahman* had received seven and six injuries respectively, Chet Ram having had one of his fingers broken, but all the other injuries were simple, and evidently caused by *lathis*. On the other side we only find that three slight injuries were caused. The fight, therefore, was a very one-sided one, and in fact as Chet Ram's party consisted of only four inside the cart, including the driver, after the *Patwari* and peon had run away, while the accused party consisted of seven or eight excluding Nur Muhammad and Rafi Uddin, who were with the party, but who did not join in the fight, it is somewhat curious that Chet Ram adopted such an aggressive attitude. Even if Chet Ram's statement is to be accepted, it is clear that Chet Ram's party had to pass the other cart and had every intention of pushing past it, and they must have known that the cart was accompanied by the opposite party, the judgment-debtor and the objector and their friends but they made no attempt to steer clear of this formidable party, as they might easily have done if they had wished to avoid an encounter. According to the statements of Nur Muhammad and Rafi Uuddin, Chhote Lal was decidedly aggressive, and must be held responsible for having started the fight. The learned Sessions Judge has accepted the more extreme version of the prosecution evidence, that is to say, he has believed the statement of Chet Ram rather than the statement of Nur Muhammad, and he has discussed the incidents of the fight from that point of view, and consequently he has come to the conclusion that all the appellants are guilty of murder and that Bhagwan Das, who started the fight by striking Chhote Lal on the head, must be hanged. We have been through the whole of the evidence and we have come to the conclusion that the account of the incident which has been given by Nur Muhammad and Rafi Uddin, is much more likely to represent the true course of events. We have already mentioned that Chhote Lal and his party evidently had no idea of avoiding the others and were quite determined to push past them, and it is also certain that as they pushed past them, Chhote Lal made some remark to his driver. As to this, both Nur Muhammad and Chet Ram agree. It is true that the party of Chhote Lal was not so strong in numbers as that of their enemies. They had, however, had the best of matters in the Courts, and they represented the decree-holder's party. They also had authority on their side, in the persons of the *Patwari* with his papers and the peon of the Court. We think it, therefore, to be far more probable that they adopted or that Chhote Lal adopted the more aggressive tone, which has been described by Nur Muhammad, and there is no reason for supposing that either Nur Muhammad or Rafi Uddin is a prejudiced witness. We regard it as certain that Chhote Lal did direct Kallu to strike the accused or some of the accused, and we have the evidence of two of these witnesses to prove that Kallu Ahir did actually strike the first blow. As to what happened after that, there can we think be little doubt from the account that has been given by all the witnesses for the prosecution. The appellants party were naturally incensed by the abuse and by the blow or blows struck by Kallu, and they surrounded the cart and belaboured Chhote Lal and his friends, with the result that Chhote Lal received a mortal injury and was killed. In these circumstances, we have to consider whether all the appellants have been properly convicted of murder. In our opinion, the offence is not one of murder, but the appellants cannot escape conviction for culpable homicide. Exception No. 1 or Exception No. 4 to s. 300 of the Indian Penal Code might be applied in the circumstances that we have described above, but in our opinion Exception No. 4 is the more suitable. The fight arose, without premeditation on the part of the appellants, and the blows were struck in the heat of passion upon a sudden quarrel and, so far as we are able to judge, without their having taken undue advantage or acting in a cruel or unusual manner. The case would no doubt have been different if they, being a party in overwhelming strength had themselves taken the aggressive and attacked the party of Chet Ram without giving them a chance to defend themselves. They were themselves provoked, and though it would be difficult to say that they were acting in self-defence when they surrounded the cart, we are very strongly of opinion that they had received grave and sudden provocation and that they acted without premeditation and must receive the benefit either of Exception No. 1 or Exception No. 4. We do not consider it to be proved by whose hand the blow or blows that were fatal to Chhote Lal were

struck. We consider that the evidence of Chet Ram, even though it is supported by the first report, is not to be relied on because this is an entirely partial account of the manner in which the quarrel broke out and we have decided that it must be discarded.

Our attentton has been drawn in the course of the arguments to the very irregular proceeding of the Sessions Judge in cross-examining the appellants or some of the appellants with a view to confronting them with the statements which they made to the Investigating Officer. Statements made even by witnesses to a Police Officer in the course of an investigation are not permitted to be used in evidence for any purpose, except as provided in s. 162 of the Criminal Procedure Code, that is to say, on the request of the accused the Court shall refer to the written statement and direct that the accused be furnished with a copy of it in order that the witness may be contradicted by the use of this statement. It was certainly never intended that an accused person when being examined by the Court for the purpose of explaining anything in evidence against him should be confronted with the statement which he had made to the Police for the purpose of being discredited on account of any contradiction. This is, however, the way in which the Court has proceeded, and has come to the conclusion that the appellant Mullu is a liar. But so far as the defence in general is concerned, the only result of this irregularity has been that one of the persons put on trial, Lochan, has been acquitted.

We consider that the evidence proves that all the seven appellants took part in this fight, and that, for the reasons we have given above, they are guilty not of murder, but of culpable homicide. We consider that they must all be held to be responsible for the injuries inflicted on Chhote Lal and the others because when they surrounded the cart, though they acted under provocation, their assembly became an unlawful one as their common object was to inflict a beating on Chhote Lal and the others in the cart. They were not then acting in self-defence, but had passed into the aggressive and every member of their assembly became, under s. 149 of the Indian Penal Code, guilty of the offence that was committed by one or more of them of killing Chhote Lal and of injuring Chet Ram and Ram Chandar.

In the circumstances, we do not consider that a very severe punishment is necessary. Chhote Lal was really very largely to blame for the beating which he had invited, and the offence of beating him has to be distributed over a large number of appellants. Of these Mullu is described as an old man of 70 years, and cannot have taken a leading part in the fight. We, therefore, allow the appeal to this extent, that we set aside the convictions under s. 302 of the Indian Penal Code and the sentences passed under that section, and substitute therefor orders of conviction against all the appellants under s. 304-149, Indian Penal Code, and we reduce the sentence in the case of each of the appellants, except Mullu, from a sentence of death and sentences of transportation for life respectively to sentences of two years' rigorous imprisonment under this section. The sentence of Mullu under these sections is reduced to one of six months' rigorous imprisonment. The other sentences of imprisonment are concurrent and it is not necessary for us to interfere with them, except in the case of Mullu. His sentences under ss. 325, 323 and 147, Indian Penal Code, are also reduced to six months' rigorous imprisonment, and will be concurrent.

N. *Sentence reduced.*

ALLAHABAD HIGH COURT

First Civil Appeal No. 186 of 1933

February 6, 1935

NIAMAT-ULLAH, J.

KESHAB DEO—APPLICANT—APPELLANT

versus

B. RAJENDRA KUMAR BHATTACHARJI, OFFICIAL RECEIVER, ALIGARH AND OTHERS—OPPOSITE PARTY—RESPONDENTS

Provincial Insolvency Act (V of 1920), s. 68—Sale by Official Receiver at public auction—One person making highest bid and depositing one-fourth of price—Subsequent higher offer by another—Registered deed in latter's favour—Deed, if can be cancelled by Insolvency Court—More appropriate proceedings should be taken.

The Insolvency Court cannot summarily set aside a registered sale deed. Where, therefore, the Official Receiver sells a house of the insolvent at public auction and one person *R* offers the highest bid and deposits one-fourth of the price but subsequently another person *G* offers a higher price and the Official Receiver under order of the Court executes a registered sale deed in *G's* favour, it is not open to *R* to apply to the Insolvency Court for cancellation of the sale deed. The matter in controversy should be settled in more appropriate proceedings, granting leave, if necessary, for a suit against the Receiver and the third person claiming rights under the sale deed.

F. C. A. against an order of the District Judge of Aligarh, dated August 19, 1933,

Messrs. *B. Malik* and *J. C. Mukerji*, for the Appellant.

Messrs. *Panna Lal* and *K. N. Malaviya*, for the Respondents.

Judgment.—This is an appeal from the order passed by the learned District Judge, Aligarh, in the exercise of his jurisdiction as Judge of the Insolvency Court. One Ganga Saran was adjudged insolvent. The Official Receiver proceeded to sell a house belonging to the insolvent. On May 7, 1933, he held a public auction and one Ram Prasad offered the highest bid of Rs. 775. He deposited one-fourth of the price on that day and the three-fourths on May 16, 1933. The Receiver duly acknowledged receipt of these sums. In the meantime on May 12, 1933, Ganeshi made an offer of Rs. 1,025 to the Receiver, who referred the matter to the Court, and the Court directed that the property should be sold to the highest bider. The Receiver sent a notice by registered post to Ram Prasad intimating the fact that Ganeshi had offered Rs 1,025. The letter was returned with the endorsement that the addressee had refused to take it. Thereupon the Receiver executed a sale-deed in favour of Ganeshi and had it registered. This was done under the orders of the Court. It now appears that Ram Prasad, who had offered the highest bid on May 7, 1933, was the agent of the appellant and entered into the transaction of sale on behalf of his master and not himself. The appellant then applied to the District Judge insisting on the sale made to him on May 7, 1933, and in the alternative offering to purchase the property for Rs. 1,800. He prayed that the sale deed in favour of Ganeshi be cancelled. The learned District Judge dismissed this application on the ground that a registered sale-deed having been executed in favour of Ganeshi Lal could not be set aside by him. The present appeal has been preferred from that order.

In my opinion the view taken by the learned District Judge is perfectly correct. The regularity of the Receiver's action in entering into the transaction of sale to Ganeshi after having accepted the purchase money from the appellant and the validity of the order of the Court permitting the Receiver to sell to Ganeshi cannot be considered at this stage. The fact remains that a registered sale deed exists, and that Ganeshi, who has paid the full purchase money, has a vested interest in the house so long as the sale is not set aside. It is open to the appellant to impunge the act of the Receiver and attack the sale deed in favour of Ganeshi in such manner as he may be advised. The learned District Judge, sitting in insolvency proceedings, could not have summarily cancelled the sale deed in favour of Ganeshi.

The learned Advocate for the appellant contended that s. 68 of the Insovency Act allows an appeal to the Court from an order of the Receiver, and that it was open to the Court to "confirm, reverse or modify the act or decision complained of". Even if the Court had power to reverse or modify such acts of the Receiver as have had the effect of vesting rights in third persons which I doubt, I do not think the lower Court should have granted the relief prayed for by the appellant under s. 68. In the circumstances of the case the matter in controversy between the appellant on the one side and the Receiver and Ganeshi on the other cannot be decided except in proceedings admitting of detailed pleadings and evidence. In such a case the Court should leave the controversy to be settled in more appropriate proceedings granting leave, if necessary, for a suit against the Receiver and the third person claiming rights under the sale deed. In the view of the case I have taken, this appeal fails, and is dismissed with costs.

N. *Appeal dismissed.*

BOMBAY HIGH COURT

First Civil Appeal No. 173 of 1929

January 22, 1934

BROOMFIELD AND N. J. WADIA, JJ.

LALLUBHAI RUPCHAND—APPELLANT

versus

MOHANLAL SAKARCHAND—RESPONDENT

Transfer of Property Act (IV of 1882), s. 55—Material defects in property and title thereto—Buyer, if bound to complete the sale—Material defect, what constitutes—Title free from reasonable doubt, meaning of—Restrictive conditions in the nature of easements, if material defect — Vendor, if bound to disclose—Vendor and vendee

A buyer is not bound to complete the sale if there are defects in the property or in the title to the property which are material and also latent, that is to say, not discoverable by the exercise of ordinary care, or if the title is not free from reasonable doubt. A defect to be material must be of such a nature that it might be reasonably supposed that if the buyer had been aware of it he might not have entered into the contract at all, for he would be getting something different from what he contracted to buy. The liability of property to be compulsorily acquired may be fairly said to amount to a material defect which is not capable of being discovered with ordinary care. [p. 566, cols. 1 & 2; p. 567, col. 1.]

The meaning of a title free from reasonable doubt is a marketable title which can at all times be forced upon an unwilling purchaser. Specific performance should not be allowed even though the Court takes a favourable view of the title if it appears that its opinion may fairly and reasonably be questioned by other competent persons. [p. 566, col. 2.]

Restrictive conditions in the nature of easements imposed on the property, are material defects and it is the duty of the vendor to disclose them to the vendee. His failure to do so, would entitle the vendee to refuse to complete the sale [p. 567, col. 2.]

F. C. A. against the decision of the First Class Sub-Judge, Surat, in C. S. No. 365 of 1927.

Messrs. *M. B. Dave* and *P. A. Dhruva*, for the Appellant.

Messrs. *Carden Noad* and *U. L. Shah*, for the Respondent No. 2.

Broomfield, J.—The first of these appeals is against the decree of the First Class Subordinate Judge at Surat decreeing the respondent's suit for specific performance of a contract for sale of a house in Gopipoora, Surat. The second appeal is a companion appeal from the decree of the same Subordinate Judge dismissing the appellant's suit for return of the earnest money paid by him in respect of the contract. The agreement of sale took place on February 26, 1927, and is Ex. 28. It contains an averment that the house is of the ownership and possession of the plaintiff. It states that Rs. 500 had been paid by the purchaser as deposit or earnest money and provides that the balance was to be paid on delivery of possession of the house and execution of a conveyance. On April 5, 1927, the plaintiff sent the defendant a notice calling upon him to complete the sale. On April 19, 1927, defendant replied demanding inspection of the title-deeds. Inspection was given in the office of defendant's Pleader. The defendant then wrote a letter, Ex. 10, taking various objections. He pointed out that at the instance of the Municipality, Government had decided to acquire the suit property along with others in the same locality under the Land Acquisition Act, and that a notification to that effect had been published in the Bombay Government Gazette in August, 1912. Next it was stated that plaintiff had purchased the house from one Bai Hirakor in 1925 under a deed, Ex. 25, that under the will of her husband this Bai Hirakor had only a widow's estate and that the will was unsigned and unattested. Thirdly, it was pointed out that there had been litigation between the plaintiff and his neighbour Champaklal in 1925 and a consent decree had been passed imposing restrictive conditions as to the user of the plaintiff's property, that is to say, the decree bound the plaintiff not to build on part of the open land at the back of the house and not to close certain windows in Champaklal's house. As to one of these windows the decree provided that it was not to be closed at all; as to the other it was to remain open until such time as the plaintiff desired to build up to that height. In view of these defects, or alleged defects, in the title, the defendant refused to complete the contract and demanded return of his deposit. To this letter plaintiff replied by Ex. 36 on June 2, 1927, but he did no more than state that the defendant was aware of all the facts. The defendant then rejoined by Ex. 37 denying his knowledge of the facts, and on June 11, 1927, plaintiff filed his suit for specific performance.

On the issues framed by the trial Judge in the main suit the one to which argument has been mainly directed in this appeal is Issue No. 3, which is in this form:

"Whether it is proved that the plaintiff's title to the property agreed to be conveyed was defective so as to entitle the defendant to refuse to complete the contract and accept the conveyance?"

The relevant provisions of the law are ss. 55, Transfer of Property Act, and 25, Specific Relief Act. Section 55 Provides:

"In the absence of a contract to the contrary... ..., (1) The seller is bound—(*a*) to disclose to the buyer any material defect in the property or in the seller's title thereto [the latter words were added by Act XX of 1929, but the law was the same before the amendment: see *Haji Essa Sulleman* v. *Dayabha Parmanandas* (1)] of which the seller is, and the buyer is not aware, and which the buyer could not with ordinary care discover; (*b*) to produce to the buyer on his request for examination all documents of title relating to the properties which are in the seller's possession or power; (*c*) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto..."

Clause 2 of the section provides:

"The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same."

The concluding words of the section are:

"An omission to make such disclosures as are mentioned in this section, para. (1), cl. (*a*) .....is fraudulent."

Section 25, Specific Relief Act, provides:

"A contract for the sale or letting of property, whether movable or immovable, cannot be specifically enforced in favour of a vendor or lessor:

(*a*) who, knowing himself not to have any title to the property, has contracted to sell or let the same;

(*b*) who, though he enterered into the contract believing that he had a good title to the property, cannot, at the time fixed by the parties or by the

(1) 20 B 522.

Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt....."

The effect of these provisions is that a buyer is not bound to complete the sale if there are defects in the property or in the title to the property which are material and also latent, that is to say, not discoverable by the exercise of ordinary care, or if the title is not free from reasonable doubt. Paragraph 2, s. 55 need not be discussed and has not been discussed in the argument. The correct view appears to be that the covenant for title in that paragraph contemplates a completed contract and corresponds to the covenant for title in English conveyances. Prior to completion the buyer's right is to a title free from reasonable doubt: see Mulla's Transfer of Property Act, p. 270. The test of materiality was laid down by Tindall, C. J., in *Flight* v. *Booth* (2); it was held there that a defect to be material must be of such a nature that it might be reasonably supposed that if the buyer had been aware of it he might not have entered into the contract at all, for he would be getting something different from what he contracted to buy. The question whether a defect is patent or latent, presents more difficulty because the expression "ordinary care" is somewhat indefinite. A defect which can be seen on inspection is obviously not latent, for instance the ruinous condition of a house, and it may be said generally that a defect should be regarded as capable of discovery with ordinary care if there is anything to put the buyer on inquiry which would disclose the defect, for instance a foot-path across a meadow. In *Manji Karimbhai* v. *Hoorbai* (3), Scott, C. J., cited the observations of Lindley, J., in *Bailey* v. *Barnes* (4) p. 35*:

".....a purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way."

Those words were cited with reference to the meaning of the expression "reasonable care" in s. 41, Transfer of Property Act, but it would appear that they apply equally well to the expression "ordinary care" in the section with which we are dealing. We were also referred to *Jones* v. *Smith* (5), in the same connection, and I may mention *Harilal Dalsukhram* v. *Mulchand* (6). There Fawcet, J., held that a failure to refer to entries in the Record of Rights, being the neglect of an easy means of investigating questions of title, amounted to a want of care and wilful abstention from an inquiry or search which the party ought to have made and that therefore the purchaser in that case had not carried out his duty under s. 55 (1) (*a*). As regards defects in title as distinct from defects in the property itself, they are almost always to be regarded as latent because *prima facie* the seller knows his title and the purchaser does not. On that point various cases are cited in Sir Dinshah Mulla's Transfer of Property Act, p. 264. The meaning of a title free from reasonable doubt was explained in *Pyrke* v *Waddingham* (7), as a marketable title which can at all times be forced upon an unwilling purchaser, and it was held in that case that specific performance should not be allowed even though the Court takes a favourable view of the title if it appears that its opinion may fairly and reasonably be questioned by other competent persons.

Applying these principles to the facts of the present case, I am of opinion that the liability of this property to be compulsorily acquired may fairly be said to amount to a material defect. The buyer is entitled to say that he wants a house and not a right to compensation, and the learned trial Judge in dealing with this part of the case has obviously applied the wrong criterion. It has been suggested by learned Counsel for the plaintiff-respondent that the notification having been made as long ago as 1912 must be regarded as obsolete and that therefore there is no real likelihood of this property being acquired. I do not feel satisfied however that that is so. The learned Counsel referred us to various sections of the Land Acquisition Act, but, as far as I can see, it is nowhere provided that the acquisition must follow within any limited time after the notification. Difficulties might no doubt arise in the event of steps being taken to acquire

(2) (1834) 1 Bing. (N S) 370; 1 Scott 190; 4 L J C 66.

(3) 8 Ind. Cas. 752; 35 B 342; 12 Bom. L R 1044.

(4) (1894) 1 Ch. 25; 63 L J Ch. 73; 42 W R 63; 69 L 542.

(5) (1841) 1 Hare 43; 1 Ph. 244; 6 Jur. 8; 12 L J Ch. 381.

(6) 113 Ind. Cas. 27; A I R 1928 Bom. 427; 52 B 883; 30 Bom. L R 1149.

(7) (1852) 10 Hare 1.

*Page of (1894) 1 C. H.—[*Ed.*]

property after the lapse of many years, because under the Act the property is to be valued as at the date of the notification. Possibly the procedure in such cases may be to publish another notification. As to that we have no evidence. But it seems to me that when once there has been a notification by Government at the instance of the Municipality that certain properties are to be acquired for Municipal purposes, such as the widening of a street, or a town planning scheme, there must always be a likelihood of steps being taken in that direction sooner or later. If this liability to be acquired under the Land Acquisition Act is a material defect, as, in my opinion, it is, there can be no doubt, I think, that it is also one which is not capable of being discovered with ordinary care in the sense of those words as used in s. 55 (1) (*a*). As far as we are aware there was really nothing at all to put the buyer on inquiry as to that particular matter. In that respect the fact that the notification was in 1912 is obviously in his favour. The view that this should be regarded as both a material and a latent defect is supported by the cases cited by Mr. Dave for the appellant in *Nursing Dass* v. *Chuttoo Lall* (8) and *Ballard* v. *Way* (9). The Calcutta case was decided under s. 20, Contract Act, because it was found that both parties to the contract were unaware of the fact that the property had been notified for acquisition. But obviously the position of the purchaser could be no worse if he was ignorant of the fact of the notification while the seller was aware of it.

I may at this stage refer to a difficulty which has arisen in this appeal owing to the manner in which the case was tried by the learned Subordinate Judge. As I have mentioned, in the correspondence the plaintiff's case was that the defendant was aware of the alleged defects in the title at the time he entered into the contract of sale. The principal averment in the plaint was the same, and one would have expected that an issue would have been framed therefore to cover the point whether defendant did or did not know of the facts on which his objections are based. He has throughout denied knowledge. But the learned trial Judge apparently understood the pleadings to mean that the plaintiff alleged a specific agreement by the defendant to accept the plaintiff's title such as it was. He framed an issue to cover that point and decided it against the plaintiff, as he was obviouly bound to do. It is not suggested in the argument before us that the plaintiff has succeeded in proving any such agreement, but it has been argued with much force by his learned Counsel that the question, whether the defendant was aware of the facts relating to the plaintiff's title, is most material for the purpose of applying the provisions of the Transfer of Property Act. It is unfortunate therefore that the question has been left undecided by the trial Judge. He decided the case on the assumption that the defendant was not aware of the facts, although he admitted that it was only an assumption, and that the plaintiff had all along alleged the contrary. In dealing with this appeal, therefore, we are compelled to act upon the same assumption, though, if the case had depended upon the view we take of the alleged defects in the property as distinct from the defect in the title, we should probably have thought it necessary to have a remand to the trial Court in order that evidence might be taken on this question of knowledge. Although, as I have said, the liability of this property to be acquired under the Land Acquisition Act is, in my opinion, a material defect within the meaning of s. 55 (1) (*a*) and one which the seller was bound to disclose, it obviously would not be so if the purchaser was already aware of the facts.

I will next deal with the restrictive conditions imposed by the consent decree. These have been held by the learned trial Judge himself to be material defects in the property, and, I think, there can be no doubt that they are. The learned Judge took the view that the defendant might have discovered the existence of these easements if he had exercised ordinary care, but on that point I am not prepared to agree with him. The existence of these restrictive conditions was certainly not discoverable by mere inspection, at any rate so far as the prohibition against building on the *chowk* is concerned. The view taken by the learned trial Judge is that the defendant should have inspected the property; in that case he would have seen the windows, and he should then have questioned the plaintiff, from whom he would have discovered all the facts. That may be so, no doubt, but the seller's duty to answer requisitions or inquiries is distinct from the duty to disclose, and the omission of the buyer to inquire would

(8) 74 Ind. Cas. 995; A I R 1923 Cal. 641; 50 C 615; 27 C W N 639.

(9) (1836) 1 M & W 520; 2 Gale 61; 5 L J Ex. 207.

not in a case like this absolve the seller if he has not made a full disclosure. In that connection I may refer to *Reeve* v. *Berridge* (10). In *Dosibai* v. *Bai Dhanbai* (11), a similar restrictive covenant not to build on a portion of the property was held to be a material defect and non-disclosure of it was held to give a right to rescind the contract. As in the case of the first objection, of course, defendant could not rely upon the provisions of the consent decree if he was aware of the decree at the time he entered into the agreement, but if he was not aware of it, then I hold that the plaintiff was bound to disclose the fact relating to this decree, and his failure to do so would entitle the defendant to refuse to complete the contracts.

Coming lastly to the question of the plaintiff's title, he purchased the house from one Bai Hirakor by a sale-deed, Ex. 25, dated June 13, 1925. This lady was in possession of the property under a document, Ex. 23, purporting to be the last will of her husband Panachand. This is a short document and runs as follows :

"On Thursday the *Maha Vadi* 9th of the *s.* Year 1953 written by Shah Panachand Tarachand that my wife Bai Hirakor is the owner of my goods and properties, cash and ornaments and the house at Surat, etc., and of all the household furnitures that may be. She is also the owner of the property in Bombay. When none of us two may exist, all the things should be spent in repairs of the old things and for good purposes. This document has been passed in writing with my free will and pleasure. Neither my heirs nor any legal representatives nor anybody else have got any claim over my property. My wife has got all powers. *Ujam* should be maintained therefrom."

The defendant's objections are, firstly, that the will is not proved, and secondly that Bai Hirakor, on the proper construction of the will, took only a widow's estate. It purports to be a holograph will. The name of Shah Panachand appears at the top. There is no signature nor attestation. That, of course, is not necessary, but in order that the Court could accept the document as a legal will, there would have to be evidence of the handwriting of Panachand and of the fact that it is his last will and testament. It is important to note that Ex. 23 is dated in 1897 and Panachand did not die till 1918. From the appearance of Ex. 23 it might obviousl be a mere draft. The plaintiff has relied in support of it on certain recitals in the sale-deed which Bai Hirakor executed in his favour, Ex. 25. In this sale-deed she referred to the will and said that in his last illness her husband had authorized her to sell the house for her maintenance, if necessary. These recitals however, are not binding upon the defendant: see *Shrivadas Bavri* v. *Meherbai* (12). No other evidence has been produced in support of the will. The learned Counsel for the plaintiff says that no evidence was necessary because the defendant had admitted that this was the will of Panachand and had merely objected that the plaintiff's vendor had only a widow's estate and, as to its execution, that the will was not signed nor attested. That is to say, the suggestion is that objection was taken only on the ground of construction and the form of the will, and plaintiff was not put to proof of the fact that this was the last will and testament of Panachand. The reference to the will in the defendant's letter, Ex. 10, dated May 27, 1927, is this—

"Bai Hirakor the vendor of Mr. Chimanlal your client has got a right as a Hindu widow only. It appears so from the will executed by Panachand Tarachand on *Maha Vad* 9th of s. 1953. Moreover, there are no signature and attestations on the said will."

At the conclusion of the letter it was stated that the plaintiff has no title at all. "Hence my client is not bound to take the property." *Mofussil* correspondence like *mofussil* pleadings, is apt to be badly worded, but, in my opinion the defendant's objections really amount to this that the will was not accepted as a valid deed of title without further evidence in support of it. I may note that the plaintiff said nothing about the will in his reply to this letter. I may also refer to the case of *Dahyabhai* v. *Kanaiyalal* (13), which points out the necessity for caution in accepting such a document as this as a valid and final testamentary disposition. I cannot accept the view that the defendant has admitted the execution of the will or the fact that it is the last will of Panachand, and it is clear in my opinion that there is no legal evidence of those facts. As to the effect of the will there is some force in Mr. Dave's argument that the provisions as to the disposal of the property after the death of the widow and as to the continuance of

(10) (1888) 20 Q B D 523; 57 L J Q B 265; 52 J P 549; 36 W R 517; 58 L T 836.

(11) 85 Ind. Cas. 597; A I R 1925 Bom. 85; 49 B 325 26 Bom. L R 1071.

(12) 39 Ind. Cas. 627; A I R 1916 P C 5; 44 I A 36; 41 B 300; 21 M L T 236; 32 M L J 175; 19 Bom. L R 151; (1927) M W N 258; 21 C W N 558; 25 C L J 311 (P C.)

(13) 127 Ind. Cas. 414; A I R 1930 Bom. 441; 32 Bom. L R 902; Ind. Rul. (1930) Bom. 590.

the *ujam* ceremony are in consistent with the absolute right of the widow.

In view of the authorities cited by learned Counsel for the plaintiff, *Raghunath Prasad* v. *Deputy Commissioner, Partabgarh* (14), and *Saraju Bala Debi* v. *Jyotirmoyee Debi* (15), it may no doubt appear probable that on the construction of this will the proper view to take would be that it gives an absolute estate and that the provisions fettering and cutting down that estate should be held repugnant and void. But a claim by the agnates of Panachand on the death of the widow is by no means improbable and though as I say, it may seem doubtful whether such a claim would be likely to succeed, I think it would be rather difficult to say that there is any certainty about it. So that even if the proof of the will had been beyond question, I should hesitate to say that the title is one which the purchaser should be forced to accept having regard to the propositions laid down in *Pyrke* v. *Waddingham* (7). It may be mentioned in that connection that the learned trial Judge refused to allow interest to the plaintiff on the ground that this will, Ex. 23

"is not quite that formal regular instrument that would on the face of it carry with it signs of its absolute genuineness,"

and that, therefore, there was some justification for the defendant hesitating before accepting plaintiff's title. In view of the two-fold objection, the deficiency of proof and the possibility of a reasonable dispute as to construction, I am of opinion that it must be held that the plaintiff has not made out his title beyond reasonable doubt. Mr. Carden Noad points out, that on the question, whether a title free from reasonable doubt has been made out the burden of proof is on the defendant and he refers to *Low & Co., Ltd.* v. *Jyoti Prosad Singh Deo* (16). Taking the burden of proof to be so the defendant has succeeded in showing facts from which I think, the only reasonable conclusion is as I have stated.

If any one of the three grounds of objection alleged by the defendant is substantiated, he would be entitled to repudiate this transaction. Had it been necessary to decide the case on the point as to the land acquisition notification or the point as to easements, I should not myself have been prepared to dispose of it without a remand to the lower Court for further evidence. But that is quite unnecessary on the question as to title. The defendant-appellant having succeeded on that point is entitled to succeed in these appeals. The result is that both appeals must be allowed. The plaintiff's suit for specific performance must be dismissed with costs. The appellant's suit for return of the deposit will be allowed with costs and interest at six per cent. until date of payment, and the appellant will be allowed his costs in this Court.

N. J. Wadia, J.—I agree.

D. *Appeals allowed.*

(14) 120 Ind. Cas. 641; A I R 1929 P C 283; 56 I A 372; 4 Luck 483; 30 L W 619; 6 O W N 862; 34 C W N 61; (1929) A L J 1265; Ind. Rul. (1930) P C 1; 32 Bom. L R 129; 58 M L J 1; 51 C L J 16 (P C).

(15) 134 Ind. Cas. 648; A I R 1931 P C 179; 58 I A 270; 59 C 142; (1931) A L J 555; 35 C W N 903; 34 L W 51; 8 O W N 944; 33 Bom. L R 1257; (1931) M W N 989; Ind. Rul. (1931) P C 296; 54 C L J 393; (P C).

(16) 135 Ind. Cas. 632; A I R 1931 P C 299; 58 I A 392; 61 M L J 699; 35 C W N 1246; 34 L W 853. 33 Bom. L R 1544; 54 C L J 366; (1931) A L J 1112' Ind. Rul. (1932) P C 24 (P C).

ALLAHABAD HIGH COURT

Letters Patent Appeal No. 21 of 1934

February 1, 1935

SULAIMAN, C. J. AND BENNET, J.

ANRUDH RAI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SANT PRASAD RAI AND OTHERS—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), s. 7—Hindu Law—Joint family - Suit by member against stranger transferee from manager — Stranger setting up title by adverse possession—Time run out against manager—Existence of minor members—Whether saves limitation —Jurisdiction—Suit filed in Civil Court—Plea that suit was not cognizable in Civil Court—Whether can be raised for first time in Letters Patent Appeal— Wajib-ul-arz — *Custom requiring permission of* zemindars *for sale—*Zemindars *constituting a joint Hindu family—Consent of manager—Sufficiency of—Landlord and tenant.*

A suit brought by one member of a family against a transferee from the manager raises a question as to the authority of the manager, and in that sense, involves a dispute as to the respective rights of the members of the family *inter se*. The nature of such a suit is obviously distinguishable from that of a suit brought against a person, who is an entire stranger to the family, who does not claim title through any member of the family and who is setting up his adverse possession as a paramount title. In such cases the manager of the joint Hindu family represents the family as one unit and if time has run out against the manager, limitation is not saved merely because there are some minor members still living. The provisions of s. 7, Limitation Act, do not apply to such a suit. *Sheonandan Prasad* v. *Tahiran Bibi* (1) and *Jawahir Singh* v. *Udai Parkash*

(2), distinguished. *Baij Nath* v. *Ram Bilas* (3), *Lala Shiam Lal* v. *Mool Chand* (4), *Radha Kant Shukul* v. *Butai Misir* (5), *Rati Ram* v. *Nadar* (6) and *Hari Lal* v. *Munman Kunwar* (7), referred to.

Where the plaintiffs file a suit on the allegation that a certain grove was in the possession of the defendants, and choose the Civil Court as the forum, it must be assumed against them that they treated the property as if it was not land within the meaning of the Agra Tenancy Act. A plea that the grove was a tenant's grove and the suit was not cognizable in the Civil Court cannot be entertained for the first time in a Letters Patent Appeal.

Where a custom is recorded in the *wajib-ul-arz* under which a tenant's grove can be sold with the permission of the *zemindars*, and the *zamindars* constitute a joint Hindu family, the consent of the managing member or *karta* will be enough to validate the transfer.

L. P. A. against the decision of Mr. Justice Kendall, dated November 28, 1933, under s. 10 of Letters Patent in Second Appeal No. 1703 of 1930.

Mr. *Shiva Prasad Sinha*, for the Appellants.

Judgment.—This is a plaintiffs' appeal under the Letters Patent from the judgment of a learned single Judge of this Court affirming the judgment of the lower Appellate Court. The plaintiffs brought a suit in the Civil Court in respect of a grove in the possession of the defendants Nos. 1 and 2, who also are *zemindars*, on the allegation that they purchased it from a tenant on January 12, 1917, who had no right to sell the grove, without the permission of the *zemindars*. At the time of the sale-deed, the plaintiffs' father was alive, and although he survived till 1925, he did not bring any suit against the defendants. The present suit was filed on April 18, 1919, just over 12 years after the date of the sale. The plaintiff No. 1, the eldest brother is an adult, but the other brother is a minor. The defendants pleaded adverse possession over the grove and the finding on the question of adverse possession is against the plaintiffs. Their contention, however, is that the claim of the plaintiffs is not barred by time, because the suit is brought within 3 years of their attaining their majority.

No doubt under s. 6 of the Limitation Act where a person entitled to institute a suit is a minor at the time from which the period of limitation is to be reckoned, he is allowed to institute the suit within the same period after his disability has ceased, but under s. 8, that period cannot exceed 3 years. There is, however, s 7, of the Limitation Act, under which where one of several persons jointly entitled to institute a suit is under any such disability but a discharge can be given without his concurrence, time will begin to run against them all. The question for consideration in this case is whether when time begins to run against the father and the manager of the joint Hindu family in favour of a stranger to the family, limitation is still saved if some of the other members are minors.

The learned Advocate for the appellants relies on the case of *Sheonandan Prasad* v. *Tahiran Bibi* (1), which followed the decision of their Lordships of the Privy Council in *Jawahir Singh* v. *Udai Parkash* (2). But that was a case where a suit was brought by a younger brother for setting aside an alienation made by his father when another elder brother was alive and had not brought the suit. It was held that the claim of the younger brother was a distinct claim and was not barred on account of the omission of the other brother, who would not be entitled to give a valid discharge. It is to be noted that a suit brought by one member of a family against a transferee from the manager raises a question as to the authority of the manager, and in that sense, involves a dispute as to the respective rights of the members of the family *inter se*. The nature of such a suit is obviously distinguishable from that of a suit brought against a person, who is an entire stranger to the family, who does not claim title through any member of the family and who is setting up his adverse possession as a paramount title. In such cases the manager of the joint Hindu family represents the family as one unit and if time has run out against the manager, limitation is not saved merely because there are some minor members still living. There is plenty of authority of this Court in support of the proposition that limitation is not saved when the dispute is between the joint Hindu family as one unit on the one hand and a stranger on the other. In the case of *Baij Nath* v. *Ram Bilas* (3), a Division Bench of this Court held that if a suit is brought by a younger brother against a trespasser, then the claim is barred by time if limitation has run out against the elder brother, who is the managar and *karta* of the family. In

(1) 130 Ind. Cas. 691; (1930) A L J 852; A I R 1930 All. 861; 52 A 768; Ind. Rul. (1931) All 307.

(2) 93 Ind. Cas. 216; 48 A 152; A I R 1926 P C 16; 53 I A 36; 24 A L J 97; (1926) M W N 197; 50 M L J 314; 3 O W N 365; 43 C L J 374; 30 C W N 698; 28 Bom. L R 851 (P C.)

(3) 80 Ind. Cas. 12; A I R 1924 All. 738; L R 5 A 386 Civ.

Lala Shiam Lal v. *Mool Chand*, 87 Ind. Cas. 177 (4), another Bench of this Court also held that where several Hindu brothers constitute a joint Hindu family, the eldest brother represents the entire family and can give a valid discharge on behalf of his minor brothers to judgment-debtors against whom there is decree in favour of the family. In the case of *Radha Kant Shukul* v. *Butai Misir*, 94 Ind. Cas. 922 (5), yet another Division Bench came to the conclusion that the manager of joint Hindu family being a member of a joint Hindu family can give a valid discharge on his own behalf and on that of a minor brother, and although a mortgage decree is obtained in their favour jointly, limitation is not saved if the younger brother remains a minor. All these were cases of dispute arising between the family as a whole on the one side and a stranger on the other, and it was held that s. 7 was applicable and the manager and the *karta* of the family represented the whole family so far as the outside world was concerned. We may also quote the case of *Rati Ram* v. *Nadar* (6), as well as the Full Bench case of *Hori Lal* v. *Munman Kunwar* (7). When the manager and the *karta* of the family is alive, minor members of the family are not entitled to bring a suit ignoring him, unless it were established that there is any collusion or fraud on the part of the manager. Time, therefore, would begin to run not only against the manager in his personal capacity but also as against the family. We are, therefore, of opinion that the learned Judge was right in holding that the present plaintiffs as junior members were not entitled to institute a suit on behalf of the joint family in 1917 when the transfer took place while their father was alive, and that, therefore, limitation began to run not only against the father but also against the family from that date, and is not now saved simply because a minor member has attained majority within 3 years of the present suit.

There is an additional reason which could also be invoked against the appellants. They rely on a custom recorded in the *wajib-ul-arz* under which a tenant's grove can be sold with the permission of the *zemindars*. It could not possibly have been intended that such a consent cannot be obtained if there is any minor member living among the families of the numerous *zemindars* in the village. Obviously the consent of the managing member or the *karta* would be enough, otherwise it would be practically impossible to sanction a transfer.

The last point urged on behalf of the plaintiffs is that the suit was not cognizable by the Civil Court and their plaint should be returned to them for presentation to the proper Court. The plaintiffs came to Court on the allegation that this was a grove in the possession of defendants Nos. 1 and 2, who were the *zemindars*. There was no suggestion in the plaint that at the present moment the grove retains the character of a tenant's grove and is not a *zemindar's* grove. The defendants were pleading adverse possession over this property. Without going into the question of fact, it would be impossible to say that the suit was not cognizable by the Civil Court. As the plaintiffs chose the forum, it must be assumed against them that they treated the property as if it was not a land within the meaning of the Agra Tenancy Act. We, therefore, see no reason to entertain this plea for the first time in the Letters Patent Appeal, particularly, as it was not urged before the learned Judge who heard the appeal.

The appeal is dismissed with costs.

N. *Appeal dismissed.*

(4) 87 Ind. Cas. 177; L R 6 A 299 Civ.; A I R 1925 All. 672.
(5) 94 Ind. Cas. 922.
(6) 49 Ind. Cas. 990; 41 A 435: A I R 1919 All. 209; 17 A L J 649.
(7) 15 Ind. Cas. 126; 34 A 549; 9 A L J 819.

ALLAHABAD HIGH COURT

Execution Second Appeal No. 329 of 1933
December 20, 1934

BAJPAI, J.

Firm SANSARCHAND LACHHMAN DAS THROUGH LACHHMAN DAS—APPLICANT—APPELLANT

versus

DINA NATH DUBE—DEFENDANT—OPPOSITE PARTY

Decree—Execution—Res judicata—*Two conflicting decrees—Principles—Cause of action and issues different in suit by* A *against* B *at* C *and suit by* B *against* A *at* S—*Decrees, if conflicting—Executability of decrees.*

On the principles underlying the plea of *res judicata* which aims at avoiding multiplicity of litigation and at securing finality, if two conflicting decrees have been obtained by parties from two different Courts or even from the same Court then the last one should be the effective decree between the parties and the first decree should be regarded as dead. The basis of this salutary rule is that if a party who could raise the plea of *res judicata* does not raise the same when an opportunity is given to him he must be deemed to have waived it.

The plea of *res judicata* is not one which affects the jurisdiction of a Court. It is a plea in bar and such a plea can be waived

Where the cause of action of and the issues in, a suit by *A* against *B* in a Court at *C* are different from those in a subsequent suit by *B* against *A* in a Court at *S*, it is not possible for *A* to plead before the Court at *S* that the decree of the Court at *C* was *res judicata*. In such circumstances there are no two conflicting decisions and it is not possible for *B* to argue that the decree of the Court at *C* is incapable of execution.

Ex. S. A. from the decision of the Second Subordinate Judge, Saharanpur, dated February 4, 1933.

Messrs. *Panna Lal* and *S. K. Mukerji*, for the Appellant.

Mr. *K. L. Misra*, for the Respondent.

Judgment.—This is a plaintiffs' appeal and the facts which have given rise to this appeal may be stated. The Firm of Sansarchand Lachhman Das has two branches, one at Saharanpur and the other at Hoshiarpur. On January 10, 1927, Dina Nath sued the Saharanpur firm in the Calcutta High Court for recovery of a sum of Rs. 4,301. This suit was numbered as 72 of 1927. The record of the Calcutta case was before the Court below but in spite of attempts made by parties the record could not come to this Court. The plaintiff, however, has filed the plaint of the suit and a perusal of the same shows that Dina Nath's claim was formulated in the following way. He alleged that between May 2, 1926, and October 11, 1926, he supplied goods of the value of Rs. 10,502-11-0 to Sansarchand Lachhman Das and again between August 14, 1926, and October 11, 1926, the defendant took delivery of four wagons of soft molasses of the value of Rs. 3,824-13-9 although the defendant had agreed to take delivery of twenty-three wagons. The total price for the goods actually taken delivery of by Sansarchand Lachhmandas thus came to Rs. 14,327-8-9. To this was added a sum of Rs. 273-7-3 by way of interest. It was then alleged that because of the fact that the defendant did not take delivery of nineteen wagons of soft molasses although he had agreed to that effect, Dina Nath suffered a loss of Rs. 1,200. Thus the claim was for the recovery of Rs. 4,301. On February 27, 1927, this suit was shelved by the Calcutta High Court and the exact reasons for this procedure are not quite apparent. It appears, however, from certain statements made by Counsel before me that Dina Nath, because of certain representations made by a relation of Sansarchand, thought that this matter as well as a certain other matter had been compromised and some payments under the compromise had been made. Dina Nath, therefore, on January 15, 1930, filed a suit in the Small Cause Court at Calcutta for Rs. 395-2-3 which according to him was the balance due to him under the compromise in respect of the two matters. Sansarchand Lachhmandas on February 15, 1930, denied that there was any compromise or that the compromise was effected by an authorised person and indeed they alleged that there was an over-payment made by them. Upon this Dina Nath withdrew his suit with liberty to institute a fresh suit on April 10, 1930.

On March 5, 1930, Sansarchand Lachhmandas filed suit No. 729 of 1930 in the Court of Small Causes at Saharanpur against Dina Nath for the recovery of a sum of Rs. 196-10-0. This claim was formulated in the following manner. It was alleged by them that they purchased goods of the value of Rs. 14,303-6-0 and not of Rs. 14,327-8-9 as alleged by Dina Nath and that they made payments to the extent of Rs. 14,500. This sum of Rs. 14,500 is composed of the sum of Rs. 11,500 admitted by Dina Nath in his suit No. 72 of 1927 and Rs. 3,000 said to have been paid later on after the institution of the suit. Sansarchand's case, therefore, was that he made an over-payment of Rs. 196-10-0. This suit was decreed *ex parte* by the Small Cause Court Judge at Saharanpur on June 12, 1930, and the decree has been satisfied.

Dina Nath then took some proceedings in the Calcutta High Court for the revival of his suit No. 72 of 1927. What exactly these proceedings were is not quite known but it appears from the decree of the Calcutta High Court filed on the record of this suit that Dina Nath's claim was decreed for Rs. 1,001 with interest and costs. It is obvious how this sum was arrived at. Dina Nath's claim was originally for Rs. 4,301. Dina Nath admitted that subsequent to the institution of the suit a sum of Rs. 3,300 was paid by Sansarchand Lachhmandas and, therefore, his claim for Rs. 1,001 was still outstanding and his suit was decreed *ex parte* for this amount.

It would thus appear that so far as suit No. 72 of 1927 of the Calcutta High Court is concerned, the claim includes a claim for Rs. 1,200 as damages in respect of nineteen wagons and that credit was given for a sum not only of Rs. 3,000 but of

another extra sum of Rs. 300. So far as Sansarchand Lachhmandas's suit at Saharanpur is concerned, it is also clear that it did not in any way embrace any question relating to nineteen wagons nor did it in any way admit the payment of Rs. 300 by himself; indeed his case as stated by his Counsel before me was that this sum of Rs. 300 was paid towards the liability of the Hoshiarpur branch. It would, therefore, appear that in suit No. 72 of 1927 a claim for damages in connection with nineteen wagons was included and a payment of Rs. 300 was also given credit and neither of these two transactions formed part of suit No. 729 of 1930 in the Court of Small Causes at Saharanpur.

It may also be mentioned that Sansarchand Lachhmandas was fully aware of the Calcutta suit as well as the revival proceedings that took place on or about May 1, 1930. In the same way Dina Nath was aware of the suit filed against him at Saharanpur.

Dina Nath got his decree in suit No. 72 of 1927 transferred from the Calcutta High Court to the Saharanpur Court and prayed for the realisation of Rs. 1,570-9-0 which is composed of the principal sum of Rs. 1,001 and interest and costs.

Sansarchand Lachhmandas then brought the present suit No. 466 of 1931 in the Court of the City Munsif of Saharanpur praying that the defendant Dina Nath may be ordered not to take out execution of his decree in Suit No. 72 of 1927 by the Calcutta High Court. The trial Court held that this was in the nature of an objection to the execution taken out by Dina Nath and, therefore, the suit was converted into proceedings under s. 47, Civil Procedure Code. It is said before me by parties that this procedure was a correct procedure. Courts below have come to the conclusion that there is no bar to the execution taken by Dina Nath and that the plaintiff Sansarchand Lachhmandas is not entitled to say that Dina Nath should be restrained from executing his decree.

The contention of Sansarchand Lachhmandas is that by reason of the decree which he obtained in suit No. 729 of 1930, Dina Nath's decree in suit No. 72 of 1927 has become ineffectual. It is contended that there are two conflicting decrees and therefore, the last of such decrees should prevail. There is no doubt that the decree at Saharanpur in Sansarchands' suit was passed after the decree of the Calcutta High Court and the question which I have got to decide is whether the two decrees are conflicting or whether they relate to two different matters. It is not correct to say that the plea taken by Sansarchand is a plea of *res judicata* strictly speaking. His contention must be deemed to amount to this, that on the principles underlying the plea of *res judicata* which aims at avoiding multiplicity of litigation and at securing finality, if two conflicting decrees have been obtained by parties from two different Courts or even from the same Court then the last one should be the effective decree between the parties and the first decree should be regarded as dead. The basis of this salutary rule is that if a party who could raise the plea of *res jvdicata* does not raise the same when an opportunity is given to him he must be deemed to have waived it. The plea of *res judicata* is not one which affects the jurisdiction of a Court. It is a plea in bar and such a plea can be waived. When Sansarchand filed his suit in Saharanpur it is said that it was open to Dina Nath to plead that the suit was barred by *res judicata* because of the decree that Dina Nath had obtained in the Calcutta High Court. I have, therefore, got to decide whether Dina Nath could with success have advanced the plea of *res judicata*. In an earlier portion of my judgment I have taken some pains to describe at length the claim which was made by Dina Nath in the Calcutta suit and the claim that was made by Sansarchand before the Small Cause Court at Saharanpur, and I have come to the conclusion that the Calcutta suit comprised a claim for damages which was not in issue in the Saharanpur Court. The Calcutta suit, further, took into consideration a payment of Rs. 300 which was not dealt with in the Saharanpur suit and as such the cause of action and the issues in the Calcatta suit were different from the cause of action and the issues in the Saharanpur suit and it was not possible for Dina Nath to have pleaded before the Saharanpur Court that the decree of the Calcutta High Court was *res judicata*. In this view there are no two conflicting decisions and it is not possible for Sansarchand Lachhmandas to argue that the Calcutta decree is incapable of execution.

For the reasons given above, I think the view taken by the Courts below is correct

and I dismiss this appeal with costs. The injunction that has been issued at the instance of the appellant will be discharged. Leave to file an appeal by way of Letters Patent is allowed.

N. *Appeal dismissed.*

MADRAS HIGH COURT

Civil Appeal No. 105 of 1930
October 23, 1934

VARADACHARIAR AND BURN, JJ.

LAKSHMANA CHETTIAR—
APPELLANT
versus
MUTHU CHELLIA GOUNDAN
AND ANOTHER—RESPONDENTS

Hindu Law—Joint family—Execution of promissory note by member—Decree against that member alone—Decree cannot be executed against shares of other members in joint family property—Binding nature of debt cannot be gone into in execution.

Where a person in whose favour a member of a joint Hindu family has executed a promissory note, obtains a decree on the note against the executant alone without impleading the other members of the family as parties to the suit, he cannot execute the decree by attaching the shares of the other members of the family. The question of the binding character of the debt as against the other members of the family at any rate if they are not sons or descendants of the judgment-debtor cannot be gone into in execution proceedings *Viraraghavamma* v. *Samudrala* (1), followed. *Krishna Iyer* v. *Krishnasami Iyer* (4), referred to.

C. A. against the decree of the Court of the Subordinate Judge, Coimbatore, dated April 18, 1929, in Original Suit No. 162 of 1926.

Messrs. *K. V. Krishnaswamy Ayyar*, *A. C. Sampath Ayyanger*, and *T. R. Srinivasa Ayyar*, for the Appellant.

Messrs. *T. M. Krishnaswamy Iyer* and *K. V. Ramachandra Iyer*, for the Respondents.

Varadachariar, J.—The appellant obtained a decree against the second defendant, in O. S. No. 71 of 1925 on a promissory note executed by the second defendant. In execution of that decree he attached certain properties which formed the joint family properties of the plaintiff and the second defendant, the plaintiff being the second defendant's minor younger brother. The plaintiff intervened with a claim petition and contended that his share of the joint family properties should not be attached in execution. As that petition was dismissed, he has filed the present suit for a declaration under O. XXI, r. 63, Civil Procedure Code.

The plaintiff rested his case on several grounds. One contention of his was that he and the second defendant were divided in status and that the second defendant could not have represented him at all. Another contention was that the promissory note was not executed for any purposes binding upon him and, therefore, his share could not be proceeded against. He also relied on the fact that he was not a party to O. S. No. 71 of 1925.

The learned Subordinate Judge has held against the first two contentions of the plaintiff and he has found that the promissory note was executed for debts binding upon the plaintiff except to a small extent. He has also found that the plaintiff and the second defendant were undivided and that the second defendant was the manager. He has, however, decided in plaintiff's favour on the ground that as the decree in O. S. No. 71 of 1925 was only against the second defendant on a personal claim, the plaintiff's share in the properties of the joint Hindu family are not liable to be attached in execution. In support of this view he has relied on the decisions in *Viraraghavamma* v. *Samudrala* (1), and *Mela Mal* v. *Gori* (2). The passage cited from Mayne's Hindu Law (page 487) and from the judgment in *Subramaniam Chettiar* v. *Sivaswami Chettiar* (3), are also to a certain extent in favour of the view taken by him.

Mr. K. V. Krishnaswami Iyer on behalf of the appellant contents that the case in *Viraraghavamma* v. *Samudrala* (1), was not correctly decided and at any rate ought not to be followed at the present day. We are unable to agree that anything has happened since that case was decided which affects the correctness of that decision. Prior to the Code of 1908, it had generally been held in this Court that the question of the binding character of a debt upon persons not impleaded in the original suit was not a proper subject for investigation in the execution proceedings. That Rule has to a certain extent been modified by s. 53 of the Code of 1908, but the present case does not fall under that provision. Where a suit is instituted on a promissory note it is *prima facie* a personal claim; and but for the decision of this Court in *Krishna*

(1) 8 M 208.
(2) 66 Ind. Cas. 485; 3 L 288; A I R 1922 Lah. 200.
(3) 109 Ind. Cas. 557; 54 M L J 278; A I R 1928 Mad. 362; 27 L W 804.

Iyer v. *Krishnasami Iyer* (4), (which has been generally followed in this Court) it is open to question whether the liability of other members of the family could have been adjudicated on at all in a suit on the promissory note. However, in view of that line of cases it was open to the creditor to implead the present plaintiff also, in O. S. No. 71 of 1925. Not having done so, he cannot ask the Court to presume that the suit against the second defendant was instituted in a representative capacity. Even apart from this question of the capacity in which the second defendant was sued, the reasons given in the case in *Viraraghavamma* v. *Samudrala* (1), justify the view that the question of the binding character of the debt as against other members of the joint family at any rate if they are not sons or descendants of the judgment-debtor could not be gone into in execution proceedings. It is, therefore, not proper that a decree like that in O. S. No. 71 of 1925 should be executed by attaching the interest of the plaintiff in the properties of the joint family. On this short ground the plaintiff must succeed. The appeal, therefore, fails and is dismissed with costs.

A. *Appeal dismissed.*

(4) 23 M 597.

MADRAS HIGH COURT

Civil Revision Petition Nos. 1644 and 1736 of 1933

September 28, 1934.

PAKENHAM WALSH, J.

SANNIDHI CHINNASUBBARAYULU—PETITIONER

versus

GODASI VEERASWAMI AND ANOTHER—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 115, O. IX, rr. 9, 13—Provincial Small Cause Courts Act (IX of 1887), s. 17—Suit on behalf of minor plaintiff—Dismissal for default—Duty to restore even if no cause for non-appearance of guardian is shown—Restoration of suit—Necessity of adjournment for final hearing—Ex parte decree on same day—Small Cause suit—Application for revision against ex parte decree—Maintainability.

Where a suit instituted on behalf of a minor is dismissed for default owing to the non-appearance of the guardian on the date of hearing and the minor applies for the restoration of the suit to the file, the suit should be restored, whether the guardian had sufficient reasons for non-appearance or not. *Donthi Venkataratnam* v. *Nagappa* (1), *Kesho Prasad* v. *Hirday Narain* (2) and *Kathaswamy Chettiar* v. *Ramachandran* (3), referred to.

If a suit dismissed for default is restored, the Court should, in view of the provisions of O. IX, r. 13, Civil Procedure Code, appoint a day for proceeding with the suit. It is illegal for the Court to proceed with the suit on the same day on which the suit is restored.

Where the Court restored a small cause suit which had been dismissed for default and on the same day passed an *ex parte* decree against the defendants and the latter applied to the High Court to revise the decree:

Held, that it was not incumbent on the defendants to apply for setting aside the decree under s. 17 of the Provincial Small Cause Courts Act and the High Court had power to set aside the decree in revision. *Raj Narain Purkait* v. *Ananga Mohan Bhandari* (4), referred to.

C. R. P. under section 25 of Act IX of 1887, praying the High Court to revise the decree dated July 10, 1933, and passed in S. C. S. No. 284 of 1932, on the file of the Court of the Subordinate Judge of Amalapuram,

Mr. *Kasturi Seshagiri Rao*, for the Petitioner.

Messrs. *G. Lakshmanna* and *G. Chandrasekara Sastri*, for the Respondents.

Judgment.—The plaintiff who was a minor brought a suit on a pro-note S. C. S. No. 284 of 1932, on the file of the Subordinate Judge's Court of Amalapuram which was first dismissed for default. On this a petition was put in to set aside the dismissal order and restore the suit to file and the Court passed the following order:

"First defendant affixed again, service sufficient against first defendant; absent and *ex parte* Second defendant also called, absent. Petition allowed."

This order is the subject of Civil Revision Petition No. 1736 of 1933. It is argued that the Court should have stated the reasons why it held that the plaintiff had sufficient reasons for his absence at the date of the hearing. I am not inclined to interfere in this revision petition because the plaintiff being represented by his guardian it would appear that whether the latter had sufficient reasons for non-appearance or not the suit had to be restored to file: *Vide*, *Donthi Venkataratnam* v. *Nagappa* (1) following *Kesho Prasad* v *Hirday Narain* (2) and *Kathaswamy Chettiar* v. *Ramachandran* (3). The Civil Revision Petition is dismissed with costs.

On the same day on which the suit was restored to file, the learned Subordi-

(1) 152 Ind. Cas. 163; 67 M L J 387; A I R 1934 Mad. 616; 40 L W 474; 7 R M 192; (1934) M W N 1176.

(2) 6 C L R 69.

(3) 150 Ind. Cas. 779; 66 M L J 683; 39 L W 653; A I R 1934 Mad. 248; 7 R M 31; 57 M 1069.

nate Judge proceeded to try it and as the defendants were *ex parte* and as the plea was want of consideration gave an *ex parte* decree to the plaintiff. This forms the subject-matter of Civil Revision Petition No. 1644 of 1934. It is quite clear that the learned Subordinate Judge failed to observe the provisions of O. IX, r. 13, which lays down that the Court "shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit." Hence it was clearly illegal for the Court to proceed with the suit on the same day on which it restored the suit to file. The injustice to the defendants was obvious. They might not have been prepared to contest the petition for restoration to file, and in fact on the law stated above useless for them to do so, but they might have reasons to contest the suit itself. It is, however, argued for the respondent that the petition is not maintainable because the correct procedure is that laid down in s. 17 of the Provincial Small Cause Courts Act and it is contended that the petitioner should have applied to set aside the *ex parte* decree and at the same time have deposited in Court the amount due under the decree or have given security. This argument overlooks the fact that the only grounds on which the 1st defendant (Petitioner) could have asked the lower Court to have the *ex parte* decree set aside are those set out under O. IX, r. 13, *i.e.*, that he was not served with notice or was for some sufficient cause unable to attend Court on the day of hearing. The ground which he takes here is that the Court's decree itself is illegal because the Court had no right to dispose of the suit on that day. This is a small cause suit in which there was no appeal against the decree and there is no provision by which the Court can be asked to set aside its own *ex parte* decree on the ground that it is illegal. Order XLVII, will not apply as there is no error apparent on the face of the judgment or decree. Consequently the only remedy is by way of revision. Sir Dinsha Mulla states under O. IX, r. 13 as follows.—

"A defendant against whom an *ex parte* decree is passed is at liberty to apply to set aside the decree under this rule, or to appeal from the decree, or to apply for review of the judgment. He is entitled to apply under this rule to set aside the decree and at the same time to appeal from the decree. Further, he is entitled to appeal from the decree without a previous application to set aside the decree under this rule. Similarly he is entitled to apply for review without previously applying under this rule. If he applies under this rule, and his application is rejected, he is entitled under O. XLIII, r. 1, to appeal from the order rejecting the application."

The case quoted by him is *Raj Narain Purkait* v. *Ananga Mohan Bhandari* (4). I do not see how it can be contended that when the petitioner has no other remedy, except by way of revision to the High Court if he is to put forward his strongest ground for having the decree set aside, there can be any objection to interference in revision. This Civil Revision Petition No. 1644 of 1933 is therefore allowed with costs. The decree of the lower Court is set aside and the suit remanded for disposal according to law.

A. *Order accordingly.*

(4) 26 C 598.

LAHORE HIGH COURT

Letters Patent Appeal No. 9 of 1934

January 18, 1935

ADDISON AND DIN MOHAMMAD, JJ.

Malik SHER MOHAMMAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KARAM CHAND AND OTHERS—DEFENDANTS AND OTHERS—PLAINTIFFS.—RESPONDENTS

Mortgage—Suit for redemption—Proof that mortgage is subsisting Onus—Acknowledgment by mortgagee—Admission by him at sale of his rights, whether amounts to acknowledgment—Limitation Act, (IX of 1908), *s.* 19.

In a redemption suit the onus lies on the mortgagor to show that at the time of the suit his mortagage was still subsisting, and if he relies on any acknowledgment for the purposes of saving limitation. it is for him to prove that that acknowledgment was made when the limitation was still alive. The mere making of an acknowledgment does not and cannot imply that it was being made within time nor does the mere fact of a mortgagee having claimed the status of a mortgagee and not that of an owner at the time of the sale of his rights, estop his assignee from demanding proof from the mortgagor at the time he seeks redemption that the mortgage was subsisting at the time the mortgagee described himself as a mere mortgagee. *Anup Singh* v. *Fateh Chand* (1), referred to.

L. P. A. against a judgment of Mr. Justice Dalip Singh, passed in Civil Appeal No. 263 of 1933, on November 16, 1933, reported in 154 Ind. Cas. 7.. reversing that of the Additional District Judge, Lyallpur, dated November 21, 1932, who affirmed that of the Subordinate Judge, Third Class, Sheikhupura, dated August 14, 1931.

Malak *Mohammad Amin*, for the Appellants.

Mr. *R. C. Soni*, for the Respondents.

Judgment.—This is a Letters Patent Appeal from the judgment of Dalip Singh, J., dated November 16, 1933*.

The sole point for determination in this case is, whether the learned Judge was right in holding that in a redemption suit the onus lay on the mortgagor to show that at the time of the suit his mortgage was still subsisting, and if he relied on any acknowledgment for the purposes of saving limitation it was for him to prove that that acknowledgment was made when the limitation was still alive.

After giving due weight to the arguments addressed to us by the Counsel for the appellants, we consider that the view of the law expressed by the learned Judge is correct. It is no doubt true that in some judgments of the Allahabad High Court it has been laid down that an acknowledgment by the mortgagee, *e. g.* in the shape of a sale by him of his mortgagee rights, is tantamount to an admission that the original mortgage was subsisting at the time of the sale. But, in the first place a Full Bench judgment of the same Court reported as *Anup Singh* v. *Fateh Chand* (1), is opposed to that view, and, secondly, as remarked by Dalip Singh, J., such an inference is not justified by law. The mere making of an acknowledgment does not and cannot imply that it was being made within time nor does the mere fact of a mortgagee having claimed the status of a mortgagee and not that of an owner at the time of the sale of his rights, estop his assignee from demanding proof from the mortgagor at the time he seeks redemption that the mortgage was subsisting at the time the mortgagee described himself as a mere mortgagee. A man may at one time be ignorant of the date of the mortgage and may labour under a wrong impression that it was still subsisting but if it turns out later that it was acutally not subsisting at that time he cannot be estopped from taking advantage of that position and putting the mortgagor to the proof of his rights. The very opening words of s. 19 of the Limitation Act indicate that an acknowledgment to be valid must relate to the time when the right was still enforceable. We, therefore, uphold the judgment of the learned Judge and dismiss this appeal. In the peculiar circumstances of the case, however, we leave the parties to bear their own costs before us.

D. *Appeal dismissed.*

(1) 56 Ind. Cas. 936; 42 A 575; A I R 1920 All. 9; 2 U P L R (A) 187; 18 A L J 789.

*See 154 Ind. Cas. 733—[*Ed.*]

PATNA HIGH COURT

Privy Council Appeals Nos. 24 and 25 of 1934

October 31, 1934

COURTNEY-TERRELL, C. J. AND AGARWALA, J.

RAHMAN AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY

Letters Patent (Patna), cl. 33—Jurisdiction exercised by High Court in reference for confirmation—Nature of—Petitioners having no right of appeal under cl. 33 or Privy Council Act—Whether can proceed direct to Privy Council for royal prerogative—Leave or certificate of High Court, if necessary—Cl. 33, strict construction—Necessity of.

The wording of cl. 33, Letters Patent (Patna) is very precise and must be strictly construed.

The jurisdiction exercised by the High Court in a reference for confirmation of death sentence is of an appellate character and can in no sense be said to be of an original nature.

Where, therefore, there is no right of appeal granted by the Letters Patent or under the Privy Council Act, those who desire to appeal must have recourse to the prerogative and approach His Majesty in Council direct for leave to present their case. In such cases, that is to say, where an appeal is presented for the exercise of the royal prerogative, either leave or a certificate from the tribunal which passed the appellate decision is not required as a preliminary step. They can proceed direct, without an intermediate application to the High Court, to His Majesty in Council and there obtain leave to present their case. *Rashbehari Lal* v. *Emperor* (2), referred to.

P. C. A. for leave to appeal to His Majesty, in Privy Council, from the decision dated October 10, 1934.

Mr. *M. N. Pal*, for the Petitioners.

Mr. *Syed Jaffar Imam*, for the Crown.

Courtney Terrell, C. J.—These are two applications made on behalf of five persons who have been sentenced to death in respect of a murder. Four of the applicants were convicted by the Sessions Judge on the verdict of the jury and were sentenced by him to death. The matter of their conviction and sentence came before this Court by way of the usual reference and by way of appeal. In the case of the fifth, the jury by a majority acquitted the accused man. The Judge, however, disagreed with the verdict and referred the case to the High Court. The High Court in his case accepted the reference convict-

ed that individual of complicity in the murder and sentenced him to death.

The present applications are for the grant of a certificate by this Court that the case is a fit and proper one for consideration by His Majesty in Council by way of appeal. Now, it is clear that His Majesty in Council under the royal prerogative has the right to entertain appeals from Criminal Judgments in any part of His Majesty's dominions and it is the right of the subject who is aggrieved by such conviction and sentence to approach His Majesty in Council with a view to his case being heard. It is, however, a very different question whether this Court has, in the circumstances of a Criminal Appellate decision, the right or power to certify that the matter is fit to be heard by His Majesty in Council. The matter of appeals to His Majesty in Council from decisions of this Court is limited by the Letters Patent under which our jurisdiction is exercised. Clause 31, Letters Patent, refers to civil appeals only; the matter of criminal appeals is dealt with by cl. 33 and the wording of that clause is very precise and must be strictly construed. In the first place there is granted an appeal from any judgment, order or sentence of the High Court of Judicature at Patna "made in the exercise of original Criminal Jurisdiction."

Now, the cases of these petitioners do not come under the exercise of original Criminal Jurisdiction. In the case of the four persons who were convicted by the jury and sentenced to death by the Judge, it is manifest that, notwithstanding the necessary reference to the High Court for confirmation of the sentence, the jurisdiction exercised by the High Court was of an appellate character and can in no sense be said to be of an original nature. It is urged, however, that in the case of the person who was acquitted by the jury and whose case was referred to the High Court by the Judge, the High Court in sentencing him to death exercised original Jurisdiction. This argument is hardly worthy of serious attention. The accused person is not in the circumstances brought before the Court nor are the witnesses heard by the Court and moreover, it is incumbent upon the Court in exercising its jurisdiction in such cases to pay weight to the verdict of the jury and to the opinion of the Judge as well as to the evidence which was recorded in the lower Court. In paying attention to these matters, it is obvious that this Court has not exercised original Criminal Jurisdiction, but is exercising jurisdiction by way of appeal. Similarly it might have been argued, if there had been any weight in such argument, that in the case of a person who has been acquitted by the jury, but whose case is brought on appeal by the Government before the Court, that the Court in convicting such a person and passing sentence was exercising original Criminal Jurisdiction. It is clear that in neither case has the original Criminal Jurisdiction been exercised; in both cases the jurisdiction is of an appellate character. The second class of cases in which leave to appeal to His Majesty in Council is granted by cl. 33, Letters Patent, is when a point or points of law have been reserved for the opinion of the said High Court in the manner provided by the 18th clause of the Letters Patent. It could not be argued that this case came under that class.

Now, a precisely similar clause was construed by their Lordships of the Privy Council in *Barendra Kumar Ghosh* v. *Emperor* (1), and the passage in question is at p. 57* where the decision is given by Lord Sumner. In that case their Lordships were considering cl. 41, Letters Patent of 1865 of the Calcutta High Court, and, in construing that decision, they pointed out that under the section which corresponds as I have said to cl. 33, Letters Patent, an appeal is limited and the right must be strictly construed and is given in the two cases to which I have made reference and beyond those cases any appeal is incompetent. It follows, therefore, that there being no right of appeal granted by the Letters Patent and certainly no right of appeal under the Privy Council Act, the petitioners, who desire to appeal, must have recourse to the prerogative and approach His Majesty in Council direct for leave to present their case. We know of no case before the High Court in India in which their Lordships have directed that in such a case, that is to say, where an appeal is presented for the exercise of the royal prerogative either leave or a certificate from the tribunal which passed the appellate decision has been required as a preliminary step. In such a case and in one recent case in particular from this High Court I refer to the

(1) 85 Ind. Cas. 47; A I R 1925 P C 1; 26 Cr. L J 431; 52 I A 40; 52 C 197; 29 C W N 181; (1925) M W N 26; L R 6 A P C 1; 26 P L R 50; 27 Bom. L R 148; 6 P L T 169; 23 A L J 314; 41 C L J. 240; 48 M L J 543; 1 O W N 935; 3 Pat. L R 1 Cr. (P C).

*Page of 25 A. I.—[*Ed.*]

case of *Kashbehari Lal* v. *Emperor* (2), the appellant proceeded direct, without an intermediate application to this Court, to His Majesty in Council and there obtained leave to present his case. It is open to the petitioners here to take the same course. It is not necessary in the circumstances to go into any of the questions which are raised in the petition of appeal.

These applications are accordingly dismissed.

Agarwala, J.—I agree.

N. *Applications dismissed.*

(2) 144 Ind. Cas. 911; A I R 1933 P C 208; (1933) Cr. Cas. 1306; 34 Cr. L J 813; 60 I A 354; 12 Pat. 811; 6 R P C 4; (1933) A L J 893; 14 P L T 641; 65 M L J 513; 38 L W 646; (1933) M W N 1025; 35 Bom. L R 1087 (P C).

OUDH CHIEF COURT

First Civil Appeal No. 82 of 1933
March 12, 1935

[SRIVASTAVA AND ZIA-UL-HASAN, JJ.

Nawab ROSHAN JAHAN BEGAM SAHIBA—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT

Land Acquisition Act (I of 1894), s. 23—U. P. Town Improvement Act (VIII of 1919), s. 10 (3) (a)—Compensation, method of calculation—Acquisition of bazar—Principles for assessment—Market value—Compensation is not to be calculated on basis of gross collections.

It is not possible to lay down any general method of valuation in calculating the amount of compensation to be paid in a land acquisition case under the U. P. Town Improvement Act as it is necessary to take the circumstances of each property into consideration in determining the suitable basis of compensation. Where the property is a *bazar* and the income of the property by its nature is of a fluctuating character, it is necessary to employ a costly staff for making realisations from day to day from the various stall keepers in the *bazar*, considerable vigilance is required on the part of the collection staff to prevent evasion of payments and close supervision is also necessary in order to prevent embezzlements by the staff entrusted with the realisation of these dues In such circumstances taking into consideration the use to which the land was put at the time of the acquisition, it is difficult to think that any buyer would have been prepared to purchase the property on the basis of the gross collections without making any allowance for the expenditure necessary for making collections. It will, in such case, be most unfair in calculating the compensation on the basis of gross collections. *Birjrani* v. *Deputy Commissioner, Sitapur* (1) and *Ali Akbar* v. *The Secretary of State for India in Council* (2), referred to.

F. C. A. against the decision of the Tribunal consisting of (President), and Messrs. K. P. Misra and Mujtaba Husain (Assessors).

Messrs. *Hyder Husain, Makund Behari Lal* and *Abid Husain*, for the Appellant.

Mr. *H. S. Gupta*, the Government Adocate, for the Respondent.

Judgment.—This is an appeal against the award of a Tribunal constituted under s. 59 of the Town Improvement Act (U. P. Act VIII of 1919).

The appellant *Nawab* Roshan Jahan Bagum and one *Nawab* Iqbal Jahan Begum owned an area of land lying on two sides of Canning Street and known as Rakabganj Bazar. On April 16, 1921 a notification was published in the *U. P. Government Gazette* in respect of a scheme regarding the aforesaid land framed by the Lucknow Improvement Trust under s. 36 of the Town Improvement Act, but actual proceedings for acquisition of the property were not taken until about six years later. Notices under s. 9 of the Land Acquisition Act were served on the owners on November 11, 1927 and after trying the objections and claims made before him, the Land Acquisition Officer on March 29, 1928 made an award declaring *Nawab* Roshan Jahan Begum and *Nawab* Iqbal Jahan Begum entitled to Rs. 16,142 as compensation for the property under acquisition. The two ladies objected to the amount of the award and the Collector made a reference under s. 18 of the Land Acquisition Act to the District Judge. The reference was heard by the Tribunal constituted under the Town Improvement Act.

It is common ground between the parties that for about the last thirty years, the *bazar* in dispute has been leased out to contractors. The last lease in force at the time of the proceedings for acquisition was given to three persons, Manni Lal, Thakur Din and Anant Ram in 1920 and the rent reserved in it was Rs. 1,850 per annum. The Land Acquisition Officer had taken the rent reserved under the lease as the basis of the compensation awarded by him but had reduced its amount on the ground of the *theka* being a collusive transaction. As the entire land included in the *theka* did not form the subject of acquisition, he had also made a further reduction in the proportion which the non-acquired area bore to the acquired one. He had thus fixed Rs. 1,153 as the annual income of the acquired property and awarded compensation at fourteen times of this amount. The majority of the Tribunal did not agree with

the opinion of the Land Acquisition Officer. They held that the *theka* money alone should not be the basis of determining the actual value of the land. On the other hand they were of opinion that compensation at the rate of 16 2/3 times of the profits should be calculated on the aggregate net yield of the property worked out on the basis of the actual collections made by *thekedar*. They also made reference to the award of an arbitrator which had been made a rule of Court in a dispute which existed between the three *thekedars* by which it was settled that each of the three *thekedars* shall manage the *theka* in rotation for one year and that the managing *thekedar* shall pay the lessors the rent for the year and Rs. 13 per month to each of the other two *thekedars*. They came to the conclusion that the net profits of the *bazar* were not far different from the amount which had been settled by the arbitrator. Accepting this as the basis of their calculation and making necessary deduction for the land included in the lease which did not form the subject of the acquisition, they fixed the amount of the net annual profits at Rs. 2,240-12-0 and awarded a sum of Rs. 37,335 as compensation at the rate of 16 2/3 years purchase. They further awarded the ladies interest at 6 per cent. per annum on the difference between this amount and the amount awarded by the Land Acquisition Officer from the September 17, 1928, the date on which the Lucknow Improvement Trust entered into possession of the property upto the date of the award and future interest on the same amount till realization.

The United Provinces Town Improvement (Appeals) Act of 1920 provides that appeals from award of the Tribunal shall only lie on one or more of the following grounds, namely:—

(*i*) the decision being contrary to law or to some usage having the force of law;

(*ii*) the decision having failed to determine some material issue of law or usage having the force of law;

(*iii*) a substantial error or defect in the procedure provided by the said Act which may possibly have produced error or defect in the decision of the case upon the merits.

The learned Counsel for the appellant in view of this provision has not disputed the findings of the Tribunal as regards the actual income derived by the lessors under the *theka* or as regards the net profit from the *bazar*. He has confined his arguments to the question as regards the principle to be followed in awarding compensation in the case of property of the nature of the *bazar* in suit. He has contended strongly that the value of the property should have been determined on the basis of the gross collections without making any deductions for the costs of collections, etc. In other words his argument is that the appellants should have been allowed compensation at 16 2/3 years purchase on the amount of Rs. 3,017-9 and not on the amount of Rs. 2,240-12. Section 23 of the Land Acquisition Act provides that in determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration *inter alia*, the market value of the land at the date of the publication of the notification under s. 4, sub-s. (1). It is not disputed that this date with reference to which the market value is to be determined is April 16 1921. Section 58 of the Town Improvement Act provides that for the purpose of acquiring land under the Land Acquisition Act for the Improvement Trust, the provisions of the Land Acquisition Act shall be subject to the modifications indicated in the schedule. One of these modifications laid down in s. 10, sub-s. (3) of the Schedule referred to in s. 58, is that the market value of the land shall be the market value according to the use the land was put at the date with reference to which the market value is to be determined under that clause. The evidence of Manni Lal, P. W. No. 4 one of the *thekedars* shows that the sources of income in respect of the *bazar* in suit were rent realized daily from the tenants, tax on *bhusa* at the rate of one pice per bundle, *chungi* in kind of grass, leaves of trees, tax on season fruits such as mangoes and *kharboozas*, tax on grain carts, *gur* carts, earthenware carts *pattal* carts, vegetable carts especially cauliflowers and other miscellaneous income. He further stated that he used to realize three annas per cart load of grain, one anna for a *thela* load of grain, nine pies per camel and two pice per pony. The grass taken by way of *chungi* used to be sold by him in the market. Besides this there were three shops which were let out on a monthly rent. Thus it will appear that realizations had to be made in kind and in cash and that the realisations made in cash ranged from one pice to four annas per dealer. In *Birjrani* v. *Deputy Comm.*

sioner, Sitapur, 57 I. C. 301 (1) Mr. Stuart, J. C. held that market value means the price that would be paid by a willing buyer to a willing seller when both are actuated by business principles prevalent at the time when the transaction takes place in the locality in which it takes place. The question in the case was as regards the market value of five shops in the Khairabad Bazar. In determining whether the compensation awarded by the Land Acquisition Officer was adequate or not, he directed his attention to finding out "the nett income from the shops" and in doing so remarked that allowance should be made for "repairs, bad debts and the shops standing empty." Again in *Ali Akbar* v. *The Secretary of State for India in Council* (2), a Bench of this Court remaked that the words "market value" have never been defined by Statute or enactment and that different methods must obviously be employed in obtaining the market value in each particular instance. They further observed that in all cases the Tribunal should look to the use to which the proprietor was putting the property, the limitations that attached to that use and the income if any he was making out of it. In this case also the learned Judges tried to find out the nett income of the property after deducting the expenses of making collections. In the case of the *Official Trustee of Bengal* v. *The Secretary of State for Indian in Council* 39 I. C. 619 (3) which was a case of acquisition of a *bazar*, the special Land Acquisition Judge had based the valuation upon nett income of the market and allowed 18 2/11 years purchase on that amount. This award was finally upheld by a Bench of the Calcutta High Court. In the present case the income of the property by its nature was of a fluctuating character and it was necessary to employ a costly staff for making realisations from day to day from the various stall keepers in the *bazar*. Considerable vigilance was required on the part of the collection staff to prevent evasion of payments. Close supervision was also necessary in order to prevent embezzlements by the staff entrusted with the realisation of these dues. Thus taking into consideration the use to which the land was put at the time of the acquisition, it is difficult to think that any buyer would have been prepared to purchase the property on the basis of the gross collections without making any allowance for the expenditure necessary for making collections. The case of agricultural lands stands on a different footing from property of the nature of the *bazar* in dispute. We are of opinion that while it is not possible to lay down any general method of valuation as it is necessary to take the circumstances of each property into consideration in determining the suitable basis of compensation, yet we are quite clear that the circumstances of the property in dispute were such that it is impossible to say that the Tribunal was wrong in awarding compensation on the basis of the nett profits. We have no hesitation in agreeing with the Tribunal that in such a case it would be most unfair to calculate compensation on the basis of gross collections.

We are, therefore, of opinion that no ground has been made out for interference with the award of the Tribunal. The appeal must, therefore, fail and is dismissed with costs.

N. *Appeal dismissed.*

(1) 57 Ind. Cas. 301; 23 O C 89.
(2) 95 Ind. Cas. 7; 3 O W N 19 Sup; A I R 1926 Oudh 477; 29 O C 241.
(3) 39 Ind. Cas. 619.

MADRAS HIGH COURT
Full Bench

Civil Revision Petition No. 1061 of 1930
December 19, 1934

BEASLEY, C. J., RAMESAM AND KING, JJ.

YELURI SATYANARAYANA AND OTHERS —PLAINTIFFS—PETITIONERS

versus

YELURI MALLAYYA AND OTHERS— DEFENDANTS—RESPONDENTS

Promissory note—Note executed by guardian of minor—Guardian not signing as such—Minor described as maker in body of note—Liability of minor—Guardian's power to execute promissory notes on behalf of minor—Frame of suit—Hindu Law—Minority and Guardianship.

A promissory note was executed by the mother of the minor defendants. In the body of the note the minor defendants were described as the makers with the words 'represented by their mother and guardian *V*,' but the note was signed by the mother *V* without any such description attached to her name. The pro-note was itself executed in renewal of an earlier promissory note executed by the defendants' father:

Held, in a suit upon the note, that it was binding on the estate of the minor defendants. In inferring the intention of the parties in such a case one must look at all the surrounding circumstances and the liability of the minor in such cases under the Hindu Law is not affected by the fact that the promissory note was made by the guardian.

The fact that a minor can be made liable only if it was executed for the purposes binding on him does not make the liability under the promissory note conditional.

It is not necessary that the plaintiff should sue in such cases on the debt. *Koyyalamudi Subbanna* v.

Koduri Subbarayudu (1), *Rameswami Mudaliar* v. *Muthuswami Ayyar* (2), *Muthuswami Naicken* v. *Somasundaram Mudaliar* (3), *Ramajogayya* v. *Jagannadhan* (4), *Meenakshi Sundaram Chetty* v. *Ranga Ayyangar* (5), other cases referred to. *Swaminatha Odayar* v. *Natesa Iyer* (12), disapproved.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Guntur, in Small Cause Suit No. 1399 of 1929.

Mr. *D. NarasaRaja* for Mr. *N. Rama Rao*, for the Petitioners.

Mr. *P. Satyanarayana Rao*, for the Respondents.

Ramesam, J. - This Revision Petition arises out of Small Cause Suit No. 1399 of 1929 on the file of the Court of the District Munsif of Guntur in which the plaintiff sought to recover a sum of money due to him evidenced by the promissory note (Ex.-A) which itself was in renewal of an earlier promissory note (Ex. A-1). Both these notes were executed by the defendants' mother Venkayamma. In the body of the note the minor defendants are described as the makers with the words 'represented by their mother and guardian Venkayamma' but she signed the notes without any such description attached to her name. Exhibit A-1 itself was in renewal of an earlier promissory note (Ex. A-2) executed by the defendants' father on February 28, 1922. According to the Hindu Law the sons are liable to pay their father's debt to the extent of the joint family properties received by them from their father or other assets inherited by them from him. The District Munsif held that on a construction of the suit promissory note it was not intended to make the defendants liable. Referring to *Koyyalamudi Subbanna* v. *Koduri Subbarayudu* (1) the learned District Munsif observed that 'the liability on a promissory note must be determined on the wording of the note and, in each case, the question is whether the instrument has been so drawn in form as to make the executant liable personally or only in his capacity as agent, guardian, etc'. He then thought that the mother did not intend to make the sons liable because she had used feminine gender in the operative part of the note. This seems to be scarcely relevant as one finds it difficult to conceive in what other form the promissory note can be drawn up. Finally, purporting to follow the decisions in *Ramaswami Mudaliar* v. *Muthuswami Ayyar* 30 Ind. Cas. 481 (2), *Koyyalamudi Subbanna* v. *Koduri Subbarayudu* (1) and *Muthuswami Naicken* v. *Somasundaram Mudaliar* (3), he dismissed the suit. The plaintiff has filed this Revision Petition.

The Revision Petition first came on for hearing before Sundaram Chetty, J. The respondents did not appear. Following the decision in *Ramajogayya* v. *Jagannadhan* (4) and *Meenakshi Sundaram Chetty* v. *Ranga Ayyangar*, 139 Ind. Cas. 383 (5), the learned Judge set aside the lower Court's decree and passed a decree in favour of the plaintiff as sued for. Afterwords the respondents applied to set aside the *ex parte* decree by showing sufficient cause for their non-appearance. The *ex parte* decre was accordingly set aside and the petition came up for disposal before our brother Varadachariar, J. The learned Judge referred the matter to a Bench of two Judges who referred it to a Full Bench.

In *Koyyalamudi Subbanna* v. *Koduri Subbarayudu* (1), the question in a similar case was whether the guardians were personally liable. It was held that they were not, as it was clear on the note that they intended to exclude personal liability. Whether the minor was liable or not did not arise in that case. But as it must have been intended to bind somebody and as it was held that the guardians were not liable, probably it would have been held that the minor was liable if the question had arisen. A portion of the case related to executors and the conclusion was different. This case does not therefore support the District Munsif's conclusion.

The decision in *Muthuswami Naicken* v. *Somasundaram Mudaliar* (3), is a decision of a single Judge.

The case in *Ramaswami Mudaliar* v. *Muthuswami Ayyar* 30 Ind. Cas. 481 (2), was decided in 1915 and is similar to the case in *Muthuswami Naicken* v. *Somasundaram Mudaliar* (3). So far as the form of the promissory note and the intention of the maker are concerned, the case before us is similar to *Koyyalamudu Subbanna* v. *Koduri Subbarayudu* (1). The intention of the makers of the note was to exclude the

(1) 92 Ind. Cas. 805; 50 M L J 125; A I R 1926 Mad. 390.

(2) 30 Ind. Cas. 481.

(3) 105 Ind. Cas. 877; 53 M L J 814; 39 M L T 387; A I R 1927 Mad. 1018.

(4) 49 Ind. Cas. 872; 42 M 185; 25 M L J 23; 9 L W 229; 36 M L J 29; (1919) M W N 148 (F B).

(5) 139 Ind. Cas. 383; 35 L W 397; Ind. Rul. (1932) Mad. 672; A I R 1932 Mad. 696.

personal liability of the guardian but to make the wards liable.

One must look at all the surrounding circumstances in inferring the intention. Seeing that the note was in renewal of earlier promissory notes—ultimately leading up to the father's liability, I think this is the proper inference to draw.

But the further question arises whether in such circumstances, it is within the competence of the guardian by executing a promissory note to make the minors liable to the extent of the joint family property in their hands. On this point it was held in some of the early cases that the minors may be liable under such circumstances [See *Subramania Ayyar* v. *Arumuga Chetty* (6) *Krishna Chettiar* v. *Nagamani Ammal* (7) and *Venkataswami Naickar* v. *Muthuswami Pillai* (8)].

The matter came up before a Full Bench in *Ramajogayya* v. *Jagannadhan* (4). Wallis, C. J., held that a guardian cannot make personal covenants in the name of the ward so as to impose personal liability upon him, relying upon *Waghela Rasanji* v. *Sheikh Masludin* (9). But Seshagiri Ayyar and Ayling, JJ., held that such a wide proposition was not intended to be laid down in *Waghela Rajsanji* v. *Sheikh Masludin* (9), and they were of opinion that the liability of a minor under the Hindu Law is not affected by the fact that the promissory note was made by a guardian. They referred to a number of decisions of this and other High Courts which are in accordance with that view. This decision has always been followed in this Court as settling the law, and I do not think that anything has happened since to induce me to depart from that decision. Its effect, as stated by Curgenven, J. in *Venkata Jagannatha* v. *Venkata Kumar* (10) is that any liability to which the minor would be subject under the Hindu Law is not the less a liability because it was incurred by his guardian on his behalf. [See also *Ramakrishna Reddiar* v. *Kasinesi Chidambara Swamigal* (11) and *Meenakshi Sundaram Chetty* v. *Ranga Ayyangar*, 139 Ind. Cas. 383 (5)].

(6) 26 M 330.

(7) 30 Ind. Cas. 574; 39 M 915; 18 M L T 216

(8) 45 Ind. Cas. 949; 34 M L J 177; 23 M L T 280.

(9) 11 B 551; 14 I A 89 (P C).

(10) 135 Ind. Cas. 17; 54 M 163; 60 M L J 56; A I R 1931 Mad. 140; 33 L W 95; Ind. Rul. (1932) Mad. 49.

(11) 108 Ind. Cas. 282; 27 L W 322; 54 M L J 412; (1928) M W N 185; A I R 1928 Mad. 407.

In *The Imperial Bank of India at Madras* v. *Veerappan*, (12), our brother Pandrang Row, J. observed 'the appellant bank can succeed in fixing the liability on the minor in respect of the promissory notes only if it is shown that the bank believed in good faith that there was a real necessity for the execution of the promissory notes or that the agent was acting for the benefit of the minor's business.' In that case it was found that this was not shown, and hence the bank failed. There is no such difficulty in the present case. That decision implies that minors may be liable on a promissory note under such circumstances.

But the decision in *Meenakshi Sundaram Chetty* v. *Ranga Ayyangar* 139 Ind. Cas. 383, (5), has been doubted in *Swaminatha Odayar* v. *Natesa Iyer* (13). In the latter case the promissory note was executed by a person who was not the lawful guardian at all but at p. 883*, Reilly, J. proceeded to observe 'how can any guardian impose a liability upon a minor by executing a promissory note on his behalf? If a promissory note is to effect anything, it must create an unconditional personal liability'. The doubt seems to arise because of the fact that the payee of the note can succeed against the minor and his estate only if certain facts are established. This is true. But I do not think this fact makes the liability under the promissory note one other than an unconditional personal liability. What is meant by that phrase is that the liability mentioned in the note should not be made contingent on some event, for if it is so made conditional or contingent upon the happening of some event, it will not conform to the definition of a promissory note. But so long as the form of the promissory note conforms to the definition of a promissory note under the Negotiable Instruments Act, it is not the less unconditional simply because when the matter goes to a Court of law and the defendant raises some defence, the plaintiff has got to establish certain facts before he can succeed against the minor. The truth is that in no transaction entered into by a guardian on behalf of a minor, can the opposite party succeed, if challenged, without establishing some facts such as that the transaction was for

(12) 151 Ind. Cas. 928; 67 M L J 573 at p 580; 40 L W 311; A I R 1934 Mad. 595; 7 R M 146; (1934) M W N 1156.

(13) 145 Ind. Cas. 716; 56 M 879; (1933) M W N 124; 38 L W 430; A I R 1933 Mad. 710; 6 R M 119; 65 M L J 350.

*Page of 56 M.—[*Ed.*]

the benefit of the minor or some such other fact. That such a fact has got to be established does not, in my opinion make the liability under the promissory note a conditional liability. On the doubt entertained by Reilly, J. it follows that a promissory note on behalf of a minor is impossible. Such a view is opposed to the trend of all the decisions in all the High Courts including the Full Bench decision in *Ramajogayya* v. *Jagannadhan* (4). I am unable, therefore, to agree with the doubt suggested by Reilly, J. The actual conclusion in the case before him rested on the fact that the promissory note was not executed by a lawful guardian at all. Otherwise, that decision must be regarded as overruled.

It was suggested that in such a case the suit should be on the debt and not on the note. But this seems to be a merely verbal distinction and not one of substance: *Krishna Chettiar* v. *Nagamani Ammal* (7). A note is only evidence of a debt. It is true that in the case of insufficiently stamped promissory notes, parties are not allowed to fall back upon the debt where the debt and the making of the note were simultaneous. Such a principle is necessary to protect the interests of public revenue. It is not necessary to extend the principle beyond such a case. In my opinion, therefore, the plaintiff is entitled to a decree. This is also the view of Sundaram Chetty, J. and of Varadachariar, J.

I would, therefore, set aside to decree of the District Munsif and give a decree to the plaintiff as prayed for with costs throughout.

Beasley, C. J.—I agree.

King, J.—I agree.

A. *Decree set aside.*

CALCUTTA HIGH COURT

Jury Reference No. 10 of 1933
and
Civil Appeal No. 173 of 1933
July 28, 1933

LORT-WILLIAMS AND M. C. GHOSE, JJ.

EMPEROR—PROSECUTOR
versus
NUR AHMED—ACCUSED

Criminal Procedure Code (Act V of 1898), s. 297—Cases arising out of sexual matters—Charges by woman against man—Testimony of woman—Corroboration—Judge's duty in charging the jury—Penal Code (Act XLV of 1860), s. 376.

The Judge should warn the jury that in cases arising out of sexual matters, when charges are made against a man by a woman, it is dangerous to convict upon her evidence alone and that they ought to require corroboration of her story before they bring in a verdict of "guilty." The kind of corroboration required by the rule must be independent evidence, that is to say, the evidence of some witnesses other than the girl herself. He should make the jury understand that only in exceptional cases would they be justified in accepting her uncorroborated testimony *R.* v. *Baskerville* (1) and *Job Whitehead* (2), relied on.

J. Ref. from an order of the Additional Sessions Judge, Alipore.

Mr. *Debrata Mookerjee*, for the Appellant.

Messrs. *Khondkar* and *Haridev Chatterjee*, for the Crown.

Lort-Williams, J.—In this case Ohajuddin Molla and Nur Ahmed *alias* Nonia were tried by the Additional Sessions Judge at Alipore and a jury which consisted of three Hindus and two Muhammadans. They were convicted under ss. 366 and 376, Penal Code, by a majority of 3 to 2. The learned Judge considers that the verdict against Nur Ahmed was against the weight of evidence and unreasonable and that he ought to be acquitted under both the sections.

The facts were that a girl named Kiran Bala Dassi of the *Bairagi* caste lives in a small village near to a much larger Muhammadan village. According to her story, some time before the date of the offence alleged in this case, Ohajuddin made immoral suggestions to her, asking her to go and live with him. She said that she was highly shocked and screamed out with fear. This is alleged to have taken place at midday, while she was working in her hut and Ohajuddin is alleged to have called her from outside. Further, it is suggested that before this incident, some persons approached her *bari* at night, but were chased away by male members of her family. There is the evidence of one witness that Ohajuddin was seen among those who were running away. This witness was Adel Molla. His evidence appears to be unsatisfactory, because it is clear that he told two entirely different stories before the Magistrate and before the Sessions Judge. On the night of the alleged offence the girl's husband was away. Her evidence was that two men whom she did not name came into her hut and gagged her with a piece of cloth. She tried to scream, but they brandished a knife, then they dragged her away to their house and raped her one after the other.

The next day, she was kept in the house and Ohajuddin forced her to eat and then raped her twice that day. The next morning, Ohajuddin came with Maniruddi

and let her out. Maniruddi was not there the previous night. Ohajuddin told her to go to her father's house and on her way home she met her '*deor*' and the *chaukidar* to whom she told what had happened. Then, "looking unwillingly" at the two men in the dock, she said "Ohajuddin and Maniruddi are in the dock." It will be noticed that in her examination-in-chief she did not mention either of the two accused when she described what happened in her hut, nor did she mention anybody else but Maniruddi, who she said was with Ohajuddin when she was let out on the Thursday morning.

Not satisfied however with the paucity of evidence elicited in examination-in-chief, the learned Pleader on behalf of the accused brought out a great deal more evidence in her cross-examination, which in my experience almost invariably seems to be the practice in this country. She said then that she had known both the accused for some four years, but neither of them had been to her hut before. She said that she could not see their faces in the dark, nor could she see any knife or whether they had a knife or not. Then she explained her former evidence by saying that she was threatened in the room twice by word of mouth. She said that the accused were outside the curtain when she awoke: she was pulled outside the curtain and then they seized and gagged her. In view of this evidence it is a little difficult to understand why the girl was not able to scream before she was gagged and threatened. Then she said that she was taken by them to their house and it is apparent from other evidence of witnesses who saw three persons going along together, that she was walking quietly between the other two. Her mouth was not gagged, but she says it was "clogged" and explains that expression as meaning that she was threatened with a knife, although she did not see one, which seems a little difficult to understand. Then the Court cross-examined her and elicited that at Ohajuddin's house that night she saw his face. Still she persisted in not mentioning the other man. Then there was further cross-examination, the Pleader for the accused being still dissatisfied with the amount of evidence elicited against his client. And after further cross-examination, she said that she recognized them both on the Tuesday night and that she saw their faces clearly in the dawn.

It appears from the evidence that she was confined the whole of Wednesday in a room in which there were two open windows. She made no effort to escape though she was left alone there. She did not see Nonia the whole of that day. Finally, the jury put some questions to which she said that on Tuesday night it was dark and she recognized the accused by their voices. Before the Magistrate she had sworn that she could not recognize either of the two men. They took her inside some one's house where both of them raped her in the course of the night; they were with her the whole of the night, but she could not recognize them at all. She says, however, that the next morning, when there was light, she recognized them both. This, again, sounds a somewhat improbable story. It is a little difficult to understand why they waited until she was able to recognize them when the light came. She did not make any complaint of actual hurt, nor were any marks found upon her. There was evidence of one or more witnesses who saw her leaving Ohajuddin's house on Thursday morning weeping. During the search for the girl, Ohajuddin assisted; in fact, it was he who said, "Let us all join in search of the girl." They searched Hindu houses but did not suspect any Muhammadan. When previously some men had been chased from their house at night, they did not suspect them of coming after Kiran Bala, but thought they were thieves. Ohajuddin has a young wife aged between 18 and 20 and two daughters. One witness said that he saw two men, whom he did not recognize, carrying a woman off. He knew their voices to be of Ohajuddin and Nonia, but he was not called as a witness. When the *chaukidar* met her, she used a curious expression "Ohajuddin took me away and dishonoured my religion." Kanai Bairagi, one of the witnesses, said that there had been a *maramari* between him and the accused before and there was friction between Ohajuddin and Chandra about the advances to Kiran Bala. This witness in the Court below said that when he observed two men taking a woman away, he did not recognize any one.

Elaj Molla said that he saw three folk walking together and he asked them where they were going. He vaguely recognized Ohajuddin from his voice chiefly. He did not feel suspicious of them. They were walking in the ordinary way. The accused being Muhammadans and the girl a Hindu, it is unfortunate that the jury was

composed as it was. It is obvious from the references which I have made to the evidence that this case is unsatisfactory from many points of view apart from the direction given by the Judge to the jury. His charge unfortunately is somewhat short and sketchy. There is little attempt to deal with the story in chronological sequence or to examine or weigh the evidence with care and point out its relevancy to the jury. The Judge has quite properly warned them that in cases of this description arising out of sexual matters, when charges are made against a man by a woman, it is dangerous to convict upon her evidence alone and that they ought to require corroboration of her story before they bring in a verdict of "guilty." He said that they were entitled to accept the evidence of the girl, but that they should be slow in accepting it. They should scrutinize her evidence very carefully and unless her story convinced them so much that they felt that it did not possibly stand in need of any corroborative evidence, they should not accept her uncorroborative evidence. This direction was correct. But in my opinion, the learned Judge has not emphasized sufficiently the danger of convicting any man upon the uncorroborated testimony of the girl in cases such as this. He ought to have dealt with this part of the charge so as to make the jury understand that only in exceptional cases would they be justified in accepting the uncorroborated testimony. Unfortunately also he misdirected them by stating that there was corroborative evidence and it was only this:

"that the prosecution says that there were those two instances before, that she was missing all the night and the following day. But she could equally have been missing if she had gone of her own free will. The corroborative evidence consists of what the girl said to the manager and to her *deor*."

This is not the kind of corroboration required by law. The leading case on this subject in which the whole law was exhaustively discussed by Lord Reading, who was then the Lord Chief Justice, is *R.* v. *Baskerville* (1). This being the leading case on the subject, I am surprised to find no reference to it in some of the leading text-books, except a passing reference upon another point. In that case, the learned Lord Chief Justice said:

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only her evidence that the crime has been committed but also that the prisoner committed it."

Then referring to the Criminal Law Amendment Act (1885), ss. 2 and 3, he says:

"The language of the statute 'implicating the accused' compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true not merely that the crime has been committed but that it was committed by the accused."

Again at p. 89* he says:

"What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. The corroboration must be by some evidence other than that of an accomplice and, therefore, one accomplice's evidence is not corroboration of the testimony of another accomplice."

It is clear, therefore, that the kind of corroboration required by the rule must be independent evidence that, is to say, the evidence of some witnesses other than the girl herself. If there were any doubt about this, it was made clear in the case of *Job* v. *Whitehead* (2), the head-note of which is that "the witness cannot be corroborated by himself." The Lord Chief Justice Lord Hewart in that case said that "corroboration should come from another person altogether." Therefore applying the rule to the evidence in this case it is clear that the evidence referred to by the learned Judge is not corroborative evidence within the meaning of the rule because what the girl said to the manager and to her *deor* and what she said about Ohajuddin having made improper proposals to her were statements made by her and equally dependent upon whether her testimony was to be believed or not. The fact that she was missing all the night and the following day was not a fact which implicated either of the accused and this the Judge has realized, because he points out that she could equally have been missing if she had gone of her own free will. The fact that some persons had been near the house at night on a previous occasion and one of them was Ohajuddin, even if the evidence of identification can be relied upon, is not evidence which implicates Ohajuddin in

(1 12 Cr. App. Rep. 81.

(2) 21 Cr. App, Cas. 23.

*Page of 12 Cr. App. Rep.—[*Ed.*]

the offence charged. The only piece of corroborative evidence which I can find in the record is the statement of one or more witnesses that they saw her coming out of Ohajuddin's house on the Thursday morning weeping. But this has not been referred to by the Judge as corroborative evidence within the meaning of the rule which the jury might take into consideration to confirm the story of the girl.

The learned Judge has pointed out a number of reasons which induced him to think that there has been a miscarriage of justice in this case and we agree with him that the trial for various reasons has been unsatisfactory. Against Nonia, there is nothing but the girl's evidence and that is not very convincing. Against Ohajuddin there is, as I have already pointed out, some evidence which might be accepted as corroboration within the meaning of the rule. It is true that if, after a careful and sufficient warning, the jury choose to condemn either or both, then upon the girl's statement alone there is nothing in law to prevent them from doing so. That being the position, we think that the fairest and the best way of dealing with this case is to set all the convictions and sentences aside and to direct a new trial of both the accused and we direct that they shall be tried by another Judge because this Judge will not wish to try the same case all over again. The accused who are on bail will continue on the same bail pending further orders by the trial Court.

M. C. Ghose, J.—I agree.

D. *Re-trial ordered.*

LAHORE HIGH COURT

Second Civil Appeal No. 1891 of 1932
March 16, 1934
RANGI LAL, J.
SHEOGA—PLAINTIFF—APPELLANT
versus
DHANNA AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 152—Order under—Applicability—Judge purporting to act under s. 152 but wrongly passing fresh decree—Appeal, if lies.

Although no appeal lies from an order under s. 152, Civil Procedure Code, yet where the Judge purporting to act under s. 152, wrongly passes a fresh decree, the mere fact that the new decree was wrongly passed does not take away the plaintiff's right to appeal.

S. C. A. from a decree of the District Judge, Hissar, dated July 4, 1932.

Mr. *R. C. Soni*, for the Appellant.

Mr. *Mehr Chand Sud*, for the Respondents.

Judgment.—On January 29, 1926, one Raman mortgaged a house and two vacant sites adjoining it. His first cousin Phusa brought a declaratory suit to challenge the mortgage on the usual ground of want of consideration and necessity. It was held that the mortgaged property was ancestral but that the mortgage was for necessity. The suit was therefore dismissed. On January 24, 1930, the mortgagee brought the present suit for possession against Phusa and two others, namely Dhanna and Mani Ram. It was alleged that Phusa had taken possession of the house after the death of the mortgagor and that Dhanna and Mani Ram were also among the latter's heirs. The trial Court held that the mortgaged property was not proved to be ancestral and that the mortgage was for necessity. The claim was, therefore, decreed. On appeal the learned District Judge held that the site under the house was ancestral, but the building was erected by Raman himself. No clear finding was given in respect of the two vacant sites adjoining the house but it appears that the finding of the trial Court with regard to them was not disturbed. It was, however, held that no necessity for the mortgage was established. The concluding paragraph of the judgment runs thus:

"The appeal is accordingly accepted so far as to give the plaintiff a decree for possession of the site of the house only, the defendant being allowed to retain the building as security for the debt. The defendant will not be disturbed in his possession for one year from to-day so that he may in the meanwhile realize his security or remove the building material, after which period the plaintiff will be entitled to obtain possession of the site even by the ouster of the defendant from the building. The parties shall bear their own costs throughout."

A decree was framed in due course in accordance with this judgment. On April 29, 1932, Phusa, Dhanna and Mani Ram made an application under s. 151 of the Civil Procedure Code for an amendment of the decree. It was alleged that there was an error in the judgment and the decree arising from an accidental slip. This application came before *Mirza* Abdul Rab and in trying to correct the mistake made by his predecessor in his judgment and decree dated May 7, 1931, he fell into another error. He ordered that the plaintiff's suit shall stand dismissed and that a fresh decree shall be prepared in accordance with that judgment. This order was complied with and a fresh decree was prepared.

The mortgagee has now preferred an appeal against that decree.

The learned Counsel for the respondents contended that an appeal did not lie because the District Judge passed his order under s. 152 of the Civil Procedure Code. It is true that the District Judge purported to act under that section but he wrongly passed a fresh decree and the appellant has a right to appeal from that decree. The mere fact that the new decree was wrongly passed does not take away the plaintiff's right to appeal.

On the merits the appeal must succeed and the decree must be made to conform to the findings given by the District Judge on May 7, 1931. There was no appeal against his decision and the findings, therefore, became final. I accept the appeal, set aside the decree passed by *Mirza* Abdul Rab on July 4, 1932, and amend the decree passed by Lala Ghanshyam Das on May 7, 1931, as follows:—The appeal is accordingly accepted and the plaintiff's suit for possession is dismissed but he can realize his security by sale of the materials of the mortgaged house. The parties shall bear their own costs throughout.

N. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT

Miscellaneous Judicial Case No. 65 of 1934

January 18, 1935

GRILLE, J. C.

BALWANTRAO—APPLICANT

versus

BALMUKUND AND ANOTHER—NON-APPLICANTS

Limitation Act (IX of 1908), ss. 5, 12—Condonation of delay in filing application must be specifically asked for—Figures in copy of judgment—Presumption of correctness—Civil Procedure Code (Act V of 1908), O. XLVII, r. 1 (1)—Delay in filing appeal not due to mistake on the part of appellant—Appellant knowing facts—Appeal dismissed as time-barred—Review—Held, there was sufficient cause.

Where delay in filing an application for review is caused by the supply of wrong information on the part of the copying department which resulted in delay in getting the copy of the decree a person making the application is not entitled to deduction of time under s. 12, Limitation Act, as of right. He has to satisfy the Court that the wrong information was given in circumstances for which he was not responsible, and if the Court is satisfied as to the justness of his contention the Court will then extend the time under s. 5, Limitation Act. Where the appeal on the face of it is time-barred it is the duty of the applicant to append to his appeal the reason for the delay and to ask for condonation of the delay under s. 5 of the Limitation Act.

An appellant is entitled to presume the accuracy of the figures which are given him in the copy of the judgment.

The error made in the Copying Department in the heading of the copy of the judgment and the consequent delay in filing an appeal may be treated as a sufficient reason within O. XLVII, r. 1 (1), Civil Procedure Code, for review of the order dismissing the appeal as time-barred. *Chhajju Ram* v. *Neki* (2), relied on.

Application for review of this Court's order dated April 13, 1934, passed in Miscellaneous Judicial Case No. 44 of 1934, dismissing the applicant's appeal (as time-barred) preferred against the decree dated July 24, 1933 passed by the District Judge, Nagpur, in Civil Appeal No. 43 of 1932, arising out of Civil Suit No. 270 of 1931, dated February 29, 1932, of the Court of the Sub-Judge, Second Class, Saoner.

Mr. *G. R. Pradhan*, for the Applicant.

Mr. *M. D. Khandekar*, for the Non-Applicants.

Order.—The applicant Balwantrao filed an appeal in this Court which was on the face of it time-barred. Certain details appearing in the schedule stamped on the reverse of the copy of the decree filed with the memorandum of appeal led to enquiries being made in the Copying Department, and it was found that the Copying Department had been in error in directing the appellant to appear on a future date without pointing out to him that the application for a copy of the decree contained inaccurate information as a result of which it was impossible to trace the decree, a copy of which had been applied for. Even excluding such time from the period requisite for obtaining a copy, it appeared that the appeal was time-barred by six days, and the following order was passed:

"In accordance with the principles laid down in *Mohammad Khan* v. *Fatma Bi* (1) this appeal must be dismissed as time-barred. On two occasions the appellant gave wrong information as a result of which the copy could not be supplied. Even if the period from October 5 to October 17, 1933, during which the Copying Department failed to point out the incorrectness of the information supplied, is deducted, the appeal will still be time-barred by six days."

The appellant has now applied for a review of that order and he has pointed out that the inaccurate information supplied by him when he asked for a copy

(1) 121 Ind. Cas. 647; 26 N L R 149; Ind. Rul. (1930) Nag. 103; A I R 1930 Nag. 129.

of the decree was due to a mistake on the part of the Copying Department which gave the wrong number of the case in supplying him with a copy of the judgment which he had obtained before he applied for a copy of the decree; that is to say, the appellate judgment against which Balwantrao wished to prefer an appeal bore the No. 43 of 1932 in the Court of the District Judge and it was an appeal against the decision of the Subordinate Judge of Saoner in Civil Suit No. 270 of 1931, dated February 29, 1932. In the copy supplied to the appellant for the purposes of the appeal before the District Judge this date has wrongly been copied as March 29, 1932, and in the copy of the appellate judgment supplied there are two typing errors where the Civil Appeal is described as being appeal No. 43 of 1933 and the date of the Subordinate Judge's decision is given as February 29, 1933. It is clear, therefore, that in asking for a copy of the decree the appellant did not rely on the date which he had given in asking for a copy of the judgment, which must have been correct since the copy of the judgment was promptly supplied but on the data given in that copy which were incorrect. It is clear, therefore, that the delay caused by the giving of wrong information was in reality due to no fault on the part of the appellant. He cannot be held bound to consult the figures which he had already used in making one application and which in all probability were destroyed; he was entitled to presume the accuracy of the figures which were given him in the copy of the judgment.

It is contended on behalf of the non-applicants in this case that without disputing the correctness of the facts they do not constitute an adequate ground for review, and it is maintained that the appellant should, in preferring his appeal, have asked for an extension of time under the provisions of s. 5 of the Limitation Act. The applicant, on the other hand, contends that there was no occasion for an application under s. 5 as he was entitled to have the time deducted as of right under s. 12 of the Limitation Act. The applicant is incorrect in this contention. Where delay is caused by the supply of wrong information, a person making the application is not entitled to deduction of time as of right. He has to satisfy the Court that the wrong information was given in circumstances for which he was not responsible, and if the Court is satisfied as to the justness of his contention the Court will then extend the time under s. 5. The appeal on the face of it was time-barred and it was the duty of the applicant to append to his appeal the reason for the delay and to ask for condonation of the delay under s. 5 of the Limitation Act.

It is urged on behalf of the applicant that he was misled by the practice of this Court to call on an appellant in such circumstances to show cause why the appeal should not be dismissed as time-barred. If such a practice exists, it is certainly not invariable and the Courts have power to reject summarily an appeal which *prima facie* is time-barred and which contains no explanation of the delay or any prayer for condonation. The facts were certainly within the knowledge of the applicant and he made no attempt to explain them. The claim that the time to be deducted was a matter of right and not a matter of grace, I have already stated to be incorrect. The claim for a review cannot fall under the heading of "the discovery of new and important matter" since the facts now alleged were already within the applicant's knowledge at the time the appeal was presented. Neither is there any mistake or error apparent on the face of the record. I am satisfied, however, that there is a ground for granting review covered by the expression "for any other sufficient reason" in O. XLVII, r. 1 (1) of the Civil Procedure Code, and the error made in the Copying Department in the heading of the copy of the judgment may be treated as a sufficient reason analogous to an error on the face of the record to bring the case within the ambit of the decision of their Lordships of the Privy Council in *Chhajju Ram* v. *Neki* (2). It would be manifestly unjust to penalise an appellant who has relied on what is supplied to him as a true copy when that copy proves to be inaccurate in the very description of what the copy purports to be.

The application for review is accordingly granted, but in order to emphasise the principle that a petition filed out of time must show on the face of it reason for the delay and contain an express prayer

(2) 72 Ind. Cas. 566; 3 Lah 127; 30 M L T 295; 26 C W N 697; 41 P L R (P C) 1922; 3 P L T 435; A I R 1922 P C 112; 16 L W 37; 17 P W R 1922 43 M L J 332; 24 Bom. L R 1238, 4 U P L R (P C) 99; 36 C L J 459; 49 I A 144 (P C).

for condonation of the delay I direct that the costs of the review application be borne by the applicant since the observance of this principle would have resulted in a different order being passed in this Court and would have avoided the necessity of an application in review. Pleader's fee Rs. 20.

D. *Application allowed.*

LAHORE HIGH COURT

Criminal Revision Petition No. 1776 of 1933

April 6, 1934

ADDISON, J

EMPEROR—PROSECUTOR

versus

GURBAKSH SINGH—ACCUSED.

Penal Code (Act XLV of 1860), s. 294-A—'Drawing', meaning of—Publication of scheme of lottery—Scheme not contemplating drawing by mechanical or human agency involving their chance extraction—Whether an offence

The meaning of the term 'drawing' in relation to a lottery is that the lots should be drawn by some mechanical or human agency involving their chance extraction. Where under a scheme there was no physical or mechanical 'drawing' to determine the lucky lots which depended on a sort of arithmetical progression based on an original number to be determined merely by the chance death of a bond-holder, then the publication of a scheme involving such a lottery is no offence under s. 294, Penal Code.

Cr. Revn. P. from order of the Sessions Judge, Lahore.

Facts.—These two revision petitions against convictions under s. 294-A, Penal Code, in separate cases, each present for consideration two legal questions which are identically the same in both cases. They may therefore be dealt with in one order. In the case Crown *v.* Sardar Gurbakhsh Singh Narang, the accused is the editor of the weekly paper, the *Fateh* of Lahore whilst in the case Crown *v.* Sayed Inait Shah, the accused is the Editor of the *Siyasat*, a daily paper of Lahore. Both these persons have been convicted for publishing a notice of a proposal for an alleged lottery managed by the Industrial Bank, Ltd. There are no facts in dispute. The publication of the notice which is the same in both cases and refers to the same lottery is admitted.

It has merely been argued: (*a*) that the scheme published is not a lottery and, (*b*) that even if it is, the publication thereof is not illegal, as it involved no "drawing" within the meaning of s. 294 A, Penal Code. A reference to the notification will explain the conditions upon which this scheme was to work. The Bank issued a lac of ten rupee bonds which were redeemable at the end of 20 years by every holder who would receive Rs. 10-8-0. Thus none of the investors suffered any capital depreciation. This money was to be invested and from the interest a series of prizes were to be allotted yearly, in the following manner. Every bond-holder who died within the ensuing year was treated as a prize winner. For the distribution of the rest of the prizes, the number of the bond held by the deceased holder whose death was first reported to the Bank, was to be taken and ten added thereto, *e. g.*, if the deceased's bond was No. 813, then the first prize winner would be the holder of the bond No. 823 and the remaining prizes were distributed by adding ten, *e. g.* No. 833, 843, 853, etc., until the prizes were exhausted. Thus it will be seen that the prizes although allotted by chance were not drawn in the manner generally accepted and were derived entirely from interest and not capital.

It has been argued before me on the first point mentioned above that such a scheme does not amount to a lottery and the Full Bench ruling in *Narayana Aiyangar* v. *Vellachami Ambalam* (1), has been cited before me in support of this contention. This concerned a chit fund and the law of lottery is discussed at length therein with special reference to English cases. It was finally held that a scheme whereby nobody lost their capital, even though they failed to profit by making interest, could not be called a lottery. Similarly an old ruling in *Kamakshi Achari* v. *Appavu Pillai* (2), has also been put forward to support the same contention. I would very respectfully venture to differ from these two rulings. The word "lottery" is nowhere defined in the Criminal Procedure Code, or in any other statute that I know of. Its common meaning, as disclosed by the dictionary is "a scheme for the distribution of prizes by lot or chance," and in the present instance the prizes were certainly to be distributed by chance, the factor of chance being the death of a bond-holder, I am unable to see how any Court is legally authorized to place a more arbitrary or restricted interpretation on the word "lottery" than is in common use in the English language. There may be in England a judicially

(1) 103 Ind. Cas. 318; 50 M 696; A I R 1927 Mad. 583; 52 M L J 687; (1927) M W N 545; 38 M L T 390; 26 L W 796.

(2) 1 M H C R 448.

restricted interpretation accepted in English Common Law which differs from the common and current meaning; but in India we are not bound by Common law and are obliged to give the current meaning to any word used in a statute. In this I am supported by a number of rulings: *Madan Gopal* v. *Emperor* (3), *A. D. Raj* v. *A. P. Thoppe Naidu* (4), *Universal Mutual Aid & Poor House Association, Limited, Madras* v. *A. D. Thoppa* (5), *Ram Parshad Khanna* v. *Union Bank of India* (6), and *Emperor* v. *Syed A. M. Vazirally* (7), which are all rulings which support the prosecution contention that a scheme such as the present is certainly a lottery. I therefore hold on the first point that the scheme published was a lottery.

On the second point it has been argued before me that the provisions of s. 294-A, Penal Code, only make illegal that type of lottery which involves an actual drawing and that the word "drawing" must be given a usual physical interpretation; that is to say, lots will have to be drawn by some human or mechanical agency from a receptacle. The relevant portion of the first part of the section reads:

> "whoever keeps an office or place for the purpose of 'drawing' a lottery; and the second part reads 'and whoever publishes any proposal to pay any sum on any event or contingency relative or applicable to the 'drawing' of any ticket, lot number or figure in any such lottery."

It has been specifically held in *Ram Parshad Khanna* v. *Union Bank of India* (6), that the word "drawing" must be read as being used in its physical sense and this is followed in *Emperor* v. *Syed A. M. Vazirally* (7), where the origin of the word "draw" and the place it finds in this section, is discussed at length. Webster's dictionary defines the word "drawing" as "the act of pulling, attracting, extracting, taking lots, a card or cards from the pack, etc." So its meaning relative to a lottery is clearly that the lots should be drawn by some mechanical or human agency involving their chance extraction. The present scheme, as has already been seen, contains no such element. There was no physical or mechanical "drawing" to determine the lucky lots which depended on a sort of arithmetical progression based on an original number to be determined merely by the chance death of a bond-holder. I would therefore hold that the publication of a scheme involving such a lottery is no offence as the law at present stands. The remedy for this if any is needed, lies with the legislature and not with the judiciary.

I forward these revision petitions to the High Court with a recommendation that in both cases the convictions be quashed on the grounds I have set out.

Mr. *R. A. Jeremy*, for the Respondent.

Order.—For reasons given by the Sessions Judge I accept the petition, set aside the conviction and direct that the fine, if paid, be refunded.

N. *Order accordingly.*

(3) 6 Ind. Cas. 620, 17 P R 1910; 92 P L R 1910; 14 P W R 1910 Cr.; 11 Cr. L J 382.

(4) 138 Ind. Cas 687; A I R 1932 Rang. 143, 10 R 232; Ind. Rul. (1932) Rang. 166; 33 Cr. L J 696: (1932) Cr. Cas. 706.

(5) 139 Ind. Cas. 644; A I R 1933 Mad. 16; (1932) M W N 904; Ind. Rul. (1932) Mad. 759; 33 Cr. L J 792; 63 M L J 554; 36 L W 610; 55 M 26; (1933) Cr. Cas. 64,

(6) 38 Ind. Cas. 943; 35 P R 1917: 13 P L R 1917.

(7) 112 Ind. Cas. 777; 53 B 57; 30 Bom. L R 1426 A I R 1928 Bom. 550; 30 Cr. L J 9.

MADRAS HIGH COURT

Letters Patent Appeal No. 67 of 1933

September 21, 1934

BEASLEY, C. J. AND KING, J.

VEDAGIRI SASTRIAR – APPELLANT

versus

JAGATHGURU SANKARACHARIAR SWAMIGAL AT KUMBAKONAM —RESPONDENT

Limitation Act (IX of 1908), Sch. I, Arts. 7, 36, 102, 120, 124—Suit by archaka *against trustees for recovery of emoluments—Limitation—Article applicable—* Archaka, *status of—'Wages', meaning of.*

An *archaka* is a servant of the temple trustees and the perquisites or emoluments received by him are 'wages' within the meaning of Art. 102 of the Limitation Act. A suit by an *archaka* against the trustees for recovery of emoluments due to him is, therefore, governed by Art. 102 of the Limitation Act and not by Art. 120 or Art. 36.

Article 7 and Art. 102 deal with different classes of wage-earners. The former deals with a lower class of wage-earner than that dealt with by Art. 102. *Baradwaja Mudaliar* v. *Arunachala Gurukkal* (1), and *Seshadri Ayyangar* v. *Ranga Bhattar* (6) followed. *Subbier* v. *Ranga Iyengar* (2), not followed. *Ratna Mudaliar* v. *Tiruvenkatachariar* (4), distinguished. *Chinnaswami Thathachariar* v. *Srirangam Nallan* (5), considered.

L. P. A. against the judgment of Mr. Justice Pakenham Walsh, dated April 11, 1933, and passed in S. A. No. 396 of 1929, preferred to the High Court against the decree of the District Court of Chingleput in A. S. No. 296 of 1926 preferred against the decree of the Court of the District Munsif of Conjeevaram, in O. S. No. 35 of 1924.

Mr. *K. L. Rajagopalachari*, for the Appellant.

Mr. *M. S. Venkatarama Iyer*, for the Respondent.

Judgment.—This is an appeal from a judgment of Pakenham Walsh, J. in S. A. No. 396 of 1929. The plaintiff is the appellant here and was a hereditary *stanika* office-holder of the temple of Sri Kamakshi Amman in Conjeevaram. The first defendant in the suit is the trustee of the temple and the second defendant is his agent. The suit was for the recovery of emoluments due to the plaintiff from December 31, 1918 to February 11, 1919. The suit was filed on January 10, 1924, more than three years and less than six years from the date of the cause of action. One plea taken at the trial was that the suit was barred by limitation. The trial Court, the lower Appellate Court and Pakenham Walsh, J. have upheld that plea. At the outset it must be stated that the emoluments sued for were received by the appellant in kind, that is to say, so many measures of rice and also food offerings. These have been assessed in the plaint at Rs. 81-14-4. The question here is which article of the Limitation Act applies. Both the lower Courts and also the second Appellate Court have applied Art. 102 following *Baradwaja Mudaliar* v. *Arunachala Gurukkal* (1), which is a direct decision upon this point. There the Court had to consider whether Art. 36 of the Limitation Act or Art. 102 or Art. 120 applied and it was held that the claim there, which was exactly similar to the claim here, fell under Art. 102 and not under Art. 36 or Art. 120. In none of the cases cited by the appellant in support of his argument was there any consideration as to whether Art. 102 should be applied rather than Art. 120. The earliest case is *Subbier* v. *Ranga Iyengar* (2). It was there held that a suit for the recovery of profits of a hereditary office by a hereditary *stanika*-holder in temples fell under Art. 120 and not, as contended, under Art. 36. The applicability of Art. 102 was not there considered and this case has been dissented from in *Baradwaja Mudaliar* v. *Arunachala Gurukkal* (1). In *Venkatavaraga* v. *District Board of Tanjore* (3), the applicability of Art. 102 was not considered and in any case on the facts of that case it does not appear to us to be much in point. In *Ratna Mudaliar* v. *Tiruvenkatachariar* (4), the question was whether the marriage fees payable to the *archaka* and claimed by him fell within Art. 144 or Art. 120. The lower Courts held that Art. 144 applied but the High Court applied Art. 120 and Art. 102 was not considered. As Pakenham Walsh, J. in his judgment says, presumably the fees there would be payable by the persons who were married. This, in our view, would be an important distinction because it could be contended with reason that the relationship of employer and servant did not there exist. This question has been considered in two recent cases in this High Court. The first is *Chinnaswami Thathachariar* v. *Srirangam Nallan*, 109 Ind. Cas. 771 (5). It was in that case observed that

"an office in connection with such institutions must really be regarded as a bundle of duties liable to be performed by the same persons under a particular designation and carrying with it certain emoluments;"

and the applicability of Art. 124 was considered in connection with a claim for recovery of the emoluments attached to an office and it was held that Art. 124 did not apply. The Court, however, was of the opinion that there would be no limitation at all in such a suit. The second is S. A. No. 1523 of 1927. There, Jackson, J., in dealing with *Chinnaswami Thathachariar* v. *Srirangam Nallan* (5), whilst agreeing that Art. 124 would not apply to such a suit, declined to accept the view that there is no bar of limitation and was of the opinion that the article applicable would be Art. 120. The applicability of Art. 102 was not discussed in either of these cases. So far as this High Court is concerned, *Baradwaja Mudaliar* v. *Arunachala Gurukkal* (1), is the only direct decision upon the point. A reference to Art. 7 is of some assistance in the present case. Under Art. 7 in a claim "for the wages of a household servant, artisan or labourer not provided for by this schedule" one year's period of limitation is given starting from the time when the wages accrue due. This article must be contrasted with Art. 102 which deals with a claim "for wages not otherwise expressly provided for by this schedule". It is clear that Art. 7 and Art. 102 deal with two different classes of wage-earners. The former obviously deals with a lower class

(1) 45 Ind. Cas. 414; 41 M 528; 23 M L T 282; 7 L W 521.
(2) 9 M L J 163.
(3) 16 M 305.
(4) 22 M 351.
(5) 109 Ind. Cas. 771; A I R 1928 Mad. 377.

of wage earner to that dealt with by Art. 102 in respect of which a three years' period of limitation is given. In spite of the appellant's contention that emoluments such as these cannot correctly be described as "wages", in our opinion, the real test is whether those emoluments are payable by an employer to his servant, in other words, whether the relationship of employer and servant exists. If it does then we think that what is payable can be described as wages. Upon this point also there is a direct decision by a Bench of this High Court, *viz* : *Seshadri Ayyangar* v. *Ranga Bhattar* (6), where Benson and Sundara Ayyar, JJ. say:

"The position of an *archaka*, though he may have a hereditary tenure in the office is, in our opinion, essentially that of a servant. The trustee is the representative of the temple and the *archaka* must be subject to his disciplinary authority."

It was, however, contended by the appellant that in that case the Court was merely considering the position of an *archaka* with reference to the disciplinary powers of the trustees. It is no doubt true that the disciplinary powers of the trustees were there in question but it was essential that the position of the *archaka* should be established first of all before the right to suspend him by the trustees could be sustained. In our view, the decision in *Seshadri Ayyangar* v. *Ranga Bhattar* (6), is correct upon this point; and an *archaka* is, therefore, a servant of the temple trustees and if he receives perquisites or emoluments, he receives them as a servant and the word "wages" used in Art. 102 seems to us to be a quite sufficiently correct description of what he receives. In our opinion, before the residuary Art. 120, can be applied to a claim, it must be established clearly that it does not fall under any other article. For the reasons we have given, the claim in this suit does not fall under Art. 120 because, in our opinion, it is one to which Art. 102 applies. This Letters Patent Appeal must, therefore, be dismissed with costs.

A. *Appeal dismissed.*

(6) 10 Ind. Cas. 548; 35 M 651 at p 633; 21 M L J 580; 10 M L T 14.

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1396 of 1933

January 22, 1935

SULAIMAN, C. J. AND BENNET, J.

MUHAMMAD MUSTAFA ALI KHAN—PLAINTIFF—APPELLANT

versus

DISTRICT BOARD, BAREILLY AND ANOTHER—DEFENDANTS—RESPONDENTS

U. P. District Boards Act (X of 1922), s. 48—Agenda paper mentioning that draft resolution and report regarding dismissal of Secretary would come up for final decision — Whether constitutes sufficient notice under s. 48—Specific Relief Act (I of 1877), s. 21 (b) — Suit for injunction by Secretary of Local Board in Civil Court — Maintainability — (Quære).

Where the agenda paper as issued for a meeting of the District Board made it clear that a draft resolution of the members regarding the dismissal of the Secretary together with the explanation and the report of the Sub-Committee would come up before the Board on a certain date for final decision;

Held, that this undoubtedly notified that final orders would be passed on the matter and that it necessarily included a resolution adopting the draft resolution as proposed by the members and hence constituted sufficient notice within the meaning of s 48, U. P District Boards Act, for a resolution for adopting a resolution for dismissal of the Secretary.

Quaere.—Whether a suit for an injunction by a Secretary of a Local Board filed in a Civil Court is at all maintainable and whether any relief for injunction can be granted in the face of the provisions of s. 21 (*b*) of the Specific Relief Act?

S. C. A. from the decision of the District Judge of Bareilly, dated October 31, 1933.

Dr. *K. N. Katju* and Mr. *Mukhtar Ahmad*, for the Appellant.

Mr. *G. S. Pathak*, for the Respondents.

Sulaiman, C. J.—This is a plaintiff's appeal arising out of a suit for an injunction brought by the plaintiff who was the Secretary of the District Board, Bareilly, against the Board restraining the Board from enforcing their resolution of March 8, 1933. A relief for a declaration that the plaintiff's dismissal was against law and unenforceable had been claimed but was withdrawn.

The Courts below have dismissed the plaintiff's suit. In appeal it is contended before us that the decree is wrong.

A question has been raised as to whether a suit for an injunction by a Secretary of Local Board filed in a Civil Court is at all maintainable and whether any relief for injunction can be granted in the face of the provisions of s. 21 (*b*) of the Indian Specific Relief Act. Under that section a contract which is so dependent on the personal qualifications or volition of the parties or otherwise from its nature is such

that the Court cannot enforce specific performance of its material terms cannot be specifically enforced. The question whether the contract of service of the plaintiff was dependent on his personal qualifications or the volition of the parties is of some difficulty and I would not express any final opinion on it at this stage of the case because the case can be disposed of without deciding this question.

Before considering the objections raised by the plaintiff it would be convenient to give briefly the previous history of the matter: Early in January, 1933, a proposal signed by 18 members of the Board in the form of a resolution was received by the Board. It suggested that the Secretary and the Engineer had been negligent in the discharge of their duties and guilty of lack of supervision causing disorder in the affairs of the Board and making its finances suffer heavily and that they were incapable and unworthy of the posts they held. The proposal was that they should be called upon to submit replies to the charges against them within 15 days and in case of their not doing so or their replies being unsatisfactory the question of their dismissal should be considered by the Board. There was a further proposal that the post of the Secretary and the Engineer should be combined. On receipt of this resolution the Chairman called upon the persons complained against to furnish explanations. Copies of the charges as well as copies of the draft resolution were handed over to them. The draft resolution together with the explanations submitted were placed before a meeting of the District Board on February 15, 1933. The resolution was considered and it was resolved by the Board that a Sub-Committee of three members should be appointed to go into the charges and examine the explanations submitted on those charges and to submit a report to the Board before its next meeting on March 8, and that the matter should come up for final decision on that date. Admittedly 0 days before March 8, 1933, a notice was issued notifying that a meeting of the Board would be held on March 8, 1933. On March 1, 1933, an agenda paper was issued which contained, as the matter for consideration, the draft resolution of the 18 members about the dismissal of the Secretary and the Engineer along with the report of the Sub-Committee, the explanations of the Secretary and the Engineer as well as the report of the Special Officer and the resolution of the Board dated February 15, 1933. A complete copy of the draft resolution as well as a copy of the resolution of the Board dated February 15, 1933, were appended. On March 8, 1933, at a full quorum the Board passed a resolution dismissing the plaintiff.

The first objection taken is that there was no due notice given of the business that was transacted. Section 48 of the U. P. District Boards Act requires that no business which is required to be transacted by a special resolution shall be transacted unless previous notice of the intention to transact such business has been given, and under s. 71 the dismissal of a Secretary is one of the matters for which a special resolution is necessary. It also appears that the Board acting under the power conferred upon it by s. 173, has framed certain regulations which require that there should be ten days' notice of a meeting and a seven days' notice of the agenda.

The first objection is that there was no notice given within the meaning of s. 48 of the Act. We are wholly unable to accept this contention. The agenda paper as issued made it perfectly clear that the draft resolution of the members together with the explanations and the report of the Sub-Committee would come up before the Board on March 8, 1933, "for final decision." This undoubtedly notified that final orders would be passed on the matter. That necessarily included a resolution adopting the draft resolution as proposed by the members. We, therefore, think that there is no force in this objection.

The second objection is that under the regulations the agenda papers should have been issued ten days earlier. We are unable to accede to this contention. The notice which is to be issued ten days before the meeting is a notice of the meeting itself, whereas the agenda is a notice of the matters which have to be considered at the meeting. There has in fact been no non-compliance with the regulation for notice of the meeting was given 10 days earlier and the agenda paper was issued seven days before the meeting. This objection also has, therefore, no force.

I would, therefore, dismiss this appeal.

Bennet, J.—I concur.

By the Court.—The order of the Court is that the appeal be dismissed with costs.

N. *Appeal dismissed.*

LAHORE HIGH COURT

Criminal Revision Petition No. 727 of 1934
July 19, 1934
COLDSTREAM, J.
SAIN – CONVICT – PETITIONER
versus
EMPEROR – OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 199—Complaint, if should specify the section under which accused is to be charged—Penal Code (Act XLV of 1860), ss 366, 368, 497—Complaint under ss. 366, 368—All requirements of s. 497, fulfilled—Conviction under s. 497, if legal

For the purpose of s. 199 of the Code of Criminal Procedure the complaint need not specify precisely the section under which the accused is to be charged so long as it sets forth matter which, if proved, would warrant a conviction, and a desire is expressed that the accused be punished for what he has done. *Jatra Sheikh* v. *Reiazat Sheikh* (1) and *Mohan Singh* v. *Emperor* (2), referred to.

If a complaint under ss. 366 and 368, fulfils all the requirements of a complaint under s. 497, and clearly makes an accusation of an offence under that section, then, if the adultery complained of is proved, a conviction under that section will not be illegal on the ground that there has been no complaint as required by s. 199 of the Code of Criminal Procedure.

C. R. P. from an order of the Sessions Judge, Sialkot, dated April 12, 1934.

Mr. *Amolak Ram Kapur*, for the Petitioner.

Mr. *Dina Nath Bhasin*, for the Opposite Party.

Judgment.—The complainant in the case out of which this revision petition arises made a complaint on March 1, 1932, through an Advocate in the Court of the Additional District Magistrate of Sialkot against Sain and others declaring that they had abducted his wife Taro and that Sain had been having sexual intercourse with her against her will knowing that she was his wife. At the consequent trial Viru gave evidence that Sain had seduced his wife, had had children by her and was now residing with her in Sialkot City. On the facts alleged the trying Magistrate charged Sain under ss. 497 and 498, Penal Code, and convicting him under these sections, sentenced him to six months' rigorous imprisonment on each charge, the sentences to run concurrently. On appeal the learned Sessions Judge of Sialkot maintained the conviction and sentence under s. 497, Penal Code alone.

The petitioner has come to this Court in revision and the point taken before me on his behalf is that the trial was illegal for want of a complaint by the husband without which under the provisions of s. 199, Criminal Procedure Code, no Court had jurisdiction to take congizance of an offence under s. 497, Penal Code.

There is no force in this contention in the circumstances of this particular case. The complaint made by Viru on March 1, 1932, alleged all the ingredients necessary for a conviction under s. 497, that is to say, marriage between *Musammat* Taro and Viru, sexual intercourse between *Musammat* Taro and the accused without Viru's consent or connivance, and knowledge on the part of Sain that *Musammat* Taro was Viru's wife. The fact that the lawyer acting for Viru did not mention s. 497, but only ss. 366 and 368 in the heading of the complaint is immaterial. The complaint clearly accused Sain of adultery with *Musammat* Taro. For the purpose of s. 199, Criminal Procedure Code, the complaint need not specify precisely the section under which the accused is to be charged so long as it sets forth matter which, if proved, would warrant a conviction, and a desire is expressed that the accused be punished for what he has done. As pointed out by a Division Bench of the Calcutta High Court in *Jatra Sheikh* v. *Reazat Sheikh* (1), the intention of s. 199, Criminal Procedure Code is to prevent Magistrates enquiring of their own motion into cases connected with marriage unless the husband or other person authorised moves them to do so. The same view was taken by the Allahabad High Court in *Mohan Singh* v. *Emperor* (2). It is true that the present case is not on all fours with those dealt with in the judgments referred to, inasmuch as in both those cases the conviction of the accused had been under s. 498, which was regarded as a minor offence of the kind punishable under s. 366 (the offence specifically mentioned in the complaint both in those cases and here) while in the present case the offence of which the present petitioner has been convicted, that is to say adultery, could not be so described. They do, however, appear to lend support to the proposition that if a complaint described in its heading as one under ss. 366 and 368 fulfils all the requirements of a complaint under s. 497, and clearly makes an accusation of an offence under that section, then, if the adultery complained of is proved, a conviction under that section will not be illegal on the ground that there has been

(1) 20 C 483.
(2) 153 Ind. Cas. 697; A I R 1934 All 472; (1934) Cr. Cas. 555.

no complaint as required by s. 19 ', Criminal Procedure Code.

Holding that in this case the Court was moved to take cognizance of the case by a complaint of adultery made by Viru I find that the trial and the conviction of Sain under s. 497, Penal Code, was not illegal.

The petitioner's Counsel contends that in the circumstances of this case the sentence imposed is excessive. I do not agree and I note that the learned Judge in Chambers in rejecting the petitioner's application for bail described the petitioner's conduct as having been most reprehensible. I dismiss the petition.

D. *Petition dismissed.*

ALLAHABAD HIGH COURT

First Civil Appeal No. 321 of 1930
January 18, 1935

NIAMAT-ULLAH AND RACHHPAL SINGH, JJ.

RAMJI LAL AND OTHERS—PLAINTIFFS —APPELLANTS

versus

ROSHAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS

Mortgage—Redemption—Suit by prior mortgagee without impleading subsequent mortgagee—Decree —Purchase of property by prior mortgagee in execution—Suit for redemption by puisne mortgagee—Amount, how to be ascertained—Liability to interest.

Where a prior mortgagee obtains a decree on foot of his mortgage and purchases the mortgaged property in execution of his own decree, to which the puisne mortgagee was not a party, the sale cannot be considered to be of no effect at all. It effectively transfers the mortgagor's right to the prior mortgagee (auction-purchaser), as between the mortgagor and the prior mortgagee, though the sale is not binding on the subsequent mortgagee, who can, in spite of it, exercise his right of redemption. When such a suit for redemption is filed, the puisne mortgagee can set off against the mortgage money the net profits from the property received by the prior mortgagee as auction purchaser. At the same time he is liable to pay interest on the mortgage amount up to date to the prior mortgagee. In the absence of evidence to show whether in the years which followed the auction sale, the profits of the property were sufficient to pay the interest each year on the aggregate amount on which interest was running, if the prior mortgagee claims that redemption may be allowed on payment of a certain sum as due to him on the date when he obtained possession, the Court may pass a decree for redemption on the puisne mortgagee accepting that amount. *Nannu Mal* v. *Ram Chander* (1), followed. *Lalta Prasad* v. *Kafayat Husain* (5), explained. *Nannu Mal* v. *Ram Charan Lal* (2), *Muthammal* v. *Razu Pillai* (3) and *Jnanendra Nath Singh* v. *Shoreshi Charan Mitra* (4), referred to.

F. C. A. from the decree of the Subordinate Judge of Bulandshahr, dated April 29, 1930.

Messrs. *S. K. Dar* and *S. B. L. Gour* for the Appellants.

Mr. *Nanak Chand*, for the Respondents

Judgment.—A Bench of this Court, o which one of us was a member, remitte the following issue to the lower Court fo finding:—

"What amount, if any, is due to the defendant mortgagee from the mortgagors on the basis of th mortgage deeds, dated July 21, 1880 and July 27 1882."

For the detailed circumstances in whic it was found necessary to have a findin on the above issue the remand order shoul be seen. For the purposes of our decisio on the issue remitted to the lower Cour whose finding is before us, it is necessar to state the facts very briefly. The defen dant-respondents were mortgagees of a $12\frac{1}{2}$ *biswansi* share in a certain villag under the deeds, one of July 21, 1880, an the other of July 27, 1882. The plaintiff took a mortgage of the same share to gether with another share under a dee of a subsequent date. The defendant obtained a decree for sale on foot of thei mortgages in 1886, and purchased th share themselves in execution of thei decree. They obtained possession of th property and have been in possession eve since. They had omitted to implead th plaintiffs as a party, and the latter there fore were not bound by the result of tha suit. The plaintiffs subsequently brough a suit on foot of their mortgage and ha the same property sold. They were them selves declared to be the auction-purcha sers in 1916. The suit, which has give rise to this appeal, was brought by th plaintiffs on May 15, 1928, for redemptio of the mortgages in favour of the defend ants, to which reference has already bee made. It was alleged that the mortgag money due under the aforesaid deeds ha been fully satisfied by the usufruct of th share which has been in possession of th defendant since 1886. The defendant denied this allegation and claimed a certai sum as a condition of redemption. They alleged that they were entitled to th entire decretal amount with interest up t date. This Court held by its remand orde that the plaintiffs were bound to pay t the defendants the amount due under th two mortgages. The issue remitted to th lower Court accordingly mentioned th question arising between the parties.

The lower Court has returned a findin which is not quite definite. It is pointe

it that the defendants claimed by their ritten statement Rs. 1,926-2-6 which re-esents the mortgage money due under ie two deeds on the date of the decree assed in their favour. They claimed no nterest subsequent to the date on which ossession was delivered to them. They eem to imply that the plaintiffs should ay the same amount for redemption now s they would have had to pay if they ad been impleaded and desired to re-eem. The lower Court is, however, of pinion that, but for this defence, the efendants would have been entitled to a rger sum of money representing the ecretal amount above referred to and terest thereon upto date, the total of hich comes to Rs. 6,457-12. Apparently ie lower Court has left it to us to decide hether one or the other of the two figures ould be considered to be the sum due nder the two mortgages.

The learned Advocate for the plaintiff-ppellants has raised a question which does ot appear to have been considered by the wer Court. He argues that the account etween the parties should be made up by iving credit to the defendants for interest ccruing on the mortgages, but the profits erived from the property purchased by iem should be set off each year against ie interest, and that so far as the profits ere in excess of the interest each year, ey should be set off against part of the incipal. It is contended that if account e made on this footing, the entire mort-age money due under the mortgage deeds question will be found to have been paid f and that some surplus is due to the aintiff-appellants. Unfortunately the de-ndant-respondents are not represented fore us. Their learned Counsel, Mr. anak Chand has stated that he has no structions. From the pleadings and from e attitude they adopted when the order remand was passed it is clear that they ntested the appellant's right to have the ofits set off against interest each year; id we cannot give effect to the plaintiff ppellants' contention as if there is no ntest on the point. The first question, erefore, which we have to decide is ether the plaintiff-appellants are, in w, entitled to have the profits of the operty purchased by the defendant-spondents in execution of their mortgage cree set off against the interest and, far as it was in excess of the interest gainst the principal.

Where a prior mortgagee obtains a decree on foot of his mortgage and purchases the mortgaged property in execution of his own decree, to which the puisne mortgagee was not a party, the sale cannot be considered to be of no effect at all. It effectively transfers the mortgagor's right to the prior mortgagee (auction-purchaser), as between the mortgagor and the prior mortgagee, though the sale is not binding on the subsequent mortgagee, who can, in spite of it, exercise his right of redemption. This has been held by a Full Bench of this Court in *Nannu Mal* v. *Ram Chander* (1). Applying that rule to the facts of the present case we have to accept the position that the mortgagors' rights were transferred to the defendant-respondents in 1886; but the plaintiff-appellants, who were no party, are entitled to redeem. In the exercise of their right of redemption they are entitled to treat the prior mortgages as still subsisting. Not being bound by the decree they can ignore it. The necessary corrolary to this is that account of the mortgage money is to be made up on the basis of the stipulations contained in the mortgage-deeds. In redeeming the mortgages they must pay the principal and interest calculated up to date. At the same time, the prior mortgagees who have been in possession of the mortgaged property by virtue of the auction sale held in execution of their own mortgage decree, should account for the usufruct received by them. They have to do this, not because their possession can be traced to anything in the mortgages in their favour, which were simple, but to the fact that the usufruct received by them should be considered to be tantamount to payments made by the mortgagors. In this connection it should not be overlooked that as between the prior mortgagees and the mortgagors the latter's rights were assigned to the prior mortgagees under the auction sale in lieu of the mortgage money. The prior mortgagees have been in receipt of the usufruct as against the mortgagor in consideration of the whole or part of the mortgage money which as against the mortgagors should be considered to have been wiped out. Any payments which the mortgagor makes to the prior mortgagee enures for the benefit of the puisne mortgagee also. If the prior mortgagees be considered to be in possession of the mortgaged property

(1) 132 Ind. Cas. 401; (1931) A L J 273; A I R 1931 All. 277; Ind. Rul. (1931) All. 497; 53 A 384 (F B.);

under an arrangement made by the Court in the auction sale on behalf of the mortgagor to the effect that the prior mortgagees may take possession of the mortgaged property and retain it as the owners thereof in full or part satisfaction of the mortgage money subject to the right of the puisne mortgagee's right to redeem, there can be no doubt that the usufruct received by the prior mortgagees under such arrangement should, in relation to the puisne mortgagee, be considered to be payments made by the mortgagor. Otherwise the prior mortgagees would have it both ways. On the one hand they insist on payment of the mortgage money consisting of the principal and interest calculated up to date, and on the other hand they are allowed to appropriate the usufruct which, but for the auction sale in their own suit, would have been taken by the mortgagor. This view was taken by a Division Bench of this Court of which one of us was a party in *Nannu Mal* v. *Ram Charan Lal* (2). To the same effect is the view of the Madras High Court in *Muthammal* v. *Razu Pillai* (3), which was followed by this Court in the case referred to above. The Calcutta High Court has taken the same view in *Jnanendra Nath Singh* v. *Shoreshi Charan Mitra* (4). There is a passage in *Lalta Prasad* v. *Kafayat Husain* (5), which is relied in support of the contrary view. The question which the learned Judges were called upon to decide was not quite similar to the one before us. In repelling the contention that interest should cease from the date the prior mortgagee obtained possession under the auction sale in his favour held in a suit on foot of his own mortgage, to which the puisne mortgagee was not a party, the learned Judges observed:—

"It is argued that as Lalta Prasad has obtained possession of the property, no interest should be allowed to him from the date of his obtaining possession. We think there is no force in this contention, as Lalta Prasad obtained possession of the property not as mortgagee but as an auction purchaser in execution of his own mortgage decree."

The view herein expressed is right so far as it goes. It is not open to the puisne mortgagee to say that, though he treats the prior mortgage as still subsisting, yet interest should be calculated only up to the date on which the prior mortgagee obtained possession after his purchase in his own suit against the mortgagor. The very hypothesis on which the puisne mortgagee claims redemption precludes the possibility of interest being calculated only up to the date when possession was obtained by prior mortgagee under the sale in his favour. The puisne mortgagee must pay interest up to date since he treats the mortgages as still subsisting. The learned Judges do not go further than this. They did not hold that the usufruct received by the prior mortgagee in his capacity as auction purchaser should not be set off against the mortgage money. They were not called upon to consider this question, the only argument before them being that interest should cease from the date of the auction purchase by the prior mortgagee. It is true that the learned Judges allowed the entire principal and interest without making any allowance for the usufruct for which no claim had been made and which had probably not been proved. As already stated, the question which has been raised before us was not considered by the learned Judges in that case. The passage quoted above is, therefore, no authority for the proposition contrary to that recognized in *Nannu Mal* v. *Ram Charan Lal* (2) and in the Madras and Calcutta cases, to which reference has already been made. The conclusion which we have arrived at is that while the defendant-respondents are, on the one hand, entitled to have an account taken of what is due to them under the mortgage deeds of 1880 and 1882, they are, on the other hand, liable to give credit for the net profit received by them every year after they entered into possession.

The plaintiff-appellants are faced with a peculiar difficulty in showing that the mortgage money has been satisfied out of the usufruct. The mortgage deed carries interest at the rate of Re 0-14-0 per cent. per mensem compoundable every year. The defendant-respondents obtained possession in 1886. It is not known what amount of principal, interest and compound interest was due to the prior mortgagees in 1886, nor is there any evidence to show whether in the years which followed the auction sale the profits of the property were sufficient to pay the interest each year on the aggrega-

(2) 126 Ind. Cas. 824; 52 A 331; A I R 1930 All 485; (1930) A L J 573; Ind. Rul. (1930) All. 872.

(3) 44 Ind. Cas. 753; 41 M 513; (1918) M W N 251; 7 L W 420; 23 M L T 106.

(4) 69 Ind. Cas. 759; 49 C 626 at p 645; A I R 1922 Cal. 23.

(5) 148 Ind. Cas. 2; A I R 1933 All. 505; 6 R A 672.

amount on which the interest was running. It is quite possible that for many years after 1886 the net profit was not equal to the interest which went on accumulating till it reached an unknown high figure. All that the plaintiff-appellants have been able to establish in the present case is that during the years ranging from 1327 *Fasli* (1920) to 1338 *Fasli* (1931), the profits of the property were in excess of the interest calculated on the original principal amount at the contractual rate. We cannot, however assume that in 1920, (1327 *Fasli*) interest for all preceding years had been paid off, so that interest was running only on the original principal. As already pointed out, it is possible that the aggregate amount on which interest was running had swallowed to a figure on which interest at the contractual rate exceeded the annual profit accruing between 1920 and 1931. In these circumstances, we cannot accept the contention put forward on behalf of the plaintiff-appellants that the entire mortgage money was satisfied by the usufruct and the next best thing that can be done for the plaintiff-appellants to accept the defendants case that redemption may be allowed to the plaintiff on payment of Rs. 1,926-2-6 due under the two mortgages on the date when the defendants obtained possession.

The result is that we pass a decree, in supersession of the decree of the lower Court, for redemption on payment of Rs. 1,926-2-6. Parties shall receive and pay costs in proportion to success and failure. Three months' time is allowed for payment.

N. *Decree passed.*

CALCUTTA HIGH COURT

Death Reference No. 19 and Appeal No. 580 of 1933

September 12, 1933

AMEER ALI AND M. C. GHOSE, JJ.

MUKUNDA MURARI PAL—ACCUSED

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 34, 114, 302—Two persons going to commit robbery—Armed with guns—Retreating on coming of villagers—Shots fired while trying to escape—One of the villagers killed from shot fired by one of the persons—Other person also is guilty under s. 302 read with ss. 34 and 114—Criminal Procedure Code (Act V of 1898), ss. 274 and 276—18 jurors summoned in murder case—8 present—7 selected and trial with their aid—Trial valid.

Two men armed with guns entered into the shop and put the inmates into fear of instant hurt and demanded the keys. Some of the inmates managed to escape, others were put to terror. About this time many villagers came up and wanted to know what was the matter whereupon one of the intruders opened the door and threatened the villagers The intruders fired two shots and got out of the room and proceeded to go away. The villagers pursued them at a distance. The offenders continued to fire at them. At a certain place in the pursuit one of the pursuers came very near the two men and shouted, whereupon one of the two, shot and killed him :

Held, that it was not the primary intention of the two persons to kill any of their pursuers. Their intention was merely to effect their escape from the pursuers. But from the circumstances, it may be concluded that their intention was to effect their escape even though for that purpose it was necessary to shoot any of the pursuers mortally and in the circumstances of this case, the other person who did not shoot should also be convicted under s. 302 read with s. 34 or s. 114, Penal Code. *Barendra Kumar Ghose* v. *Emperor* (1), referred to.

In a murder case 18 jurors were duly summoned for the trial of the case. But when the Judge took up the trial and the names of the 18 jurors were called, only eight of them were found present in Court. Thereupon the Judge chose seven of them and held the trial with the aid of seven jurors:

Held, that it was not the duty of the Judge to send his Court officers to search for jurors in adjacent Sessions Court. The constitution of a jury of seven, in the circumstances, was not, an illegality such as would render the trial invalid. *Serajul Ismail* v. *Emperor* (2), *Dwarika Malo* v. *Emperor* (3), *Amir Khan* v. *Emperor* (4), *Shaheb Ali* v. *Emperor* (5), *Emperor* v. *Tamiz-ud-din* (6) and *Emperor* v. *Erman Ali* (7), referred to. [p. 602, col. 1.]

Mr. *Ramendra Chandra Roy*, for the Appellant.

Mr. *N. A. Khundkar*, for the Crown.

M. C. Ghose, J.—This is an appeal by Mukunda Murari Pal *alias* Jatindra Pal *alias* Harendra Chandra De who has been convicted under s. 393 read with s. 398 and s. 75, Indian Penal Code, and also under s. 302 read with s. 114, Indian Penal Code. He was sentenced under the first section to transportation for life and under the second section sentenced to death. There is a reference by the learned Sessions Judge for confirmation of the sentence of death. The facts in short are that about 2 to 3 A. M. on May 1, 1931, two men armed with guns entered into the shop of Sita Nath Sil at Bahadurabad and put the inmates into fear of instant hurt and demanded the keys. Some of the inmates managed to escape, others were put to terror. About this time many villagers came up and wanted to know what was the matter whereupon one of the intruders opened the door and threatened the villagers. The intruders fired two shots and got out of the room and

proceeded to go away. The villagers pursued them at a distance. The offenders continued to fire at them. At a certain place in the pursuit one of the pursuers Astha Lal Mali, came very near the two men and shouted, whereupon one of the two, not the present accused, shot and killed Astha Lal Mali. The villagers, however, continued to pursue the men who continued to fire shots. One of the shots struck and caused slight injury to witness Salim. After a long pursuit the two men at last ceased firing and the villagers concluded that their ammunition was exhausted. Then the villagers beat them down, captured them together with two guns and brought them back to Bahadurabad where they were kept in the local *zamindar's* cutchery. A *chowkidar* went to the *Thana* and the Police arrived in the morning and took charge of the two captives and the two guns.

The two men took the Police to a certain boat where a dog prevented the Police party from entering. The present accused caught the dog and tied it and thereafter the boat was searched and the present accused produced a bag containing gold and silver coins from the sand near the boat. The two men were duly sent up and were committed to the Court of Sessions. While the trial was pending one of the men, Ismail, died in prison. It appears that the present accused who was allowed bail absconded from bail by reason of which the trial was not held till more than two years after the occurrence. The learned Advocate for the appellant has read the whole of the evidence before us. It is urged that many of the witnesses who were said to have seen the occurrence have not been examined. It appears that there were 5 men inside the shop when the offenders entered. Of them three men were examined in the Sessions Court and two men were tendered for cross-examination. Of the pursuers, who amounted to a large number, a good many have been examined in the Sessions Court. There is, in our opinion, no prejudice caused to the accused because all the pursuers were not examined. The two guns which were found in the possession of the two offenders were proved by evidence to have been stolen shortly before the occurrence. It is urged that a certain bullet was found on the body of the deceased but the bullet was not produced in the Sessions Court and further that no expert was examined to show that the guns had been recently fired. We are of opinion that these omissions have not cast any doubt upon the prosecution story. Upon the whole of the evidence it is clear that the jury had sufficient materials in finding the present accused guilty under s. 393 read with s. 398 and s. 75, Indian Penal Code.

It is urged that the conviction under s. 302 read with s. 114 is wrong in law inasmuch as there is no evidence that the present accused abetted his companion Ismail to shoot and kill Astha Lal Mali. The charge of the learned Sessions Judge on this point has been read and commented upon before us. There is no doubt on the evidence that the accused's companion Ismail deliberately shot and killed Astha Lal Mali and thereby committed an offence of murder punishable under s. 302, Indian Penal Code. The question is whether in the circumstances it can be said that the accused abetted his companion in committing the murder. Under s. 107, Indian Penal Code, a person abets the doing of a thing who (1) instigates any person to do that thing; (2) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or (3) intentionally aids, by any act or illegal omission, the doing of that thing.

As the learned Sessions Judge rightly pointed out to the jury in the present case there is nothing to show that the present accused instigated Ismail or intentionally aided him to commit the murder. The question is whether he engaged in a conspiracy with Ismail for the commission of the murder. For this purpose, the whole of the circumstances must be taken into account. The two men were armed with guns and had plenty of ammunition and they entered the shop for the purpose of committing robbery. When they were disturbed in their act by a large number of villagers they decided to retreat, and in so retreating, they fired a large number of shots. It is clear that their primary intention was to effect their escape from their pursuers and it was their determination to prevent the pursuers from arresting them. It may be conceded that it was not their primary intention to kill any of their pursuers. Their intention was merely to effect their escape from the pursuers. But from the circumstances, it may be concluded that their intention was to effect their

cial Small Causes Courts Act and is not cognisable by a Small Cause Court.

The intention of Art. 13 is to exclude claims to the somewhat arbitrary dues designated as *meras* and *resums* from the cognisance of the Small Cause Court.

Petition under s. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Tirupati in S. C. S. No. 927 of 1930.

Mr. *P. Srikantan*, for the Appellant.

Mr. *A. Ramachandra Ayyar*, for the Respondent.

Judgment.—This Civil Revision Petition arises out of a Small Cause suit filed by the Rajah of Kalahasthi to recover a sum of Rs. 263-11-0 said to be due as *jodi* or *meras* from the *agraharamdars* of Parlapalle Agraharam for *Faslis* 1336 to 1338. There have been several previous suits to recover the same dues for earlier *Faslis*, of which O. S. No 393 of 1905 on the file of the District Munsif's Court of Tirupati ended in a Second Appeal reported as *Rajah of Kalahasthi* v. *Kamall Shama* (1). The learned District Munsif has decreed the claim subject to a certain deduction as set off, and this petition has been presented by two of the *agrharamdars*.

The main contention raised is that the suit was of a kind excepted from the cognizance of a Small Cause Court as falling within Art. 13 of the second schedule of the Provincial Small Cause Courts Act. The Article excepts,

"A suit to enforce payment of the allowance or fees respectively called *milikana* and *hakk* or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immovable property or in an hereditary office or in a shrine or other religious institution."

I do not think that any assistance in deciding this point can be obtained from the earlier litigation. It is true that in the appeal and the Second Appeal in O. S. No. 393 of 1905 it was assumed, in considering the issue of *res judicata* that the previous suit (O. S. No. 787 of 1902) was of a Small Cause nature, but no question seems to have been raised as to the applicability of Art. 13. The point has to be decided here for the first time, on a consideration of the nature of the dues claimed. The original deed of grant to the *agraharamdars* is not forthcoming, but there is a document of the year 1803, which gives details of the various reasons and means which the *agraharamdars* had been previously paying in kind and which at the request of the *agraharamdars* were converted into fixed cash payments. Although these payments have been described by the plaintiff as *jodi*, I think it is clear that they are not of the nature of rent at all. They are customary dues payable to the Rajah in consideration of certain things done by him or certain expenses borne by the *zemindari*-performing *ubhayams* in a temple, visiting the village, employing a Diwan, employing a *karnam*, etc. They are styled *meras* or *resums*, and a *mera* is defined in Wilson's glossary as "a portion of crop given as perquisite to holders of proprietary rights in village lands or to hereditary village officers and servants, out of the common stock on the threshing floor". It will be seen how closely this definition resembles the terms of Art. 13 in each the proprietor of an estate and the holder of a hereditary office are designated as recipients. It appears to me that the intention of the article is to exclude claims to the somewhat arbitrary dues designated as *meras* and *resums* from the cognizance of the Small Cause Court, and that for a very good reason. As the litigation itself shows, difficult questions are raised both as to the original liability for these payments and as to the conditions upon which the landholder may continue to exact them. These questions ought not to be decided summarily, and, so far as the right of appeal is concerned, finally by a Small Cause Court. The learned Advocate for the respondent, while contending that such dues do not fall within Art. 13, has been unable to specify any other due which does so fall. It appears to me that, in general, they are payable to the plaintiff by reason of his interest in immovable property, *i. e.*, as landholder and that in other respects the language of the Article is wide enough to cover them. Several cases have been cited to me, but I have not derived much assistance from them. Most of them relate to what is in fact rent, variously described as Kattubadi (1) *Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rao* (2); Melvaram (2) *Krishnaswami Naidu* v. *Sriramulu Naidu* (3);

(1) 31 Ind. Cas. 214; 29 M L J 535.

(2) 19 M 329.

(3) 106 Ind. Cas. 5; 53 M L J 727; (1927) M W N 823; 26 L W 676; 39 M L T 490; A I R 1928 Mad. 21.

Poruppu (3) *Ramaswami Chettiar* v. *Muthu Vijya Raghunatha Doraisingam* (4), *Chontayi Krishna Mahanty* v. *Gangadhara Padhi* (5). In one or two cases, such as *Maharajah of Vizianagaram* v. *Kota Veeranna* (6), and *Krishnaswami Naidu* v. *Sriramula Naidu* (3), the dues collected were merely passed on by the landholder. Even if this be true of the *Samprati Mera* claimed in this case, which is said to be a payment for the services of a *karnam*, it is only one among other *meras*, of which the same cannot be said. Nor is this a case of a voluntary payment such as was dealt with in *Raja of Venkatagiri* v. *Budam Venkatasubbayya* (7).

My conclusion accordingly is that the suit was of a nature excepted from the cognizance of a Small Cause Court. For the reasons which I have already given, I think that its trial by Small Cause procedure was objectionable, and that, since the decree was passed without jurisdiction this Court ought to interfere in revision. I accordingly allow the petition, set aside the decree of the lower Court, and direct it to return the plaint for presentation in accordance with law.

The petitioners will have their costs in both Courts.

A. *Appeal allowed.*

(4) 137 Ind Cas. 564; 35 L W 144; A I R 1932 Mad. 224; (1932) M W N 55; Ind. Rul. (1932) Mad. 411.

(5) 103 Ind. Cas. 120, 52 M L J 706; A I R 1927 Mad. 670; 38 M L T 385; (1927) M W N 748.

(6) 11 Ind Cas. 760; 36 M 18; 21 M L J 819; 10 M L T 167; (1911) 2 M W N 139.

(7) 117 Ind. Cas. 295; A I R 1929 Mad. 694.

ALLAHABAD HIGH COURT

Criminal Appeal No. 770 of 1934, and Appeal No. 618 of 1934

January 30, 1935

HARRIES AND BAJPAI, JJ.

EMPEROR—PROSECUTOR

versus

BANDHOO AHIR AND OTHERS—ACCUSED

Penal Code (Act XLV of 1860), s. 333—Assault on Sub-Inspector in consequence of what he had done to accused—Accused, when can be convicted for such offence against public servant—Held, 18 months' rigorous imprisonment not enough.

Under the provision of law contained in s. 333, Penal Code, a person who causes grievous hurt to a public servant can be convicted under three circumstances; (1) when grievous hurt is caused while the public servant is in the discharge of his duty as such public servant; in this case motive and object are irrelevant; (2) when a public servant is prevented or deterred from discharging his duty as such public servant; in this case it is necessary that the object of the accused should be to deter the public servant from discharging his duty but it is not necessary to prove any motive; (3) when the public servant is assaulted in consequence of anything done or attempted to be done by that public servant in the discharge of his duty; in this case it is not necessary that the public servant should be discharging his duty at the time of the assault. The object, too, is irrelevant. The only thing that has got to be seen is the motive. The last circumstance mentioned above applies to a case, where the assault is committed on the Sub-Inspector, in consequence of what he had done against the accused.

[In this particular case, considering the high-handedness of the offence under s. 333, Penal Code, it was held, that the proper sentence was a sentence of two years' rigorous imprisonment and that 18 months' rigorous imprisonment was not sufficient]

Cr. A. from an order of the Third Additional Sessions Judge, Gorakhpur, dated June 18, 1934.

Messrs. *Ismail* and *N. Upadhaya*, for the Crown.

Messrs. *Kalim Jafri* and *Kanhaiya Lal Misra*, for the Accused.

Judgment.—Bandhu Ahir, Badal Dube and Magan Beldar were placed on their trial before the Additional Sessions Judge of Gorakhpur for offences under ss. 307, 325 and 333, Penal Code. They were acquitted of offences under ss. 307 and 333, Penal Code, but were convicted of an offence under s. 325, Penal Code. The Local Government has filed an appeal against the acquittal of the three accused under s. 333, Penal Code, and in the appeal of the Local Government the accused are represented by Mr. Kalim Jafri; Badal Dube and Magan Beldar have appealed against their conviction under s. 325, Penal Code, and are represented by Mr. Kanhaiya Lal Misra. Bandhu has remained content with his conviction under s. 325, Penal Code. We have heard the learned Government Advocate in support of the Government appeal and Mr. Jafri in answer. We have also heard Mr. Misra who has taken us through the entire record in connection with the appeal filed by Badal and Magan.

The facts alleged by the prosecution are that Nurul Huda, the Sub-Inspector in charge of Gola *thana*, had made several reports against the three accused and therefore, on February 7, 1934, when the Sub-Inspector had gone to Gorakhpur to give evidence in a criminal case, the three accused surrounded the *ekka* of the Sub-Inspector and struck him with *lathis*. Bandhu was caught on the spot, but the other two managed to run away. Before the Committing Magistrate the two accused

escape even though for that purpose it was necessary to shoot any of the pursuers mortally. There can be no other conclusion from the fact of their constant shooting. It is true that if none of the pursuers had come within the range of their shots no one would have been killed. Astha Lal Mali happened to run near the pursuers and immediately one of the offenders turned and shot him dead. That person was the accused's companion Ismail. From these circumstances the jury, in our opinion, were right to conclude that the accused conspired with Ismail to commit the robbery and to effect their escape if necessary by shooting with their guns. In the prosecution of the object of their conspiracy the accused's companion shot Astha Lal Mali dead. There is thus no doubt that accused Mukunda Murari Pal has been rightly convicted under s. 302 read with s. 114, Indian Penal Code. Indeed in the circumstances of this case, the accused might well have been convicted under s. 302 read with s. 34, Indian Penal Code: see the case of *Barendra Kumar Ghose* v. *Emperor* (1).

A preliminary objection was taken that the whole trial was illegal inasmuch as the jury were not properly constituted. The facts are that 18 jurors were duly summoned for the trial of the case. But when the learned Judge took up the trial and the names of the 18 jurors were called one by one, only eight of them were found present in Court. Thereupon the learned Sessions Judge chose seven of them and held the trial with the aid of seven jurors. It is provided by s. 274, Criminal Procedure Code that where an accused person is charged with an offence punishable with death the jury shall consist of not less than seven persons and, if practicable, of nine persons. In numerous cases of this Court it has been held that the meaning of this section is that in trying an offence punishable with death the jury shall consist of nine persons, but if it be not practicable to have nine persons then it may be held with the aid of seven persons. Section 326, Criminal Procedure Code provides that the number of jurors to be summoned shall not be less than double the number required. Upon the two sections it has been held that in a murder case at least 18 jurors must be summoned for the trial: see *Serajul Ismali* v. *Emperor* (2), *Dwarika Mali* v. *Emperor* (3), *Amir Khan* v. *Emperor* (4), *Shahebali* v. *Emperor* (5). In the case of *Emperor* v. *Tamiz-ud-Din* (6) the learned Judges went so far as to hold that where less than 18 jurors were summoned though nine jurors attended and were chosen without objection, yet the jury were not properly constituted according to the above sections. This case, however, was overruled by the Full Bench decision in the case of *Emperor* v. *Erman Ali* (7) where the Court held that in a murder case where 14 jurors were summoned and nine of them were chosen without objection the trial was not bad merely by reason of the fact that only 14 jurors were summoned. In the present case, 18 jurors were summoned and there can be no objection on the score that a proper number of jurors were not summoned under s. 326, Criminal Procedure Code. The question is whether the learned Judge duly complied with s. 274, Criminal Procedure Code, according to which he should have considered whether it was practicable to have nine jurors. Upon considering the fact that only eight jourors were present, it is clear that there were not a sufficient number of persons from whom nine jurors might have been chosen. The question is whether the learned Judge complied with s. 276, Criminal Procedure Code which provides *inter alia* that in case of deficiency of persons summoned the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present. It is apparent in this case that there were no such persons present in the Court of the learned Sessions Judge. It has been urged by the learned Advocate for the appellant that there are four or five Sessions Courts in Mymen Sing and it may be presumed that there were Sessions cases going on in one or other Court on that date, and it is urged that it was the duty of

(1) 85 Ind. Cas. 47; A I R 1925 P C 1; 26 Cr. L J 431; 52 I A 40; 52 C 197; 29 C W N 181; (1925) M W N 26; L R 6 A P C 1; 26 P L R 50; 27 Bom. L R 148; 6 P L T 169; 23 A L J 314; 41 C L J 240; 48 M L J 543; 1 O W N 935; 3 Pat. L R 1 Cr. (P C).

(2) 111 Ind. Cas. 735; A I R 1928 Cal. 645; 29 Cr. L J 927; 55 C 794; 11 A I Cr. R 66.

(3) 122 Ind. Cas. 219; A I R 1930 Cal. 60; (1930) Cr. Cas. 12; 31 Cr. L J 377; 56 C 1154; 33 C W N 692; Ind. Rul. (1930) Cal. 219.

(4) 122 Ind. Cas. 557; 33 C W N 1053; Ind. Rul. (1930) Cal. 253; 51 C L J 574; 31 Cr. L J 425.

(5) 135 Ind. Cas. 435; A I R 1931 Cal. 793; (1931) Cr. Cas. 1057; 33 Cr. L J 129; 58 C 1272; 35 C W N 711; 54 C L J 307; Ind. Rul. (1932) Cal. 115.

(6) 122 Ind. Cas. 558; 33 C W N 1054; Ind. Rul. (1930) Cal. 254; 31 Cr. L J 426.

(7) 123 Ind. Cas. 664; A I R 1930 Cal. 212; (1930) Cr. Cas. 212; 57 C 1228; 34 C W N 296; Ind. Rul (1930) Cal. 360; 31 Cr. L J 536; 51 C L J 171.

the learned Sessions Judge to send his Court Officers to those other Court-rooms and bring from there such jurymen as were available. The question is whether s. 276, Criminal Procedure Code, casts a duty upon the trial Judge to send his Court Officers to adjacent Sessions Courts to find out men to serve as jurors in his Court. Upon considering the wording of the section, we are of opinion, that no such duty is cast upon the trial Judge. The section merely says that the number of jurors required may, with the leave of the Court, be chosen from such persons as may be present. The meaning of the words is plain. It cannot, in our opinion, be held to mean that it was the duty of the Judge to send his Court Officers to search for jurors in adjacent Sessions Courts. We are, therefore, of opinion, that in this case as there were not nine suitable persons present in Court it was not practicable for the trial Judge to empanel nine jurors. The constitution of a jury of seven, in the circumstances, was not in our opinion, an illegality such as would render the trial invalid. The preliminary objection is overruled.

It remains to consider the sentence of death which has been passed upon the appellant. The learned Sessions Judge recorded his age to be about 28 to 30 years. The Committing Magistrate estimated his age to be about 25 years. He did not fire the fatal shot. He fired many shots from his guns but it does not appear that he caused hurt to anyone. His companion who fired the fatal shot died in jail while he was under trial. Having regard to all the circumstances, we are of opinion, that a sentence of transportation for life will meet the ends of justice in this case. In the result, the convictions are upheld and the sentence of death is reduced to transportation for life.

Ameer Ali, J.—I agree. I desire only to emphasise that we have no intention of laying down any general rule as to what is or is not to be considered "practicable" under any particular set of circumstances.

D. *Sentence reduced.*

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1110 of 1934
January 21, 1935
NIAMAT-ULLAH, J.

BADLOO AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NANU AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXII, r. 3—Suit for possession of land and demolition of constructions against several defendants—Decree—Appeal—Death of one defendant during pendency of appeal—Legal representatives not brought on record—Dismissal of suit by lower Appellate Court—Procedure, if proper.

The plaintiff's suit for recovery of possession of a plot of land and for demolition of certain constructions made by the defendants thereon, was decreed by the trial Court. The defendants, eight in number, filed an appeal in the lower Appellate Court, during the pendency of which one of the defendants died and his legal representatives were not brought on the record. The appeal was accepted and the plaintiff's suit dismissed *in toto*:

Held, on second appeal, that any one of the defendants could have resisted the plaintiff's claim to possession and to demolition of the constructions made by the defendants. As anyone of them could have impugned the entire decree and the lower Appellate Court did set aside the entire decree at their instance and dismissed the plaintiff's suit *in toto*, no fault could be found with the procedure of that Court and its decree was not open to challenge.

S. C. A. from the decision of the First Sub-Judge Meerut, dated March 16, 1934.

Mr. *K. C. Mital*, for the Appellants.

Judgment.—This is a plaintiffs' appeal and arises from a suit for recovery of possession of a plot of land and for demolition of certain constructions admittedly made by the defendants thereon. The plaintiffs' case was that the defendants had encroached upon the plaintiffs' land in 1927 and that they had no right to built on it. The defence was that the land was the property of the defendants and that the constructions complained of by the plaintiffs had been made 30 years before the suit. The plaintiffs' suit was decreed by the trial Court. The defendants, eight in number, preferred an appeal to the lower Appellate Court. The appellant has filed an affidavit which shows that during the pendency of the appeal before the lower Appellate Court one of the defendants namely, Amar Singh, died and his legal representatives were not brought on the record. Apparently this fact was not brought to the notice of the lower Court when the appeal was heard. The learned Judge accepted the appeal and dismissed "the plaintiffs' suit *in toto*." One of the grounds taken in

second appeal is that the legal representatives of one of the defendants not having been brought on the records the entire appeal should be deemed to have abated, and that in any case the decree of the trial Court should not have neen reversed so far as it affects the deceased Amar Singh. I am unable to give effect to this contention. The appellants in the lower Appellate Court were the defendants. It cannot be disputed that any one of them could have resisted the plaintiffs' claim to possession and to demolition of the constructions made by the defendants. If Amar Singh had not originally joined in the appeal, the remaining seven or, for the matter of that, anyone of them, could have appealed from the decree of the trial Court, impugning it in its entirety. The fact that Amar Singh died can only lead to the conclusion that the appeal in the lower Appellate Court abated so far as he was concerned; but the appeal could not abate so far as the surviving appellants were concerned. As anyone of them could have impugned the entire decree and the lower Appellate Court did set aside the entire decree at their instance and dismissed the plaintiffs' suit *in toto* no fault can be found with the procedure of that Court. In my opinion the decree of the lower Appellate Court dismissing the plaintiffs' suit is not open to challenge.

The only other question argued before me is whether the conclusion arrived at by the lower Appellate Court on the main question on which his decree proceeds is correct. That conclusion is that the defendants constructed the '*gher*' in question not in 1927, as alleged by the plaintiffs, but 30 years before the institution of the suit. It is the plaintiffs' own case that in constructing the '*gher*' the defendants were guilty of an act of trespass. This being so, the trespass complained of by the plaintiffs took place 30 years before the institution of this suit. The logical result of this finding is that the defendants were in adverse possession for more than 12 years before the institution of this suit. The learned Advocate for the appellants argues that the defendants did not take the plea of adverse possession in so many words in the written statement. This is true; but I think it is clearly implied in the defendants' allegation that they constructed the '*gher*' 30 years before the suit. There was no other object in making an allegation of this kind. It was understood in that sense by the Courts below; and since a finding has been arrived at, effect must be given to it. The only manner in which effect can be given to such a finding is that the plaintiffs' suit should be held to be barred by limitation. This appeal has no force and is dismissed under O. XLI, r. 11, Civil Procedure Code.

N. *Appeal dismissed.*

LAHORE HIGH COURT

Civil Revision Petition No. 757 of 1933

July 3, 1934

TEK CHAND, J.

BUTI RAM—JUDGMENT-DEBTOR—PETITIONER

versus

SARDAR SINGH—DECREE-HOLDER—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 92 (3), s. 148—Limitation Act (IX of 1908), Sch. I, Art. 166—Deposit of amount for setting aside sale—Deposit not made due to act of Court—Effect of—'Actus curiae neminem gravabit'*—Applicability of.*

It may be taken as settled law that under O. XXI, r. 89, Civil Procedure Code, read with r. 92, (3) and Art. 166 of the Limitation Act, it is necessary that not only the application but also the deposit must be made within thirty days of the date of the sale. Section 148 has no application to such cases and the period of thirty days cannot be extended by the Courts. But at the same time a party litigant ought not to be penalized when he found it impossible to comply with the requirements of the statute, not because of any fault of his own, but by reason of the action or inaction of the Court. On the happening of such a contingency, the maxim "*actus curiae neminem gravabit*" (an act of Court prejudices no man) applies. Consequently, when a deposit is not made in time due to the Court's action, the person depositing will be deemed to have deposited at the time he was ready to deposit. *Mohamad Akbar* v. *Sukhdeo Pandey* (1), *Munna Lal* v. *Radha Kishen* (2), *Gajadhar Das* v. *Ram Sumiran Dube* (3) and *Gopala Krishna Pillai* v. *Kunjithapatham Pillai* (4), referred to.

C. R. P. from an order of the Senior Sub-Judge, Jhelum, dated July 11, 1933.

Messrs. *Shamair Chand* and *Qabul Chand*, for the Petitioner.

Mr. *Amar Nath Chona*, for the Opposite Party.

Order.—In execution of a money decree for Rs. 270-12-0 obtained by respondent No. 1 against the petitioner, his land was attached and sold for Rs. 775. The auction-sale was held on March 9, 1933, and April 18, was fixed for confirmation after hearing the objections (if any) of the judgment-debtor. In the meantime on March 28, 1933, the judgment-debtor presented in the Executing Court an application

under O. XXI, r. 89, stating that he was prepared to pay the decretal amount together with five per cent. of the purchase price and praying that on his depositing the amount the sale be set aside. He also prayed that he be informed of the exact amount to be deposited. On the same day the Court recorded an order that the amount payable was Rs. 315, which might be deposited in the Treasury, and the case brought up for hearing on the date fixed, *i. e.*, on April 18.

On April 8, 1933, the petitioner presented another application stating that the amount be ordered to be deposited and the sale set aside. It is clear from the uncontradicted affidavit of the petitioner that he had actually brought the money with him but under the rules the deposit had to be made in the Treasury after the *chalan* had been obtained from the Court. As the exact amount to be deposited had already been calculated, all that was necessary to do was to issue the *chalan*. But instead of doing so the learned Sub-Judge quite unnecessarily sent the application to the office for *kaifiyat*. The next day April 9, was a holiday and, therefore, the *kaifiyat* was put up on the 10th, when the learned Judge passed a fresh order that the amount be deposited in the Treasury, and issued a *chalan* accordingly. The petitioner says that he went immediately to the Treasury with the money, but it had become too late and he was asked to come the next day. The respondent, however, does not admit this allegation. In the view which I take of the case it is not necessary to determine whether the allegation of the Treasurer actually asking the petitioner to come the next day is correct. It is common ground that the amount was actually deposited on April 11.

At the date of hearing (April 18), the auction-purchaser objected that the deposit had not been made within thirty days of the date of the sale as required by Art. 166, Limitation Act, and, therefore, the sale could not be set aside. This objection has been accepted by the Courts below and the sale confirmed. It may be taken as settled law that under O. XXI, r. 89, read with r. 92 (3) and Art. 166, Limitation Act, it is necessary that not only the application but also the deposit be made within thirty days of the date of the sale. It has also been held in several cases that s. 148 has no application to such cases and the period of thirty days cannot be extended by the Courts. But it is equally well-setted that a party litigant ought not to be penalized when he found it impossible to comply with the requirements of the statute, not because of any fault of his own but by reason of the action or inaction of the Court. On the happening of such a contingency the maxim "*actus curiae neminem gravabit*" (an act of Court prejudices no man) applies: *Mohamad Akbar* v. *Sukhdeo Pandey* (1), *Munna Lal* v. *Radha Kishan* (2), and *Gajadhar Das* v. *Ram Sumiran Dube* (3).

In this case, as already stated, the sale was held on March 9, the judgment-debtor made the application on March 28, and on being informed of the amount to be deposited he brought the money to Court on April 8, when he asked for a formal order for its deposit in the Treasury, but the Sub-Judge instead of issuing the *chalan* forthwith, unnecessarily delayed issuing it till the 10th, and therefore, the amount was actually deposited the next day. It is clear that if the *chalan* had been given to him on April 8, as it should have been and the deposit made that day or the following day, the requirements of the law would have been complied with and the sale set aside. The inaction of the Sub-Judge for two days, however, made the application out of time by the same period, *i. e*, two days and I do not see why the petitioner should suffer in consequence. As observed by the Madras High Court in *Gopala Krishna Pillai* v. *Kunjithapatham Pillai* (4):

"it will be contrary to all principles of justice to require a man to comply with the rules which insist on the taking out of a *chalan* and paying the money to a different officer and then to dismiss the application on the ground that the money ought to have been paid to the Judge himself or to hold that the payment to the officer contemplated by the rules would not be equivalent to compliance with the rules where the delay in payment is entirely due to causes beyond the control of the person taking out the *chalan*."

I hold that the petitioner had complied with the requirements of O. XXI, r. 89, and that the sale should have been set aside, he having duly deposited the decretal amount as well as 5 per cent. of the purchase price in the Treasury. I accept the petition, reverse the orders of the Courts below and set aside the auction sale. Having regard to all the circumstances I leave

(1) 10 Ind. Cas. 51; 13 O L J 467 at p. 470.
(2) 30 Ind. Cas. 146; 37 A 591; 13 A L J 793.
(3) 52 Ind. Cas. 161; 17 A L J 991.
(4) 79 Ind. Cas. 651; 47 M 543 at p. 549; (1923) M W N 811; 18 L W 814; 45 M L J 849; A I R 1924 Mad. 324; 33 M L T 106.

the parties to bear their own costs throughout.

N. *Petition accepted.*

ALLAHABAD HIGH COURT

Criminal Revision No. 786 of 1934
December 13, 1934
KENDALL, ACTG. C. J. AND HARRIES, J.
QASIM RAZA—APPLICANT
versus
EMPEROR—OPPOSITE PARTY

Police Act (V of 1861), s. 30—Scope of—Power of absolutely refusing permission to take out a procession—Whether can be read into the Act—Breaking promise not to take out procession—Whether amounts to disobeying order issued under the Act.

It is the right of a citizen to use the public thoroughfares, provided that he commits no offence in doing so, and the taking out of a procession is not in itself an offence, nor does it require a special licence, except as provided by s 30 of the Police Act. Section 30 empowers the authorities to control processions, and the manner in which they are to be controlled, if it is necessary to control them, is set forth in sub-s. (2). Neither in the marginal note, nor in the body of the section, is any express power given to the authorities absolutely to forbid the taking out of a procession. It is impossible to read into the Act any authority for absolutely refusing permission to take out a procession. *Sitaram Das* v. *Emperor* (2), relied on, *Emperor* v. *Abdul Hamid* (1), distinguished.

To break a promise to the Superintendent of Police made by a person that he would not take out a procession is not to disobey an order issued under the Act and he cannot be convicted.

Cr. R. from an order of the Sessions Judge of Agra dated July 16, 1934.

Mr. *A. P. Dube*, for the Applicant.

The Assistant Government Advocate, for the Crown.

Judgment.—This is an application for the revision of an appellate order of the Sessions Judge of Agra, dismissing an appeal from an order of the City Magistrate in which he convicted the applicant of an offence under s. 30 of the Police Act of 1861 and sentenced him to pay a fine of Rs. 100. It appears, however, that the Magistrate intended to convict the applicant of an offence under s. 32 of the Act, which provides a penalty for disobeying orders issued under the three preceding sections, or for violating the conditions of a licence. The circumstances of the case are fully stated in the orders of the Magistrate and the Sessions Judge. It is only necessary to repeat here that the applicant, who is a Shiah Muhammadan, had been up to 1931 in the habit of taking out a procession called the "*Duldul*" procession from his house in the City of Agra, that in 1931 and the two following years the procession had been discontinued owing to certain orders passed by the authorities, and that in 1934 the applicant applied both to the District Magistrate and to the Superintendent of Police for permission to take out a procession. On a report by the Superintendent of Police, this application was refused, apparently by both the authorities applied to. After this, some time in April 1934, notices were issued by the Superintendent of Police, and one of these was affixed to the applicant's house. It evidently purports to be a notice under sub-s. (2) of s. 30 of the Police Act, and it contains the following order:—

"Besides the persons who have already obtained permission, no other person without obtaining permission of the Superintendent of Police will be authorised to take a procession on the public way and thoroughfare."

On April 23, the applicant made another application by telegram to the District Magistrate informing him that he was proposing to take out the procession, and this was forwarded to the Deputy Magistrate in charge of the *mohalla*, who sent for the applicant and informed him that his application had already been refused. We are informed by Counsel that after this the applicant asked for a written order for his use in the Civil Court, and then decided to take out a formal procession, which he did. The procession was stopped about five paces from his house and no trouble resulted. But the applicant was prosecuted and convicted, as we have described above.

Both the Courts have convicted the applicant on the grounds that the order refusing permission to take out a procession was issued under ss. 30-31 of the Police Act and that as the applicant disobeyed that order, he is therefore, liable to punishment under s. 32, but it has been argued before us by Mr. Dube that the conviction is illegal, because the order refusing permission to take out the procession was in itself not a legal order, and in any case was not an order passed under the provisions of ss. 30-31 of the Act.

We may mention that two other matters were argued before us, which may at once be disposed of. It was said that on the facts of the case, as stated by the witnesses for the prosecution the procession was stopped before any harm was done and, therefore, there was no offence. This, however, is irrelevant, as the question is whether a legal order under the Police Act has been contravened. It was also said that

the applicant had committed no offence because the road on which he had actually taken out the procession was his private property. It has not, however, been proved that this road is his private property, and as it has been admitted that this road is freely used as a public thoroughfare, the objection cannot be seriously considered.

The more technical objection, however, is not so easily disposed of. Section 30 of the Police Act, as the marginal note shows, is one for "regulating of public assemblies and processions and licensing of same." Sub-section (1) shows that:

"The District Superintendent or Assistant District Superintendent of Police may, as occasion requires, direct the conduct of all assemblies and processions on the public roads or in the public streets and thoroughfares and prescribe the routes from which or the time at which such processions may pass."

Sub-section (2) says:

"If he is satisfied that it is intended by any person or class of persons to convene or collect an assembly in any such road, street or thoroughfare or to form a procession which would, in the judgment of the Magistrate of the District or of a Sub-Division, if uncontrolled, be likely to cause a breach of the peace, he may require by general or special notice that the person convening or collecting such assembly or directing or promoting such procession shall apply for a licence."

The third sub-section shows that when such application has been made,

"he may issue a licence specifying the names of the licencees and defining the conditions on which alone such assembly or such procession is to be permitted to take place, and otherwise giving effect to the section."

In the present case, it is not denied that the applicant had applied for a licence, and that the application had been rejected. The learned Judge has remarked that under sub-s. (3) of s. 30, the Magistrate may issue a licence, and that this means that he has the power to refuse to issue one, otherwise the word "shall" would have been used. It appears to us that under the section it is the Superintendent of Police and not the Magistrate who may issue the licence, but this is not a matter of importance in the present case. We may agree with the learned Judge that there could be no obligation on the Superintendent of Police to issue a licence merely because an application has been made for one. What the Judge does not appear to have considered, however, is what the effect of "refusing to grant" a licence will be. We have used the expression "refusing to grant a licence" because that is in fact what the authorities did or claimed to have done. But we think we shall be following the wording of the section more closely if we hold that the Superintendent of Police under sub-s. (3) of s. 30 either may issue a licence or may not issue a licence, because when the matter is put in this way it is clear that the Superintendent of Police is authorised by the Act to issue a licence, if he thinks it necessary, or not to issue a licence, if he thinks it unnecessary to do so. The Act does not in terms give him authority to refuse to issue a licence, for the purpose of preventing a procession from being taken out. It is quite conceivable that after an application for a licence has been made and the Superintendent of Police has satisfied himself, after examining the application and, if necessary, questioning the applicant, that there is no danger to the public peace, it may be unnecessary to issue a licence or regulate or direct the conduct of the procession at all, and in this case he would presumably not issue a licence and not lay down any conditions.

In such a case it could hardly be contended that it would be an offence to take out a procession merely because no licence had been issued.

In fact it has not been suggested to us that the act of taking out an unlicensed procession is in itself an offence against any law. It is the right of a citizen to use the public thoroughfares, provided that he commits no offence in doing so, and the taking out of a procession is not in itself an offence, nor does it require a special licence, except as provided by s. 30 of the Police Act. That is a section which empowers the authorities to control processions, and the manner in which they are to be controlled, if it is necessary to control them, is set forth in sub-s. (2). Neither in the marginal note, nor in the body of the section, is any express power given to the authorities absolutely to forbid the taking out of a procession.

It has been argued by Dr. Wali Ullah, on behalf of the Crown—and again this must be obvious—that if this interpretation of the section is correct, then a person whose application for a licence under sub-s. (2) of s. 30 has been refused is in a better position than one whose application has been accepted and who has obtained a licence, because the procession of the latter will be regulated by the conditions of his licence, whereas the unsuccessful applicant will not be fettered in any way. The apparent paradox, however, appears to us to be due to a misreading of s. 30 of the Act. If once it is admitted that the Superintendent of Police has no power under the Act absolutely to

forbid a procession, but only has the power to regulate one, it becomes clear that it is his duty to regulate a procession, if he thinks that it requires regulating, in the manner prescribed by the Act, that is to say, by the issue of a licence, or to leave it alone; and thus the issue of a licence imposes a liability on the applicant and not a privilege.

We are far from saying that the Act has been worded as clearly as it might have been, but we have to interpret it strictly, and we consider that it is impossible to read into it any authority for absolutely refusing permission to take out a procession. We have been referred to a decision of a Full Bench of the Patna High Court in the case of *Emperor* v. *Abdul Hamid* (1), in which there are some passages which support the argument of the learned Assistant Government Advocate in this case. In the course of his judgment Mullick, J., remarked:

"Now s. 30 of the Police Act, though not happily worded, appears to mean this. The Superintendent of Police has to be satisfied that an assembly or procession is in the judgment of the District Magistrate likely to cause a breach of the peace. He may then issue a notice upon the person... ...to apply for a licence. It is contended that the Superintendent is not authorised to issue a general order, but must call upon the convenor or promoter of the assembly or procession to take out a licence for the occasion. In my opinion, the words are sufficiently general to enable the Superintendent to issue a general notification containing a prohibition from convening or collecting an assembly or promoting or directing a procession without a licence. The terms of the section are also wide enough to cover a prohibition without any limit of time. If the person or persons against whom the notice is directed convene or collect an assembly or promote or direct a procession without licence, he or they will be punishable under s. 32 of the Act."

This is an *obiter dictum*, as the persons who were convicted in that case were not convicted under the provisions of the Police Act, but under the Penal Code, and we notice that Das, J., disagreed with the other two learned Judges in the interpretation of the Police Act. In a later case, that of *Sitaram Das* v. *Emperor* (2), in dealing with a case under s. 32 of the Police Act it was remarked:

"So far as I can see the Police have no power to forbid the issue of a procession. The power to control does not include the power to forbid,"

and that is the view we have taken in the present case. It was, in our opinion, believed by the Legislature that it should be possible for the authorities so to regulate a procession by the conditions of a licence that no danger to the public peace would be likely to arise, and for this reason it was not thought necessary to restrict the liberties of the subject further than has, in our opinion, been already done in s. 30 of the Act.

It has been remarked by the Magistrate that the present applicant gave a promise to the Superintendent of Police that he would not take out the procession and that he broke this promise, and if this is so his conduct was most improper. But to break a promise to the Superintendent of Police is not to disobey an order issued under the Act, and we must, therefore, hold that the applicant has been wrongly convicted. We, therefore, set aside the orders of the Courts below convicting the applicant and direct that he be acquitted and that the amount of the fine, if paid, be returned to him.

N. *Order set aside.*

(1) 63 Ind. Cas. 945; 2 Pat. 131; 3 P L T 585; (1922) Pat. 274; 4 U P L R (Pat.) 79; 23 Cr. L J 625; A I R 1923 Pat. 1; 1 Pat. L R 199 Cr.

(2) 93 Ind. Cas. 986; 4 Pat. 795; A I R 1926 Pat. 173; 27 Cr. L J 522; 7 P L T 622.

NAGPUR JUDICIAL COMMISSIONER'S COURT

Civil Revision Application No. 271-B of 1933

January 17, 1935

POLLOCK, A. J. C.

SHRIRAM—DEFENDANT—APPLICANT

versus

MOHANLAL—PLAINTIFF—NON-APPLICANT

Minor—Ratification—Minor just attaining majority—Old promissory note executed by mother-guardian renewed—If proves ratification of old debt—Legal necessity—Hindu Law—Minor—Negotiable Instruments Act (XXVI of 1881), s. 118—Presumption under—Power of Attorney—Agent authorised to represent family in Civil, Criminal, revenue, registration and mutation proceedings—Whether includes power to incur debts.

In order that an act may amount to a ratification, there must be, after majority and after the late minor has acquired full knowledge of the nature and effect of the transaction, some promise or other act, which shows an internal acknowledgment of his liability in respect of the act done on his behalf during minority. Where, therefore, a person, two months after attaining majority, renews the promissory note executed by the late agent of his mother guardian, and such agent, at the time of the renewal is in the employ of the person in whose favour the promissory note is executed, it cannot be said that the act of the minor amounted to a ratification of the act of his mother guardian and the plaintiff must prove that there was a legal necessity.

Section 118, Negotiable Instruments Act, does not raise any presumption that the consideration of the promissory note was advanced for legal necessity and the burden of proving that such advance was for legal necessity rests on the plaintiff making the advance on the promissory note.

Where an agent has a power-of-attorney

authorising him to represent the members of the family in Civil, Criminal and Revenue Courts and in registration and mutation proceedings, there is no presumption that he was authorised to incur debts on behalf of the family.

C. App. for revision of the decree of the Judge, Small Cause Court, Akola, dated August 30, 1933, in Civil Suit No. 913 of 1932.

Mr. *M. R. Bobde*, for the Applicant.

Mr. *T. L. Sheode*, for the Non-Applicant.

Order.—The plaintiff sued to recover money due on a promissory note, Ex. P-1, executed by the defendant Shriram in his favour on February 23, 1930. The consideration, as stated in the note, was Rs. 21 in cash, which was admittedly not paid, and Rs. 729 due on a previous promissory note dated July 22, 1927. This history of the previous debt is as follows:—

On August 11, 1922, Narayan, the brother of Shriram's grand-father, borrowed Rs. 600 in cash from the plaintiff, and Ganpat Mulluji, who was then Narayan's agent, signed a receipt in the plaintiff's account books. Narayan was then the sole adult male member in the family. Narayan died in 1924, and on July 29, 1925, a promissory note for Rs. 400 was executed in renewal of the old debt by Ganpat Malluji as agent of *Musammat* Kashibai, the mother and guardian of the defendant Shriram. This promissory note was renewed on July 22, 1927, by the execution of another promissory note for Rs. 450, which was again executed by Ganpat Malluji as the agent of Shriram's mother and guardian Kashibai. On July 22, 1927, Rs. 729 was found due on this promissory note.

The defendant Shriram attained the age of 18 years on December 23, 1929, just two months before the promissory note in suit was executed. Ganpat Malluji, who had managed the estate of the defendant's family for many years, left the defendant's service in March 1929 and was in the plaintiff's service when the promissory note in suit was executed. The defendant alleged that he executed this promissory note under the undue influence of the plaintiff and Ganpat Malluji without understanding what he was doing, and he also alleged that there was no legal necessity for the original loan of Rs. 600. To this the plaintiff replied that the defendant had specifically admitted his liability under the old promissory note and had ratified the act of his agent Ganpat. It may be noted that Ganpat was the agent not of the defendant but of the defendant's guardian and that the plaintiff did not allege that the original loan was borrowed for legal necessity. It was, therefore, not open to the plaintiff to prove legal necessity, and there is in fact no evidence of legal necessity except a remark to that effect by Ganpat which can hardly be considered conclusive.

Ganpat had a power-of attorney authorising him to represent the members of the defendant's family in Civil, Criminal and Revenue Courts and in registration and mutation proceedings. This power did not authorise him to incur debts on behalf of the family, and even though he managed the estate I do not see why it should be inferred that he had power to borrow money, nor why anybody should think that he had. He was in any case merely the agent of the defendant's guardian, and the defendant's guardian had no power to borrow money on the defendant's behalf, except for legal necessity. The defendant, therefore, was not liable under the old promissory notes.

It was of course open to the defendant to ratify the acts of his guardian, and the acts of the guardian's agent may be taken to be the acts of the guardian. Ganpat stated that he was not present when the promissory note in suit was executed, but this can hardly be true if, as the plaintiff states, the previous dealings were explained to the defendant. The defendant had just attained majority, and Ganpat, who had for many years looked after him and his estate, was then in the plaintiff's service. It is conceded that the defendant had no independent advice. Even if these circumstances do not inevitably raise the inference that undue influence was exerted on the defendant, I am of opinion that at least there was no valid ratification. Ratification is defined at page 199 of Trevelyan's Law Relating to Minors, 6th edition, as follows:

"To amount to a ratification, there must be, after majority and after the late minor has acquired full knowledge of the nature and effect of the transaction, some promise or other act, which shows an internal acknowledgment of his liability in respect of the acts done on his behalf during minority."

It seems to me clear that the defendant did not execute the promissory note with full knowledge of the nature and effect of the transaction and

that it cannot be inferred that he intended to acknowledge liability for the old debt. I hold, therefore, that he is not liable under the promissory note in suit.

It has been argued that under s. 118 of the Negotiable Instruments Act, there is a presumption that the promissory note in suit was for consideration. That presumption, which is of course rebuttable, merely means in effect that there is a presumption that Rs. 600 was originally advanced in cash. In does not raise any presumption that Rs. 600 was advanced for legal necessity and the burden of proving that such advance was for legal necessity rests on the plaintiff.

The application for revision is, therefore, allowed with costs and the plaintiff's suit stands dismissed with costs. Counsel's fee Rs. 20.

D. *Application allowed.*

LAHORE HIGH COURT

Criminal Revision Petition No. 824 of 1934

July 26, 1934

ADDISON, J.

NUR MUHAMMAD—ACCUSED—PETITIONER

versus

Musammat HAJRAN—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance proceedings — Wife, examination of—Husband expressing willingness to take back wife—Duty of Court to examine wife—Bona fides *of offer and sufficiency of reasons for refusal to go back to husband should be considered before making order.*

Proceedings under s. 488, Criminal Procedure Code, are not complaints and hence it is not legally necessary for the wife to be examined. But when a husband expresses his willingness to take back the wife and child, it is the duty of the Magistrate to enquire from the wife her reasons for not going back to her husband and failure to do so amounts to illegality. *Subbayya* v. *Ambamma* (1), referred to.

The mere fact that some three years ago the husband beat the wife and turned her out is no reason for holding that the subsequent offer to take her back, was not *bona fide* or could justify the refusal of the wife to go back to her husband. Unless the Magistrate finds that the offer is not *bona fide* or that the reason given by the wife for not going back to her husband is sufficient, he should not make an order for maintenance *Phula Khan* v. *Emperor* (2) and *Sultan* v. *Mahtab Bibi* (3), referred to.

Case reported by the Additional District and Sessions Judge, Lahore, with his No. 2262 of 2nd June, 1934.

Facts:—*Musammat* Hajran, wife of Nur Muhammad, claimed separate maintenance from her husband for herself and her son under s. 488, Criminal Procedure Code, on the allegation that she was beaten and turned out of her house by her husband three years ago since when she has been living with her brother Fazal Din and her mother and that though attempts were made to persuade Nur Muhammad to take her back, they failed.

According to the allegation of Nur Muhammad he neither beat his wife nor turned her out, but *Musammat* Hajran left her house with her ornaments during his absence in dudgeon as he did not agree to marry his sister to P. W. No. 1 Fazal Din, her brother. He tried to get her back several times but without success.

The Magistrate after taking evidence found that *Musammat* Hajran was turned out of her house by Nur Muhammad and that she and her son have not been allowed any allowance during the last three years although Nur Muhammad had ample means to do so. The Magistrate, therefore, ordered that Nur Muhammad should pay Rs. 8 for *Musammat* Hajran and Rs. 4 for her son monthly towards the maintenance allowance from July 1, 1933, onwards.

From this order the petitioner Nur Muhammad has petitioned to this Court on the revisional side to recommend to the Hon'ble High Court to set it aside on the grounds that the order is illegal: (1) as before the issue of process the statement of *Musammat* Hajran was not recorded and there was no order dispensing with her personal attendance, (2) that the petitioner stated that he was ready to take her back, and Fazal Din, P. W. No. 1, her brother said that he was willing to send her back hence the provisions of s. 488, Criminal Procedure Code, did not justify the order of payment of separate maintenance, (3), that it was the duty of the Magistrate to examine the wife as to the reason why she was unwilling to go back to the respondent but the Magistrate never made such enquiry, (4) that on the merits no desertion or neglect was established. With respect to the non-examination of the wife before issue of process, it must be noticed that the complaint itself was lodged by her *mukhtar* who was examined before issue of process. Proceedings under s. 488, Criminal Procedure Code, are not complaints and hence it is not legally necessary for the wife to be examined.

But when a husband expressed his willingness to take back the wife and child it was the duty of the Magistrate to enquire from the wife her reasons for not going back to her husband and failure to do

so amounts to illegality: *Subbayya* v. *Ambamma* (1).

The mere fact that some three years ago the husband beat her and turned her out is no reason for holding that the present offer was not *bona fide* or could justify the refusal of the wife to go back to her husband.

For, in this case, the evidence produced by the wife showed that attempts were made to make the husband take her back. The previous beating therefore was no bar to her going back to her husband. Further still if the wife was willing to go back to her husband, the jurisdiction of the Magistrate to fix maintenance ceased to exist: *Phula Khan* v. *Emperor* (2). The Magistrate in this case altogether ignored the offer of the husband and never enquired from the wife if she was willing to go back to her husband, and if not, why not. He never gave any finding that the offer was not *bona fide* or the reason given by the wife for not going back to her husband was sufficient: *Sultan* v. *Mahtab Bibi* (3). The order for maintenance was, therefore, made without going through the necessary procedure and is illegal. I therefore submit the records of the case to the Hon'ble High Court that the order of the Magistrate may be set aside and he should be ordered to proceed according to law in the light of the above remarks.

Mr. *Iftikhar Ali*, for the Petitioner.

Mr. *T. D. Khanna*, for the Opposite Party.

Judgment.—For reasons given by the learned Additional Sessions Judge, I set aside the order of the Magistrate and remand the proceedings to him for disposal in accordance with law.

N. *Case remanded.*

(1) 2 Ind. Cas. 155; 9 Cr. L J 501.

(2) 26 Ind. Cas. 998; 213 P L R 1915; 16 Cr. L J 86; A I R 1914 Lah. 590.

(3) 98 Ind. Cas. 391; A IR 1926 Lah. 536; 27 Cr. L J 1319.

LAHORE HIGH COURT

Second Civil Appeal No. 581 of 1932

February 1, 1935

DALIP SINGH AND BHIDE, JJ.

PIR BAKHSH AND ANOTHER—PLAINTIFFS APPELLANTS

versus

KIDAR NATH AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 11—Suit for specific performance of contract by two plaintiffs—Plaintiffs' shares not specified—Share in consideration not known—Appeal by them against lower Court's decision—Death of one of them—Legal representative not brought on record within time—Held, appeal abated as whole—Held also that ignorance of death was not sufficient cause to extend limitation—Limitation Act (IX of 1908), s. 5—Contract Act (IX of 1872), s. 45.

A contract was entered into by defendant No. 1 in favour of two persons named *P* and *K* who were the plaintiffs in a suit for specific performance of the contract to sell certain land and both of them had preferred the appeal jointly. During the pendency of the appeal *P* died and no application was made within the prescribed period to bring his legal representatives on the record. It was, however, made after the prescribed period, but it merely stated that the delay was due to ignorance on the part of the applicants:

Held, (*i*) that the reason for delay could not be considered to be an adequate ground for extension of time under s. 5 of the Limitation Act, *Amin Chand* v. *Firm Baldeo Sahai Ganga Sahai* (1), relied on.

(*ii*) that the right of appeal on the death of *P* vested in the legal representative of *P* and not in *K* and the appeal abated according to the provisions of rr. 3 and 11 of O. XXII, Civil Procedure Code, at least so far as *P* was concerned.

(*iii*) that since the agreement between the parties did not specify any shares and it was impossible to say in what shares the consideration was to be paid by, or the land to be divided between the two plaintiffs, the right to enforce the contract vested on the death of *P* in his legal representatives along with *K* and not in *K* alone. Therefore, no relief could be given to *K* when the legal representatives of *P* had not been brought on the record and his share could be ascertained. Consequently, the whole appeal abated.

S. C. A. from the decree of the Additional District Judge, Lahore, dated January 19, 1932, modifying that of the Subordinate Judge, Second Class, Lahore, dated December 17, 1928.

Messrs. *J. N. Aggarwal* and *S. L. Puri*, for the Appellants.

Mr. *M. L. Sethi*, for Mr. *J. G. Sethi*, Messrs. *Har Bhajan Das* and *Badri Das*, R. B. for the Respondents.

Bhide, J.—This Second Appeal arises out of a suit for specific performance of a contract to sell certain land and in the alternative for damages. The suit was decreed by the trial Court but was dismissed on appeal by the learned District Judge who merely allowed plaintiffs a refund of the earnest money paid by them.

The contract was entered into by defendant No. 1 in favour of two persons named Pir Bakhsh and Khuda Bakhsh who were the plaintiffs in this case and both of whom had preferred this appeal jointly. During the pendency of this appeal Pir Bakhsh died and no application was made within the prescribed period to bring his legal representatives on the record. A preliminary objection is

raised that the whole appeal abates in the circumstances.

An application for bringing the legal representatives of Pir Bakhsh on the record was made after the prescribed period but it merely states that the delay was due to ignorance on the part of the applicants. This cannot be considered to be an adequate ground for extension of time under s. 5 of the Indian Limitation Act. The learned Counsel for the respondents has relied upon *Amin Chand* v. *Firm Baldeo Sahai Ghanga Sahai* (1), which dissents from the view taken by the Punjab Chief Court in *Piyare Lal* v. *Chura Mani* (2). This ruling certainly appears to support his contention that the appeal abates. The learned Counsel for the appellant tried to distinguish this ruling on the ground that it related to a suit for accounts, while the present case was a suit for specific performance of a contract. But the reasoning in *Amin Chand* v. *Firm Baldeo Sahai-Ganga Sahai* (1) does not seem to be confined to a suit for accounts.

The question has to be decided primarily on the basis of the provisions of O. XXII, r. 3, Civil Procedure Code, read with r. 11, of the same Order. According to these rules, the appeal would abate so far as the deceased appellant was concerned, if the right to appeal does not survive to the surviving appellant. The learned Counsel for the appellant has urged that the right to appeal does survive to the surviving appellent Khuda Bakhsh, inasmuch as according to the provisions of O. XLI, r. 4, Civil Procedure Code, he alone could have appealed from the whole decree. But this argument does not appear to be sound. What has to be considered is whether Pir Bakhsh's right to appeal has survived to the appellant Khuda Bakhsh and it seems to my mind clear, that that right, on the death of Pir Bakhsh vested in the legal representative of Pir Bakhsh and not in Khuda Bakhsh. It is true that Khuda Bakhsh could have appealed from the whole decree, but he did not purport to do so and in any case that point seems to be hardly relevant to the question of devolution of Pir Bakhsh's right to appeal after his death. I would, therefore, hold that the appeal would abate according to the provisions of the rules referred to above at least so far as Pir Bakhsh was concerned.

(1) 151 Ind. Cas. 781; 15 Lah. 667; 35 P L R 92; A I R 1934 Lah. 206; 7 R L 204.
(2) 46 Ind. Cas. 50; 84 P R 1918.

But it was urged that the whole appeal must abate as Pir Bakhsh's share was not specified in the contract and in support of this argument reliance was placed on *Sant Singh* v. *Gulab Singh* (3). This contention also appears to me to be correct. The agreement between the parties does not specify any shares and it is impossible to say in what shares the consideration was to be paid by, or the land to be divided between the two plaintiffs. The right to enforce the contract vests on the death of Pir Bakhsh in his legal representatives along with Khuda Bakhsh and not in Khuda Bakhsh alone (*cf.* s. 45 of the Indian Contract Act). It seems, therefore, impossible to give any relief to Khuda Bakhsh when the legal representatives of Pir Bakhsh have not been brought on the record and his share cannot be ascertained. I would accordingly hold that the whole appeal abates and dismiss the same. As there is some conflict of authority on the question of abatement when one of the appellants dies, I would leave the parties to bear their costs.

Dalip Singh, J.—I agree.

D. *Appeal dismissed.*

(3) 114 Ind. Cas. 417; 10 Lah. 7; [A I R 1928 Lah. 572; 30 P L R 453 (F. B.).

MADRAS HIGH COURT

Civil Revision Petition No. 259 of 1929
March 8, 1934
SUNDARAM CHETTY, J.

A. L. S. P. P. L. SUBRAMANIAN CHETTIAR—PETITIONER
versus
SUBBARAYA GOUNDEN AND OTHERS—RESPONDENTS

Provincial Insolvency Act (V of 1920), ss. 53, 54—Vindictive preference, whether fraudulent—Mortgage by father and sons—Father alone adjudicated—Mortgage can be avoided under ss. 53 and 54 only in respect of father's share—Advance of fresh loan when giving preference to creditor, effect of—Transfer of Property Act (IV of 1882), s. 53.

Where a father executed a mortgage of properties belonging to him and his two minor sons to one of their creditors acting on his own behalf and as guardian of his minor sons, and the father alone was subsequently adjudged an insolvent:

Held, that the transfer by the insolvent father alone to the extent of his own share therein would come within s. 54 of the Provincial Insolvency Act. The transfer of the sons' shares cannot be dealt with either under s. 53 or s. 54 of the Insolvency Act, though it may be sought to be avoided under s. 53 of the Transfer of Property Act. *Narayana Iyer* v. *Venkataraman Iyer* (1) and *Sivasami Chetty* v. *Sevugan Chetti* (2), referred to, *Surapu Raju* v. *Venkayya* (3) and *Rajagopalan* v. *Subhrama Iyer* (4), distinguished.

Where a creditor at the time of receiving a fraudulent preference by way of mortgage from a debtor in embarassed circumstances advanced a fresh loan to the debtor:

Held, that though the transaction could not be strictly viewed as a fraudulent preference within s. 54 of the Insolvency Act so far as the fresh advance was concerned, yet it could be avoided under s. 53 of the said Act even in respect of the fresh advance. *Janaki Ram Vilas Nidhi* v. *Official Assignee, Coimbatore* (5), distinguished. [p. 614, col. 2]

Where a debtor who was in embarassed circumstances being pricked in mind on account of the refractory conduct of some of the creditors who declined to reduce the interest as desired by him created a mortgage practically over his entire property in favour of one of them giving him a vindictive preference with a view to punish the other creditors:

Held, that the transaction came within s. 54 of the Provincial Insolvency Act.

C. Rev. P. under s. 75 of the Provincial Insolvency Act, praying the High Court to revise the order of the District Court, Coimbatore, dated January 10, 1929, and made in C. M. A. No. 31 of 1928, preferred against the decree of the First Additional Subordinate Judge, Coimbatore, in the Court of the Subordinate Judge of Coimbatore, dated December 31, 1927, and passed in I. A. No. 749 of 1926 in I. P. No. 29 of 1925.

Mr. *M. Patanjali Sastri*, for the Petitioner.

Messrs. *A. C. Sampath Ayyangar*, *M. Krishna Bharathi* and *N. G. Krishna Ayyangar*, for the Respondents.

Judgment.—This is a Civil Revision Petition filed against the judgment of the District Judge of Coimbatore in C. M. A. No. 31 of 1928 confirming the decision of the trial Court in an application under ss. 53 and 54 of the Provincial Insolvency Act, V of 1920, for the annulment of the mortgage deed Ex. 1, dated October 9, 1924, and executed by one Subbaraya Gounden (who was subsequently adjudged an insolvent) in favour of Subramaniam Chettiar, by his agent Narayanan Chettiar, for Rs. 7,000. The applicant was one of the petitioning creditors at whose instance the debtor, Subbaraya Gounden, was declared an insolvent. Both the lower Courts have given a concurrent finding that the aforesaid mortgage was a fraudulent preference in favour of one of the creditors within the meaning of s. 54 of the Act and on the strength of that finding annulled the mortgage as against the Official Receiver. The petition for annulment had to be filed by one of the creditors as the Official Receiver declined to take any action. There is no doubt that a creditor can make an application of this kind when the Receiver refused to act. The present Civil Revision Petition was filed by the alienee. The debtor is the first respondent in this petition, and on his death, his two sons have been added as his legal representatives. The second respondent is the applicant who filed the petition for annulment of the mortgage.

The facts of this case may be briefly stated. Subbaraya Gounden, though possessed of some property, was in embarrassed circumstances. He was indebted to several-money lending firms and other creditors. In respect of some of the debts, decrees also appear to have been passed. When the matters stood thus, he found himself unable to pay his debts as they became due, with the result that a sort of composition with his creditors was attempted to be effected. At a meeting of some of the creditors, the debtor desired them to reduce the rate of interest upon his debts from three to one per cent. per mensem, and asked them to wait for two months. Two of the creditors agreed to the reduction of interest to 18 per cent. in respect of all the debts, but Narayanan Chetty the agent of the present petitioner, did not agree to such a reduction in respect of his dues. No final agreement could be reached; subsequently some arrangement was effected as between Narayanan Chettiar (the agent of the petitioner) and the debtor, whereby the mortgage in question for Rs. 7,000 was created in favour of the petitioner over almost the entire property of the debtor's family. The interest due to the petitioner on the previous debts was fixed at 1½ per cent. per mensem, and for the amount so found due, namely Rs. 5,009 together with a sum of Rs. 1,991 received in cash, (in all Rs. 7,000) interest at 2 per cent. per mensem was fixed in the mortgage bond. The finding of the learned Subordinate Judge is to the effect, that the debtor who was in embarrassed circumstances, was pricked in mind on account of the refractory conduct of some of the creditors who declined to reduce the interest as desired by him, and created a mortgage practically over his entire property in favour of the present petitioner, to whom he gave a vindictive preference, with a view to punish the other creditors. The learned District Judge has adopted a similar view. He says that the debtor acted in this way in order to put one creditor (the petitioner) in a favoured

position. It is, however, argued before me that the Courts below should have held that the dominant motive of the debtor was to secure the cash advance of Rs. 1,991 and not to show any preference to the petitioner over the other creditors of the insolvent. It is true that for the purpose of avoiding a transfer of property under s. 54 of the Act as a fraudulent preference, it must be shown that the dominant or substantial motive of the debtor was to give preference to one creditor over the rest. That is a question of fact to be decided according to the circumstances of each case. After a due consideration of the argument on both sides, I am not inclined to interfere in revision with a concurrent finding of fact arrived at by both the Courts below. It does not appear that the mortgage was given in the present case as the result of any pressure put upon the debtor by the petitioner's agent, Narayanan Chettiar. As observed by the learned District Judge, a mere threat to sue, which if at all, was the only pressure, would not be such as to change the nature of the debtor's act from a voluntary to an involuntary one, especially when he was in expectation of such suits being filed by almost all the creditors. It was not, therefore, to secure freedom from being sued for the debts that this mortgage was created. In this case the debtor seems to have been in a position to tell Narayanan Chettiar, that he would not give a mortgage in order to give security for the debts due to the petitioner, unless a further loan was advanced. Narayanan Chettiar does not appear to have been in a position to dictate to the debter that a mortgage must be executed as a security for the debts due to the petitioner. The dominant or substantial motive of the debtor in the present case was to give preference to one creditor over the rest, and the transfer was not made simply to protect himself from legal proceedings. Nor can it be said that the further advance of Rs. 1,991 was the main factor which prompted the debtor to execute the mortgage deed. I concur with the findings of the Courts below that the transaction in question amounts to a fraudulent preference within the meaning of s. 54 of the Act.

A new question of law was raised in this Civil Revision Petition, that in the view taken by the Courts below, namely, that this mortgage is a fraudulent preference, it could be annulled only in respect of the insolvent's share in the mortgaged properties but not in respect of the shares of his two sons also which were comprised in the mortgage. Under s. 54 of the Act, it is only a transfer of property effected by the insolvent that can be annulled. In the present case, the mortgage deed Ex. I was executed not only by Subbaraya Gounden (the insolvent) but also by his two minor sons represented by him as their father and guardian. The deed expressly recites that they have hypothecated the properties specified in the schedule belonging to them and remaining in their enjoyment. The deed purports to be a transfer by way of mortgage of the joint properties of the father and his two sons who constitute a joint Hindu family. Obviously, it is not a transfer of property by the father alone. This is a case where the creditor dealt not with the managing member only of an undivided family but with all the members of the family as co-obligors. The mere fact that the two sons were minors and had to be represented by their father as guardian does not make it a mortgage effected by the father alone as the managing member of the family. It must be taken that the executants of this mortgage deed are three and not one, and that would be the case if the two sons were majors when the mortgage deed was executed. Can it be said that the two sons were not parties at all to this mortgage deed and that the deed does not purport to transfer their interests also in the properties mentioned in the schedule? Any such contention would be against the plaint recitals in Ex. 1. It is clear that the parties to this transaction intended that all the members of the family, namely, the father and his two sons should execute the mortgage deed as co-obligors: *vide* the observations in *Narayana Iyer* v. *Venkatraman Iyer* (1), and *Sivasami Chetty* v. *Sevugan Chetti* (2). If three co-owners one of whom alone being an adjudged insolvent, should transfer their joint properties in favour of one of their creditors, the transfer by the insolvent alone to the extent of his own share therein, would come within the scope of s. 54 of the Act. The transfer by the other two co-owners to the extent of their interests in the properties cannot be dealt with under s. 53 or s. 54 of the Insolvency Act, though such a trans-

(1) 25 M 220.
(2) 25 M 389 at p. 393.

fer may be sought to be avoided under s. 53 of the Transfer of Property Act.

Reference was made by the learned Counsel for the 2nd respondent to the decisions reported in *Surapu Raju* v. *Venkayya* (3), and *Rajagopalan* v. *Subbarama Iyer* (4). Those cases do not in my opinion help him in his contention in this case. In the first case, the sale deed was executed by the elder brother who was a major and also the manager of the family, and the younger brother a minor represented by his mother as guardian, also joined in the execution of that sale deed. It was found that the sale by the minor represented by his mother as guardian would be invalid, but this circumstance was held not to be sufficient to vitiate the sale as such, inasmuch as the elder brother as manager of the family was competent to sell the family property for justifiable purposes. On such a view, the sale as a whole was upheld. In the second case also, the transfer was not only by the father who was clearly entitled to dispose of the properties in order to discharge the debts binding on the minor sons, but the minors also joined in the execution represented by their guardian *ad litem*. Even if such a guardian was not competent to execute a sale deed or mortgage deed on their behalf, the sale as a whole was treated as a valid transaction, ignoring or leaving out of consideration the fact of the minors by their guardian *ad litem* having joined as co-executants. In the present case, there is no question of the invalidity of the mortgage deed, Ex. I, so far as the execution of it by the minor sons represented by their father as guardian is concerned. According to the recitals in the deed, this mortgage was effected to the extent of the major portion of the consideration, for the purpose of discharging the antecedent debts of the father. The cash consideration received is stated to be for discharging some other debts by him. The purpose for which this mortgage was effected being such as would justify the guardian of the minors to alienate their shares in the family property, the execution of the deed by the father as guardian of the minor sons would not be invalid by reason of any defect as found in the aforesaid decisions. There is no need to treat the mortgage deed in question as one executed by the father alone as the manager of the family ignoring the fact of its execution by the minors also for the purpose of enabling the Insolvency Court to annul this mortgage deed in its entirety. I am clearly of opinion that in so far as it is an alienation by the two sons of the debtor (insolvent) it cannot be viewed as a transfer by the insolvent for the purposes of ss. 53 and 54. On this ground, I hold that the mortgage deed Ex. 1, cannot be annulled so far as the two third share of the insolvent's sons in the mortgaged property is concerned.

Another contention raised on behalf of the petitioner, is, that the mortgage must be upheld in respect of the amount advanced in cash at the time of the mortgage, as there could be no question of fraudulent preference of a creditor regarding the same. It is true that at the time of giving preference by means of a transfer of property there should be the relation of debtor and creditor between the parties to the transfer. The petitioner was a creditor to whom a sum of Rs. 5,009 was due at the time of this transfer. The sum of Rs. 1,991 was cash advanced as a fresh loan and the mortgage given to secure the repayment of that sum cannot strictly be deemed to be a transfer in favour of the one who was already a creditor. This seems to be the view taken by a Division Bench of this Court in a decision reported in *Janki Ram Vilas Nidhi* v. *Official Assignee, Coimbatore*, 78 Ind. Cas. 16 at p. 18 (5). The learned Judges have held that so far as the amount newly received was concerned s. 54 of the Act could have no application. But, in the present case, the application was filed under both the sections. The circumstances disclosed in the evidence from which a fraudulent preference was inferred indicate also that when this sum of Rs. 1,991 was advanced as an additional loan to get the mortgage-deed executed, the petitioner could not be deemed to have acted in good faith. He was fully aware of the debtor's embarrassed condition. No *bona fide* enquiries were made as to the alleged necessity for borrowing this sum. The fraudulent object of the debtor which would prejudicially affect the interests of the other creditors was well known to the petitioner's agent Narayanan Chettiar. I should think that even if it could not be strictly brought under s. 54, the annulment could be effected under s. 53 of the Act. No modification of the order of the Courts below need be made in respect of this newly raised objection. The finding of the Courts below that

(3) 32 Ind. Cas. 802; (1915) M W N 908.
(4) 53 Ind. Cas. 354; (1919) M W N 356.
(5) 78 Ind. Cas. 16 at p. 18.

the mortgage-deed Ex. 1, is fully supported by consideration is upheld.

For the foregoing reasons, the order of annulment passed by the Courts below is modified by declaring that the mortgage-deed Ex. 1, is fraudulent and void as against the Receiver to the extent of its being an alienation of the debtor Subbaraya Gounden's one-third share in the mortgaged properties and it shall stand annulled to that extent only. Considering the peculiar circumstances of this case and also the partial success and failure on both sides, I direct the parties to bear their own costs in this revision petition, and would leave the order as to costs made by the Courts below undisturbed.

A. *Order modified.*

LAHORE HIGH COURT

Letters Patent Appeal No. 135 of 1929

April 14, 1934

TEK CHAND AND DIN MOHAMMAD, JJ.

SARBULAND AND ANOTHER —DEFENDANTS—APPELLANTS

versus

PREM DAS—PLAINTIFF—RESPONDENT

Punjab Alienation of Land Act (XIII of 1900), ss. 3 (2), 14, 21-A (2)—Decree in violation of s. 3 (2), if a nullity—Remedy by Deputy Commissioner—S. 14, application of—Alienation by decree of Court—Deputy Commissioner's power to change nature of alienation.

A decree passed in violation of the terms of s. 3 (2) of the Punjab Alienation of Land Act is not a nullity. Such a decree unless set aside, in appeal or revision cannot be treated as a nullity. It is not a decree passed without jurisdiction. *Darya Ditta* v. *Mana Singh* (1), followed.

The only course open to the Deputy Commissioner in a case where a decree is passed by a civil Court which offends against the provisions of s. 3 (2) Punjab Alienation of Land Act, and this defect is brought to the notice of the Deputy Commissioner, is that under s. 21-A (2) of the Act, which authorises him to move the higher Civil Court for revision in accordance with the Act. The permanent alienation cannot be converted by himself, under s. 14 of the Act, into a temporary one.

Section 14 of the Punjab Alienation of Land Act has no application to a case where a permanent alienation of land in favour of non-agriculturist has been effected by a decree of Civil Court. It deals with those cases only in which the dispute as to the validity of the alienation has not been taken to a Civil Court and that Court has not passed a decree in connection therewith.

L. P. A. from the decree of Bhide, J., dated July 19, 1929, reported in 120 Ind. Cas. 481.

Mr. *R. C. Soni*, for the Appellants.

Mr. *Dev Raj Sawhney*, for the Respondent.

Tek Chand, J.—In December 1896, Samundar Khan, father of defendants-appellants mortgaged with possession his occupancy rights in the land in dispute to Prem Das. About ten years later, on March 25, 1906, Samundar Khan executed a sale-deed of the same occupancy rights in favour of Prem Das for Rs. 1,000. Mutation of the sale was duly sanctioned in the name of the vendee.

Some years later Samundar Khan died, and after his death his sons, Sarbuland and Ghulam Zakria, on January 10, 1921, instituted a suit against Prem Das for possession of the land alleging: (1) that the sale was not binding on them as the occupancy tenancy was ancestral and Samundar Khan has sold it without consideration or legal necessity, and (2) that the sale was contrary to the provisions of the Punjab Alienation of Land Act, the vendor Samundar Khan being a Hattar Rajput, which is a notified agricultural tribe in this District, and the vendee Prem Das a non-agriculturist. Prem Das denied the ancestral nature of the tenancy and urged that the transaction had been effected for consideration and necessity. He further pleaded that Hattars were not Rajputs and that therefore the Punjab Alienation of Land Act did not apply. On August 6, 1923, the Subordinate Judge dismissed the suit as time-barred so far as the share of Sarbuland was concerned and decreed it as regards the share of Ghulam Zakria. On appeal Ghulam Zakria's suit also was dismissed by the District Judge Mr. Forbes on March 3, 1924. On the evidence the learned Judge held that the sale of 1906 had been effected for consideration and necessity and could not be challenged by the plaintiff on that ground. He further found that Hattars were a branch of Rajputs, and therefore he expressed the opinion that the alienation contravened the provisions of the Punjab Alienation of Land Act. But instead of himself deciding what the effect of this finding on the case was, he dismissed the suit ordering that a copy of his decree be sent to the Deputy Commissioner under s. 21-A (1), Punjab Alienation of Land Act.

A copy of the decree was accordingly sent to the Deputy Commissioner but he, instead of taking action under sub-s. (2), s. 21-A, and moving the High Court to revise the decree of the District Judge so as to make it consistent with the Act, took cognizance of the matter himself and, purporting to act under s. 14, passed an

order on June 8, 1925, converting the sale into a mortgage for 20 years, ending March 25, 1926, on which date the sons of the vendor could recover possession without any payment. In pursuance of this order the appellants took possession of the land in March 1926.

It may be mentioned here, that it appears to have been overlooked that Prem Das was, in any case, entitled to remain in possession under the mortgage of 1896 which had been effected long before the Alienation of Land Act had been enacted, and upon which he could have fallen back in the event of sale of 1906 being set aside. That mortgage was never redeemed, and the learned Counsel for the appellant frankly conceded that for this reason at least the dispossession of Prem Das in March 1926, without payment of the mortgage money, was illegal.

On November 20, 1926, the present suit was brought by Prem Das for recovery of possession of the land on the ground that the Deputy Commissioner had no power to himself alter the decree of the District Judge and that his order and the consequent dispossession of the plaintiff were illegal and *ultra vires*. This contention did not find favour with the Subordinate Judge, who dismissed the suit. His decision was affirmed by the District Judge, but on second appeal the learned Judge in Chambers took a different view. He held that the only course open to the Deputy Commissioner was to apply to the High Court under sub-s. (2), s. 21-A, within two months of the date on which he was informed of the decree of Mr. Forbes, and that he having failed to do so the decree had become final and conclusive between the parties. The learned Judge accordingly decreed the plaintiff's suit. He however granted a certificate to the defendants for a further appeal under cl. 10, Letters Patent.

It is beyond dispute that on the finding that the vendor was a member of a notified agricultural tribe and the vendee was a non-agriculturist, the sale as such could not take effect under s. 3 (2), Punjab Alienation of Land Act, and if the matter had not been the subject of litigation in Civil Courts in 1921—24, the Deputy Commissioner would have had full power to convert the sale into a mortgage for a period not exceeding 20 years under s. 14 of the Act. But, as already stated, the sons of the vendor had instituted a suit in the Civil Court impeaching the sale, *inter alia*, on the ground that the sale contravened the provisions of the Act and the parties had joined issue on this point. The learned District Judge Mr. Forbes while holding that the alienation contravened the provisions of the Act, had dismissed the suit. It is conceded that the effect of this decree unless it was set aside on appeal or revision by the High Court, was that the sale was binding on the plaintiff. It is also conceded that it was open to the appellants to appeal to the High Court against the decree of the District Judge, and it was equally open to the Deputy Commissioner to whom the District Judge himself had sent a copy of the decree to take action under sub-s. (2), s. 21-A to have the decree altered by the High Court so as to make it consistent with the Act. But neither the appellants nor the Deputy Commissioner chose to adopt the course open to them under the law. The position therefore is that the decree of Mr. Forbes stood unaltered by a higher Court.

Mr. Soni urged that the decree was none the less a nullity, as it gave effect to a sale which contravened the provisions of the Alienation of Land Act. This contention is, however, without force. This point was considered by Chief Court in *Darya Ditta* v. *Mana Singh* (1), where Clerk, C. J., ruled that a decree passed in violation of the terms of s. 3 (2) of the Act, was not a nullity. The learned Chief Judge observed that :

"the decree was open to appeal or revision, but unless set aside, it cannot be treated as a nullity. It was not a decree passed without jurisdiction."

It was also pointed out in that case that under the Act, as originally passed in 1900, there was no remedy against a final decree passed by a Civil Court upholding a permanent alienation of land in contravention of the provisions of the Act; and in order to remove this defect the Legislature in 1907, enacted s. 21-A, which makes it obligatory on every Civil Court passing a decree involving a permanent alienation of his land by a member of an agricultural tribe, to send a copy of its decree to the Deputy Commissioner and further empowers the Deputy Commissioner to move the superior appellate or revisional Civil Court to revise the decree so as to bring it in conformity with the Act.

There can be no doubt that the course laid down in sub-s. (2) s. 21-A is the only one, that is open to the Deputy Commissioner, whose attention has been drawn to a decree passed by a Civil Court, which appears

(1) 1 Ind. Cas. 13; (0 P R 1909; 219 P L R 1906; 3 P W R 1909.

to give effect to a permanent alienation of land which had been effected in contravention of the provisions of the Act, and if he fails to take action in the manner prescribed therein, the decree stands. Obviously s. 14 has no application to such a case. It deals with those cases only in which the dispute as to the validity of the alienation has not been taken to a Civil Court and that Court has not passed a decree in connection therewith. The action of the Deputy Commissioner taken under s. 14 in this case was, therefore, clearly *ultra vires* and could not in any way affect the decree passed by Mr. Forbes in favour of the respondent. It is unfortunate that the District Judge, Mr. Forbes, made a mistake in dismissing the defendant's suit, but as observed by the Lord Hobhouse in *Malkarjun* v. *Narhari* (2), at p. 347* :

"In doing so the Court was exercising its jurisdiction. It made a sad mistake it is true ; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed."

Here, as shown already, neither the appellants, who were the wronged party, appealed nor the Deputy Commissioner, on whom the Legislature has conferred a special *locus standi* to move the higher Civil Court for the revision of the decree, took action in the manner prescribed in s. 21-A. The decree, therefore, remains unaltered. The order passed by the Deputy Commissioner under s. 14, was passed without jurisdiction and being *ultra vires* and manifestly illegal, has no legal effect.

For the foregoing reasons I am of opinion that the decision of the learned Judge in Chambers is correct and must be upheld. In this view of the case it is not necessary to consider the further question decided by the learned Judge whether the plaintiff had acquired an indefeasible right to the land by adverse possession. I would accordingly dismiss the appeal, but having regard to all the circumstances would leave the parties to bear their own costs.

Din Muhammad, J.—I agree.

D. *Appeal dismissed.*

(2) 25 B 337; 27 I A 216; 5 C W N 10; 2 Bom. L R 927; 10 M L J 368; 7 Sar. 739 (P C).

*Page of 25 B.—[*Ed.*]

PATNA HIGH COURT

Civil Revision No. 630 of 1933 and Civil Revision No. 198 of 1934

January 14, 1935

WORT, J.

Kumar RAMKINKAR SINGH AND ANOTHER—PETITIONER

versus

Kumar JOGENDRA NATH SINGH AND OTHERS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 115, O. VII, r. 11—Interlocutory order—Powers of interference of High Court—Interlocutory order on question of court-fee—Revision, if competent.

Although ordinarily the High Court will not interfere in revision with an interlocutory order when there is another course open to him, yet when there is no right of appeal and the order complained against is calculated to cause irreparable damage to the petitioner, the High Court may interfere with an interlocutory order. An interlocutory order deciding the question of court-fee will not be interfered with in revision as another remedy by way of appeal is open to the injured party. *Sham Narain Singh* v. *Basudeo Prasad Singh* (2) and *Manilal* v *Durga Prasad* (3), followed, *Ram Bhusan Das* v. *Bachu Rai* (1), doubted.

C. R. from an order of the Subordinate Judge of Bhagalpur, dated November 27, 1933.

Sir *Sultan Ahmad* and *N. C. Ghosh*, for the Petitioners.

Messrs. *S. M. Mullick*, *M. N. Pal*, *S. C. Mazumdar* and *P. B. Ganguli*, for the Opposite Party.

Judgment.—These are two rules directed against the order of the Subordinate Judge in two actions brought by the same plaintiffs against the same defendants and relate to a matter of court-fees. In the case of *Kumar Ram Kinkar Singh* v. *Kumar Jogendra Nath Singh* the learned Judge has decided that in the circumstances of the case the plaintiffs were liable to pay *ad valorem* court-fees. In the case of *Surendra Nath Basu* v. *Sitaram Singh* the learned Judge has decided that the court-fees of Rs. 15 was sufficient. As I have said, against these two decisions these rules are directed.

If the report is correct of the case of *Ram Bhusan Das* v. *Bachu Rai* (1), decided by the Chief Justice and Luby, J. (and there is no explanation which appears on the face of the report), then I am in the unfortunate position of having to choose between that decision and the decisions not only of the Privy Council but a long line of cases in this Court decided by Divisional Benches, all of which are for one reason or another in agreement. I

(1) 152 Ind. Cas. 1003; A I R 1934 Pat. 641; 7 R P 296; 16 P L T 69.

might at this stage refer to the case of *Sham Narain Singh* v. *Basdeo Prasad Singh* (2) in which I with my brother Kulwant Shay expressed the view that the point decided by the Subordinate Judge in that case was one within his jurisdiction. That together with the fact that there was another remedy open to the petitioner placed the matter beyond the revisional powers of this Court. The learned Chief Justice in the case to which I have first referred has stated that the decision reported in 11 Patna Law Times [*Sham Narain Singh* v. *Basdeo Prasad Singh* (2).] might be explained on the basis that it came within that class of cases which was not open to revision. But as a party to that judgment I must say that the matter there in dispute was whether the Judges had rightly decided what was the nature of the action brought by the plaintiff and, therefore, what was the proper court-fee; in other words, what category did the case come within. I would add also that the case was decided not only on the ground that it was within the jurisdiction of the Subordinate Judge to decide the question, but that the plaintiff had another remedy which would immediately arise on his refusal to pay the extra court-fee and the Subordinate Judge rejecting the plaint. On the plain reading of s. 115 of the Code of Civil Procedure, therefore, it was impossible for this Court to exercise its revisional powers. In the case decided by the Chief Justice and Luby, J. unless it is misreported (the only explanation can be that it is misreported) s. 115 would come into operation in that another remedy was open to the plaintiff and, therefore, the revisional power of the Court could not be exercised. The learned Chief Justice in the judgment of which I have referred had said that if it was a matter of "category" an application in revision lay. If the matter to be determined by the Subordinate Judge was a matter of 'category', it was for him to decide what was the nature of the action and what was the relief claimed to the suit. Having decided that, he would then decide under which provisions of the Court Fees Act, the case came and decide the question of court-fee accordingly. That might be a question of fact; if it were, it certainly would be within the jurisdiction of the Judge. It might at the most be a question of law and in that event it would equally be within the jurisdiction of the Judge. The decision of either kind would only affect the matter of jurisdiction if the Judge had to determine whether the particular kind of action or the amount claimed brought it within his jurisdiction. As the Privy Council has pointed out, if a conclusion of fact or law was the basis of a decision as to jurisdiction, then the matter would be open to revision and not otherwise. The learned Chief Justice referred to the case of *Manilal* v. *Durga Prasad* (3), the reasons given therein being adopted by the Chief Justice. The point which the late Jwala Prasad, J. appeared to be dealing with was whether in any event an order which was interlocutory could be dealt with in revision by the High Court and, if I may say so with respect to that distinguished Judge, I do not disagree with the general proposition that if an interlocutory order was such as raised the question of jurisdiction and the order would do an irreparable damage to the complaining party, then an application such as this would lie. But with great respect to the Judges in the case of *Ram Bhusan Das* v. *Bachu Rai* (1), that is very far from saying that although another remedy was open and although it was a matter within the jurisdiction of the Judge deciding it, yet an application in revision lay. I am bound in my judgment in this case to rely upon the decisions of the Privy Council, because it is in my judgment impossible to distinguish the principles involved in this case.

The first and the best known case is that of *Amir Hassan Khan* v. *Sheo Bakhsh Singh* (4). In the trial Court it appears to have been argued that as the Code forbade a Court from deciding a matter which had already been disposed of by a previous litigation, the Court was acting with material irregularity by proceeding to try such a suit. Their Lordships of the Privy Council in the judgment of Sir B. Peacock said this :—

"The question then is, did the Judges of the lower Court in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity".

I then come to the well-known case of

(2) 122 Ind. Cas. 152; 11 P L T 172; Ind. Rul. (1930) Pat. 184; A I R 1930 Pat. 277.

(3) 80 Ind Cas. 667; 5 P L T 425; (1924) Pat. 254; 3 Pat. 230; A I R 1924 Pat. 673.

(4) 11 C 6; 11 I A 237; 4 Sar. 559 (P C).

Balakrishna Udayar v. *Vasudeva Aiyer* (5) in which their Lordships of the Judicial Committee made this observation at page 267* of the Report referring to s. 115 of the Code of Civil Procedure;

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law of fact in which the question of jurisdiction is not involved. And if the appellant's contention be correct, then if the Civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie".

This Court in *Bankey Behari* v. *Ram Bahadur* (6) has decided against the jurisdiction of the High Court in matters of this kind. Coutts, J. and Adami, J. decided in *Lachmibati Kumari* v. *Nand Kumar Singh* (7) that this Court will not interfere in revision with an interlocutory order where there is another course open to the applicant and no irremediable harm can be suffered by the interlocutory order. This judgment of a Division Bench of this Court in my judgment, with great respect, applied to the facts of a *Ram Bhusan Das's case* (1). There is then the decision of this Court in *Sham Narain Singh's case* (2) to which I have already made reference. It seems to me to be perfectly clear that if I come to the conclusion that what the learned Judges in both these cases were deciding was the question of the construction of the plaint and the reliefs claimed therein and the construction of the Court Fees Act, then it is impossible to say that it was not a question of law; and if indeed it was a question of law, their Lordships of the Privy Council have finally and for all time decided that an application for the exercise of the revisional powers of this Court would not lie. But not only am I bound in my judgment to follow their Lordships of the Judicial Committee for the reasons which they have stated, but I am also bound to follow the plain reading of the section itself which prohibits an application of this kind, as I have said more than once, where the aggrieved party has another remedy open to him. He most certainly had a remedy open here; he merely declines to pay court-fees; his application is dismissed under the condition and an appeal is open to him.

In those circumstances both the rules must be discharged with costs; hearing fee two gold *mohurs* in each case.

In Civil Revision No. 630 two months' time is allowed to pay the court-fee.

N. *Rules discharged.*

(5) 40 Ind. Cas. 650; 44 I A 261; 15 A L J 645; 2 P L W 101; 33 M L J 69; 26 C L J 143; 19 Bom. L R 715; (1917) M W N 628; 40 M 793; 6 L W 501; 22 C W N 50; 11 Bur L T 48 (P C).

(6) 44 Ind. Cas. 891; 4 P L J 191; 4 P L W 281; (1918) Pat. 223.

(7) 56 Ind. Cas. 649; 5 P L J 400; 1 P L T 268; (1921) Pat. 166; 3 U P L R (Pat.) 138.

*Page of 44 I. A.—[*Ed.*].

PATNA HIGH COURT

Civil Revision No. 537 of 1934
February 28, 1935
DHAVLE, J.

Hakim MUHAMMAD NAZIRUDDIN AND OTHERS—PETITIONERS
versus
RAJA RAM AND ANOTHER—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXXIX, rr. 1, 2, cl 3—Cl. 3 of r 2, whether covers breach of injunctions issued under r. 1.

Clause 3 of r. 2 of O. XXXIX, Civil Procedure Code, applies to disobedience generally of an injunction granted by the Court and the words 'in case of disobedience' in cl. 3 are wide enough to cover breaches of injunctions issued under O. XXXIX, r. 1, for which breaches no penalty is elsewhere provided. *Balbhaddar* v. *Balla* (1), dissented from; *Ram Prasad Singh* v. *The Benares Bank, Ltd* (2), and *S. Adaikhale Thevean* v. *Imperial Bank, Madura Branch* (3), followed.

C. Rev. from a decision of the Subordinate Judge, Second Court, Monghyr, dated August 30, 1934, affirming that of the Munsif, Monghyr, dated March 9, 1934.

Messrs. *Syed Ali Khan* and *Ameer Ali Khan Warsi*, for the Petitioners.

Messrs. *L. K. Jha* and *S. N. Ray*, for the Opposite Party.

Judgment.—This is a revisional application against an order of a Munsif of Monghyr committing the petitioners to the civil prison for a period of three weeks for breach of an injunction under O. XXXIX, r. 1, restraining them as defendants in a suit on the file of the Munsif from burying dead bodies in the disputed land during the pendency of the suit. The order of the lower Court was upheld on appeal. The only point raised before the Munsif and the Court of appeal below was that the petitioners were not guilty of the breach complained of by the other side. This point is no longer open, and Mr. Syed Ali Khan has quite properly confined his argument to a question of law. He has argued that though the injunction was issued by the trial Court in the present case under O. XXXIX, r. 1, the order of commitment was passed under cl. 3 of r. 2

of O. XXXIX, and that this clause only applies to breaches of injunctions issued under r. 2. The contention seems to be supported by the decision of Dalal, J. in *Balbhaddar* v. *Balla* (1), which Mr Syed Ali Khan has cited in support. But the report of the case does not by any means make it clear how far the question of the applicability of cl. 3 to injunctions passed under r. 1 arose before the learned Judge. It is, however, clear that the learned Judge was of opinion that there was some inadvertence with reference to the provision of a penalty for breach of an injunction under r. 1 of O. XXXIX and that though it is likely that the provisions of r. 2, cl. 3 of O. XXXIX, were intended to be applied to the breach of an injunction under r. 1 also, as cl. 3 is included in r. 2, it would follow that the provisions of that clause will not apply to r. 1. It was not brought to the notice of the learned Judge, who was sitting singly, that there was a decision to the contrary by a Bench of two Judges of the same High Court. This decision is *Ram Prasad Singh* v. *The Benares Bank, Ltd.* (2), where the learned Judges were satisfied that the words "in case of disobedience" in cl. 3 of r. 2 were wide enough to cover breaches of injunctions issued under O. XXXIX, r. 1, for which breaches no penalty is elsewhere provided. Mr. Syed Ali Khan points out that that was a case of breach of an injunction issued by a Judge of the Allahabad High Court itself, and that reference was made in that decision to the unquestionable jurisdiction of that Court to punish contempts of its own orders. *Ram Prasad Singh's case* (2), was, however, followed in *S. Adaikhale Thevan* v. *Imperial Bank, Madura Branch* (3), where cl. 3 of r. 2 was applied to the breach of an injunction not coming within r. 2. The drafting of the rule was characterized as somewhat inartistic (the learned Judges of the Allahabad High Court had used the word 'clumsy'), but the Madras High Court considered that there was no doubt that cl 3 applies to disobedience generally of an injunction granted by the Court. These rulings do not appear to have been brought to the notice of Dalal, J. In these circumstances, I am not prepared, with all respect to adopt Dalal, J 's view or to dissent from the other rulings referred to.

The application fails and is dismissed with costs. Hearing fee, one gold *mohur*.

N. *Application dismissed.*

(1) 127 Ind. Cas. 577; A I R 1930 All. 387; Ind. Rul. (1930) All. 929.

(2) 58 Ind. Cas. 600; 42 A 98; 17 A L J 1127.

(3) 95 Ind. Cas. 196; 50 M L J 401; A I R 1926 Mad. 574.

LAHORE HIGH COURT

First Civil Appeal No. 1734 of 1926

June 11, 1934

COLDSTREAM AND HILTON, JJ.

NIHAL CHAND AND OTHERS—DEFENDANTS —APPELLANTS

versus

NARAIN DAS—PLAINTIFF—RESPONDENT

Hindu Law—Religious institution—Tests to determine if a religious institution is a public trust—Property passing from Guru *to* Chela*—Presumption —Charitable and Religious Trusts Act (XIV of* 1920*), s. 3—Members of general public worshipping at religious institution, whether persons interested.*

The fact that properties passed always from *guru* to *chela* the exclusion of blood relations affords a strong presumption of a religious institution, the members of which renounce the world. [p. 629, col. 1.]

[Case-law discussed.]

A religious or monastic institution may be a public trust for religious or charitable purposes and the question whether it is so or not is to be determined by the evidence in regard to the usage and custom of the particular institution in respect of the duties and obligations attached to the office of the *mahant*.

Members of the general public who worship at religious institution are persons interested in the Public Trust for the purposes of Act XIV of 1920. [p. , col. .

F. C. A. from an order of the Senior Sub-Judge, Gujranwala, dated May 26, 1926.

Messrs. *Mukand Lal Puri*, *Hargopal*, *Bhagat Singh* and *Mehr Chand*, *Hem Raj Mahajan* for Mr. *Tek Chand*, for the Appellant.

Messrs. *Badri Das* and *J. L. Kapur*, for the Respondent.

Hilton, J.—The plaintiff in this litigation, *Mahant* Narain Das, an Udasi Sadh of Gujranwala, made a will, which he registered on November 6, 1922. By it he bequeathed the *asthan* known as Baghichi Thakeran at Gujranwala and also house and shop property situated at Gujranwala and Nankana Sahib to his disciple or *chela Pandit* Parma Nand.

On August 28, 1923, Nihal Chand a Khatri, and Hara Mal, a Brahman, both of Gujranwala, made an application to the District Judge under s. 3 of Act XIV of 1920 alleging that the *Gurdwara* known as Baghichi Thakeran at Gujranwala together with shop and house property attached to it was dedicated for religious and charitable purposes of the Hindu public and that

Narain Das was its trustee and asking for various reliefs contemplated by the said Act. In the course of those proceedings Narain Das denied the existence of a trust and under s. 5 (3) of the Act the District Judge ordered a stay upon his undertaking to institute, within three months, a suit for a declaration to that effect. Narain Das thereupon instituted the present suit against the aforesaid Nihal Chand and Hara Lal on April 8, 1924. On May 26, 1926, the Senior Subordinate Judge of Gujranwala passed a decree in his favour with costs declaring that the property which was the subject-matter of the dispute was not dedicated property and consequently was not liable to be made the subject of proceedings under Act XIV of 1920 and further that the defendants had no *locus standi* to institute such proceedings. Against this decree the defendants now appeal.

The case which *Mahant* Narain Das set up in his plaint was that the disputed property belonged to him as full owner, part having been acquired by himself and part having been inherited by him as the heir of his *Guru*, *Mahant* Sant Das. He also asserted his own possession. He asked that it might be declared to be his own property.

The defendants did not deny the plaintiff's possession but maintained that the property was dedicated to a public trust for religious and charitable purposes. Only two issues were framed as follows: (1) Is the property in dispute *Wakf*? (on defendants). (2) Are defendants worshippers of the place and have they a right to challenge the plaintiff? (on defendants).

The learned trial Judge has reached the conclusion on a consideration of the evidence that although the *Asthan* was always used by the public for religious purposes, no actual dedication could be inferred from its usage and other attending circumstances. The first issue being thus found against the defendants, it was held on the second issue that the defendants had established no right of access to the property which had not been proved to be a public trust. The decree which the trial Judge gave does not, however, embody any declaration that the plaintiff is the owner of the property. It merely asserts that the property is not *wakf* and that Act XIV of 1920 does not apply to it.

In arguing the case for the respondent-plaintiff before us Mr. Badri Das has confined himself to an attempt to prove that the plaintiff owns the property and no argument has been made that there exists any trust to which the Act of 1920 does not apply or any trust different from that which has been set up by the defendants.

Before coming to the facts of the case I will deal with an objection which was taken by Mr. Mukand Lal Puri on behalf of the appellant-defendants regarding the onus of the first issue. Such an objection had also been made in the trial Court and overruled. In my judgment the matter is not of fundamental importance as both sides produced a considerable volume of evidence, both oral and documentary, and the decision of this issue must finally be determined by the facts proved on evidence rather than by any initial presumption that may exist in favour of one party or the other. I think, however, that on the pleadings the initial onus was rightly placed on the defendants. The plaintiff had asserted possession which had not been denied. He could, therefore, claim a presumption of ownership under s. 110, Evidence Act. It was argued against this that if no evidence had been called for either side, plaintiff would have failed; but that is not the case, for if there had been no evidence on either side the plaintiff could have claimed a decree by the force of the above-mentioned presumption. It was also argued that the proceedings which had taken place under Act XIV of 1920 threw onus on to the plaintiff, but the mere fact that circumstances compelled him to take the role of plaintiff rather than that of defendant does not deprive him of the presumption that arises in his favour under s. 110, Evidence Act, owing to his possession not being denied. Thus the objection as to onus was rightly overruled by the trial Judge.

The following is a brief history of the *Asthan* or *Gurdwara* known as Baghichi Thakeran. It has always been inhabited by Udasi Sadhs and the first *mahant* was Baba Kulla or Kuljas whose original caste was Khatri. He died about 1800 A. D. There is some rather shadowy evidence that along with other Hindus he migrated to Guranwala from Saidnagar to escape from Muhammadan repression (Ex. P-21 P. 88-B). A street in Gujranwala town is called after the Saidnagris. Whether this is true or not, there seems no doubt that Baba Kulla took up a plot of land at Gujranwala and built a house and planted

a garden whence the name Baghichi was derived. There is no satisfactory evidence as to the conditions, if any, on which he obtained this plot of land. His successor was his disciple Thakar Ram Das who had been an Arora and who died in 1845 A. D. He is stated in the plaint to have improved the building and to have practised as a physician but these matters can hardly be said to have been proved. The Samadhs of Baba Kulla and of Ram Das are to be found at the Gurdwara Baghichi.

Ram Das was succeeded by Sant Ram whose original caste was Khatri and who died in 1879. During the 34 years of the *mahantship* of Sant Das the property was considerably extended. An adjacent vacant plot was taken over and house and shop property at Gujranwala were acquired.

Sant Das was unfortunate in regard to his *chelas*. The first of these was Bishen Das, who died, as also did Ram Parkash, the *chela* of Bishen Das. After that Sant Das made a will, Ex. D. W. No. 1, which he registered on October 19, 1875. In this will he contemplated the possibility that he might die without a *chela* and he provided that in that contingency extensive powers of management should be exercised by a certain Bhai Prem Singh. This Prem Singh was a Nirmala and had already been the *chela* of another and could not, therefore, become the *chela* of Sant Das, but the will speaks of him as the sincere well-wisher of Sant Das.

After this, early in 1877, Sant Das made one Atma Ram his *chela*, the name of Prag Das being given to him, but after a few days Atma Ram renounced his *chela-ship* owing to parental opposition and returned to his own family (Ex. P-28). Finally, later in 1877, and two years before his own death, Sant Das made Narain Das, the plaintiff in this case, his *chela*, Narain Das being then only 12 years of age.

Prem Singh lived until 1890, but Narain Das has stated in his evidence as D. W. No. 25 that Prem Singh never came to the Baghichi after his own appointment as *chela* and the evidence of the defendants' own witnesses lends considerable support to the story that before Sant Das's death Prem Singh left the Baghichi and he took himself about 1875 to a *dharamsala* of Mool Singh (see D. W. No. 3, D. W. No. 5, D. W. No. 10). Plaintiff's witnesses go further and say hat Prem Singh was turned out by Sant Das (P. W. No. 8, P. W. No. 19, etc.). It cannot be conclusively held that there was any estrangement between the two men but the weight of the oral evidence seems to show that Prem Singh did not interfere in the management of the Baghichi during the minority of Narain Das.

Other evidence was led to show that a committee of management supervised the Baghichi affairs after Sant Das's death, but the principal witness on this point, Brij Lal, D. W. No. 10, who had offered to produce the accounts of the management failed to do so and the fact what this man witnessed a rent deed that was executed in favour of Narain Das himself in 1885 shows that any committee of management which may have functioned during Narain Das's minority was no longer in control when he became a major. I do not think that any supervision of the affairs of the Baghichi after the death of Sant Das either by Prem Singh or by a committee of management is clearly proved.

Narain Das added to the property by acquisitions at Nankana Sahib and he also built shops on the vacant plots at Gujranwala. The income during the time of Narain Das rose from Rs. 1,394 in 1905 to Rs. 7,664 in 1923 (see V. A. Nos. 987-998 at p. 139-B). Narain Das died in 1931 during the pendency of this appeal and was succeeded by his *chela* Pandit Parma Nand, P. W. No. 38. This man who had been brought on the record as plaintiff in place of Narain Das, was educated at Benares and elsewhere and returned to Gujranwala about 1919.

This suit was instituted on April 8, 1924, and decided in the trial Court on May 26, 1926. In the meantime the Sikh Gurdwaras Act, 1925, was passed and litigation under that Act concerning the Gurdwara Baghichi ensued between *mahant* Narain Das and certain Sikhs of that locality. That litigation was finally decided by an appellate judgment of a Division Bench of this Court on April 30, 1934, *Sunder Singh* v. *Narain Das* (1). That judgment decided that the Gurdwara Baghichi is not a Sikh Gurdwara and that consequently there was no jurisdiction over it under the Sikh Gurdwaras Act (see s. 16 (3) of the said Act). We have been asked to treat that judgment and also the judgment of

(1) 155 Ind. Cas. 396; 35 P L R 619; A I R 1934 Lah 920; 37 R L 706.

the Tribunal, which was under appeal, as relevant evidence in the present appeal under s. 42, Evidence Act, and also to admit it as such under O. XLI, r. 27, Civil Procedure Code. It is not, however, necessary to make a formal admission of that judgment in the manner proposed. As a judgment of this Court we can refer to it to enable us to ascertain what was there decided and upon what grounds. It is conceded, however, that no evidence was produced in those proceedings which was not or could not have been produced in the suit to which this appeal relates and we have to make up our minds about such evidence and the various points at issue independently of the conclusions arrived at in that judgment. Moreover, the relevance of that judgment to the present proceedings is definitely restricted by the consideration that it was taken for granted for the purpose of proceedings under s. 8, Sikh Gurdwaras Act, that the *Gurdwara* is a place of worship to which worshippers have access and it was held that it was not open to Narain Das in those proceedings to plead that it was his own private property. Those judgments cannot therefore be held relevant to depreciate any evidence or argument adduced by Narain Das in the present case in support of his assertion that the *Gurdwara* is his private property. This being the state of affairs we have not thought it desirable to admit those judgments as formal evidence in the present case under O. XLI, r. 27, Civil Procedure Code.

The first important matter for consideration in this appeal is the presumption, if any, to be drawn from the fact that the Gurdwara Baghichi and other properties in suit have descended from *Guru* to *Chela* instead of being inherited by the blood relations of the various *mahants* beginning from Baba Kulla. The *mahants* from Baba Kulla to Parma Nand have all been celibate but they all had blood relations in their natural families, and these blood relations did not in any case succeed to the property. Thakar Das, P. W. No. 19, is a direct descendant of Baba Kulla's brother. Narain Das in his own evidence speaks of the grandsons of Ram Das' sister to whom Ram Das is said to have gifted some property which Sant Das brought back from the grandsons. Hemraj, P. W. No. 5, is a grandson of Sant Das's brother and Bishen Das, P. W. No. 31, is himself the brother of the plaintiff Narain Das. Thus blood relations have existed who might have inherited in each case, and the question is why they did not.

There is a long series of judgments of the Punjab Chief Court and subsequently of this Court in which it has been held that where property has passed to a *chela* by virtue of his being *chela* to the exclusion of natural heirs, that fact affords a presumption that the property has a religious character and was held as such by men who belonged to a religious fraternity and was not, therefore, their private property. *Ram Singh* v. *Nihal Singh* (2) and *Har Devi* v. *Charan Das* (3) are typical cases of which the latter was a case of Udasis and the judgment also speaks of

> "a feeling against the secularization of property held in religious trust for the benefit of a community or of the public at large."

The trial Judge was unwilling to apply any such rule to the present case because he took the view that the *chela* was the only heir to these *mahants*. Mr. Badri Das for the respondent-plaintiff has pressed this view to its utmost and has argued that when a man becomes *chela* of an Udasi *mahant* he thereby renounces the world and thus disconnects himself from his blood relations, who from that date can no longer be said to be his heirs: consequently, it is contended, when a *chela* succeeds to his *Guru*, there is no exclusion of natural heirs, for they had already ceased to be heirs at an earlier stage when their quondam relative had renounced the world and thus only the *chela* could succeed to the *Guru's* property, whether that property were religious or secular, and if the *Guru* was competent to acquire secular property, such property would not change its original character by the mere process of being inherited by his *chela*.

This reasoning finds support from a judgment of a Division Bench of the Allahabad High Court *Sheo Ghulam Puri* v. *Shiam Lal Bhagat* (4). In that case the *mahants* were Dasnami Goshains and were held to sever their connection with their natural families on being admitted to the order, but at the same time they were competent to acquire private property. It was held in such circumstances there was no legal presumption that particular pro-

(2) 136 P R 1889.
(3) 12 P L R 1906; 101 P R 1905.
(4) 107 Ind. Cas. 252; 50 A 485; A I R 1928 All, 257.

perties were trust properties, there having been no exclusion of natural relations, since the tie of relationship had ceased to exist when the admission to the ascetic order took place. This authority would seem at first sight to clash with the rule that has been generally followed in the Punjab, but in fact the Allahabad case proceeded on the premise that the *mahants* were competent to acquire private property, whereas in the present case that is a point which is a subject of controversy. The rule which has been generally followed in the Punjab and which has been stated above appears to go back to the Punjab Civil Code of 1869, of which two clauses are pertient. Section 4, cl. 20:

"When any member of a family voluntarily retires from the world and enters a religious order, he loses all claim to his patrimony and any property which he may subsequently acquire will not be inherited by his blood relatives, but will belong to the institution to which he is attached"

Section 22, cl. 6:

"In religious institutions the head of the establishment administers the entire property of all kinds for the benefit of the endowment and in fulfilment of the trust * * * * Members of these institutions cannot ordinarily become possessed of private property: whatever they may acquire in the exercise of their vocation is thrown into the common stock and devoted to religious uses."

Paragraphs 30 and 89 of Rattigan's Digest of Customary Law (1926 edition) are in accordance with the above rules. Given these rules as a starting point it is easy to deduce conclusions as to the presumptions that should be drawn. From the first clause it follows that when a *chela* succeeds in preference to blood relations there is a presumption that the deceased was a man who had retired from the world and had entered a religious institution or order; and from the second clause it follows that such a man having entered such a religious order is ordinarily incompetent to hold private property and that the presumption is against the property being his private property. This presumption, however, would naturally be rebuttable and if according to the usage of any particular institution or order, it were found that a member of it could acquire private property, the reasoning in the Allahabad case would then come into play and there would be no legal presumption that any particular property was trust property rather than private property.

Applying these principles to the present base I would hold that the exclusion of blood relations from inheritance affords strong evidence that the *mahants* from Baba Kulla to Parma Nand have been members of a religious order who have renounced worldly affairs and that there is therefore an initial presumption against their ability to own private property. Similar monastic institutions of Bengal and Madras known at *matts*, have been the subject of pronouncements by their Lordships of the Privy Council in *Ram Parkash Das* v. *Anand Das* (5) and *Aruna Chellam Chetty* v. *Venkata Chalapapathi Guruswamigal* (6). The two following principles have been laid down in those authorities

"(1) The nature of the *mahant's* ownership is an ownership in trust for the institution, and (2) the only law of these *mahants* and their offices, functions and duties is to be found in custom and practice which is proved by testimony and it is the usage and custom of the particular *matt* which governs the conditions and incidents of tenure. As regards the first of these two propositions their Lordships further explained in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (7), that the words "trust" and "trustees" as applied to the *mahant* are not to be interpreted in the strict sense of the English Law. This point was further considered by a Division Bench of the Madras High Court in *Nelliappa Achari* v. *Punnaivanam Achari* (8) where after a review of the Privy Council authorities above cited the conclusion was reached that the head of a *matt* is a constructive trustee as contemplated by s. 92, Civil Procedure Code, and a suit against him under s. 92 is therefore maintainable. In the course of the judgment it was remarked that the head of a *matt* may be answerable as a trustee in the general sense for mal-administration and has to administer a trust for general pious and religious purposes in view of the duties and obligations attached to his office: if these are not merely voluntarily, that is, if the head is bound to carry them out, he must be answerable, if he does not, notwithstanding that he may have a very wide discretion as to the application of the *matt* funds and other properties for this purpose, if the public or a portion of them are interested in the performance of these duties and obligations which are or ought to be employed at least as to some part of them, in the maintenance of a public, religious and charitable endowment, the only way the public can interfere is by a suit under s. 92, Civil Procedure Code.

The foregoing observations with which I respectfully agree lead to the conclusion

(5) 33 Ind. Cas. 533; 43 C 707; A I R 1916 P C 256; 43 I A 73; 20 C W N 802: 14 A L J 621; (1916) I M W N 403; 31 M L J 1; 18 Bom. L R 490; 3 L W 556; 24 C L J 116; 20 M L T 267 (P C).

(6) 53 Ind. Cas. 288; 43 M 253; A I R 1919 P C 62; 46 I A 204; 37 M L J 460. (1919) M W N 850; 17 A L J 1097; 10 L W 642; 26 M L T 479; 24 C W N 249; 2 U P L R (P C) 10, 22 Bom. L R 457 (P C).

(7) 65 Ind. Cas 161; 44 M 831; A I R 1922 P C 123; 48 I A 302; (1921) M W N 449; 41 M L J 346; 3 U P L R (P C) 62; 15 L W 78; 30 M L T 66; 6 P L T 245; 26 C W N 537; 24 Bom. L R 629; 20 A L J 497 (P C).

(8) 101 Ind. Cas. 420; 50 M 567; A I R 1927 Mad. 614; 25 L W 461; (1927) M W N 233; 52 M L J 415; 39 M L T 37.

that the words "any express or constructive trust" in s. 92, Civil Procedure Code, are not confined to what may be called the English Law sense of the word "trustee." Now the wording of s. 92, Civil Procedure Code, in regard to public trusts for religious or charitable purposes is the same as the wording of Act XIV of 1920 and the above judgment is therefore directly pertinent to this case.

Another authority is *Puran Atal* v. *Darshan Das* (9) where it was held that a *matt* of Nanakshahi Faqirs was a public trust for religious or charitable purposes within the meaning of s. 92, Civil Procedure Code, even though the main purpose of the trust was to benefit a particular sect.

The upshot of the matter therefore is that a religious or monastic institution of this type may be a public trust for religious or charitable purposes and the question whether it is so or not is to be determined by the evidence in regard to the usage and custom of the particular institution in respect of the duties and obligations attached to the office of the *mahant*. The evidence in the case must, therefore, be examined with a view to ascertaining the usage and custom of this particular institution in these matters.

The first point that the evidence indicates is that no express dedication of the *Gurdwara* or its property by any founder and no conditions of any such express dedication have been proved. It had been tentatively pleaded by the defendants that one Bhai Gurdial Singh founded the *Gurdwara* Baghichi and endowed it with land in the time of Baba Kulla but there is no evidence of this. The trial Judge took the view that although it was established that the *Gurdwara* was always used by the public for religious purposes, no inference could be drawn from that fact that the property was *wakf*. As pointed out above, however, the existence of a public trust should be held to be proved if the usage and custom of the institution as appearing from the evidence indicates that duties and obligations are attached to the office of *mahant*, which he is bound to carry out and in which the public are interested.

The earliest documentary evidence of importance is of 1853 to 1856, (Exs. P-17, V. A. Nos. 893 to 897, E. A. No. 1). These documents show that, in 1883 *katha* or recitation from the Hindu sacred books was being performed regularly at the Baghichi by a *Pandit* named Radha Kishen. One Dilla Ram sued this Radha Kishen claiming a share of the offerings made at the time of the *katha* on the ground that he had a hereditary right to recite the *katha*. *Mahant* Sant Das asserted the view that there was no hereditary office and that he could get *katha* recited by whomsoever he pleased. He quoted an opinion of the *Panches* of Gurjranwala given in 1849 to this effect. The Deputy Commissioner, who decided the matter, upheld Sant Das's view. The important points are that public recitation was going on in 1853, offerings were being made by the public and Sant Das justified himself by the aid of an award made by the *Panches* of Gujranwala. Three years later the same Dilla Ram brought a similar claim against Sant Das himself but it met with a similar fate. What Dilla Ram said in this plaint about the functions of Sant Das must be discounted by the controversy that existed between them and so must also some of the expressions used by the Deputy Commissioner in his judgment of August 29, 1856, as these seem to have been taken from Dilla Ram's plaint.

In 1869 four Sikh descendants of Bhai Gurdial Singh wrote a document (Ex. D. W. No. 2) asking the Government to include in the *Gurdwara* Baghichi a plot of land which was adjacent to it and of which the signatories were the land revenue assignees. They stated in this document that not only the vacant plot but also the *Gurdwara* building were "solely for the benefit of the public." It appears that the Government took no action on this request at that time but the opinion of the signatories regarding the public character of the *Gurdwara* is relevant under s. 32 (4), Evidence Act. The same open space was eventually included in the *Gurdwara* five years later, in 1874 (Exs. V. A. 923, 924, 925, 929 and 930 at pp. 105 to 108 of paper book B.) The Deputy Commissioner of the time found this site to be an unsightly plot adjoining the public road and he agreed that it should be handed over to Sant Das if the latter would wall it off. Sant Das himself was unwilling to purchase it, but the citizens (who included one Muhammadan signatory) arranged the affair by persuading the Deputy Commissioner to remit the share of the price of the plot which was due to the Government "in the interest of the city." The actual proprietors of the plot were compensated out

(9) 14 Ind. Cas. 698; 34 A 468; 9 A L J 709.

of a public fund and the *muafidars* waived their interest. These documents are important for the expressions which they contain about the character of the *Gurdwara* and the *mahant*:

"The house in question is very holy. The *sadhu* occupying it is a very good man. The citizens consider the house and *sadhu* to be holy and worship them. The house benefits the public. The people derive comfort from it. Travellers come and rest there."

The transaction itself however seems to have had a town-planning motive rather than to have been prompted by a desire to endow the *Gurdwara*.

The documents so far examined are important as evidencing the public character of the *Mahant's* functions and obligations from 1853 to 1874 though perhaps not conclusive on the subject. The will of *mahant* Sant Das made and registered in 1875 (Ex. D. W. No. 1) leaves little doubt that he regarded himself and his successors as trustees responsible for duties and obligations of a public character. When he made this will he had, as already related, no *chela* and he was contemplating the possibility that he might die without one. He was not however content that in such a contingency the property should pass to his blood relations but he made elaborate provision for the *Gurdwara* to be carried on as a public institution by Bhai Prem Singh, or failing him, by a committee of management of Hindu and Sikh citizens. Towards the beginning of the will he certainly stated that the *Gurdwara* and the properties attached to it belonged to him and that he was competent to alienate these properties. This however it has been plausibly argued, was a necessary prelude to the making of a will, and it is in any case conditioned by what follows.

Sant Das next set forth that he was making the will for the upkeep of the *Gurdwara* Baghichi with the consent of the *Satsangis* (congregation or companions in truth), At the end of the will it is clearly stated that the building of the *Gurdwara* Baghichi and the house and shop property at Gujranwala were *wakf* property and a place of wroship for all Hindus." The will also disclose Sant Das's solicitude that the *Gurdwara* and the other properties should not beceme burdened with any loan or otherwise subjected to interference by creditors. From these phrases and from the provision that his own *chela*, if appointed, should only have a right to spend the income of the properties, it is manifest that Sant Das regarded himself and his successors as trustees for the Hindu community in respect of these properties.

The will, moreover, indicates also the object of the trust as conceived by Sant Das, who provided that one quarter of the entire income should be devoted to *katha khawani* and *kirtan*, which are forms of public worship, one quarter to the food expenses of *sadhs* and chance visitors, one-quarter to the repairs and improvements of the buildings, and the remaining quarter to the expenses of the manager of the *Gurdwara*. It has been contended that this will created an endowment even if one did not already exist, but I think that the correct view to be derived from the wording of the will itself is that Sant Das was arranging to continue a state of affairs which he already regarded as existing, only a change in the personnel of the management being necessitated by his having at that time no *chela*. Support for this view is derived from the passage which describes the forms of worship then being carried on at the *Gurdwara* and directs their continuance:

"*Amawas* fairs, *katha*, recitation from the *Granth Sahib* and *Kirtan* shall go on in the *Gurdwara* as before."

Against this will, the case argued for the respondent-plaintiff was that Sant Das himself revoked the will (and the trial Judge appears to have adopted this view); secondly, that in any case it was never acted upon and that what Sant Das stated therein related merely to the future and not the existing state of affairs at the *Gurdwara*.

The evidence that Sant Das revoked the will is unconvincing. A story is told by some witnesses of the plaintiff (P. Ws. Nos. 5, 7, 8, 9, 19, 20 and 21) that Sant Das had made the will when he was ill and that when he recovered, he tore it up and drove Prem Singh from the *Gurdwara*. Some of these witnesses merely give this story as hearsay, while all those who profess to have been present at this scene can only have been boys at the time whose presence was not probable, nor, if present, would they be likely to have understood exactly what was happening or to have remembered it for fifty years. I have no hesitation in rejecting this evidence. The statements of two men Gobind Das, p. 222, and Janki Das (V. A. 753-756) made in 1891, that Sant Das revoked his will are inadmissible in evidence as these men are not proved to be dead. Moreover, these statements were made as witnesses at a time when the

matter appears to have become a controversial topic.

As to the contention that the will, even if not revoked, was never acted upon, there is doubt that the appointment two years later of Narain Das as the *chela* and the disconnection about the same time of Prem Singh with the *Gurdwara* Baghichi rendered most of the provisions of the will of Sant Das abortive. There is no good reason however to hold that Narain Das inherited the *Gurdwara* and its properties from Sant Das otherwise than subject to the conditions and restrictions which the will of Sant Das clearly intended to impose upon their control and management.

Thus this will is a most important document in support of the appellant's case and in face of its provisions and assertions it is difficult to adopt any other view than that Sant Das regarded himself and his successors as trustees for the Hindu public of the properties in question.

The next point is whether any of the *mahants* have been transferring any of the properties to strangers, as from any such transfer it could be inferred that they were treating the property as their own. Acquisitions were made by all the *mahants*, but Narain Das admitted that those made by himself were bought from the income of the estate, which as already related has been rising steadily in recent years. Ram Das made some gifts of house property to his sister's relatives, but after Ram Das' death Sant Das appears to have bought back the house from those relatives, after an inconclusive proposal to give them another house in exchange for it. These transactions were evidently not in the same category as alienations to strangers for a consideration and may almost be regarded as an exception which proves the rule.

Sant Das made a similar gift to the son of Radha Kishen who had recited *katha* at the *Gurdwara* for over fifty years. This may reasonably be regarded as an alienation in furtherance of the general purposes of the institution.

Exhibit P. W. No. 18, purports to be a sale deed of a house executed by Sant Das in 1865. This unregistered document is not properly proved nor was it produced from proper custody and its genuineness is therefore open to question. It cannot be taken as proof of a transfer. No other alienation by Sant Das is satisfactorily proved.

Narain Das admitted that during his sixty-two years of *mahantship* he neither sold nor gifted any property. One property which he bought, he mortgaged in order to raise the funds to pay for the purchase, and this mortgage he subsequently paid off out of the income of the estate. The evidence accordingly cannot be said to support the view that the *mahants* had been alienating the properties freely as their own personal property.

Next, there are various admissions of Narain Das which require to be noticed. Ex. V. A. No. 891 is an application purporting to be made by him to the Deputy Commissioner in 1916 praying that a noisy flour mill might be removed from the vicinity of the *Gurdwara*. This document is not admitted to be genuine though it was produced from public records. It was written by a man who is dead, but whose hand-writing is proved by his son, P. W. No. 13. The signature of Narain Das on it is proved by D. W. No. 11 and not clearly and distinctly denied by Narain Das. I have no doubt that this is a genuine document and that Narain Das signed it. It recites that the noise of the flour mill incommoded visitors from elsewhere to the Jor Fair and also *mahatamas* who were accustomed to staying at the "well-known" *Gurdwara* by diverting their attention from prayer. This shows the public character of the *Gurdwara* in the time of Narain Das as late as 1916.

In 1891, Narain Das described himself in a plaint as *mahant* of the *asthan* Baghichi and in 1903 he was similarly described in a sale-deed. Other documents speak of the place as *Gurdwara* or *Thakardwara*. Such names might possibly, however, be given to private institutions, and the title of *mahant* to persons who are not trustees and this part of the evidence does not therefore carry the case of the appellants much farther.

For the year 1905-06 Narain Das was assessed to Rs. 28 as income-tax. This income-tax was remitted on his objection and he was not again assessed until the pendency of the present proceedings. It is contended for the appellants that the tax was remitted in 1906 on Narain Das's representation that his income was derived from *wakf* property. The documents have been destroyed and only oral evidence is available except for Narain Das' own accounts of 1906, which show that it was on his application that the remission was made. There are three witnesses who say that the remission was made because the property was stated to be *wakf* and they all

had special means of knowing what they assert. Hira Nand (D. W. No. 9), was Narain Das's witness in the income-tax objection proceedings. Diwan Chand (D. W. No. 22), was income-tax clerk in 1906 and remembers the case as he was also a regular visitor of the *Gurdwara*. Karam Chand (C. W.) is a pleader and had seen the remission order. Against this Narain Das merely deposed that he did not remember on what grounds he had claimed exemption. I think that the above evidence adequately proves that Narain Das had represented the property to be *wakf* in 1906.

The learned Counsel for the appellants contended that a public kitchen, a school (*pathshala*) and a library are proved to be attached to the *Gurdwara*. There is no good evidence of the existence of a public kitchen. The school was started by Parma Nand after his return from Benares in 1919 with the help of public subscriptions. The connection of Narain Das and of the *Gurdwara* with it seems to have been limited to the loan of two rooms and to donations of a more or less recurring character. This school seems to have been an independent enterprise of Parma Nand and throws no light on the functions and duties of Narain Das prior to the institution of these proceedings. As to the library this also seems to have belonged to Parma Nand and it is doubtful how far it was available for public use.

The next point concerns the nature of the worship that has been taking place at the *Gurdwara*. There is no temple there nor any idol, though *Samadhs* exist. It has already been shown that public recitations of religious books (*katha*) took place there prior to 1853 and also in 1875. These recitations continued until about 1902 when Radha Kishen, the *Pandit* who had conducted them for over 50 years, and his son Vishen Sharma had died. They were then discontinued until their revival in 1919 by Parma Nand. The evidence that one Chet Ram continued them after 1902 is scanty and unconvincing. Parma Nand invited the public to his recitations by means of hand-bills. The discontinuance of *katha* for 17 years is a point in favour of the plaintiff and so is the fact proved by many witnesses that such recitations take place in private houses. The will of Sant Das however clearly recognised these recitations as one of the permanent objects of the institution.

The *Granth Sahib* was being opened and read at the *Gurdwara* in 1875. There is some evidence (*e. g.*, P. W. No. 5) that Prem Singh took away the *Granth Sahib* with him before Sant Das' death and that many years elapsed before Narain Das again started the opening of the *Granth Sahib* and its reading. Narain Das however admitted that he had opened the *Granth Sahib* 27 or 28 years before the suit, his contention being that he kept it at his house in the same way as any other house-holder might do. This contention, however, is forcibly shaken in my opinion by the proof contained in his own account books that certain articles kept for the procession of the *Granth Sahib* had been stolen on *Amawas* day and had to be replaced. This appears to have occurred in 1901 and such a procession would be a clear indication of the public nature of the worship of the *Granth Sahib* at this *Gurdwara*. The reading of the *Granth Sahib* was apparently not discontinued until a few years before the institution of this suit and it is clear that either *katha* or reading of the *Granth Sahib* or both were going on at this *Gurdwara* from 1853 to 1922.

The accounts of Narain Das also indicate that the *Amawas* Fair was regularly celebrated and that *Jor Mela* took place on these occasions. Such entries recur regularly. That the public came is stated by witnesses and is also evident from such entries as "purchased fans for the *Sangat* on the occasion of *Jor Mela* on *Amawas* (May 3, 1918)." Narain Das has attempted to explain that what was done monthly on *Amawas* day was to hold the *Sharadh* of Baba Kulla. Parma Nand and other witnesses also stated this. It is not a convincing explanation as the *Sharadhs* of Ram Das and Sant Das are admitted by Parma Nand to be performed annually.

Against all this it is not satisfactorily proved that any subscriptions were ever made by the public towards the upkeep of the *Gurdwara* nor that any offerings made by the public either to the *Granth Sahib* or on the occasion of *katha* were ever taken by the *mahant* himself. The need for public subscriptions would not be pressing as the income of this *Gurdwara* from rent of shops was apparently sufficient at all times to meet the costs of repairs and also to furnish funds for new acquisitions. Offerings made at the time of *katha* would naturally be taken by the *Pandit* who recited the *katha* and those made to the *Granth Sahib* might not be very substantial

and might, as Narain Das deposed, have been assigned to the *ragis* or singers. But the mere fact that such offerings were made indicates the attendance of the public.

To sum up the whole matter, I am of opinion that the properties passed always from *guru* to *chela* to the exclusion of blood relations affords a strong presumption of the existence of a religious institution, the members of which renounce the word; that the documents of 1853, 1856, 1869, 1874 and particularly the will of Sant Das of 1875 the absence of alienations of property by these *mahants*, the admissions of Narain Das and especially his representation regarding the remission of income-tax in 1906, and finally the continued performance of public worship at the *Gurdwara* and the holding of fairs attended by the public, prove that these *mahants* do not own property on their own behalf but as trustees for the Hindu public for the performance of religous worship and the feeding of travellers, and that the trust in question is a public trust within the meaning of Act XIV of 1920.

On the second issue, there is evidence of two witnesses who had been called by the plaintiff to prove documents, P. Ws. Nos. 14 and 15, who say that within their knowledge Nihal Chand, defendant, used to visit the Baghichi *Gurdwara* to hear *katha*, while some of the defendants witnesses have also deposed that the defendants are worshippers at the *Gurdwara* (D. Ws. Nos. 4, 6, 7, 9, 20 and 22). This matter was not seriously controverted before us by the learned Counsel for the plaintiff and I would hold on the strength of the above evidence that the defendants are persons interested in the Public Trust for the purposes of Act XIV of 1920.

For the foregoing reasons I would accept the appeal of the appellants-defendants and setting aside the judgment and decree of the Senior Sub-Judge of Gujranwala, dated May 26, 1926, I would make an order dismissing the suit of the plaintiff with costs throughout.

Coldstream, J.—I agree.

D. *Appeal accepted.*

PATNA HIGH COURT

Criminal Revision No. 605 of 1934

January 10, 1935

VARMA, J.

NIHERA KAHAR—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 238—Penal Code (Act XLV of 1860), ss. 454, 441—Charge under s. 454—Conviction under s. 441—Legality of.

Where a person is charged under s. 454, Penal Code for committing trespass with the intention of committing theft, he can be convicted under s. 441, for trespass committed with the object of committing an offence. *Karali Prasad Garu* v *Emperor* (3) and *Jadav Mahton* v. *Emperor* (4), applied.

C. R. from a decision of the District Magistrate of Shahabad, dated October 15, 1934, affirming that of the Sub-Deputy Magistrate, of Buxar, dated September 6, 1934.

Messrs. *P. N. Gour* and *Gopal Prasad*, for the Petitioner.

Mr. *B. C. De*, for the Assistant Government Advocate, for the Crown.

Judgment.—This is an application on behalf of Nihera Kahar who was convicted by the Sub-Deputy Magistrate of Buxar with Second Class Powers under s. 454 of the Indian Penal Code and sentenced to three months' rigorous imprisonment. The charge against him was as follows:

"That you, on or about June 30, 1934, at Dumraon, committed dwelling house trespass by entering into the house of *Musammat* Munwa Pasin and used as human dwelling in order to the commission of theft punishable with imprisonment and thereby committed an offence punishable under s. 454 of the Indian Penal Code, etc."

The case for the prosecution is a very simple one. *Musammat* Munwa on the day of occurrence had gone out early in the morning at 5 A. M. to an orchard of which she had taken settlement from the owners. When she returned at 2 P. M. to her house she found the accused inside it. On seeing her he tried to conceal himself in the kitchen. Thereupon *Musammat* Munwa locked the door from outside and shouted "thief, thief". Some of the prosecution witnesses, including three constables belonging to an out-post close by, reached the house and the accused was taken out of the room in their presence and taken to the *thana*. A first information was lodged by Munwa Pasin. It may be noted here that Munwa Pasin had left the house in charge of her daughter Premia, a married woman, who came from her husband's place about six or seven months before the date of occurrence,

Her age is said to be twenty years. Premia's statement is that a little before the time the accused was found in the house, she had gone out to bring water from a neighbouring well. The trial Court found, to quote his own words,

"that there is an overwhelming evidence to connect the accused with the offence under s. 454, Indian Penal Code as he was found committing lurking house trespass by entering into the house of *Musammat* Munwa used as human dwelling in order to the commission of an offence."

From this it is clear that the trial Court did not feel justified in convicting the accused under s. 454, that is committing lurking house trespass with the object of committing theft as he was originally charged. But he has convicted the accused for having committed lurking house-trespass "in order to the commission of an offence."

The case for the defence was that the accused had been carrying on an intrigue with Premia and went to the house in the absence of the mother to meet Premia. A number of letters were produced for the purpose of showing that elaborate correspondence was going on between the accused on the one hand and *Musammat* Premia on the other. These letters, to my mind, could not be of any use to the accused. Premia denies the authorship and the boy Ramjan Mian, who was supposed to be the go-between, and has been examined on behalf of the accused, stands thoroughly discredited. Mr. Gopal Prasad for the petitioner raises a point of law and that is that when the charge indicated that the trespass was committed with the intention of committing theft, the petitioner should not have been convicted for having committed trespass with the object of committing an offence. A number of decisions have been placed before me both for and against the contention. Mr. Gopal Prasad relies upon the decision in *Raghu Singh* v. *Emperor* (1) which is based on a decision of the Calcutta High Court in *Muhammad Hussein* v. *Emperor* (2); whereas Mr. B. C. De appearing on behalf of the Crown relies chiefly upon the case of *Karali Prasad Garu* v. *Emperor* (3), and also on the decision of this Court in *Jadab Mahton* v. *Emperor* (4). I am of opinion, that the last two cases are applicable to the facts of this case. The only difference between these cases and the present case is that whereas the charge in this case was under s. 454 with the object of committing theft, in these cases the charges were under s. 457, with the object of committing theft. But apart from the decisions, s. 238 of the Criminal Procedure Code lays down that:—

"When a person is charged with an offence consisting of several particulars, a combination of some only of which constituted a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted by the minor offence, though he was not charged with it .."

On this point, I am afraid, the contention of Mr. Gopal Prasad cannot succeed. But there is another point urged by Mr. Gopal Prasad with some amount of force that if the entry into the house with the intention of committing theft is not proved, what is the offence which could be the object when the accused trespassed into the house. Mr. De suggested adultery. There are no doubt a number of cases in which when a man was found inside a house under very exceptional circumstances, for example, at midnight, the presumption was raised that he was there with an intention of committing an offence whatever that offence might be. At any rate his entrance into the house was sure to cause annoyance to the inmates which brings his act within the purviews of s. 441 of the Indian Penal Code. But in this case I do not find anything on the record to indicate that the accused entered the house with the intention of committing an offence. There is no evidence to support the suggestion made by Mr. De that the intention was to commit adultery. So far as the accused knew there were no other inmates in the house except the girl when the accused entered, the mother having left the house at 5 A. M. as I have already mentioned. His subsequent conduct of trying to conceal himself when *Musammat* Munwa arrived does not indicate an intention to do any of the acts mentioned in s. 441 of the Indian Penal Code, the whole anxiety being to conceal himself as soon as possible. It may be that he went only to have a talk with the girl Premia and when discovered in the house, he did no like to be seen any more. That being so I do not feel satisfied that it has been proved that the intention of the accused in going to the house was to commit an

(1) 56 Ind. Cas. 592; A I R 1920 Pat. 590; 21 Cr. L J 496: 1 P L T 221.

(2) 22 Ind. Cas. 766; A I R 1914 Cal. 663; 15 Cr. L J 190; 41 C 743; 18 C W N 1247.

(3) 35 Ind. Cas. 984; A I R 1917 Cal. 824; 44 C 358; 20 C W N 1075; 17 Cr. L J 424.

(4) 61 Ind. Cas. 922; 2 P L T 240; A I R 1921 Pat. 217.

offence. I would, therefore, set aside the conviction and sentence passed upon the accused.

The lower Appellate Court seems to be under a misapprehension when it says that the trial Court found that the accused entered the house with the object of committing theft. To quote his words:—

"As the record stands, the circumstances in which the appellant was caught inside the house, the lower Court's conclusion that the man had committed lurking house trespass in order to commit the crime of theft."

With all respect to the lower Appellate Court I do not find where the trial Court came to that conclusion. But any how it does not affect the position of the accused because the effective portion of the lower Appellate Court's judgment is that he upheld the finding of the trial Court.

N. *Conviction set aside.*

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1199 of 1932
January 23, 1935
BAJPAI, J.
THE B. B & C. I. RAILWAY Co., THROUGH THE AGENT AT BOMBAY—DEFENDANT—APPELLANT
versus
DWARKA NATH—PLAINTIFF—RESPONDENT

Tort—Negligence—Railway—Damage caused to plaintiff's property by spark from engine—Burden of proof as to whether proper precaution was taken lies on Railway Company—Contributory negligence—Finding that plaintiff's servants could not have averted damage by any means humanly possible—Failure of plaintiff to extinguish fire—Whether constitutes contributory negligence

In a suit for damages brought against a Railway Company on the allegation that the plaintiff's property adjoining the Railway line was destroyed by a spark from the engine of a running train the burden of proof as to whether proper precaution had been taken to avoid emission of such sparks lay on the Railway Company and the latter would be liable if it failed to take all reasonable precaution. *Secretary of State for India in Council* v. *Dwarka Prasad* (1), relied on, *Halford* v. *The E. I. R. Company* (2), distinguished.

Where in a suit for damages for loss through fire caused by a spark falling from the ash-pan of a Railway engine, it was found that the servants of the plaintiff could not have averted the damage by adopting such steps as were humanly possible:

Held, that the plaintiff could not be held to be guilty of contributory negligence.

S. C. A. from the decision of the Subordinat Judge of Farrukhabad, dated June 8, 1932.

Dr. *K. N. Katju* and Mr. *R. N. Gurtu*, for the Appellant.

Mr. *S. B. Johari*, for the Respondent.

Judgment.—This is a second appeal by a Railway Company against the decree of the Courts below awarding damages to the plaintiff for loss sustained by him through fire. The origin of the fire was stated to be that certain sparks from an engine of the Railway Company fell on the grass growing on the Railway banks and spreading on to the jungle of the plaintiff's adjoining land damaged some *patel* grass and trees. The plaintiff is the owner of village Bholanpore Chirpura and a portion of its area is situated close to the Railway line which passes over a certain portion of the land of this village. There are waste and jungle lands belonging to the plaintiff in this village and various kinds of timber and fruit trees and *patel* grass grow on these lands. The plaintiff's case is that on April 13, 1930, a passenger train owned by the B. B. & C. I. Railway Company was running between Cawnpore and Farrukhabad and certain sparks from the engine were responsible for the fire and the damage to the plaintiff's property. Courts below have decreed the plaintiff's suit for damages to the extent of Rs. 600 on the finding that the defendant Company was guilty of negligence.

In second appeal it is contended before me that on the findings of the lower Appellate Court no negligence, such as is actionable in law, has been established and that the plaintiff was guilty of contributory negligence. It is said that the Railway Company has a statutory power of running locomotive engines on the Cawnpore-Farrukhabad line and, therefore, they are not responsible for the consequences of the fire because

"when the Legislature has sanctioned the use of a particular means for a given purpose the sanction carries with it the consequence that the use of the means itself for that purpose is not an act for which an action can lie."

This argument, however, was modified by the concession that in case of negligence the Railway Company would not be exonerated. The question, therefore, is whether the defendant was guilty of such negligence as to entitle the plaintiff to obtain damages.

The lower Appellate Court has found that

"the plaintiff's oral evidence is worthy of being relied on."

It has also discussed the defendant

evidence and has come to the conclusion that

"in face of the plaintiff's clear evidence no weight can be given to the defence evidence."

It is not possible for me in second appeal to come to a different conclusion on the question of the weight to be attached to the evidence adduced by the parties. It was, however, argued by Dr. Katju that the lower Appellate Court has misread a portion of the evidence given by Ala Rakhu, a witness for the defendant, and that the finding is vitiated because the Court thinks that Ala Rakhu to a certain extent corroborates the plaintiff's evidence. Ala Rakhu in examination-in chief supported the defence case but in cross-examination stated that when he was about to start for Fatehgarh to report the matter to the Permanent-way Inspector the fire had already gone out of the Railway fencing (*ag tar ke bahar pahunch chuki thi*). The case of the defendant was that the fire did not have its origin within the Railway boundaries but in the land belonging to the plaintiff caused by the negligence of some of the plaintiff's servant. The lower Appellate Court, therefore, was justified in saying that the admission by Ala Rakhu to the effect that the fire had gone out of the Railway fencing suggests that the fire originated on the Railway banks. In my view there has been no misreading of the testimony of Ala Rakhu. After a review of the evidence produced by the parties the lower Appellate Court records this finding

"There was grass on the defendants' land, between the fencing on either side of the Railway line, 1 to 1½ cubit high; that that grass caught fire, owing to sparks, falling down from the Railway engine; and that that fire spread on to the plaintiff's land and burnt his *patel* and trees."

It is then argued that even if this finding be accepted the plaintiff has no cause of action to maintain a suit for damages. The contention is that although it may be the duty of the Railway Company to take proper precaution for the avoidance of fire due to sparks from Railway engines yet an impossible duty should not be imposed and if the Railway Company were liable for damages caused to the plaintiff's land by reason of the sparks from the engine falling on the grass on the Railway banks and then spreading on to the plaintiff's land the task of the Railway Company would be an impossible one, because it would amount to asking them to keep the banks of their line "trimmed like a lawn or altogether preventing visitation thereon." It is said that the imposition o such a liability was not intended by the Legislature which gave the Railway Company power and authority to run trains and locomotive engines.

It was held by Mukerji J. in the *Secretary of State for India in Council* v. *Dwarka Prasad* (1), in a plaintiff's suit for damages brought against a Railway Company on the allegation that his property adjoining the Railway line was destroyed by a spark from the engine of a running train the burden of proof as to whether proper precaution had been taken to avoid emission of such sparks lay on the Railway Company and the latter would be liable if it failed to take all reasonable precaution. Mr. Dey was examined in the present case by the Railway Company and he said that 10 feet of land near the Railway fencing is kept clean by the Railway Authorities and this track is known as the fire line, then again a piece of land 2 feet in width near the Railway track itself is kept clean and that all these precautions were taken in 1930 also. This would go to show that the Railway Company itself did not consider it impossible to keep about 10 feet wide land near the fencing and 2 feet wide land near the Railway track clean. It also appears in the evidence of the plaintiff and of Mr. Dey that the plaintiff had made several complaints to the Railway Authorities for damage caused to his property by the sparks from the engine and that several *thekadars* who had taken a *theka* of cutting grass from the plaintiff's land had shown their disinclination to take the *theka*. The attention of the authorities was pointedly drawn to the duty of cutting the tall grass inside the fencing in order to prevent damage to the plaintiff. The lower Appellate Court has refused to believe Mr. Dey when the latter said that the precaution of cutting the grass had been taken in the year 1930. The learned Judge says, "Neither his oral statement nor his reports can be worthy of being given any weight". Under these circumstances I am of the opinion that the finding of the lower Appellate Court that the defendant Railway Company was guilty of actionable negligence was sound in law.

Reliance, however, was placed by Dr. Katju on the case of *Halford* v. *The E. I. R. Company* (2). This case lays down

(1) 100 Ind. Cas. 640; 25 A L J 336; A I R 1927 All. 349.

(2) 14 B L R 1.

that if every precaution which the nature of the case suggests has been observed then the Railway Company which has a statutory power of running locomotive engines will not be liable for damages caused to the plaintiff's property independent of negligence. Coming to the facts of that case it appears that they were entirely different from the facts of the present case. The learned Single Judge as well as the Judges who heard the Letters Patent Appeal relied greatly upon the evidence tendered by the Railway Company which was to the effect that the grass on the Railway banks was not more than a foot high and that it was not to be expected that the Railway Company would trim the grass on the banks like a lawn. In the present case it is admitted by the Railway Company that the fire line and another two feet wide line near the Railway track has to be kept clean of grass, and the finding is that the grass on the defendants' land between the fencing on either side of the Railway line was about 18 to 24 inches high. The case cited by the appellant, therefore, does not help the Railway Company. Next it was contended that the plaintiff was guilty of contributory negligence inasmuch as some of his servants saw some live coal falling from the ash-pan of the Railway engine which ignited the grass on the Railway line and this fire in its turn by the westerly wind that was blowing spread on to the plaintiff's land. It is said that the plaintiff's servants could have managed to extinguish the fire if they had taken proper steps. According to the defendants' own witness Ala Rakhu the fire spread with great rapidity and the jungle was ablaze within a very short time, and I am, therefore, of the opinion that it was not possible for the plaintiff's servants to have averted the damage by adopting such steps as were humanly possible.

For the reasons given above there is no force in this appeal and I dismiss it with costs. Dr. Katju has asked for permission to file an appeal by way of Letters Patent saying that the question is of great importance to the Railway Company and I give him leave.

N. *Appeal dismissed.*

PATNA HIGH COURT

Privy Council Appeal No. 21 of 1933.

February 13, 1935

COURTNEY TERRELL, C. J. AND DHAVLE, J.

KARUNAKAR TIKAIT SAMANTA AND OTHERS—PETITIONERS

versus

PURNA CHANDRA BIDYADHAR MAHAPATRA AND OTHERS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 110—Question, whether in partition suit valuation for purposes of appeal to Privy Council should be of entire property—Whether of sufficient importance to allow appeal to Privy Council—Decision on question of impartibility of estate—Whether one affecting whole estate.

The question whether for the purpose of s. 110 of the Civil Procedure Code in the right to appeal to His Majesty in Council the valuation for the purpose of that section is to be taken of the entire property which it was sought to partition or whether it is the value of the share claimed by the plaintiff, itself is one of sufficient importance for allowing leave to appeal to the Privy Council. *Muhammad Asghar* v. *Abida Begam* (1), applied.

A decision on the question of the impartibility of an estate raised as a bar to the suit for partition is one which possibly affects the estate and if the value of the estate is above Rs. 10,000, appeal to His Majesty in Council is competent.

Application for leave to Appeal to His Majesty in Council under ss. 109, 110 and O. XLV, r. 2, of the Civil Procedure Code.

Messrs. *A. B. Mukharji* and *Nawadip Chandra Ghosh*, for the Petitioners.

Messrs. *S M. Mullick*, *P. Misra* and *D. C. Varma*, for the Opposite Party.

Courtney Terrell, C. J.—This is an application for leave to appeal to His Majesty in Council from a judgment of this Court allowing an appeal from the judgment of the Subordinate Judge in a suit for partition of certain property. The Subordinate Judge had given a decree for partition. That decree was reversed by this Court. The value of the property as stated by the plaintiff for the purpose of jurisdiction was Rs. 12,000 and he claimed an 8 annas interest in the property. The value placed did not affect the jurisdiction of the Court to which an appeal lay and the stamp fee payable upon the plaint was a fixed and definite amount.

There has been, as was pointed out by the Allahabad High Court in the case of *Muhammad Asghar* v. *Abida Begam* (1), a difference of opinion between the views of the various High Courts in India on the question of whether for the purpose of

(1) 138 Ind. Cas. 670; 54 A 858; (1932) A L J 730; Ind. Rul. (1932) All. 481.

s. 110 of the Civil Procedure Code in the right to appeal to His Majesty in Council the valuation for the purpose of that section was to be taken of the entire property which it was sought to partition or whether it was the value of the share claimed by the plaintiff.

The respondents to this application have contended that the correct view is that under the first part of s. 110 the amount to be considered for the purpose of valuation is the share claimed by the plaintiff and therefore leave to appeal should be refused.

I agree with the view taken by the Allahabad High Court that this question itself is one of sufficient importance for allowing leave to appeal to His Majesty in Council, under s. 110.

A second point has been taken by the petitioner that the decision, apart from the question of the value of the share claimed by him, affects directly or indirectly the entire property which it was sought to partition. I was a party to the decision of the High Court and took the view that the estate in question was impartible. In addition to this point I agreed with the judgment of Fazl Ali, J., who took the view that the plaintiff could not succeed in the suit for other reasons. It may be said therefore that the decision on the question of the impartibility of the estate raised as it was as a bar to the suit for partition was a decision which possibly affected the estate notwithstanding that the judgment could only take effect as *res judicata* between the parties to the litigation.

For both reasons, therefore, in my opinion, it is desirable that the petitioners should be given leave to appeal.

The costs of this application will abide the result of the appeal to the Privy Council.

Dhavle, J.—I agree.

N. *Leave granted.*

ALLAHABAD HIGH COURT

Second Civil Appeal No. 68 of 1933
February 27, 1935
NIAMAT-ULLAH, J.

BANAPHAL SINGH—PLAINTIFF—APPELLANT
versus
NOOR MOHAMMAD—DEFENDANT AND RAJ KISHORE SINGH—PLAINTIFF—RESPONDENTS

Evidence Act (IX of 1872), s. 97—One part of deed indicating that whole grove is sold—Another part indicating that only part is sold—Evidence to prove what was meant to be conveyed—Admissibility—Deed—Construction—Ambiguity—Civil Procedure Code (Act V of 1908), s 100—Finding based on admissible evidence—Finding of fact.

Where the language of a deed, so far as the boundaries are concerned is indicative of the fact alleged by one party, namely that the whole of a grove was sold, and another part of the deed, referring to the number and area, is indicative of the fact alleged by the other party, that part only of the grove was sold, under s 97, Evidence Act, evidence is admissible to show whether it was meant that the deed should convey the whole of the grove or only part of it

Where evidence which is admissible is admitted and a finding arrived at by the lower Appellate Court, the finding is one of fact and cannot be questioned in second appeal.

A document must be taken as a whole and if there is inconsistency between two parts of it, the case is one of ambiguity.

S. C. A. from the decision of the District Judge of Azamgarh, dated October 14, 1932.

Mr. *A. P. Pandey*, for the Appellant.

Mr. *Mukhtar Ahmad*, for the Respondent

Judgment.—This second appeal has arisen from a suit brought by the appellant for recovery of possession of plot No. 258 with trees standing thereon. The trial Court decreed the suit. The lower Appellate Court dismissed it.

It is common ground that the plaintiff owned what looked on the spot like a grove surrounded by a ditch all round. It is, however, composed of two distinct plots, No. 257 area 753 *karis* or one *bigha* 6 *biswas* 14 *dhurs* and No. 258 area 97 *kari* or 3 *biswas* 9 *dhurs*. There are trees all over the grove on both the plots. The plaintiff executed a sale-deed in favour of the defendent in 1925 in respect of a grove which is described in the body of the sale-deed as No. 257, area 753 *karis*, bounded as stated at the foot of the deed. The boundaries include not only plot No. 257 but also No. 258. The lower Appellate Court treated it as a case of ambiguity and proceeded to decide on evidence whether the sale-deed was meant to cover the entire grove, including plots No. 258, as alleged by the defendant, or only No. 257, as alleged by the plaintiff. There was oral evidence on both sides which the lower Appellate Court did not consider to be quite reliable. On the documentary evidence and certain circumstances referred to in the judgment that Court held that the plaintiff sold the entire grove, including No. 258, and that the defendant has been in possession of the entire grove ever since the date of sale. On that finding the plaintiff's suit was dismissed.

The learned Advocate for the appellant argues that this was not a case of latent ambiguity and that extrinsic evidence was not admissible. He points out that the sale-deed clearly mentions the area of the property sold besides its number and that the vendee is not entitled to any area in excess of what is mentioned in the deed. If there had been nothing else in the sale-deed, this argument would have been unaswerable, but the document must be taken as a whole and if there is inconsistency between two parts of it, there can be no doubt, whatever, that the case is one of ambiguity. The deed purports to convey plot No. 257 subject to the qualification, *viz.*, the area enclosed within the boundaries set forth at the foot of the deed. The defendant's case was that the plaintiff showed to him on the spot the grove which was enclosed by a ditch on all sides of it, and that the parties entered into the transaction of sale in respect of the entire grove which at that time was considered to be only No. 257 with an area of 753 *karis*. The lower Appellate Court has found that the defendant has been in possession of the entire grove, including No. 258, ever since the date of sale. The plaintiff himself admits that he (the defendant) is in possession of No. 258, because the present suit is one for possession. The '*khatauni*' of 1334 *Fasli* which corresponds to 1926-27, records both plots, Nos. 257 and 258, in the name of the defendant as grove-holder. In all subsequent years the same entry is found. Learned Advocate for the appellant attempted to explain away the entry in the *khatauni* of 1334 *Fasli* on the ground that plot No. 258 is shown in red ink. It does not, however, appear what significance of the entry in red ink is. He suggests that plot No. 258 was subsequently entered in the defendant's grove *khata*. This may be so. The fact remains that the plaintiff did not take any exception to the defendant's possession for nearly 8 years, or to the entries in the '*khatauni*'. This fact is strongly relied upon by the lower Appellate Court, which refers to one or two other circumstances which, according to it, give rise to an inference in favour of the defendant.

It is conceded that the finding arrived at by the lower Appellate Court is one of fact and is supported by, at least, some evidence. The only contention which is put forward on behalf of the appellant is that the lower Appellate Court was not justified in entering into the question as to whether anything more than plot No. 257 was sold. In my opinion s. 97, Indian Evidence Act, is fully applicable. It provides that, when the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show which of the two it was meant to apply. In the present case, the language of the deed, so far as the boundaries are concerned, is indicative of the fact alleged by the defendant, namely, that the whole of the grove was sold. Another part of the deed, which refers to the number and area, is indicative of the fact alleged by the plaintiff, namely, that part only of the grove, that is to say, No. 257, was sold. In this state of things, according to the section, evidence is clearly admissible to show whether it was meant that the deed should convey the whole of the grove or only part of it. In my opinion, the lower Appellate Court was justified in admitting extrinsic evidence. As already stated, such evidence being admitted, the finding of the lower Appellate Court is one of fact and cannot be questioned in second appeal, which is accordingly dismissed, with costs.

Leave to appeal under the Letters Patent is refused.

N. *Appeal dismissed.*

PATNA HIGH COURT

Civil Appeal No. 1160 of 1930

January 2, 1934

MOHAMMAD NOOR AND AGARWALA, JJ.

BHEKDHARI MAHTON—DEFENDANT —APPELLANT

versus

RADHIKA KOER—PLAINTIFF—RESPONDENT

Bihar and Orissa Public Demands Recovery Act (IV of 1914), ss. 7, 8—Transfer of Property Act (IV of 1882), ss. 100, 60—Effect—Secretary of State, if becomes simple mortgagee of property charged with payment of cess—Suit by prior mortgagee—Secretary of State not impleaded—Whether bound by proceedings—Right of redemption, if lost—Partial redemption—Integrity of mortgage—When can be said to be broken up—Omission to implead persons interested—Redemption of portion on payment of proportionate amount.

The effect of s. 8, Public Demands Recovery Act, and s. 100, Transfer of Property Act, is that for all practical purposes the Secretary of State becomes a simple mortgagee of those properties which are charged with payment of cess money under ss. 7 and 8 of the Public Demands Recovery Act. Therefore, he must be impleaded in a mortgage suit by the prior mortgagee, and when he is not so impleaded, the Secretary of State and the purchaser of the property in enforcement of that mortgage are not bound by the proceedings which take place

in the prior mortgagee's suit. Nor is the sale of the property in any way binding upon them and their right of redemption remains absolutely intact. *Sheo Narain Sahu* v. *Ram Nirekhan Ojha* (1), *Amirchand* v. *Moti Pande* (2), *Aziz un-nissa* v. *Komal Singh* (3) and *Raghunath Prasad* v. *Sadhu Saran* (4), referred to.

Under ordinary circumstances a mortgage is indivisible but this indivisibility is for the protection of the mortgagee and the mortgagee by his own act can create a situation under which the integrity of the mortgage debt must be held to have broken up.

If a mortgagee omits to implead persons interested in a portion of the mortgaged property and then brings about the property to sale and purchases it himself, he is bound to allow the redemption of the portion concerned on payment of the proportionate amount.

C. A. from appellate decree of the District Judge, Patna, dated February 21, 1930.

Messrs. *Manohar Lal* and *B. N. Sahu*, for the Appellant.

Messrs. *S. N. Rai* and *B. N. Rai*, for the Respondent.

Mohammad Noor, J.—The fact leading up to the present appeal are these: By a mortgage deed dated March 9, 1915, one Narayan Prasad mortgaged certain properties to one Rajendra Prasad one of the properties being *Mauza* Chak Pahar, Tauzi No. 7399. Later on one Bhagwan Hajam in execution of his simple money decree against him purchased the interest of Narayan Prasad in the mortgaged properties and obtained possession of them. Rajendra Prasad brought a suit against Bhagwan Hajam for a declaration that the latter's purchase was subject to the mortgage in favour of the former. That suit was decreed. Rajendra Prasad then brought a mortgage suit and in due course put the mortgaged properties to sale and purchased them on January 25, 1926. Delivery of possession was formally given to him on the June 16, 1926. Subsequently he sold five out of seven properties which he had purchased to the plaintiff by a sale deed dated August 2, 1926. One of the properties so sold was Chak Pahar the subject-matter of the present litigation. In the meantime Bhagwan Hajam who was in possession of the mortgaged properties by virtue of his purchase in execution of the simple money decree, fell into arrears of cesses and notice under s. 7, Public Demands Recovery Act, was served on him on September 26, 1923. Chak Pahar was sold in execution of that certificate and was purchased by one Angnu on March 19, 1924, but later on he transferred it to the present defendant. The plaintiffs not being able to get their names recorded in the Collectorate Register by expunging the name of the defendant who had already got his name recorded in respect of Chak Pahar, brought the present suit for confirmation of possession or for recovery of possession of the property in suit basing their title on the purchase by Rajendra Prasad in execution of the mortgage decree. On behalf of the defendant it was urged that the effect of the service of notice under s. 7, Public Demands Recovery Act, on Bhagwan Hajam was that a charge was created on his properties in favour of the Secretary of State for the arrears of cesses due to Government. The suit having been instituted in January 1924, some three months after the service of notice the Secretary of State was a necessary party to the mortgage suit and Angnu who purchased the property which was subject to the charge was not bound by the mortgage sale and the plaintiffs were not, therefore, entitled to recover possession from the defendant who had acquired the right, title and interest of Angnu in the village in suit. The first Court decreed the plaintiffs' suit, but on appeal the learned District Judge has allowed the defendant the option of redeeming all the mortgaged properties by paying up the entire mortgage dues of Rajendra Prasad. The defendant has preferred this second appeal.

The only question involved in the present appeal is the position of the defendant who bases his title upon the certificate of sale for arrears of cesses, notice of which was served upon Bhagwan on September 26, 1923. In other words, the question is whether the mortgage sale was binding upon Angnu and, therefore, upon the defendant. Section 8, Public Demands Recovery Act, runs thus:

"From and after the service of notice of any certificate under s. 7 upon a certificate-debtor—

* * * *

the amount due from time to time in respect of the certificate shall be a charge upon such property to which every other charge created subsequently to the service of the said notice shall be postponed."

It is clear that by the operation of law, on September 26, 1923, a charge was created on the property in dispute in favour of the Secretary of State in respect of the amount due under the certificate. Section 100, Transfer of Property Act enacts that:

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage the

latter person is said to have a charge on the property and all the provision hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

The effect of s. 8, Public Demands Recovery Act, and s. 100, Transfer of Property Act, is that for all practical purposes the Secretary of State became a simple mortgagee of the properties of Bhagwan Hajam including Chak Pahar. This simple mortgage was of course subject to the simple mortgage in favour of Rajendra created in 1915 and the respective rights of the two purchasers at the two mortgage sales, namely, Rajendra and Angnu must be governed by the provision of law which governs the rights of the two mortgagees, the prior and the subsequent. It is obvious that the purchaser at the certificate sale is entitled to all the rights of the puisne mortgagee at whose instance the property which he purchased was sold namely, a right to an opportunity to redeem. Now under the law, *viz.*, O. XXXIV, r. 1, Civil Procedure Code, it was incumbent upon Rajendra to implead in the mortgage suit, the Secretary of State who held a subsequent mortgage of the property in question, the mortgage having been created by the operation of law prior to the institution of the mortgage suit. This not being done the Secretary of State and Angnu who purchased the property in enforcement of that mortgage are not bound by the proceedings which took place in the suit instituted by Rajendra. Nor is the sale of the property in any way binding upon them and their right of redemption remains absolutely intact. This is the view which has been taken by this Court in a fairly large number of cases. Among them I may mention the following: *Sheo Narain Sahu* v. *Ram Nirekhan Ojha* (1), *Amirchand* v. *Moti Pande* (2), *Azizunnissa* v. *Komal Singh* (3), and *Raghunath Prasad* v. *Sadhu Saran* (4).

Now the learned District Judge has allowed the defendant the right of redemption but he has done so in respect of the entire mortgaged property by paying up the entire mortgage debt. Presumably he relied upon the doctrine of indivisibility of the mortgage debt. No doubt under ordinary circumstances a mortgage is indivisible but this indivisibility is for the protection of the mortgagee and the mortgagee by his own act can create a situation under which the integrity of the mortgage debt must be held to have broken up. One well known circumstance under which a mortgage debt is split up is when the mortgagee himself acquires the equity of redemption in respect of a portion of the mortgaged properties. In that case the persons interested in the remaining portion can insist upon redemption of that portion only by paying up the proportionate mortgage debt. The cases referred to above clearly show that if the mortgagee omits to implead persons interested in a portion of the mortgaged property and then brings about the property to sale and purchases it himself, he is bound to allow the redemption of the portion concerned on payment of the proportionate amount. In this particular case the mortgagee Rajendra omitted to implead the Secretary of State who, as I have said was a puisne mortgagee in respect of the certificate debt and purchased the mortgaged property himself. Now at the time when the purchaser in execution of the certificate sale claims redemption it is found that the equity of redemption in respect of the remaining property is vested in the mortgagee himself, the defendant, therefore, can in equity claim to be allowed to redeem that portion of the property only in which he is interested. The plaintiffs are the representatives of Rajendra and the defendant of Angnu.

In my opinion the decree of the learned District Judge must be varied by allowing the defendant to redeem the property in suit by paying up the proportionate amount due in respect of the property in suit as was ordered in the case of *Balli Singh* v. *Bindeshwari Tewari* (5). I would, therefore, allow the appeal and order the trial Court to take an account of the amount due under the mortgage of March 1915, up to June 16, 1926, the date on which Rajendra Prasad the mortgagee auction-purchaser was formally given possession of the property. Then the value of the several mortgaged properties on the date of the mortgage should be ascertained and the mortgage debt found due as above should be distributed on them proportionately and the amount due from the village in suit should thus be ascertained. Thereafter the defendant will be given three

(1) 52 Ind. Cas. 512; A I R 1919 Pat. 399.
(2) 134 Ind. Cas 959; A I R 1931 Pat. 434; 12 P L T 769; Ind. Rul. (1931) Pat. 511.
(3) 130 Ind. Cas. 33; A I R 1930 Pat. 579; 9 Pat. 930; 11 P L T 595; Ind. Rul. (1931) Pat. 129.
(4) 75 Ind. Cas. 821; A I R 1925 Pat 31; 5 P L T 212.
(5) 35 Ind. Cas. 532; A I R 1916 Pat. 282; I P L J 133; 2 P L W 432.

months' time to redeem the property by paying up to the plaintiffs the amount so found due in respect of the property in suit. In that event the plaintiffs suit for possession will be dismissed. If he fails to do so within the time aforesaid, the property in suit will be put up for sale. Out of the sale proceeds the mortgage debt due upon the property will be satisfied first and the amount will be paid to the plaintiffs as the representatives of the mortgagee and the balance if, any, will go towards the satisfaction of the mortgage decree if it still remains unsatisfied otherwise it will be paid to the defendant. The plaintiffs are not entitled to a decree for possession as on the date of the present suit they were not entitled to possession as the sale at which they purchased was not binding upon the defendant. The only right they had was a right on failure of redemption to bring the property to sale. We understand that since the order passed by the learned District Judge the plaintiffs are in possession of the property in suit and are enjoying the usufruct thereof. We have, therefore, not directed the taking of the account of the mortgage debt for the period after June 16, 1926. Under the circumstances it is directed that the parties will bear their own costs throughout.

Agarwala, J.—I agree.

N. *Appeal allowed.*
Case remanded.

ALLAHABAD HIGH COURT

Criminal Revision Application No. 8 of 1935
March 11, 1935
KENDALL, J.

WAHID ULLAH AHRARI—
APPLICANT
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 500—Defamation—Essence of offence—Articles implying that girls of a college were habitually guilty of misbehaviour—All girls in college collectively and each girl individually suffer in reputation—Complaint for defamation—Maintainability of.

The essence of the offence of defamation is the publication of an imputation with the knowledge that it will harm the reputation of the person defamed.

Where certain articles published in a paper contained scandalous accusations against the girl students of a college and implied that the girls were habitually guilty of misbehaviour described in the article, the inevitable effect on the reader must be to make him believe that it is habitual with the girls of the college to behave in this way. As by the articles all the girls in the college collectvely and each girl individually suffer in reputation, an action for defamation is competent by some of them. *Government Advocate, Bihar and Orissa* v. *Gopabandhu Das* (1), distinguished.

Cr. R. App. from an order of the Sessions Judge of Aligarh, dated December 13, 1934.

Mr. *Kumuda Prasad*, for the Applicant.

Mr. *M. Nasim* and Mrs. *Faruqi*, for the Opposite Parties

The Assistant Government Advocate, for the Crown.

Judgment.—This is an application for the revision of an order of the Sessions Judge of Aligarh upholding the order of conviction and sentence passed by a First Class Magistrate on the applicant under s. 500 of the Indian Penal Code. The facts on which the conviction has been based are given fully in the order of the Magistrate, and the essentials have been repeated in that of the Sessions Judge. It is sufficient to state here that the applicant was admittedly responsible for two articles which were published in a paper called the *University Punch*, Aligarh, containing the most scandalous accusations against the girls of the Girls' Intermediate College of Aligarh. The articles are given in full both in English and Urdu in the order of the Magistrate. The first of them asserts that the girls of the college frequented broad Marris Road, green meadows and canal banks which are frequented by pleasure seeking youths every morning and evening for their solace and enjoyment, and also that Meena Bazar Exhibition was held within the precincts of the college, that university students and professors, Muslim and non-Muslim gentry of the town and gay officers visited the place after obtaining tickets for shopping with these educated Muslim harlots of the Meena Bazar. I should mention that the translation of the word "*shahidan*" into "harlots" has been objected to by learned Counsel for the applicant, and it is suggested that the word means no more than "beauties", unless it is connected with the word "bazar". This, however, is a very technical objection, because the implication conveyed by the word in its context is unmistakable. The second article refers to a particular case, namely that of a young girl who is said to have been found unconscious near the Girls' Intermediate College and it was added that it was widely said that she was the victim of repeated brutal assaults. The implication

of the article undoubtedly is that owing to the conditions within the college such an incident was quite likely to take place in its neighbourhood.

Both the Courts have agreed that the articles are defamatory. In the lower Appellate Court a plea was taken that the person aimed at in the article was not the girls in the college, but the Honorary Secretary, and that he was not the complainant, so that the prosecution ought to fail. This was a purely technical argument and has not been pressed in this Court. The argument that has been pressed in appeal is, firstly, that the articles which contain the defamatory matter do not refer to the "boarder girls", but simply to the girls of the college. It is said that there are over 150 girls in the college of whom 75 are boarders, and of the 67 who joined in making the complaint in the present case one was a minor and her guardian subsequently withdrew from the prosecution. The argument is that if the articles are defamatory, they apply equally to any one of the girls in the college, and that no individual girl is defamed thereby, nor is the college collectively defamed. The case of *Government Advocate, Bihar and Orissa* v. *Gopabandhu Das* reported in 67 Ind. Cas. 609 (1) has been relied on by Mr. Kumuda Prasad, in which it has been remarked by a Bench of the Patna High Court that

"An imputation against an association or collection of persons jointly may amount to defamation within the meaning of s. 499 of the Indian Penal Code, but it must be an imputation capable of being brought home to a particular individual or collection of individuals as such,"

and again

"the rule is that if the words used contain no reflection on a particular individual or individuals, but may equally well apply to others, although belonging to the same class, an action will not lie."

Explanation No. 2 of s. 499 of the Indian Penal Code shows that

"It may amount to defamation to make an imputation concerning a company or association".

In the case before the Patna High Court the defamatory words were used in regard to two constables who were said to have committed a particular act on a particular occasion. There was nothing in the article itself to show who the two constables were. They were not even referred to in the article as being constables of a particular *thana*, though they were taken by the villagers to have been two constables attached to Begunia Police Station. But there is nothing to indicate which were the two in question. The facts are certainly not analogous to those of the present case. Here the defamatory articles relate to the alleged habitual conduct of the girls of the Intermediate College. Those girls may be over 150 in number and it may not have been the intention of the writer of the articles to imply that every girl in the college was guilty of this conduct. The essence of the offence of defamation, however, is the publication of an imputation with the knowledge that it will harm the reputation of the person defamed, and as these articles do beyond question imply that the girls of the college are habitually guilty of the misbehaviour described in the articles, the inevitable effect on the reader must be to make him believe that it is habitual with the girls of the college to behave in this way.

That being so, it seems quite clear that all the girls in the college collectively and each girl individually must suffer in reputation. The difference between this case and the one before the Patna High Court is obvious. In that case two constables were accused of a particular act, and it did not follow from that that all constables suffered in their individual reputation.

The view that has been taken by the Courts appears to me to be perfectly correct, and there is no reason to interfere with the orders passed. The sentence no doubt is severe, but the offence, as has been pointed out, was an extremely serious one and the applicant when on his trial made no attempt to express his regret or make any acknowledgment of the fact that he had done wrong. The application is, therefore, dismissed.

N. *Application dismissed.*

(1) 67 Ind. Cas. 609; 3 P L T 209; (1922) Pat. 117; Q L J 433; 1 Pat. 414; A I R 1922 Pat. 101.

LAHORE HIGH COURT

Letters Patent Appeal No. 10 of 1930
March 8, 1934

TEK CHAND AND ABDUL RASHID, JJ.

JUGAL KISHORE-GULAB SINGH—DECREE-HOLDER—APPELLANT

versus

DINA NATH-SIRI RAM AND OTHERS—RESPONDENTS

Court Fees Act (VII of 1870), Sch. I, Art. 1, Sch. II, Arts. 11, 17—Civil Procedure Code (Act V of 1908), O. XXI, r. 50 (2)—Appeal from order under—Court-fee payable.

The subject-matter in appeal against an order passed under sub-r. 2 of O. XXI, r. 50, Civil Procedure Code, is the liability of the judgment-debtor for the same amount. This amount is clearly ascertainable, and it cannot, therefore, be said that the subject-matter of the appeal is one where it is not possible to estimate it at a money value. The case is governed by Sch. I, Art. 1, Court Fees Act under which the proper court-fee payable is *ad valorem* on the subject-matter in dispute, *i. e.*, the amount for which the party concerned is sought to be made liable.

L. P. A. from an order of Mr. Justice Jai Lal, dated January 3, 1930.

Messrs. *Shamair Chand* and *Qabul Chand*, for the Appellants.

Messrs. *M. C. Mahajan* and *J. L. Kapur*, for the Respondents.

Tek Chand, J.—The appellants obtained a money-decree against firm Dina Nath-Siri Ram of Chandni Chauk, Delhi. In execution of this decree certain house properties were attached. The respondents, Amar Nath, Brij Nath, Radhe Lal and Ram Sarup, objected that the properties belonged to them and were not liable to attachment and sale in execution of the decree. The decree-holder replied that the objectors were partners in the judgment-debtor firm and consequently their property could be seized in execution. On these pleadings the learned Senior Subordinate Judge treated the proceedings as being under O. XXI, r. 50 (2), Civil Procedure Code, and proceeded to try and determine the liability of the objectors as partners in the judgment debtor firm. After an elaborate inquiry he came to the conclusion that the objectors had not been proved to be partners in the firm Dina Nath-Siri Ram and therefore they or their properties were not liable for the satisfaction of the decree. He accordingly released the properties from atttachment.

The plaintiff decree-holder appealed to this Court and affixed a court-fee stamp of Rs. 4 only on the memorandum of appeal. When the appeal came up for hearing before Jai Lal, J., sitting in Single Bench, a preliminary objection was raised on behalf of the objectors-respondents that the memorandum was insufficiently stamped, the proper fee payable being *ad valorem* on the amount for which the appellants wanted to fix liability on them. The learned Judge upheld the objection and adjourned the hearing to enable the appellants to make good the deficiency in the court-fee. The appellant, however, failed to comply with the order within the time fixed, and consequently the learned Judge dismissed their appeal with costs.

From this judgment the decree-holders have preferred an appeal under cl. 10, Letters Patent, and on their behalf Mr. Shamair Chand has contended that the proper court-fee payable was Rs. 4 only and if that contention failed, the case would be governed by Art. 17 (*vi*), as it was not possible to estimate in money value the subject-matter in dispute in appeal and in that case the fee payable would be Rs. 10. In my opinion both these contentions are without force. Article 11 is obviously inapplicable for it expressly excludes from its purview appeal "from a decree or an order having the force of a decree," and it is distinctly laid down in sub-r. (3), r. 50, Order XXI, that where the liability of any person has been tried and determined under sub-r. (2) the order made thereon shall

"have the same force and be subject to the same conditions as to appeal or otherwise as if it was a decree"

The wording of this rule is very wide, and there can be no manner of doubt that the word "otherwise" here means "in all other respects," as has been held in *Bhutnath Ta* v. *Barindranath Bhatta* (1). Counsel also relied on s. 47 of the Code, which is equally inapplicable. That section deals with questions which arise "between the parties to the suit" in which the decree was passed, or their representatives, and relate to the execution, discharge or satisfaction of the decree. Admittedly the objector-respondents were not "parties to the suit" and the order could not be said to have been passed under s. 47. It follows, therefore, that a court-fee of Rs. 4 was insufficient. The next contention is that Art. 17 governed the case. This point was raised before the learned Judge in Chambers, but appears to have been abandoned. It has, however, been urged again before us and we must give our decision on it. Article 17 applies to plaints or memoranda of Appeal in suits where it is not possible

"to estimate at a money-value the subject-matter in dispute and which is not otherwise provided for by this Act."

Now, a careful perusal of the terms of O. XXI, r. 50 (2) and (3) shows that the subject-matter in dispute in proceedings under these sub-rules is the liability of the person against whom execution is sought for payment of the decretal amount,

(1) 146 Ind. Cas. 123; 60 C 530; 37 C W N 227; A I R 1933 Cal. 546; 6 R C 178.

on the ground that he was a partner in the judgment-debtor firm. The subject-matter in appeal against an order passed under sub-r. (2), therefore, is the liability of the judgment-debtor for the same amount. This amount is clearly ascertainable, and it cannot, therefore, be said that the subject-matter of the appeal is one where it is not possible to estimate it at a money value.

The case does not fall under any of the exceptions and must, therefore, be held to be governed by Art. 1, r. 1, under which the proper court-fee payable is *ad valorem* on the subject-matter in dispute, *i. e.*, the amount for which the appellants wish to fix liability on the respondents. The view taken by the learned Judge in Chambers is in accord with that taken in other Courts: see *Vulliappa* v. *Rangasawamy* (2), *Punjab National Bank, Ltd.* v. *Ranchoredas Gurdhandas* (3 *Bhutnath Ta* v. *Barindra Nath Bhatta* (1). Mr. Shamair Chand pointed out that in some cases this would result in hardship on the decree-holder or the objector as *ad valorem* court-fee may have to be paid several times in the course of the same litigation, but the remedy lies with the Legislature or the Local Government, who have power under s. 35 to remit in whole or in part any of the fees which are payable under the Act. So far as the Courts are concerned, they have to interpret the law as it is, and cannot decline to enforce its provisions merely on *argumentum ab inconvenienti*. The appeal fails and I would dismiss it with costs.

Abdul Rashid, J.—I agree.

N. *Appeal dismissed.*

(2) 35 Ind. Cas. 429; 8 L B R 300; 10 Bur. L T 42.

(3) 127 Ind. Cas. 704; A I R 1930 Sind 255; Ind. Rul. (1930) Sind 320.

BOMBAY HIGH COURT

Original Civil Jurisdiction Suit No. 786 of 1933

April 20, 1934

B. J. WADIA, J.

ANGLO-INDIAN DRUG AND CHEMICAL CO.—PLAINTIFFS

versus

SWASTIK OIL MILLS CO. LTD.—DEFENDANTS*

Trade-mark—Infringement—Nature of proof required of plaintiff—Reasonable probability and no proof of actual deception required—Plaintiff must establish that particular mark indicates that goods are those of plaintiff—Defendant using same number as trade-mark as plaintiff—Burden of proving and probability of deception—"Passing off"—Gist—Trade-mark, how assigned—Right to use particular trade-mark—Limitations in India and England—Combination of numerals, if can form a trade-mark—Trade-mark, if can be applied to goods which are not sold—Trade-mark, property in—If exists apart from goods.

In actions for infringement of trade-marks the plaintiff has to prove that his goods were known to the public by some distinct name, marks, badge, get-up, or appearance, and that the defendant's use or imitation of the same is likely to mislead the public into a belief that the defendant's goods are those of the plaintiff. The actual length of time during which a trade-mark is used or employed is not an important element for consideration. It must, however, have been used or employed long enough to render it probable that a reputation in the market has been acquired. [p. 644, col. 1.]

There must be a reasonable probability and not a mere possibility of deception. It is not necessary to prove that the defendants had the intention to deceive. It is also not necessary to give proof of actual instances of deception. Such evidence, namely, evidence of actual instances may often be useful to the Court, though the Court has to exercise its own judgment as to the probability of the deception. [p. 644, col. 2; p. 645, col. 1.]

Protection cannot be granted unless a plaintiff establishes that the particular mark indicates not merely a certain quality of goods but also that they are the goods of the plaintiff's manufacture. [p. 646, col. 1.]

Where the defendants have used an identical number as the plaintiff's on their goods, the burden is upon them to disprove the probability of the deception, and not upon the plaintiffs to prove it. [p. 649, col. 2.]

The gist of a passing off action is deceit, for "passing off" is one of the ways whereby the goods of one trader are sold by another in a manner calculated to deceive the purchaser into thinking that they are the goods of the former. [p. 650, col. 1.]

A trade-mark is generally transmitted in connection with the goodwill of a business, and can only be assigned in writing. [p. 643, col. 1.]

In England a trade-mark is registered not only for a particular article but for a class of goods under which that article falls, and if any one else attempted to put on the market goods which could be included in that class under another trade-mark, the Registrar might refuse to register it. In India the right to use a particular trade-mark is confined to the article to which it is affixed, but it is open to the plaintiffs to establish by proper and sufficient evidence that the particular trade-mark has been so identified and associated with the plaintiffs' products that their name would suggest itself to a purchaser on seeing it on any other product which the plaintiffs allege is a product "allied" to or of the same description. There is, however, this limitation that the acquisition of an exclusive right to a trade-mark in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark in connection with goods of a totally different character. *Somerville* v. *Schembri* (2), referred to. [p. 644, col. 2.]

A combination of numerals can form a trade-mark, if distinctive. [p. 645, col. 1.]

A trade-mark must be applied to goods offered for sale and not to those which are neither manufactured nor sold at the date of the suit. [p. 648 col. 1.]

There can be no property in a trade-mark apart from the goods of which it has become the symbol. [p. 648, col. 2.]

Messrs. *D. N. Bahadurji* and *C. K. Daphtary*, for the Plaintiffs.

Messrs. *J. H. Vakeel* and *K. M. Munshi*, for the Defendants.

Judgment.—The plaintiffs have been carrying on for a number of years past the business of manufacturing and selling drugs, patent medicines, hair oils, perfumery and toilet requisites in Bombay, and have filed this suit for an injunction to restrain the defendant Company from selling its bar soap under the mark "No. 777" which the plaintiffs claim as their trade-mark for their "toilet preparations." Prior to August 24, 1922, one Mulji Premji Rathod was the sole proprietor of the Kathiawar Trading Company and the Bombay Perfumery Manufacturing Company which was also carrying on business in Bombay. The Kathiawar Trading Company had been manufacturing for a number of years certain toilet preparations bearing the No. "777" which Mulji Premji had declared to be his own trade-mark. On August 24, 1922, he sold both these concerns by a deed of conveyance for the consideration mentioned in the deed along with the goodwill, the stock-in-trade, and the right to the exclusive user of the names of the two businesses and of the trade-marks, trade names and designs, including the No. "777" contained in the schedule annexed to it to one Keshavlal Vallabhji Shah, a partner in the plaintiffs' firm. In the deed of conveyance Keshavlal is described as the purchaser. The other three partners at the time were his brothers. Plaintiffs say that they carry on business in different names, including, since 1922, the Kathiawar Trading Company, and have been making and selling various toilet preparations in the name of the Kathiawar Trading Company, under the trade-mark No. "777". They further say that these preparations have acquired a wide reputation in the market and are also extensively sold under that number, and the number denotes only and exclusively their toilet preparations in the name of the Kathiawar Trading Company.

Since about February 1933, plaintiffs have been manufacturing soap called the "Keti Turkish Bath Soap." They put this soap on the market also in the name of the Kathiawar Trading Company in cartons containing twelve tablets each, each carton costing a rupee; the carton as well as each of the tablets bears the mark No. "777". Since about August 1932, the defendant Company which had been manufacturing various kinds of oil and by-products of oil began selling in the market bar soap with the name of the Company and the Swastik mark at each end on one side of the bar, and the No. "777" underneath the words "Vegetable Soap Washes Well," on the other. It is a washing soap which the defendants manufacture in bars, cubes and twins; only the bars bear the No. "777". Plaintiffs complain that the use of the said number on this bar soap is calculated to deceive purchasers into the belief that the soap was the plaintiffs' product. They say that they first came to know that the defendant Company was manufacturing bar soap bearing that number in November or December 1932. They made inquiries, and correspondence ensued between the solicitors of the parties, after which this suit was filed on May 18, 1933. Defendants deny any infringement of the trade-mark and also deny liability. They say that they were the first to put their bar soap in the market, and plaintiffs had at the time neither manufactured nor sold any soap, much less bar soap, in the name of the Kathiawar Trading Company under the mark in dispute, *viz.*, "No. 777".

There is a preliminary point taken by the defendants which is covered by the first two issues. Defendants contend that the plaintiffs, *viz.*, the Anglo-Indian Drug and Chemical Co., have no interest in the trade-mark "No. 777", which, according to them, is the mark of the Kathiawar Trading Company, a separate firm altogether, and that in the absence of any averment of an assignment or transfer of the said mark in favour of the plaintiffs, the suit as framed is not maintainable. There was an assignment in 1922 of the two businesses of the Kathiawar Trading Company and the Bombay Perfumery Manufacturing Company together with their goodwill, stock-in-trade, and trade-marks, by Mulji Premji in favour of Keshavlal Vallabhji, as I have stated before, but the plaintiffs have not pleaded it. They have, however, pleaded that they carry on business also in the name of the Kathiawar Trading Company and they have produced the deed of conveyance which gives to Keshavlal, one of their partners, the right *inter alia* to the

user of the names of the two businesses and the trade-marks referred to in the schedule which mentions "No. 777." That mark was originally used in connection with a scent or perfume manufactured by the Kathiawar Trading Company, known as the "Madhukar Attar," but since then it has been used in connection with other preparations also, and the plaintiffs say that after August 1922 they became entitled by virtue of the assignment to this trade-mark and the benefit of its denotation. Defendants however contend that the Anglo-Indian Drug and Chemical Co. and the Kathiawar Trading Company were and are still two separate firms. It is however in evidence that since the date of the assignment the owners of the two firms are the same, *viz.*, the partners in the plaintiff firm. There are partnership deeds showing who the partners in the plaintiff firm were from time to time; there is no separate deed of partnership of the Kathiawar Trading Company.

The partners at the date of the assignment in 1922 were Keshavlal Vallabhji and his three brothers. One brother retired in 1923. There is a deed of dissolution in that year, but it is not stated therein that the brothers have been doing business both in the name of the plaintiff Company and the Kathiawar Trading Company. Another brother went out of the firm in 1928, and the names of both the firms are mentioned in the deed of dissolution of that year. The remaining two brothers, Kashavlal and Parmanand, took their respective wives as partners in the business in 1931, and these four are the present partners of the plaintiff firm, though the plaintiffs' attorneys stated in one of their letters in June 1933 to the defendants' solicitors in connection with some other matter that only the two brothers were partners in the plaintiff firm. In the plaintiffs' cash book the amount of the consideration mentioned in the deed of assignment has been debited to the account of the Kathiawar Trading Company, and in one or two advertisements, the Kathiawar Trading Company have been described as the sole agents of the plaintiffs. The defendants, therefore, contend that the two firms are separate. It may be mentioned that only the plaintiff firm has been registered with the Registrar of Companies and Firms to meet the requirements of the new Partnership Act, and not the Kathiawa Trading Company. There are no doubt separate stock-books of the two firms, but there is only one book containing entries of purchase of raw products bought for manufacture in respect of both. There are also separate books for registering orders of purchases, but the amounts of the price of the goods sold are entered in the books kept in the name of the plaintiffs. There is also no separate shop of the Kathiawar Trading Company. The bills for advertisement charges of the goods put in the market in the name of both are made out only in the name of the plaintiffs. There is, therefore, evidence either way, but, considering it is a whole, I am of opinion that the two firms are now one and the same.

Defendants however further contend that the deed of conveyance stands in the name of Keshavlal Vallabhji alone, and plaintiffs cannot sue for infringement of a trade mark which has not been assigned to them by Keshavlal. A trade-mark is generally transmitted in connection with the goodwill of a business, and can only be assigned in writing. Keshavlal stated that he took the assignment for the benefit of the partnership, and since 1922 the plaintiffs have acted upon it. It was argued that Keshavlal's statement in the box could not supply the need of a written assignment. At the same time the plaintiffs have actually used the trade-mark as their own for a number of years, that is since 1922, and they are not estopped from putting it forward as such. It is not alleged that any particular representation was made to the defendants on which they have acted to their prejudice. The point is not quite free from doubt, but, taking all the facts and circumstances into consideration, I am inclined to hold that the plaintiffs have an interest in the trade-mark "No. 777" and the suit is, therefore, maintainable.

The plaintiffs claim relief in this suit on the ground that the defendants have infringed their trade-mark. What constitutes an infringement of a trade-mark is a question of fact in each case. Plaintiffs allege in the plaint that they have been manufacturing and selling various kinds of perfumery and toilet preparations and requisites in the name of their concern, the Kathiawar Trading Company under the trade-mark "No. 777," that "No. 777" means and denotes in the markets only exclusively their well-known toilet preparations and toilet requisites

and that soap including bar soap is an article usually manufactured and sold in India by persons manufacturing and selling other toilet preparations, such as hair oils, perfumes, otto scents, which the plaintiffs manufacture and sell. The cause of action is contained in para. 9 of the plaint where plaintiffs say that the defendants' user of the mark "777" as a prominent and characteristic feature in connection with their bar soap is calculated to deceive and to enable other persons to deceive purchasers and others into the belief that the defendants' bar soap is soap of the plaintiffs' manufacture.

In England the law relating to trade-marks has been codified since 1875. The English statutes provide for the registration of trade-marks by owners. There is no such legislation in India which gives a statutory title to owners of trade-marks. The rules of the English common law in what are called "passing-off actions" are generally followed, and rights and liabilities in connection with trade-marks are determined by reference to the common law. In such actions the plaintiff has to prove that his goods were known to the public by some distinct name, marks, badge, get-up, or appearance, and that the defendant's use or imitation of the same is likely to mislead the public into a belief that the defendant's goods are those of the plaintiff. These cases are only instances of the application of the much wider principle of equity that the Court will always interfere by injunction to restrain an irreparable injury to a person's property. The actual length of time during which a trade-mark issued or employed is not an important element for consideration.

It must however have been used or employed long enough to render it probable that a reputation in the market has been acquired: *Badische Aniline* v. *Tejpal* (1). In order, therefore, to establish their claim to an injunction against the defendants, the plaintiffs must show that the trade-mark "No. 777" used on their toilet preparations and requisites, which are sold in the name of the Kathiawar Trading Company, is symbolical only of the plaintiffs' manufacture, and that they have acquired a wide reputation in the market. In England a trade-mark is registered not only for a particular article but for a class of goods under which that article falls, and if any one else attempted to put on the market goods which could be included in that class under another trade-mark, the Registrar might refuse to register it. In India the right to use a particular trade-mark is confined to the article to which it is affixed, but it is open to the plaintiffs to establish by proper and sufficient evidence that the particular trade-mark has been so identified and associated with the plaintiffs' products that their name would suggest itself to a purchaser on seeing it on any other product like bar soap which the plaintiffs allege is a product "allied" to or of the same description as "toilet preparations." There is however this limitation which was pointed out by the Privy Council in *Somerville* v. *Schembri* (2), that the acquisition of an exclusive right to a trade-mark in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark in connection with goods of a totally different character.

Plaintiffs have also to show in order to be entitled to the injunction they claim that the defendants' user of No. "777" on their bar soap is calculated to deceive the public, that is the unwary purchaser, into the belief that the purchaser is buying bar soap of the plaintiffs' manufacture. There must be a reasonable probability and not a mere possibility of deception. It is not now necessary to prove that the defendants had the intention to deceive. Originally the common law Courts insisted on proof of fraud, but the Courts of Equity intervened by granting injunctions even in cases where the use or imitation of another's trade-mark was made in ignorance, provided it was likely to mislead the public. The decisions of the Courts of Equity were accepted as part of the common law after the fusion of law and equity brought about by the Judicature Act in England. It is also not necessary to give proof of actual instances of deception, the reason being, as was pointed out by James, L. J., in *Orr Ewing & Co.* v. *Johnston & Co.* (3), and repeated by the House of Lords in *Johnston* v. *Orr Ewing* (4), that "the very life of a trade-mark depends upon the promptitude with which it is vindicated." Such evidence, namely, evidence of actual instances, may often be

(1) 5 Bom. L R 1025

(2) (1887) 12 A C 453; 56 L J P C 61; 56 L T 454.

(3) (1880) 13 Ch. D 434.

(4) (1882) 7 A C 219; 51 L J Ch. 797; 30 W R 417; 46 L T 216.

useful to the Court, though the Court has to exercise its own judgment as to the probability of the deception.

The trade-mark "No. 777" is a triple combination of the numeral 7. For the purposes of the Trade-Mark Acts in England "mark" includes "device, brand, heading, label ticket, name, signature, letter or numeral or any combination thereof;" and "trade-mark" means a mark "used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade-mark by virtue of manufacture, selection, certification, dealing with or offering for sale."

A combination of numerals can form a trade-mark if distinctive. "No. 777" was used as a trade-mark to distinguish one or two of the preparations of the Kathiawar Trading Company in the beginning. Thereafter it was used for different hair oils and toilet preparations put by the plaintiffs on the market in the name of the Kathiawar Trading Company According to the evidence, there was a good sale of these hair oils and toilet preparations about the date of the assignment in 1922. It has since increased and is said to be of two to two and a half lakh bottles a year. A collection of the different lables of the Kathiawar Trading Company numbering over sixty and bearing the "No. 777" has been put in. These preparations are widely advertised and Keshavlal on behalf of the plaintiffs stated that they spent Rs. 10,000 to Rs. 15,000 a year on advertisements, not only in newspapers but in various forms such as posters, calendars, fans, etc. The plaintiff had, however, put numerous toilet soaps previously in the market, but none of them bore the "No. 777." Their toilet soap, *viz.*, the "Keti Turkish Bath Soap," was first put on the market under "No. 777" in or about February 1933, but not much of it was sold before the date of the suit. Plaintiffs also began manufacturing bar soap after the suit. It is called the "Cherry Bar Soap," but no number was put upon it, as this litigation was pending.

Plaintiffs called some Bombay merchants and dealers, both wholesale and retail, and one wholesale and retail dealer who is the sole agent of the Kathiawar Trading Company in the Nizam's Dominions and has shops in Hyderabad (Deccan) and Secunderabad. Most of them said that they stocked together and sold hair oils, perfumery, toilet soaps and bath soaps that many other merchants did the same. One or two of them, however, sold only toilet soaps along with hair oils and perfumes, but not bar soap. These witnesses stated that they had been stocking the products of the Kathiawar Trading Company bearing "No. 777" for some years past, namely, hair oils and scents and perfumes, that these products were well-known to their customers and were in demand, and they did not know of any other Company which manufactured similar products under that mark. Whenever a customer wanted to buy a hair oil or perfume, and asked, for instance, for White Rose Hair Oil "No. 777" or Otto "No. 777," they always understood that he wanted hair oil or perfume of the Kathiawar Trading Company. The witness Purandas Ranchoddas, who is the sole agent of the Kathiawar Trading Company in the Nizam's Dominions, said that he bought goods of that Company bearing "No. 777' and also other Kaminia products of the plaintiffs to the extent of Rs. 15,000 to Rs. 18,000 a year in ordinary times, and goods worth about Rs. 8,000, a year in times of epidemic and that goods bearing that mark sold well in the Nizam's Dominions, the sales amounting to about Rs. 7,000 to Rs. 8,000 a year in ordinary times, and to about Rs. 4,000 to Rs. 4,500 a year in times of epidemic. The witness Maganlal Mulji who is the sale mans of Mohanlal Mahasukhlal & Co., said that his firm sold goods of the Kathiawar Trading Company bearing "No. 777" to the extent of about Rs. 2,000 a year. None of these witnesses supported his evidence by producing any books. The amount of the sales is not of such importance as the reputation of the goods, though the extent of the sale may be an index to their reputation. On the other hand, one of the defenddants' witnesses, Bhawanishankar Atmaram carrying on business in the name of B. A. & Brothers as wholesale and retail chemists in Princess Street, Bombay, stated that it was only the cocoanut oil of the Kathiawar Trading Company bearing No. 777 that was in demand. The evidence of the plaintiffs' witnesses has been further supported by the numerous postcards addressed to the Kathiawar Trading Company giving orders for goods by their description together with the 'No. 777' from different parts of India. These products are also well advertised both in and outside Bombay..

The witness Motilal Desai who carries on business in the name of the Ind. Advertising Agency stated that plaintiffs' scents, hair oils and toilet soaps were widely adver-

tised but he did not mention any goods of the Kathiawar Trading Company under the 'No. 777.' The witness Govind Limaye' however, who is in the service of B. Dattaram & Co., Advertising Agents, did state that the scents and hair oils of the Kathiawar Trading Company were largely advertised outside Bombay. The defendants produced some specimens of washing soap of the same quality as bar soap, but in the form of cubes, with the 'No. 777' on them but only one of them was put in through Mr. Chhotubhai, a partner of the defendants' attorneys' firm who purchased the same at an exhibition in the Lathi State near Junagadh for ¾ anna about the end of last year. There is no evidence when and by whom that soap was manufactured and Keshavlal Vallabhji said that he never heard or knew anything about it. A consideration of this evidence shows that the plaintiffs' toilet preparations namely, their various hair oils, scents, and perfumes, which are sold in the name of the Kathiawar Trading Company along with 'No. 777' have acquired a great reputation in the market. In para. 6 of the plaint it is alleged that the trade-mark No. 777. is "a guarantee of high quality," *i. e.*, the high quality of the goods. It has, however, been held that protection cannot be granted unless a plaintiff establishes that the particular marks indicate not merely a certain quality of goods but also that they are the goods of the plaintiff's manufacture: *Badische Aniline* v. *Farbenfadriken* (5). The plaintiffs have alleged that the toilet preparations of the Kathiawar Trading Company under 'No. 777,' mentioned in the plaint are the sole and exclusive products of their manufacture. They have also led some evidence to support that allegation.

The infringement which the plaintiffs complain of in this suit is the user by the defendants of the mark 'No. 777' on their bar soap. The defendant Company was started in or about January 1931, and the objects for which it was established are stated in sub-cl. 5, cl. 3 of the Memorandum of Association, *viz.*, to carry on all or any of the businesses of soap and/or candle makers, etc., and also as:

"dealers in pharmaceutical, chemical, medicinal and other preparations, or compounds, perfumery and other such articles of every such description."

They first began manufacturing oil out of oil seeds, and then took to soap. They have recently also taken to manufacture hair oil and it is open to them to make perfumes also. It seems that the Company made a loss of over a lac of rupees by the end of 1932 in the business of crushing oil seeds into oil. It is not clear when they began to manufacture their bar soap with the 'No. 777' on it but the first sale of that soap was on August 12, 1932. The soap is of the quality of a washing soap, *i. e.*, soap used generally for washing clothes. It is made in the form of bars, cubes and twins but it is only the bar that bears the number "777." On one side of the bar there are the words "Swastik Oil Mills, Ltd. Bombay", with the Swastik mark on each side. On exactly the opposite side are the words "Vegetable Soap Washes Well," with the 'No. 777' put underneath those words. The defendants next manufactured a soap which is known as their Superfine Soap; it is sold in cartons. They call it a washing soap, but on the wrapper round the soap they recommend it for washing clothes as well as for washing the human body. Then they began manufacturing their commercial soaps or soaps used in mills. These are also in bars but the tints are somewhat different. They were manufactured six months after the bar soap bearing the 'No. 777' was manufactured. About the same time the defendants produced their Marseilles Soap and their Monopole Soap or Indiapole Soap also. The 'No. 777' has not been placed on any of their soaps except the bar soap. Keshavlal stated that they made inquiries about this soap in November or December 1932, and correspondence started about the end of the year, after which this suit was filed in May, 1933.

The principal witness on behalf of the defendants was one of their directors, Chhotabhai Shankerbhai Patel, who said that the defendant Company were not keen about the 'No. 777' as they attached more importance to the Swastik mark, and that their soaps were known in the market as soaps of the Swastik brand. He also stated that he did not know that the plaintiff's hair oils and scents and perfumes bore that number, and he explained how he came to use the same number on the defendants' bar soap. That explanation has not been consistent, for in his affidavit on the notice of motion for injunction he said that the number was used to distinguish the defendants' bar soap from their other soaps. There was, however, no other soap manufactured

(5) 6 Bom. L R 407.

at the time they produced their bar soap, except that the same quality of soap was produced in the shape not only of bars but also cubes and twins, but these could be easily distinguished from one another without any number. In his evidence he stated that the defendants wanted an auspicious number, that amongst the Hindus the Nos. 1, 5, 7 and 9 were considered auspicious, that the Tata Oil Mills Company, Ltd., were ahead of the defendants with their washing soap bearing No. 501, that he wanted to avoid any combination of the numerals which include Nos. 1 and 5 so as not to come in conflict with the products of the Tata Oil Mills, that soaps usually bore numbers consisting of three numerals, and he thought of '777' without consulting his co-directors as he fancied the number and used it after making inquiries that it was not used on any other bar soap in the market. Later on he gave another explanation, *viz.*, that the 'No. 777' was put on the soap, in order to help the unintelligent packers at the defendants' mill premises to distinguish it from their other soap whilst packing soap in wooden cases. The other varieties of their soap were, however, not manufactured in August, 1932, so that there was no chance of mixing up the bar soap, but he said that they intended manufacturing other soaps, and as he anticipated difficulties in distinguishing them, he used the 'No. 777' on the bar soap. As I have said before, his explanation has varied; at the same time the defendants have not put the same number on their Superfine Soap which was manufactured three months after the bar soap was manufactured, that is, even before the correspondence between them and the plaintiffs regarding the user of the 'No. 777' began. It is true that the 'No. 777' is shown on the picture or drawing of the soap in the defendants' price-list and also in their advertisements. The witness said that he did not attend to advertisements, but left the matter to his assistant, and the artist or engraver had brought out the 'No. 777' in the picture, though on a correct representation of the bar soap it should not have been shown, as it actually appeared on the soap on the side exactly opposite to the side of the bar on which the Swastik mark was shown. The cube form of the soap is also represented in the picture, and that too is not correct according to the model. One other fact must also be mentioned. Defendants had sold 1701 cases, *i. e.*, 1,58,000 lbs. of their bar soap 'No. 777' in the open market before the suit was filed. Keshavlal stated that the plaintiffs raised their objection as soon as they learnt about it, and the defendants offered in correspondence to withdraw the number if they were satisfied that it had been used by the plaintiffs on their soap before. But the fact is that the plaintiffs' Keti Turkish Bath Soap under 'No. 777' was first put on the market long after that objection was raised, and the plaintiffs' bar soap was not manufactured until after the suit. There is nothing in the evidence to show that the defendants' bar soap is sold by the 'No. 777' in the market, and Mr. Patel said that out of numerous inquiries for their Swastik soap only about two referred to the defendants' bar soap under that number. There is also nothing to show that the defendants knew or had information that 'No. 777' was used by the plaintiffs for their hair oils and scents and perfumes, and although the explanation given by Mr. Patel as to how he adopted the 'No. 777' for the defendants' bar shop has been inconsistent, I cannot infer that he must have had the knowledge or information because of such explanation. There is no substance in the allegation that the number was deliberately used by the defendants on their bar soap to trade on the plaintiffs' reputation which was associated only with their toilet requisites and preparations. It is not, however, necessary for the plaintiffs to prove that the defendants had the intention to deceive, and their ignorance of the existence of the plaintiffs' trade-mark cannot save them from the injunction, if the plaintiffs can show (1) that the user of the 'No. 777' on bar soap is an infringement of a trade-mark which had been used only in connection with the particular toilet preparations mentioned above, and (2) that by such user there is a reasonable probability of deception.

It is in evidence that the plaintiffs first put their 'Keti Turkish Bath Soap' under 'No. 777' on the market in or about February, 1933. The defendants allege in their written statement that this was done with the object of creating evidence in support of a contemplated action by the plaintiffs against them. There is nothing to substantiate the allegation, except that this soap was put on the market long after the plaintiffs commenced correspondence with the defendants regarding the defendants' bar soap. The plaintiffs' bar

soap known as the 'Cherry Bar Soap' was produced and put on the market after the suit. The plaintiffs thus seek to claim a right in a trade-mark in respect of a commodity which was neither manufactured nor sold by them at the date of the suit. The price list of the Kathiwar Trading Company printed in 1933, which was put in by the plaintiffs, does not mention any kind of soap at all. A trade-mark must be applied to goods offered for sale, and in *Maxwell* v. *Hogg*: *Hogg Maxwell* (6), Cairns, L. J., has observed (p. 314*):

"... all the definitions which have been given in this Court (meaning a Court of Equity) of the nature of the right to protection in the case of trade-marks, seems to me to be opposed to the idea that protection can be given where there has been no sale, or offering for sale, of the articles to which the name is to be attached."

The same learned Judge cites with approval a passage from Lord Westbury's judgment in *M'Andrew* v. *Bassett* (7), and goes on to state that the property in a word or name or any other trade-mark cannot be acquired until the vendible article is put upon the market, for

"no property could be acquired, except through the process of sale, or offering for sale, in the market."

No case was cited by plaintiffs' Counsel to support their claim to a right in a trade-mark in respect of an article which had not been produced, much less sold, by them in the market. In cases of infringement of trade-marks in India it is the user of the trade mark on the same kind of goods already put on the market which is complained of, *e. g.*, the user by the defendants of No. 2051 on their black twill which had always been associated with the black twill produced by the plaintiffs in *Madhavji Dharamsey Manufacturing Co.* v. *Central India Spinning, Weaving and Manufacturing Co.* (8). Several English cases were cited by plaintiffs' Counsel. They deal, however, with the construction of sections of the English statutes under which a trade-mark is registered in connection with a class of goods, and the prohibition is confined not to the same goods but to 'the same goods or description of goods' though these decisions are useful on the principles of the law relating to infringement of trade-marks and the probability of deception. In India the action is generally limited to a particular kind of goods only, and it is for the plaintiffs to establish by their evidence that bar soap comes under the description of "toilet preparations" or is "allied" to the same in order to attract to it the benefit of a trade-mark which had been used only in connection with such preparations. In the first place, there is not even a clear averment in the plaint that bar soap comes under the description of "toilet preparations." All that is alleged is that it is an article usually manufactured and sold in India by persons manufacturing and selling such toilet preparations as the plaintiffs have been doing. Plaintiffs cannot, in law, claim property in "No. 777' in gross, for it has been held that there can be no property in a trade-mark apart from the goods of which it has become the symbol. There is no authority, at least none to which the Court has been referred, in support of a claim to a trade-mark in India in respect of an article neither manufactured nor sold by the plaintiffs, but which, they allege, is 'allied' to their "toilet preparations." The evidence on the record does not support the claim either. The only evidence is the solitary statement of Keshavlal that whenever a soap bears the "No. 777" it must mean to the purchaser that it is the product of the Kathiawar Trading Company, and that if a man bought the bar soap of the defendants bearing that number, the purchaser would take it that that soap was the produce or manufacture of the Kathiawar Trading Company, *i. e.*, of the plaintiffs, even though the number had not been associated by the plaintiffs with any bar soap before.

That statement, has not been supported by any other witness, and I do not accept it as correct. He said he had not received any complaint that a purchaser had been deceived by that number appearing on the defendants' bar soap. It was not necessary for the plaintiffs to adduce evidence of actual instances of deception, but such evidence, if adduced, would have been useful, especially as 1701 cases, *viz.*, about 1,58,000 lbs. of the defendants' bar soap, bearing number "777," worth about Rs. 26,000 had been sold from about August 12, 1932, up to the date of the filing of the suit. Keshavlal added that enquiries were made by merchants whether the plaintiffs produced any bar soap bearing "No. 777." The inquires were made from their salesman, Jamnadas Panachand; but

(6) (1867) 2 Ch. A 307; 36 L J Ch. 433; 15 W R 467; 16 L T 130.

(7) (1864) 4 De G J & S 380; 33 L J Ch. 561; 10 Jur. (N S) 550; 10 L T (N S) 442; 12 W R 777; 4 N R 123; 146 R R 356.

(8) 34 Ind. Cas. 529; A I R 1916 Bom. 183; 41 B 49; 18 Bom. L R 206.

*Page of (1867) 2 Ch. A.—[*Ed.*]

neither Jamnadas nor any party alleged to have made such enquiries has been called. The evidence therefore is both meagre and insufficient, and in my opinion the plaintiffs have not proved that "No. 777" is associated with the "toilet preparations" of the Kathiawar Trading Company generally. The only toilet preparations which have acquired a reputation in the market under "No. 777" are the various hair oils, scents and perfumes, which have been referred to before, and no other.

Some evidence was led on behalf of the plaintiffs to show that shopkeepers stock hair oils, perfumes, toilet soaps, and bar soap together for purposes of sale, but two of the plaintiffs' witnesses stated that they did not stock any bar soap at all, though they did stock and sell toilet soap. It was argued that the matter should be looked at from a business and commercial point of view, and reliance was placed on a passage in Kerly on Trade Marks, Edition 6, at page 260, where it is stated that the true test is:

"Are the two sets of goods so commonly dealt in by the same trader that his customers, knowing his mark in connection with one set and seeing it upon the other, would be likely to suppose that it was used upon them also to indicate that they were his goods?"

That test is applicable in England in order to determine whether a particular article falls within the words of the section of the English Act, *viz.*, "same goods or description of goods." For instance, in *Eastman Photographic Materials Co. Ltd.* v. *John Griffiths Cycle Corporation Ltd.* (9), it was found on the evidence that there was an intimate connection between the bicycle and camera trades; there was also an intimate connection between wines and spirits, as in *In re The Australian Wine Importers, Limited* (10). In another case *Eno* v. *Dunn* (11), the registration of "Dunn's Fruit Salt Trade Mark Baking Powder" was refused for baking powder by reason of a prior use of the words "Fruit Salt" for an aperient or medicinal drink. Such a test in India, where there are no similar statutory provisions, is hardly of any use. Moreover, the evidence led by the plaintiffs is not sufficient to support the contention that there is a close connection in the trade between "toilet preparations" and bar soap. As against the plaintiffs' evidence the defendants called witnesses to show that many dealers who stock hair oils, perfumery and toilet soaps, do not stock bar soap at all, just as petty merchants, like grain dealers who stock bar soap, do not stock any toilet soaps. The defendants' witnesses, Robert Jackson, Manager of Kemp & Co., Ltd., Alfred Wilkinson, Manager of Thompson and Taylor, Ltd., Chhaganlal Khothari of G. Chhaganlal & Co., Bhawanishankar Atmaram of B. A. & Brothers, and Maneklal Chaturbhuj of Maneklal & Co., all carrying on business as chemists and druggists in Bombay, said that there was a distinction in the trade between what is called "toilet soap" used for washing the body and "washing soap" used for washing clothes. A reference was also made to a statement in the Annual Statement of the Trade and Navigation of the Bombay Presidency (excluding Sind) for 1930-1931, issued in March 1932 by the Government of India Central Publication Branch, Calcutta, showing that soaps were classified, for the purposes of collecting duty on goods imported into the Presidency, into "Household and Laundry soaps in bars or tablets," "Toilet soap," and "other sorts." These witnesses stated that bar soap was a washing soap used for washing clothes: some of them also stated that amongst large masses of poor people washing soap, which is cheaper than toilet soap, was also used for washing the body. It may be said that bar soap is the poor man's toilet soap, but such user cannot by itself determine the character of the article. I have considered all the evidence, and taking it as a whole, it does not justify the conclusion that bar soap is usually manufactured and/or sold by the same merchants in India who manufacture and/or sell other toilet preparations.

Even if it be held that bar soap comes under the description of "toilet preparations," the next question is whether the user by the defendants of the number "777" on their bar soap is calculated to deceive the unwary purchaser and induce him to buy under a false impression. As the defendants have used an identical number, the burden is upon them to disprove the probability of the deception and not upon the plaintiffs to prove it: Sebastian's Law of Trade Marks, Edition 5, page 140. That number had been long associated with the toilet preparations of the Kathiawar Trading Company, namely their hair oils and their scents and perfumes which purchasers were accustomed to buy. No purchaser had ever seen plaintiffs' bar soap bearing

(9) (1898) 15 R P C 105.

(10) (1889) 41 Ch. D 278; 58 L J Ch. 380; 37 W R 578; 60 L T 436.

(11) (1890) 15 A C 252; 39 W R 161; 63 L T 6.

that number, as none had been produced before the suit, so that the number could not have been associated with any other article in the market except those toilet preparations. Now the gist of a passing off action is deceit, for "passing off" is one of the ways whereby the goods of one trader are sold by another in a manner calculated to deceive the purchaser into thinking that they are the goods of the former. Can it be really said that there is a reasonable probability of deception if goods manufactured by the defendants have neither been manufactured nor sold by the plaintiffs before? The defendants' witness Mr. Patel stated that their bar soap was sold in the market as Swastik soap, though the number appeared on one side of the bar soap, and the name of the defendant Company and the two Swastik marks appeared exactly on the opposite side. It was also argued that the use of the identical number indicated an intention to deceive; but I do not agree with that contention.

There are circumstances which, in my opinion, do not point to any such intention. The wooden cases in which the soap is packed on the mill premises do not bear any number, but only show the Swastik mark prominently. The number was also in use from August 1932, and 1,701 cases had already been sold openly in the market before the date of the suit. Further, those who are the likely purchasers and consumers of bar soap, especially bar soap sold in small pieces, do not generally belong to the same class of people who purchase hair oils and perfumes. It must also be remembered that the name of the "Kathiawar Trading Company" appears along with "No. 777" on the plaintiffs' toilet preparations. Taking all these circumstances into consideration, I am of opinion that there was no reasonable probability of deception as alleged by the plaintiffs. It was argued that the use of the number on the bar soap by the defendants was only the thin end of the wedge, and that, unless restrained, they would be tempted to put the same number on their toilet soaps and their hair oils and perfumeries which they would produce in future. But the Court is not concerned with what the defendants might or might not do hereafter; the plaintiffs can always pursue their remedy as and when the occasion arises.

In my opinion it is established by the evidence that the toilet preparations of the plaintiffs' manufacture, sold in the name of the Kathiawar Trading Company, namely their various hair oils, perfumes and scents, are known under the trade-mark "No. 777," and as such have acquired a wide reputation and command an extensive sale in the market. According to the evidence, they are the products only and exclusively of the plaintiffs' manufacture, and the defendants have not claimed to use that number on any similar toilet preparation of their manufacture. It is, however, not established by the evidence that the plaintiffs have acquired an exclusive right to use the trade-mark in connection with each and every toilet preparation of their manufacture, nor does the evidence justify the conclusion that bar soap falls within the description of "toilet preparations," and that is usually manufactured and/or sold in India by persons manufacturing and selling such "toilet preparations" as the plaintiffs do. There is also no reasonable probability of deception as alleged by the plaintiffs. The defendants' user of the "No. 777" on their bar soap is therefore not an infringement of the plaintiffs' trade-mark "No. 777," and the plaintiffs are not entitled to the injunction which they claim.

In conclusion, I would like to state that defendant's Counsel intimated to the Court at the outset that the directors of the defendant Company were not keen on using the "No. 777" on their products, but as the plaintiffs alleged in their plaint that the object of the defendants was 'to trade on the reputation enjoyed by the plaintiffs' goods bearing the same "No. 777" and charged the defendants with fraud, they wished to stand on their strict rights and contest the claim. Plaintiffs also insisted on their rights, and the case was accordingly heard at some length. In the result the suit must be dismissed. I have heard Counsel on the question of the costs of the suit. This was a suit for infringement of a trade-mark, and according to my finding the plaintiffs have failed to establish the infringement. The defendants have substantially succeeded in their defence. Plaintiffs must, therefore, pay the defendants' costs of the suit. Suit dismissed with costs.

D. *Suit dismissed.*

MADRAS HIGH COURT

Second Civil Appeal No. 635 of 1930
August 2, 1934
PAKENHAM WALSH, J.
Ottapilakool Kurunkot Mammili
RAMUNNI KITAV AND ANOTHER
—APPELLANTS
versus
Chalikkara KUNHAYAN AND OTHERS
—RESPONDENTS

Malabar Law—Joint family—Allotment of property to descendants of some daughters to the exclusion of another daughter—Whether descendants take the property as thavazhi *or as tenants-in-common—Right of member to sue for recovery of property from trespassers*—Karar—*Total deprivation of* karnavan's *powers—Notice to strangers, whether necessary.*

A female governed by the Marumakkathayam Law had four daughters *A, B, C* and *D*. Under a *razinamah*, certain properties were allotted to the *thavazhi* of *A, C* and *D* and their descendants excluding *B* and her descendants The descendants of *B* claiming the property as their own mortgaged the same. The senior member of *A's thavazhi* instituted a suit for declaring the mortgage invalid and recovering the properties ;

Held, even if the *thavazhi* of *A, C* and *D* created by the *razinamah* was not legally constituted, the right of management under the *razinamah* vested in the senior male member and if the parties did not take the property under the *razinamah* as a *thavazhi* they would be tenants-in-common and the plaintiff as a tenant-in-common was entitled to sue to recover the properties as against the defendants who were trespassers. *Debendra Narayan Singh* v. *Narendra Narayan Singh* (2), referred to.

Held, further, that having regard to the nature of the exclusive right set up by the defendants to the property, it was not open to them to plead in appeal that the mortgage was binding on the larger *thavazhi* to which the plaintiff belonged on the ground that the amount was advanced for that *thavazhi's* purposes.

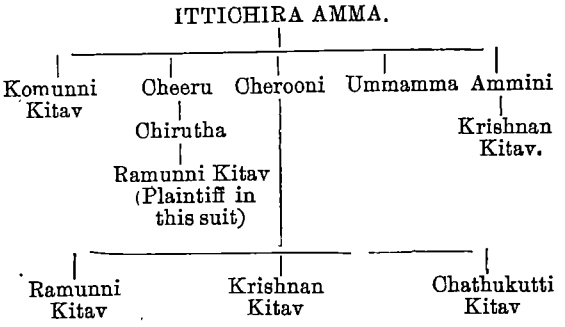
Quaere.—Whether, where the effect of a *karar* is to terminate the *karnavan's* authority altogether, any disposition made by him in favour of strangers who had no notice of the *karar* will be binding on the family. *Kanna Pisharo* v *Kombitchan* (3), referred to.

S. C. A. against the decree of the Court of the Subordinate Judge of Tellicherry in Appeal Suit No. 108 of 1929 (A. S. No. 489 of 1928, District Court) preferred against the decree of the Court of the District Munsif of Quilandi in Original Suit No. 123 of 1927.

Mr. *K. Kuttikrishna Menon*, for the Appellants.

Mr. *M. C. Sridharan*, for the Respondents.

Judgment.- The plaintiff's suit was decreed in the trial Court and dismissed in the lower Appellate Court and he prefers this second appeal. The genealogy of the family has been set out in para. 9 of the trial Court's judgment and it will be convenient to repeat it here.



One further fact may be noted that of the three sons of Cherooni, Ramunni Kitav was the son by the first husband and Krishnan Kitav and Chathukutti Kitav are the sons by the second husband. The facts which led up to the suit are as follows. Krishnan Kitav and Chathukutti Kitav who are the sons of Cherooni applied to the Collector to have the registry transferred to their names. This was ordered. Komunni Kitav shown at the extreme left of the table in whose name the properties stood as the son of Ittichira Amma filed O. S. No. 344 of 1902, for a declaration that the properties belong to him and that Krishnan Kitav and Chathukutti Kitav had no right at all. That suit ended in a *razinamah* decree Ex. A dated November 27, 1902. Under this *razinamah* the plaintiff in that suit Komunni Kitav got the plaint items. During his lifetime Ramunni Kitav *i. e.*, the present plaintiff was to have possession and pay him rent until he attained *karnavanship*. On this happening he was to give up possession to Krishnan Kitav and Chathukutti Kitav and as these in their turn attained *karnavanship* the property was to be enjoyed by the *tavazhi* consisting of the descendants of Chheru, Ammini and Ummamma excluding Cherooni and her descendants. Subsequently Krishnan Kitav and Chatukutti Kitav have demised the property in favour of the present 1st defendant: *Vide* Ex. B dated April 7, 1909. Krishnan Kitav died and Chathukutti Kitav granted a *melkanom* on November 15, 1921, Ex. 1, in favour of the present 2nd defendant who brought O. S. No. 344 of 1922 and obtained possession: *Vide* Exs. F and XII. The Appellate Court held that the present plaintiff could not in that suit contest the validity of the *melkanom* and that his remedy was by way of a separate suit. He has, therefore, filed the present suit. The plaintiff's case in the

suit is that the properties belong to the *tavazhi* consisting of the descendants of Cheeru and Ummamma and that he as *karnavan* is entitled to be in possession and that the *melkanom* granted to the 2nd defendant is in contravention of the terms of the *razinamah*. The 2nd defendant pleaded that the properties belong to a smaller *tavazhi* consisting of Krishnan Kitav and Chathukutti Kitav and their mother who got the property from the 2nd husband of Cheerooni. The trial Court gave a decree for the plaintiff agreeing with the contentions raised by him. This was reversed by the lower Appellate Court on four grounds: (1) that the *tavazhi* created by the *razinamah* Ex. A is one unknown to the law, (2) that Ammini's son shown in the right hand corner of the pedigree is senior to the plaintiff and the suit should have been therefore, brought by him, (3) that the 2nd defendant had no notice of the *razinamah* and (4) that the *melkanom* is binding on the larger *tavazhi* because the amount was advanced to clear the debt of the *tavazhi*. I agree with the learned Advocate for the appellant that none of these grounds can be maintained. The plea that such a *tavazhi* was unknown to the law was not raised in the trial Court nor in the appeal to the lower Appellate Court. Assuming that it was competent to the lower Appellate Court to raise it and that its view is justified by the ruling in *Kypreth Moithiyan Kutti* v. *Natukandy Puthiapurayil* (1), which it quotes, it will not make any difference in this case for two reasons: (1) even if the *tavazhi* was not legally constituted, the right of management under the *razinamah* Ex. A vests in the senior male member and if the parties did not take the property under Ex. A as a *tavazhi*, they would be tenants-in-common and (2) any tenant-in-common can sue to recover the properties as against the trespasser: *Vide* Freeman on Co-tenancy, 2nd Edition, Art. 343 and *Debendra Narayan Singh* v. *Narendra Narayan Singh* (2), and the decision in S. A. No. 157 of 1930.

With regard to the second point that the suit should have been brought by Krishnan Kitav, son of Ammini, it is not in my opinion open to the lower Appellate Court to raise this question. The defence in the suit was not that this Krishnan Kitav and not the plaintiff was the proper person to bring the suit, but that the plaintiff was not a member of the *tavazhi* at all, nor entitled to the *tavazhi* property. It should be mentioned here that the witnesses in their evidence speak to three legal entities. First there is the larger *tavazhi* consisting of those persons shown in the tree (descendants of Ittichira) and some other members. Secondly, there is the *tavazhi*, to which the plaintiff is speaking, which is a special one constituted by the *razi*, excluding cheerunni and her descendants. This is the *tavazhi* which the lower Appellate Court has found to be illegal. Thirdly, there is a small *tavazhi* which the defendants speak to consisting of Krishnan Kitav, Chathukutti Kitav, Ramunni Kitav and Cheerunni. The 2nd defendant's case has throughout been that the property in question came to Krishnan Kitav and Chathukutti Kitav through their father. It was never their case that it belonged to a larger *tavazhi*, and that as such not the plaintiff but Krishnan Kitav, the son of Ammini should be the *karnavan* who should sue. The matter was not put in evidence nor in the First Appeal memo. It is sought here to argue that it is referred to in para. 2 of the appeal preferred to the Subordinate Judge which says:

> "Because the Court below erred in not recording any clear finding on the first issue."

But the next words are:

> "The Court below should have held that the plaintiff is not a member of Kurunghot *tavazhi* and he has no right to maintain the suit."

The first issue raised was "Is the plaintiff entitled to sue?" Nowhere was the contention raised that he was a member but was not the *karnavan*. In his evidence the plaintiff as P. W. No. 1 alluded to this Krishnan Kitav and said:

> "Ammini has a son called Krishnan Kidavu the *karnavan* of Marunalli *tarwad*. He has no right over the plaint property."

This witness was in no way cross-examined on this statement nor was any suggestion made that this Krishnan Kidavu had the right and was the proper person to bring the suit as *karnavan*. Therefore, in my opinion the lower Appellate Court was not justified in raising a mixed question of law and fact which was not the case of the parties. The third ground was that the 2nd defendant had no notice of the *razi*. That matter seems to have been alleged in the written statement: *Vide* para. 8 of the trial Court's judgment. But it does not seem to have been argued before the trial Court nor was any ground raised in the first appeal on this point nor objection

(1) 110 Ind. Cas. 480; 51 M 574; (1928) M W N 331; A I R 1928 Mad. 870; 55 M L J 208; 28 L W 491.

(2) 51 Ind. Cas. 976; 47 C 182 at p. 187; 29 C L J 504; 23 C W N 900.

taken that the trial Court did not consider it. The lower Appellate Court has itself found and it is quite obvious that under the *razinamah* Chathukutti Kitav was not a member of the *tavazhi* constituted by the *razinamah* and was deprived under that *razinamah* of that property and the rent. Sundara Ayyar, J. in his book, Malabar Law at p. 129, states as follows, referring to the judgment of Holloway, J. in *Kanna Pisharo* v. *Kombitchen* (3):

"If the reasoning of Holloway, J. is accepted, where there is a total prohibition against the *karnavan* dealing with the property his disposition will not be binding on the family, whether the lender had notice or not * * * Suppose the effect of the *karar* is to terminate the *karnavan's* authority altogether. How would it then stand? Would the analogy of s. 20°, Indian Contract Act apply and would third parties not be affected till they have notice of such termination? This would be pushing too far the analogy of agency. The *karnavan* is not an agent. He has authority to act by reason of his status. If he ceases to have the status, he has no longer authority to act on behalf of the family. If the analogy is pressed too far, even a decree in a suit deposing the *karnavan* might not be efficacious enough to terminate the agency so far as ignorant strangers are concerned."

It appears to me on perusing *Kanna Pisharo* v. *Kombitchen* (3), that it really is no help in the matter. It concerns a case where the party had no notice of the limited powers of the *karnavan* and I can find no remarks of Holloway, J. as to what the position would be if the *karnavan* had no power at all. Nevertheless, in the absence of any cases quoted to the contrary, the opinion of Sundara Ayyar, J. deserves very high respect. In the present case, however, having regard to the defence set up and the evidence of the 2nd defendant himself, it is really unnecessary to give any final opinion on this point of want of notice because the 2nd defendant entirely supported the defence case that the *tavazhi* to which he was lending money was the minor *tavazhi* of Krishnan Kitav and Chathukutti Kitav and that he lent the money on the property which they got from their father. His evidence is quite clear. He says:

"Krishnan Kitav was the *karnavan* of Kurungothil house. Properties belonging to Kurungothil house were given on Puthravakasom right to Krishnan Kitav and Chathukutti Kitav by their father. I paid Rs. 450 to discharge the debt due by that *tavazhi*."

To the same effect is the evidence of D. W. No. 2 who got the decree on Ex. II which the 2nd defendant paid off. Therefore, the 2nd defendant helped this smaller *tavazhi* to discharge a debt created by it and the property which he took was the property which had come from the father of Krishnan Kitav and Chathukutti Kitav. There is no question, therefore, of want of notice.

The last ground on which the lower Appellate Court based its judgment is that the *melkanom* is binding on the larger *tavazhi* because the amount advanced is clearly *tavazhi* family debt. That is really an astonishing conclusion in the face of the evidence of D. W. No. 1 himself and the whole defence in the suit and the evidence adduced. Exhibit I, *melkanom* does not profess to be executed on behalf of the *tavazhi*. On the other hand Chathukutti Kitav says the property is his exclusive property. The 1st and 2nd defendants have attempted to support this view and sworn to the effect that this smaller *tavazhi* to which they lent the money held the property as the property given on Puthravakasam right to Krishnan Kitav and Chathukutti Kitav by their father. In the face of that it is absolutely impossible to say that there is any evidence at all for holding that the *melkanom* was binding on the larger *tavazhi*. In fact it is opposed to the defendant's case. The only respondent who has contested this appeal is the 2nd defendant and in the face of his plea in the written statement that the property did not belong to the *tavazhi* of Cheeru and her descendants but was the property obtained by Krishnan Kitav and Chathukutti Kitav and their father; he cannot be allowed to argue in appeal that this was not so and that the evidence which he gave before the Court, especially when that evidence was the defence case, was not true. This appeal must, therefore, be allowed and the decree of the District Munsif restored with costs here and in the lower Appellate Court.

A. *Appeal allowed.*

(3) 8 M 381.

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1352 of 1930
November 9, 1933
BENNET, J.

CHATAR SEN—PLAINTIFF—APPELLANT
versus
MITTER SEN AND ANOTHER—DEFENDANTS—RESPONDENTS

Agra Tenancy Act (III of 1926), ss. 227, 226 (2)—Co-sharer—Whether can be held accountable for profits not collected by him—Collecting co-sharer—Liability of.

There is no provision in s. 227, Agra Tenancy Act, for a co-sharer being held accountable for profits

that he has not collected, and that applies in s. 226 (2) only in the case of a *lambardar*, the reason being that a co-sharer has no duty to collect for other co-sharers. Section 227 is not intended to convey the meaning that the collecting co-sharer is liable to share arrears rateably with co-sharers who do not collect.

S. C. A. from the decision of the Second Additional District Judge, Meerut, dated July 24, 1930.

Mr. *Panna Lal*, for the Appellant.

Mr. *N. C. Shastri*, for the Respondents.

Judgment.—This is a second appeal by a plaintiff against a decree of the lower Appellate Court which modified the decree of the Court of first instance allowing certain sums to the plaintiff under s. 227 of Act III of 1926. There were two sets of co-sharers in the *khewat* in question, the plaintiff on the one hand and the two defendants on the other. The plaintiff brought a suit against the defendants for rendition of accounts and his share of profits The suit was for the years 1331 to 1334 *Fasli*. There were certain arrears collected in the years in dispute for the period prior to 1331 *Fasli*. The plaintiff claims in second appeal that because the defendant Mitter Sen is the sole collecting co-sharer, and has paid profits of previous years on the basis of collection, he was bound in law to pay to the plaintiff his rateable share of the arrears of the past years realized during the years in question. The lower Appellate Court in regard to this claim states that the plaintiff in the plaint did not claim arrears for the period prior to 1331 *Fasli*. The claim in the plaint was limited to the years in suit and was based on the full rental of those years. There is no provision in s. 227 for a co-sharer being held accountable for profits that he has not collected and that applies in s. 226 (2) only in the case of a *lambardar*, the reason being that a co-sharer has no duty to collect for other co-sharers. When the amount of the plaint claim therefore was reduced by the Courts, the plaintiff put forward this claim for the collections in the years in suit for previous years. Such a claim would require an amendment of the plaint which was not made in the present case. But even if the plaint were amended, it does not appear that the plaintiff's claim is well-founded. The lower Appellate Court has held that the plaintiff could not be allowed arrears so realised by defendant co-sharers unless it was proved that it was in excess of shares, and that there is nothing to show this. Learned Counsel argued that the collecting co-sharer is liable to share these arrears rateably with co-sharers who do not collect. I do not consider that s. 227 is intended to convey such a meaning. The language of the sub-section has not been altered from the language of the previous s. 165 (1) of Act II of 1901. Under the previous section a co-sharer has been held to be liable to the extent of what he has collected beyond his own legitimate share and out of the plaintiff's share: see *Angad Singh* v. *Zorawar Singh* (1). I do not consider that there is anything wrong in the decision on this point of the lower Appellate Court The second ground of appeal stated that a reference to a copy of a decree for profits for previous years and filed in the record and the statement of account filed by the *Patwari*, do show that there was an excess amount realised by the defendant, and that the Court below was under some misapprehension in holding otherwise. This ground of appeal does not state in what way there was an excess realised and to what extent there was an excess. Possibly learned Counsel meant that the collections were in excess of the shares of defendants. In any case it is not the function of this Court in second appeal to re-examine the evidence and to come to conclusions of fact on such evidence. I dismiss this second appeal. The opposite party was not represented and so no costs are allowed. Leave for a Letters Patent Appeal is granted.

N. *Appeal allowed.*

(1) 44 Ind. Cas. 542; 16 A L J 146.

LAHORE HIGH COURT

First Civil Appeal No. 2429 of 1928

June 15, 1934

ADDISON AND BECKETT, JJ.

BHAGWANA AND OTHERS – DEFENDANTS —APPELLANTS

versus

SHADI AND OTHERS—PLAINTIFFS—RESPONDENTS

Limitation Act (IX of 1908), s. 18, Sch. I, Art. 10—Fraud—Mere suggestion of fraud is not enough —Nature of fraud to be proved under s. 18—Pre-emption—Sale disguised as mortgage to avoid pre-emption—Suit for pre-emption—Limitation, when commences — Purchaser with equal rights with pre-emptor associating in purchase with person with inferior rights—Whether can resist pre-emptor's claim.

Where a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A person, who, in such

circumstances, desires to invoke the aid of s. 18, Limitation Act, must establish that there has been fraud, and that, by means of such fraud, he has been kept from the knowledge of his right to sue, or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. Mere suggestions of fraud do not amount to such knowledge as is required by s. 18 of the Limitation Act. *Rahimbhoy-Habibbhoy* v. *Charles Agnew Turner* (3), *Gordhan Das* v. *Ahmad* (4), *Biman Chandra Dotta* v. *Promotha Nath Ghose* (5) and *Abdul Rahman Khan* v. *Parshotam Das* (6), referred to. [p. , col. .]

Where a sale is disguised as a mortgage in order to avoid pre-emption, a suit for pre-emption can be brought within one year from the date on which the fraud is discovered.

If a purchaser having an equal right of pre-emption associates with himself in the purchase, a person with rights inferior to those of the pre-emptor, he is not entitled to resist the claim of such pre-emptor to enforce his rights even as to his share of the purchase *Achhru* v. *Labhu* (7), *Tota Ram* v. *Kundan* (8) and *Kesar Singh* v. *Punjab Singh* (9), relied on.

F. C. A. from the decree of the First Class Sub-Judge, Delhi, dated May 8, 1928.

Mr. *Mehr Chand Mahajan*, for the Appellants.

Messrs. *Shamair Chand* and *Qabul Chand*, for the Respondents.

Judgment.—On July 27, 1911, Ram Partap mortgaged three-fourths of 66 *bighas* 10 *biswansis* in favour of Roshan and Khimman in equal shares one-third, and Nihal and Bihal in equal shares two-thirds. The amount of the mortgage was Rs. 5,000, and the mortgage could not be redeemed for ten years. Power was given to the mortgagees to plant a garden, build houses, etc., and, on redemption, the cost of these improvements, together with interest at 6 per cent. had to be paid. On September 26, 1911, he sold the remaining one-fourth of the 66 *bighas* 10 *biswansis* in favour of Shadi and Tej Ram for Rs. 1,800. On March 15, 1929, Ram Partap sold the equity of redemption of the three-fourths to Tej Ram for Rs. 10,800 of which Rs. 5,000 were left with the vendee to redeem the mortgage. There was a clause in the sale deed that the vendee had to pay whatever was found to be due to the mortgagees.

On October 9, 1920, Tej Ram gave notice to the mortgagees that he wished to redeem the mortgage on payment of Rs. 5,000 but was told by them that redemption was not possible as the mortgage transaction was in reality a sale disguised as a mortgage in order to defeat pre-emption. On July 7, 1921, he again gave notice of redemption, adding that he had redeemed Khimman's one-sixth share. Ultimately in 1921 Tej Ram instituted a suit for redemption against the mortgagees other than Khimman. The defendants pleaded that the transaction was a sale. On October 4, 1923, the suit was referred to arbitration. The arbitrators gave their award on February 13, 1924. They held that the transaction was in reality a sale and that the suit should be dismissed. Objections were taken before the Judge to this award. He upheld the award and granted a decree on May 18, 1925, in accordance therewith. Khimman's share was not incorporated in the decree as he was not sued. The Judge added that he left parties to bear their own costs as he considered that the defendants would have lost their case had there been no reference to arbitration.

Thereupon Shadi and Har Gyan instituted this suit on August 28, 1925, for pre-emption of the mortgaged land, on the ground that it was a sale which had been kept from their knowledge. They stated that they were co-sharers in the *patti* and were entitled to pre-empt and that the suit was within limitation by reason of s. 18, Limitation Act. The suit was decreed with costs, on payment of Rs. 5,000 by May 31, 1928, and it was also ordered that the plaintiffs should pay Rs. 6,000 as the value of improvements before taking possession. Against this decision the defendants have appealed.

Only two grounds were argued before us. The first was that the suit was barred by time. In this connection it was first urged that there was no fraud within the meaning of s. 18, Limitation Act. What was said was that the defendants were entitled to disguise their sale in the form of a mortgage and that it was open to the plaintiffs to have sued within one year of the original transaction to pre-empt the sale. It has been held in *Jagdish* v. *Man Singh* (1) and *Mihan Singh* v. *Ishar Das* (2) that a plaintiff can come into Court alleging that a mortgage is in reality a sale and that he is entitled to pre-empt the bargain. Although this is the case, this does not mean that s. 18, Limitation Act, does not apply. That

(1) 100 P R 1895.
(2) 130 Ind. Cas. 516; 12 Lah. 488; 32 P L R 749; Ind. Rul. (1931) Lah. 318; A I R 1931 Lah. 258.

section runs as follows:

"Where any person having a right to institute a suit has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, the time limited for instituting a suit (*a*) against the person guilty of the fraud or accessory thereto, or (*b*) against any person claiming through him otherwise than in good faith and for valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby."

The mortgage in the present case certainly had all the appearance of a mortgage and there was nothing to indicate that it was a sale and therefore there can be no question that the parties acted fraudulently in giving the transaction the shape of a mortgage. The plaintiffs were, therefore, entitled to compute limitation from the time when that fraud first became known to them.

The law on this question is not in doubt. Their Lordships of the Privy Council laid down in *Rahimbhoy Habib Bhoy* v. *Charles Agnew Turner* (3) that, in order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts constituting the fraud at a time which is too remote for the suit to be brought. The suggestion of his having been defrauded did not amount to such knowledge as was required by s. 18, Limitation Act. This burden was not discharged by proof of the facts that some hints and clues had reached the Official Assignee which might have led to such knowledge. The Chief Court of the Punjab held in *Gordhan Das* v. *Ahmad* (4) that where an original transaction is tainted by fraud it lies on the party, against whom fraud is found, to prove that the plaintiff had clear and definite knowledge of the fraud for more than the period of limitation allowed. A Full Bench of the Calcutta High Court in *Biman Chandra Datta* v. *Promotha Nath Ghose* (5) held that where the plaintiff had been kept from knowledge by the defendant of the circumstances constituting the fraud, the plaintiff could rely upon s. 18, to escape from the bar of limitation. The true position is that, where a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A person, who, in such circumstances, desires to invoke the aid of s. 18 must establish that there has been fraud, and that, by means of such fraud, he has been kept from the knowledge of his right to sue, or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. The same subject came before the Privy Council in a case reported as *Abdul Rahman Khan* v. *Parshotam Das* (6).

In the case before us the plaintiffs have clearly established that there was fraud and that by means of this fraud they were kept from the knowledge of their right to sue and of the title whereon this right was founded. The burden is, therefore, upon the defendants to show that the plaintiffs had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. In this case the fraud was that a sale was disguised in the form of an ordinary mortgage.

There is good evidence that the plaintiff-pre-emptors came to know that the defence set up in Tej Ram's redemption suit was that the transaction was in reality a sale. They were both present when the arbitrators were hearing evidence in the village to this effect. The contention however of Tej Ram was that the transaction was a mortgage as it certainly appeared to be. It was argued on behalf of the appellants that it must be held that the plaintiffs had knowledge of the fact that it was a sale during the arbitration proceedings in 1923 or early in 1924 and, therefore, this suit having been instituted on August 28, 1925, was barred by time. On the other side it was contended that it could not be said that the plaintiffs had knowledge that the transaction was a sale until the Court upheld the award on May 18, 1925, in which case the suit would be well within limitation. On the authorities it is clear that mere suggestions of fraud do not amount to such knowledge as is required by s. 18, Limitation Act, and that the knowledge must be clear and definite

(3) 17 B 341; 20 I A 1; 6 Sar. 256; 17 Ind. Jur. 100 (P C).

(4) 34 P R 1904; 29 P L R 1904 Supp.

(5) 68 Ind. Cas. 94; 49 C 886; 36 C L J 295; A I R 1922 Cal. 157.

(6) 128 Ind. Cas. 257; 5 Luck. 492, A I R 1931 P C 12; 7 O W N 1219; 53 C L J 24 (P C).

knowledge of the facts constituting the particular fraud. The Court which upheld the award did not allow costs on the ground that the award appeared to go against the merits of the case. All that the plaintiffs knew was that one side was contending that it was a sale while the other side was contending that it was a mortgage as it certainly appeared to be. The allegation that it was a sale might easily have been the usual false defence so commonly set up in this country and in our opinion, knowledge of this allegation did not amount to clear and definite knowledge of the facts constituting the fraud in question. That knowledge did not become definite and clear till the award was upheld and the suit of Tej Ram for redemption dismissed. The suit is thus within limitation.

The trial Judge held that as Nihal and Bihal also held land in the *patti* the plaintiffs had not a superior claim to pre-empt compared with those two persons. If Nihal and Bihal, therefore, had been the sole, purchasers the plaintiffs' suit for pre-emption must have failed. As however they associated with themselves two persons in the sale who had no right to pre-empt, namely, Roshan and Khimman, the trial Judge held that the plaintiffs were entitled to pre-empt the whole sale. There is no doubt that this is the view consistently taken by this Court. In *Achhru* v. *Labhu* (7), a Division Bench of the Punjab Chief Court held that, if a purchaser having an equal right to pre-emption associates with himself in the purchase a person with rights inferior to those of the pre-emptor, he is not entitled to resist the claim of such pre-emptor to enforce his rights even as to his share of the purchase.

There are many other rulings, but it is only necessary to refer to one of the latest, namely, *Tota Ram* v. *Kundan* (8). These decisions are based on another Division Bench judgment *Kesar Singh* v. *Punjab Singh* (9). It was held there that in the case of a sale to various persons, the contract of sale as regards the vendor was one and indivisible, the specification of the shares in the sale-deed being merely an arrangement among the purchasers *inter se*, which did not affect the vendor, who had contracted to take the purchase money for the whole land, and could not have been compelled to sell to one or other of the vendors his specified share on payment of a proportionate share of the purchase money. With great respect this seems to be the correct view. There is only one sale transaction which is indivisible and the plaintiffs are therefore, entitled to pre-empt. No other point was argued.

For the reasons given the appeal is dismissed with costs.

N. *Appeal dismissed.*

(7) 48 P R 1907; 81 P L R 1908.
(8) 112 Ind. Cas. 704; A I R 1928 Lah. 784.
(9) 66 P R 1896.

ALLAHABAD HIGH COURT

Criminal Revision Application No. 54 of 1935
March 22, 1935
KENDALL, J.
RAJA RAM - APPLICANT
versus
EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 288—Scope of—Evidence given before Magistrate—Whether can be utilised in support of conviction—Independent corroboration is not necessary.

Under s. 288 of the Criminal Procedure Code, evidence admitted under that section may be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act. It will not be proper to limit the use of such evidence by the proviso that unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilised in support of a conviction. Nor can it be said that evidence admitted under s. 288, Criminal Procedure Code, invariably requires some independent corroboration in the same manner as the statement of an accomplice. *Emperor* v. *Tehal Teli* (1), dissented from, *Emperor* v. *Behari* (2), relied on.

Cr. R. App. from an order of the Sessions Judge, Meerut, dated October 30, 1934.

Mr. *K. D. Malaviya*, for the Applicant.

The Assistant Government Advocate, for the Crown.

Judgment.—This application has been argued by Mr. Kapildev Malaviya on the ground that the trial Court and the lower Appellate Court have both given a value to two statements admitted under s. 288 of the Criminal Procedure Code to which they are not entitled by law. The facts of the case are given fully in the judgment of the lower Appellate Court. The principal evidence for the prosecution was that of the complainant, Suggan, who was poisoned and the two bakers Ram Chander and Khazan, who were attracted to the *dharamshala* by the cries of the poisoned man, and who testified to finding the present

applicant Raja Ram, who is a boy of 16, in the *dharamshala*, together with the complainant Suggan, while the other person who had accompanied the applicant to the *dharamshala* ran away. The case for the prosecution was that the applicant was in league with this person who had escaped to administer poison to Suggan in order to rob him. The argument is that if the statements admitted under s. 288, Criminal Procedure Code, are ignored, there is no evidence to prove that the applicant himself had any guilty knowledge.

The case on which Mr. Malaviya has relied is that of *Emperor* v. *Tehal Teli* (1) in which it was remarked (p. 794*):

"I think therefore that the principle is quite clearly settled by this line of cases that unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilised in support of a conviction."

If the meaning of this sentence is that evidence admitted under s. 288, Criminal Procedure Code, invariably requires some independent corroboration in the same manner as the statement of an accomplice. I am with due respect not yet satisfied that the general practice of the Courts substantiates the principle laid down. Under s. 288 of the Criminal Procedure Code evidence admitted under that section may be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act of 1872, and a Bench of this Court in the case of *Emperor* v. *Behari* (2) has discussed the meaning of this section without giving any indication that it would be proper to limit the use of such evidence in the manner laid down by the Patna High Court.

It is not, however, necessary for me to come to a decision on the wider question, for in the present case it appears to be quite clear that there was other evidence on which the Court relied and which proved the guilt of the applicant in addition to the statements admitted under s. 288. The learned Judge has remarked that the two bakers Ram Chander and Khazan appeared to have altered their statements in the Sessions Court in favour of the applicant on three points:—

They said that they found the applicant sitting down, whereas one of them at any rate said in the Magistrate's Court that he was ready to run away, but was arrested.

(2) One of them, Ram Chander, was ambiguous as to whether the purse was found in the bundle or on the person of the sweeper.

(3) They said that the bundle which contained some of the poisoned sweetmeats was lying on the ground, whereas in the Magistrate's Court both had said that the bundle was in possession of the applicant.

The Appellate Court has found, however, that according to the Urdu record Khazan Singh said in the trial Court not that the bundle was lying on the ground near the applicant, but that the applicant had it in his possession while the English record of the trial Court shows that Ram Chander said that the applicant had a bundle and that crushed sweets were found in that bundle. It appears therefore that there was sufficient evidence given by these witnesses in the trial Court to corroborate the statements made before the Magistrate, though in some details their statements in the two places were not consistent. I have examined the evidence and I find that there are circumstances in the case that justified the Courts in giving preference to the statements of these two witnesses which were made in the Magistrate's Court to their statements in the Sessions Court, where the two differ, and I am, therefore, not satisfied that the Courts were wrong in relying on the statements admitted under s. 288 of the Criminal Procedure Code or that they acted illegally in convicting the applicant.

The application, therefore, fails and is dismissed.

The applicant is on bail and must surrender to his sureties.

N. *Application dismissed.*

(1) 84 Ind. Cas. 734; 3 Pat. 781; A I R 1925 Pat 51; 6 P L T 53; 26 Cr L J 270.

(2) 98 Ind. Cas. 485; 49 A 251; 25 A L J 126; 27 Cr L J 1365; L R 7 A 205.

*Page of 3 Pat.—[*Ed.*]

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1346 of 1932 (Connected with Second Civil Appeal No. 1347 of 1932)

March 8, 1935

GANGA NATH, J.

Munshi MUHAMMAD-UD-DIN—PLAINTIFF—APPELLANT

versus

BHUPAN—DEFENDANT—RESPONDENT

U. P. Land Revenue Act (III of 1901), s. 86—Chaukidara cannot be regarded as ground rent but is a cess—Such cess not recorded in last settlement—Whether recoverable.

Chaukidara cannot be regarded as ground rent for the houses of the *raiyats* but is apparently a cess When no such cess has been recorded in the last settlement, it is not recoverable under the provisions of s. 86, U. P. Land Revenue Act. *Tirkha Ram* v. *Chhotey* (1), referred to.

S. C. A. from the decision of the Subordinate Judge of Meerut, dated May 19, 1932.

Mr. *A. Aziz*, for the Appellant.

Messrs. *N. P. Asthana* and *H. P. Asthana*, for the Respondent.

Judgment.—Second Appeal No. 1347 of 1932 has been heard with this appeal. Both these appeals are plaintiff's appeals and arise out of two suits brought by the same plaintiff against the defendants-respondents to recover arrears of ground-rent. The plaintiff brought the suits as *mutwalli* of the *abadi* in which the defendants' houses are. The defendants contended that they had never paid any ground-rent and that they were not liable to pay any. The plaintiff relied on para. 28 of the *wajib-ul-arz* of 1278 *Fasli* which is as follows: "*Raiyats* who have settled in the village render service according to their profession and *chaukidara* is also realised from them according to their status". The plaintiff claimed ground-rent from the defendants on the basis of the provision for *chaukidara* in this *wajib-ul-arz*. As has been rightly held by both the Courts below *chaukidara* cannot be regarded as ground-rent. On the other hand, *chaukidara* was assessed not to be paid by the defendants on account of the use and occupation of their houses or on account of the rent of the sites of their houses but to be paid by the *raiyats* on account of the salaries of the *chaukidars* maintained for the safety of the village. The *chaukidara* could not be regarded as ground-rent for the houses of the *raiyats* but is apparently a cess. The same point was considered in *Tirkha Ram* v. *Chhotey* (1), where the same view was taken. Section 86 of the Land Revenue Act provides that:

"A list of all cesses other than those referred to in s. 56 levied in accordance with village custom shall, if generally or especially sanctioned by the Local Government be recorded by the Settlement Officer and no cesses, not so recorded, shall be recoverable in any Civil or Revenue Court; and no such list shall be altered or added to during the currency of settlement"

After the settlement of 1278 *Fasli* another settlement took place but no *wajib-ul-arz* of it was produced. If there had been any entry of any such *chaukidara* cess in it as was entered in the *wajib-ul-arz* of 1278 *Fasli*, the plaintiff would certainly have produced it. As no such cess was recorded in the last settlement, it is not recoverable under the provisions of s. 86 of the Land Revenue Act.

Both the suits have been rightly dismissed by the Courts below. It is, therefore, ordered that both the appeals be dismissed with costs and the decrees of the lower Court be confirmed.

N. *Appeal dismissed.*

(1) 100 Ind. Cas. 740; A I R 1927 All. 520; L R 8 A 99 Rev.

LAHORE HIGH COURT
Full Bench

Miscellaneous Second Civil Appeal No. 326 of 1934

October 19, 1934

YOUNG, C. J., BHIDE AND DIN MUHAMMAD, JJ.

BHAGWANA—JUDGMENT-DEBTOR—APPELLANT

versus

GOPI—DECREE-HOLDER—RESPONDENT

Punjab Alienation of Land Act (XIII of 1900), ss. 2 (3), 15—Trees, whether land.

Trees, whether fruit trees or otherwise, cannot be considered to be "land" within s. 2 (3), Punjab Alienation of Land Act. Reading ss. 2 (3) and 15 of the Act together the terms "land" in s. 2 (3) must be confined to the ordinary meaning of "land" especially as there is a distinction drawn in the Act itself between land and the products of the earth or land. *Amir Khan* v *Lahori Mal* (4) and *Deputy Commissioner, Jhang* v. *Ganga Ram* (5), Overruled. *Jhanda Khan* v. *Fateh Din* (1), referred to and *Achhru Mal* v. *Maula Bakhsh* (3), relied on.

Misc. S. C. A. from an order of the District Judge, Hoshiarpur, dated December 5, 1933.

Mr. *Gullu Ram*, for the Appellant.

Young, C. J.—The point for consideration by this Full Bench is whether trees can be considered to be "land" within the definition contained in the Punjab Alienation of Land Act, s. 2 (3). We are of opinion that trees whether fruit trees or otherwise, cannot the considered to be "land" within the said definition. Sub-s. (3) reads as follows:

"The expression 'land' means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture and includes: (*a*) the sites of buildings and other structures on such land..... . . "

It is unnecessary to reproduce the remaining clause of the definition as it is conceded that trees cannot come within

any of them. It is argued on behalf of the appellant that on a proper construction the above portition of the sub-section would include trees. On the plain grammatical meaning of the sub-section, however, it is difficult to include trees therein. Trees are not "occupied as the site of any building in a town or village" nor can trees be "occupied or let for agricultural purposes." The inclusion of the "sites of buildings and other structures on such land" as land further confirms our view that it would have been perfectly easy if so desired for the Legislature to have included trees in this sub-section. We are further confirmed in our opinion by a consideration of s. 15 of the same Act. The definition of the "produce of land" is included in s. 15. It is as follows:—

"The produce of land means : (*a*) crops and other products of the earth standing or ungathered on the holding ; (*b*) crops and other products of the earth which have been grown on the land during the past year and have been reaped or gathered."

Trees, it is clear, would come within this explanation as "other products of the earth standing or ungathered on the holding." Reading these two sections together, we think that the term "land" in s. 2 (3) must be confined to the ordinary meaning of "land" especially as there is a distinction drawn in the Act itself between land and the products of the earth or land. We have been referred to a decision of the Chief Court of this Province contained in *Jhanda Khan* v. *Fateh Din* (1). The question for decision in that case was whether a suit in respect of land occupied as a fruit garden was a "land suit" within the definition of that term as given in the Punjab Courts Act. It was held in that case with reference to the definition of "land" as given in the Punjab Tenancy Act which is also adopted for the purpose of the Punjab Courts Act, and is identical with the definition of land as given in the Punjab Alienation of Land Act, exclusive of cls. (*b*) to (*f*) on which as stated above reliance has been placed before us, that land occupied as a fruit garden is land occupied for agricultural purposes. We see no reason to disagree with this decision but it does not really touch the point we have to decide. In the present instance we are concerned only with trees and not with the land occupied by those trees.

The opinion we hold is supported by a Full Bench decision of the Punjab Court reported in *Dhani Das* v. *Aya Ram* (2), as also by a Division Bench decision of this Court contained in *Achhru Mal* v. *Maula Bakhsh* (3). In the former case it was pointed out that trees growing on land can be sold, let or mortgaged independently of the land on which they stand and it was held that a suit for possession of a share in an orchard, (*i. e.*, the fruit trees apart from the land (is not a suit with respect to any right or interest in land and was not, therefore, a land suit.

In *Amir Khan* v. *Lahori Mal* (4), it was held by Wilberforce, J., that standing trees were included in the definition of land given in the Punjab Alienation of Land Act. But when the same question arose before Chevis, J., in a later case he was inclined to differ from that view and, therefore, referred the case to a Division Bench. The decision of the Division Bench is reported in *Achhru Mal* v. *Maula Bakhsh* (3). In this case after reviewing the previous relevant authorities on the point, *Amir Khan* v. *Lahori Mal* (4), was dissented from and it was held that trees growing on agricultural land are not "land" within the meaning of sub-s. (3), s. 2, Punjab Alienation of Land Act. A different view has recently been taken in a Single Bench decision reported in *Deputy Commissioner, Jhang* v. *Ganga Ram* (5), but in that case *Amir Khan* v. *Lahori Mal* (4), was followed without any reference to the Division Bench ruling reported in *Achhru Mal* v. *Maula Bakhsh* (3). It appears to be conceded in *Deputy Commissioner, Jhang* v. *Ganga Ram* (5), that trees are not expressly mentioned or included in the definition of land as given in the Punjab Alienation of Land Act but it was considered that the Legislature could not have intended to permit members of agricultural tribes to sell trees apart from the land. We have, however, to interpret the definition as it stands and if the language used does not carry out the real intention of the Legislature, it is of course open to it to amend the definition. It is, however, note-worthy that the Legislature has not thought it necessary to intervene though ten years have now elapsed since : *Achhru Mal* v. *Maula Bakhsh* (3), was published.

The answer, therefore, that we give to the question put to the Full Bench is that

(1) 111 P R 1890.
(2) 15 P R 1892.
(3) 84 Ind. Cas. 89; A I R 1925 Lah. 29; 5 Lah 385; 1 Lah. Cas. 238.
(4) 58 Ind. Cas. 638; A I R 1920 Lah. 351; 108 P R 1919.
(5) 144 Ind. Cas. 691; A I R 1933 Lah. 880; 6 R L 12; 34 P L R 786.

trees are not "land" within the meaning of s. 2 (3), Punjab Alienation of Land Act.

D. *Question answered,*

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1015 of 1931

February 5, 1935

SULAIMAN, C. J. AND BENNET, J.

Lala BHAGWAN DAS—DEFENDANT —APPELLANT

versus

Lala LAKSHMI CHAND - PLAINTIFF AND AMOLAK CHAND AND OTHERS —DEFENDANTS—RESPONDENTS

Insolvency—Joint Hindu family firm adjudicated insolvent—Effect—All members of family, if made insolvents—Allahabad High Court Rules, Chap. XIX, r. 27—Provincial Insolvency Act (V of 1920), ss. 79, 28—Creditor obtaining decree on understanding that debtors are insolvents—Remedy—Separate execution —Legality of—Hindu Law—Joint family business—Adjudication of joint Hindu family as insolvent—Powers of Receiver—One member surrendering rights by release deed in favour of Receiver—Subsequent attachment of his share by creditor—Whether confers additional rights paramount to those of Receiver.

In the case of a firm carried on by a joint Hindu family, the effect of the adjudication of the firm as an insolvent is to make all the members of the family insolvent.

Where a creditor has obtained a decree on the understanding that he was getting a decree against certain insolvents, his exclusive remedy is to go to the Insolvency Court and get rateable shares in the assets and not to proceed separately by way of execution and claim priority as against the Official Receiver.

The right of a Hindu father to dispose of the joint Hindu family property in order to satisfy his own debts is properly within the meaning of s. 28 of the Provincial Insolvency Act and vests in the Receiver and the Receiver is entitled to seize the entire family property and transfer it in order to satisfy the debts of the father. It is not incumbent on such a Receiver to obtain an order of the Court to execute it and attach the family property. He can straightway seize the property and sell it under a private deed, it not being incumbent upon him to take out an attachment. In these circumstances the seizure of the property by the Receiver must be taken to be tantamount to attachment of the property by him so as to get his interest crystallised in preference to any creditor who subsequently attaches the same property.

Where a member of a joint Hindu family firm which has been adjudicated insolvent surrenders his rights by a deed of release in favour of the Receiver, the subsequent attachment of his supposed interest cannot confer upon the attaching creditor any additional right which would be paramount to the rights of the Receiver.

S. C. A. from the decision of the District Judge, Agra, dated April 9, 1921.

Messrs. *N. P. Asthana* and *B. N. Saha* for the Appellant.

Mr. *B. Malik*, for the Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for declaration as to the plaintiff's ownership in a certain property. Munna Lal and his three sons were carrying on an ancestral business under the name of firm Gobind Ram Munna Lal and became heavily indebted. On the application of some of the creditors the firm was declared insolvent on August 1, 1922. In the application the firm had been described as the firm Gobind Ram Munna Lal through Munna Lal Radhe Lal and Brij Mohan, and the name of Amolak Chand, the youngest son of Munna Lal was somehow omitted from the application. But it is noteworthy that it was the firm itself which was adjudicated as insolvent and not the individual members of the family.

The present defendant-appellant obtained a decree against the firm through the four persons on November 14, 1922. An objection had been taken in the suit that the defendants were insolvents and they could not be sued separately but the Court overruled that objection on the ground that a decree could be given on certain conditions and pointed out that the decree-holder would of course take the decree to the Insolvent Court and get a rateable distribution of the assets along with the other creditors. In the Insolvency Court a composition scheme was submitted and approved by the Court on May 16, 1924, to which the present appellant also agree. In accordance with the composition scheme one Ram Babu was appointed Receiver to the estate and he took charge of the entire family property including the undivided shares of all the members. In order to strengthen the position of the Receiver Amolak Chand, whose name had been left out from the application, executed a deed of release on July 10, 1924, relinquishing all claim to any share in the family property. It was after this release that the present defendant in execution of the decree got Amolak's share attached on May 14, 1925. On February 5, 1925, Ram Babu the Receiver sold the property to the present plaintiff. It was after the sale that the defendant-appellant purchased Amolak's share at auction.

We are not concerned with the result of the finding in a previous proceeding which took place in 1927 to which neither the Official Receiver nor the present respondent was a party.

The Courts below have disallowed the pleas of the defendants and have decreed

the claim holding that the property validly passed to the present plaintiff in preference to the defendant.

There are several grounds on which the defendant's case must fail.

In the first place it was the firm itself which was declared insolvent and not any individual persons. Under the authority vested in this High Court by s. 79 of the Provincial Insolvency Act this Court has framed certain rules which have the same effect as if enacted in this Act. Chapter XIX, r. 27, provides that adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in the firm. If that analogy be applied to the members of a firm carried on by a joint Hindu family then the effect of the adjudication of the firm as an insolvent was to make all the members of the family insolvents.

In the second place the defendant-appellant obtained his decree on the understanding that he was getting a decree against certain insolvents and his exclusive remedy would be to go to the Insolvency Court and get rateable shares in the assets and not that he would proceed separately by way of execution and claim priority as against the Official Receiver.

In the third place the defendant himself agreed to the composition scheme and was a party to the arrangement under which the entire property was to be disposed of by the Official Receiver.

In the fourth place the Official Receiver had already taken possession of the entire estate on behalf of the creditors and had, therefore, exercised the right which had previously vested in the father to dispose of the property in payment of his debts.

It has now been held by the Full Bench in the case of *Anand Prakash* v. *Narain Das Dori Lal* (1) that the right of a Hindu father to dispose of the joint Hindu family property in order to satisfy his own debts is properly within the meaning of s. 28 of the Insolvency Act and vests in the Receiver and that the Receiver is entitled to seize the entire family property and transfer it in order to satisfy the debts of the father. Now it is not incumbent on such a Receiver to obtain an order of the Court to execute it and attach the family property. He can straightaway seize the property and sell it under a private deed it not being incumbent upon him to take on an attachment. In these circumstances if the principles of English Law are to be applied to the system under which properties are held by a Hindu family, the seizure of the property by the Receiver must be taken to be tantamount to attachment of the property by him so as to get his interest crystallised in preference to any creditor who subsequently attaches the same property. We do not think that the Receiver should be put in any worse position than if he had actually taken out an order for attachment and got the property attached though in either case he would sell it afterwards.

In the fifth place the appellant instead of going to the Insolvency Court and claiming the rateable share in the assets as had been directed in the judgment, proceeded to execute the decree independently of the Insolvency Court and attached the property contrary to the provisions of s. 28 (2) of the Insolvency Act. He had no right to take this legal proceeding independently of the Insolvency Court.

In the sixth place Amolak had already executed a deed of release in favour of the Receiver relinquishing all his interest in the property. There is nothing in the law to prevent him from surrendering his rights particularly when the firm was declared insolvent. The debts were due against the whole family and as a member of the family he was under the Rules of the High Court liable to pay such debts. The subsequent attachment of the supposed interest of Amolak by the present appellant cannot, therefore, confer upon him any additional right which would be paramount to the rights of the Receiver. We, therefore, think that the appeal has no force and we accordingly dismiss it with costs.

N. *Appeal dismissed.*

(1) 135 Ind. Cas. 119; 53 A 239; A I R 1931 All. 162; (1931) A L J 122; Ind. Rul. (1932) All. 7 (P B).

ALLAHABAD HIGH COURT

Criminal Appeal No. 36 of 1935

March 12, 1935

KENDALL, J.

NARAIN AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT

Penal Code (Act XLV of 1860), s 366—Object of accused to bring pressure to bear on husband of woman—Judge's direction likely to lead jury to believe that this was object of accused—Conviction under s 366—Legality of—Jury trial—Misdirection

In a case under s. 366, Penal Code, if the object of the accused was to bring pressure to bear on the husband of the woman, it cannot be said that they knew it to be likely that she would be forced or seduced to illicit intercourse.

Where it appeared by the Judge's direction to the jury, the jury were likely to be misled, that is, they were likely to believe that what they had to find was not that the woman was abducted for illicit intercourse but that she was abducted for the purpose of bringing pressure to bear on her husband, and they brought in a verdict of guilty on his understanding, the conviction under s. 366 ought not to stand.

Cr. A. from an order of the Sessions Judge, Bareilly, dated December 3, 1934.

Mr. *G. S. Pathak*, for the Appellants.

The Government Pleader, for the Crown.

Judgment.—The three appellants have been convicted by the learned Sessions Judge of Bareilly of an offence under s. 366 of the Indian Penal Code and sentenced to three years' rigorous imprisonment. The trial was by jury, and the appeal is made on the ground that there was a misdirectien of the jury by the learned Judge.

The three appellants and one other were charged with abducting *Musammat* Tulsha while she was going on her way to Khamaria with her maternal uncle Hira Lal, in order that the appellant Narain should commit illicit intercourse with her, and knowing it to be likely that she would be forced to illicit intercourse with another person by means of criminal intimidation. It has been pointed out that in the charge to the jury the learned Judge has not explained the ingredients of an offence under s. 366 of the Indian Penal Code. The first of the ingredients is the abduction of the woman, and the second is the

"intention that she may be compelled or knowing it to be likely that she may be compelled . or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she would be forced or seduced to illicit intercourse"

i. e., the object of the abduction must be an enforcement or compulsion or seduction to illicit intercourse. At the beginning of the charge to the jury, however, the Judge said that the prosecution case was that the idea of the accused was to bring such influence to bear on the woman or her family that the burglary case which was then pending against Narain accused would be withdrawn or seriously prejudiced. This matter is again referred to a little lower down where the Judge says that the defence does not

"carry any great weight if their intention was merely to force her family to withdraw the case by abducting her or to force her herself to give evidence in favour of Narain".

If this was the object of abduction, then s. 366 would not be applicable. It is true the Judge remarks

"section 366 also refers to a case in which the accused knows that it is likely that the woman will be seduced or compelled to illicit intercourse, and it is on this case that the prosecution proceeds."

I am not quite clear as to the meaning of this sentence. If the object of the accused was to bring pressure to bear on the husband then it can hardly be said that they knew it to be likely that she would be forced or seduced to illicit intercourse. Putting the case at its highest, it may fairly be said that the jury were likely to be misled, that is to say, that they were likely to believe that what they had to find was not that the woman was abducted for illicit intercourse but that she was abducted for the purpose of bringing pressure to bear on her husband and if the jury brought in a verdict of guilty on this understanding, it is quite clear that the conviction under s. 366 ought not to stand.

It should be remarked that the Judge did not in his charge remind the jury that if they had any reasonable doubt about the guilt of the accused, they were to bring in a verdict of not guilty.

I, therefore, allow the appeal, set aside the order of conviction and sentence passed on the appellants, and direct that the case be returned to the learned Sessions Judge for re-trial. The appellants may remain on bail until further orders have been passed by the Sessions Judge.

N. *Appeal allowed.*

PATNA HIGH COURT

Civil Appeal No. 758 of 1931

October 17, 1933

WORT, J.

RAMNANDAN PRASAD SINGH—

—DEFENDANT—APPELLANT

versus

RAM DAS AND OTHERS—PLAINTIFFS

—RESPONDENTS

Bengal Tenancy Act (VIII of 1885), ss. 65, 167—Subrogation—Mortgagee advancing money to mortgagor for paying off rent decree—Whether subrogated to position of landlord—Incumbrance created by tenant of transferable holding—Whether void as regards third parties—Mortgage—Purchaser under first mortgage decree—Whether can set up first mortgage as shield in subsequent mortgagee's suit

Where money is advanced to a mortgagor to pay off a mortgage debt and the person advancing the

money gets a mortgage in security of that advance he becomes entitled to be subrogated to the rights of the mortgagee. But where the landlord obtains a decree for rent, the charge created by the decree is a right to which the landlord alone is entitled and the person advancing money to the tenant to pay off the rents does not get the right of subrogation, as the charge obtained by the landlord is not on the same footing as that of a mortgagee.

So far as the other parties are concerned, the incumbrances which were created by the tenant in a non-transferable holding are not incumbrances which are void but which may be treated as void only as between the tenant and the landlord.

A person, who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage, is entitled at the suit of a subsequent mortgagee who is not bound by the sale of the decree on which it proceeded, to set up the first mortgage as a shield. *Ram Narain* v. *Sahadeo Singh* (3), relied on.

C. A. from the Appellate decree of the District Judge, Patna, dated January 19, 1931.

Mr. *G. P. Singh*, for the Appellant.

Messrs. *K. Husnain*, *Baldeo Sahay* and *Chowdhuri Mathura Prasad*, for the Respondents.

Judgment.—This appeal arises out of an action on a mortgage. The appellant is defendant No. 4. The principal defendant was the occupancy tenant of a certain holding. The plaintiff is a mortgagee under a mortgage obtained by him from the principal defendant No. 1. It is necessary to state the history of the case in order to appreciate the points which have arisen.

In the first place I should like to say that I am indebted to the lucid arguments of Mr. Gandhari Prasad Singh and Mr. Khurshed Husnain which have been of material assistance to me, and although the matter is of considerable importance I propose to state my conclusions at once and not to reserve my decision for the reason that the points for consideration which have been advanced in the case are now fresh in my mind. The facts are these. In December 1914, defendant No. 4, the appellant, obtained two mortgages from defendant No. 1. To prevent a confusion I propose to call defendant No. 4 the appellant, the principal defendant that is defendant No. 1, I shall describe as the mortgagor and the respondent-plaintiff I shall describe as the plaintiff.

The appellant, as I have stated, obtained two mortgages in 1914. The mortgagor was, as I stated, the occupancy tenant of the holding, and on July 29, 1921, the landlord obtained a decree for rent against the mortgagor. On May 20, 1924, the landlord purchased the holding at the execution sale arising out of the action for rent. On May 31, 1922, the plaintiff having paid off the usufructuary mortgage of the appellant of 1914 obtained a usufructuary mortgage from the mortgagor. I have stated that the landlord had purchased the holding in execution of the rent decree on May 20, 1924. Then the plaintiff in his relation to the mortgage, which is the subject-matter of this suit, comes on to the scene and he advances money to the mortgagor tenant to enable him to pay off the rent decree obtained by the landlord. As security for the money advanced, he obtained the mortgage which was sued upon in this action dated August 31, 1924. I should have stated, if I have not already done so, although I have given some indication of the fact, that of the two mortgages of the appellant of December 1914 one was a usufructuary mortgage which was redeemed in circumstances to which I have already referred, and the other was a simple mortgage which still subsisted. On May 31, 1924, the appellant obtained a decree against the mortgagor on the simple mortgage of December 1914, and on October 20, 1925, the appellant purchased the property, which was the subject-matter of the mortgage, in execution of the decree. In those circumstances the plaintiff brought his action on his mortgage which he had obtained as security for the money which he had advanced to the mortgagor tenant in 1924, the action being commenced in the year 1928. I wish to repeat one fact to which I have already made more than one reference, namely, that the plaintiff obtained his mortgage as security for advancing the money to the mortgagor tenant to enable him to pay off the debt, and in those circumstances and in this action he claimed to be subrogated to the rights of the landlord.

The learned Judge in the Court below has held that he was so entitled and has also held that he, the plaintiff, was entitled to a mortgage decree not only against his mortgagor, defendant No. 1, but also as against the appellant, defendant No. 4. In those circumstances the appellant as defendant No. 4 contends that there was no right to subrogation. It is admitted that had the plaintiff advanced the money to a mortgagor to pay off a mortgage-debt and got a mortgage in security of that advance, then he would be entitled to be subrogated to the rights of the original mortgagee. But it is contended that the charge which was created by the decree for

rent obtained by the landlord was a right to which the landlord alone was entitled and that in those circumstances there was no right of subrogation in the plaintiff. For that there is an alternative argument, that being that under the mortgage-deed of the appellant, the appellant was liable to pay the rent of the holding. As the rent was not paid and as the rent decree resulted from the non-payment of the rent and as in effect the plaintiff has paid of the liability in respect of the rent, he, the plaintiff, is entitled to be indemnified as against the defendant on the general principle of law which is analogous to ss. 69 and 70, Contract Act. In my judgment, in the first place, s. 69 does not apply to this case and the question of indemnity is obviously a new point in the case and does not seem to me to arise in this appeal. But the other matter, the question of whether the plaintiff is entitled to be subrogated to the rights of the landlord is one of some considerable difficulty. The appellant relies first upon s. 65, Bengal Tenancy Act. This section provides

"that the holding of a tenant shall be liable to sale in execution of a decree for the rent thereof and the rent shall be a first charge thereon."

That has to be read with s. 148 (*h*) which provides:

"Notwithstanding anything contained in s. 232, Civil Procedure Code, an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest in the land has become and is vested in him."

Now it is said that those sections together with the decision in *A. H. Forbes* v. *Maharaj Bahadur Singh* (1), clearly show that the rights given under s. 65, Bengal Tenancy Act, are peculiar to the landlord. The argument has taken a further step by a reference to the decision in *Kesho Prasad Singh* v. *Paranjota Koer* (2) which at any rate for the purposes of this Court finally decided, unless the decision is overruled by a Full Bench, that a rent decree is in no sense a mortgage-decree. This decision is important, because from what I have said it can be seen that it is contended that the effect of the advance made by the plaintiff to the tenant in the subsequent mortgage to him places the plaintiff in the position as described in the case of *Ram Narain* v. *Sahadeo Singh* (3) where the principle of subrogation was discussed and held to apply in the circumstances of that case. It will be seen therefore that the real matter which has to be determined in this case is whether the charge which the plaintiff landlord obtained is on the same footing as that of a mortgage. On the authority to which I referred a moment ago it seems to me that that question must be answered in the negative.

There is another important point to be mentioned at this stage. The landlord purchased in execution of his decree, as I have stated on May 20, 1924, but it is clear that that sale was not confirmed. I am inclined, therefore, to the view which is advanced by the learned Advocate on behalf of the appellant that in any event by reason of that fact alone it cannot be said that the plaintiff is placed in the shoes of the landlord decree holder. The argument took another turn in this way. It was contended by Mr. Khurshed Husnain that as a result of the purchase by the appellant in execution of his mortgage-decree on October 20, 1925, the mortgage became merged in the decree, and consequently the appellant was merely in the position of an owner of the property and as such the plaintiff was entitled to a mortgage-decree not only against his mortgagor but against the appellant also and as the mortgage in other words had disappeared. Another branch of the same argument was that by the purchase by the landlord in execution of the rent decree the incumbrance of the appellant had been wiped out Mr. Khurshed Husnain in this connection relies upon the provisions of the Bengal Tenancy Act and contends that the purchase in execution of a rent decree is a purchase free of incumbrances.

For the respondent on this point the case of *Sital Chandra* v. *Parbati Charan* (4) is relied on. The decision in that case was that a sale in execution of a rent decree did not *ipso facto* cancel an incumbrance and that the landlord is bound to annul the incumbrance under s. 167 as in the case of any other third party purchaser. This case, however, was explained in this Court in the decision in *Sourendra Mohan Singh* v. *Kunjbihari Lal* (5). The reasoning in that case was this: that *prima facie* the occu-

(1) 23 Ind. Cas. 632; A I R 1914 P C 111; 41 I A 91; 41 C 926; 18 C W N 747; (1914) M W N 397; 15 M L T 380; 12 A L J 653; 27 M L J 614; 1 L W 1059; 25 C L J 434 (P C).

(2) 62 Ind. Cas. 532; A I R 1921 Pat. 184; 6 P L J 354.

(3) 67 Ind. Cas. 221; A I R 1922 Pat. 181; 1 Pat. 332. 3 P L T 261; (1922) Pat. 174.

(4) 69 Ind. Cas. 841; A I R 1922 Cal. 32; 35 C L J 1.

(5) 116 Ind. Cas. 518; A I R 1929 Pat. 222; 8 Pat; 439; 10 P L T 129.

pancy holding was non-transferable and that therefore so far as the landlord of a non-transferable holding is concerned, any incumbrance without his consent might be said not to exist, and it was suggested by Jwala Prasad, J., who delivered the judgment of the Court, as I understand it, that the case to which I was referring, *Sital Chandra* v. *Parbati Charan* (4), could be explained only on the assumption that the holding was transferable. But so far as the point which Mr. Khurshed Husnain raises, namely, that by reason of the execution of the rent decree the incumbrance of the appellant ceased to exist, his argument, it seems to me, cannot be supported. It is unnecessary in connection with this point, perhaps, to rely upon the decisions to which I have just referred as it is not necessary to decide the point. In my judgment, the most that need be said is that the incumbrance, as between the tenant on the one hand and the landlord on the other, is a matter which the landlord can ignore. That at any rate cannot be doubted and it cannot be said that the transaction creating the incumbrance is void; otherwise the necessity for the provisions contained in the Bengal Tenancy Act allowing third party purchasers to avoid incumbrances would not exist. If that be the true position, we have then to ascertain what is the position as between the plaintiff and the appellant in this case, who admittedly was a prior incumbrancer. It is only by holding that the plaintiff is placed in the position of the landlord who obtained a rent decree that it could be said that the plaintiff was a prior incumbrancer. If that position cannot be maintained it is clear that he must be held to be a puisne mortgagee.

For the reasons which I have advanced, it seems to me to be concluded that the plaintiff is in no better position than a person who has obtained a mortgage at a time when the prior incumbrance was already in existence and, therefore, in the position of a puisne mortgagee. Now I come to the other point which Mr. Khurshed Husnain advances to meet the position which I hold was the position on the facts and law in this case. The point which he advances is, as I have already stated, that by the purchase by the appellant in execution of his mortgage decree the mortgage merged in the decree and no longer stands in the way of the plaintiff.

The first case to which I would refer is the case of *Ram Narain* v. *Sahadeo Singh* (5). It is contended here by the learned Advocate on behalf of the appellant that the mortgage upon which he sued and in execution of which he purchased the mortgaged property being prior in date to that of the plaintiff, he was entitled to use it as a shield against the plaintiff. The case to which I have just made reference held that a person, who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage, is entitled at the suit of a subsequent mortgagee who is not bound by the sale of the decree on which it proceeded, to set up the first mortgage as a shield. I refer to that case, because there was a discussion there of the leading cases on this question and which were decided by the Judicial Committee of the Privy Council, the one being the case of *Het Ram* v. *Shadi Ram* (6), and the other being the case of *Suki* v. *Ghulam Safdar Khan* (7). In the latter case there was some discussion of the opinion expressed by the Judicial Committee in the former case and the question was finally decided in the words to which I have referred and read and which formed part of the judgment in *Ram Narain* v. *Sahadeo Singh* (3).

It seems to me for these reasons that the learned Judge in the Court below was wrong in holding that the plaintiff is subrogated to the rights of the landlord. Reliance was not placed upon s. 92, Transfer of Property Act. To sum up my conclusions in this matter it seems to me that the true position is that the charge which was obtained by the landlord by his rent decree was a charge, to use my former expression, peculiar to himself. That charge could not be passed on in the manner which is suggested in this case and that at any rate, so far as the other parties are concerned, the incumbrances which were created by the tenant in a non-transferable holding—and I assume this to be one—are not incumbrances which are void but which may be treated as void only as between the tenant and the landlord. A sufficient indication that they are not void as between tenants and third parties will be found in the somewhat elaborate provision

(6) 45 Ind. Cas. 798; A I R 1918 P C 34; 45 I A 130; 40 A 407; 5 P L W 88; 16 A L J 607; 35 M L J 1; 24 M L T 92; 28 C L J 188. (1918) M W N 518; 20 Bom L R 798; 22 C W N 1033; 9 L W 570; 12 Bur L T 73 (P C).

(7) 65 Ind. Cas. 151; A I R 1922 P C 11; 48 I A 405; 43 A 469; (1921) M W N 445; 14 L W 162; 26 C W N 279; 42 M L J 15; 30 M L T 175; 24 Bom. L R 590 (P C).

of the Bengal Tenancy Act giving a right to certain persons purchasing in rent sales to annul those incumbrances. Another matter which seems to be equally clear is that by the purchase by the appellant in execution of his mortgage decree the mortgage was not for all purposes merged in the decree, that is to say, he was entitled to use the mortgage as a shield against the plaintiff.

There is one further observation which I wish to make and it is this. The learned Judge in the Court below has relied upon the case of *Muhammad Musa* v. *Edal Singh* (8), but there is a considerable difference in that case. First there is the distinction which I have already drawn from the observations which I have made, namely, first that *Muhammad Musa's* case (8) was a case of a mortgage and not a case of a rent decree, and secondly, the person who in that case, namely, defendant No. 17, who was in a similar position to that of the appellant in this case, had been a party to the mortgage action, and, as held by the learned Judges in that case had had a right of which he had not availed himself. In the circumstances of the case it seems to me that the judgment of the learned District Judge was wrong and must be modified to the extent that the plaintiff is not entitled to a mortgage decree against defendant No. 4. The appeal, therefore, will be allowed with costs. There will be leave to appeal.

N. — *Appeal allowed.*

(8) 65 Ind. Cas 801; A I R 1922 Pat. 91; 3 P.L T 232.

ALLAHABAD HIGH COURT

Second Civil Appeal No. 762 of 1933

March 6, 1935

GANGA NATH, J.

BRAJ KISHORE UPADHIA AND OTHERS—DEFENDANTS—APPELLANTS

versus

PANCHAITI AKHARA MAHA NIRWANI FIRQA GOSHAIYAN NAGA THROUGH *Mahant* GANPAT BHARTHI—PLAINTIFF—RESPONDENT

U. P. Land Revenue Act (III of 1901), s. 118—Heap of manure or cattle trough—Whether "a dwelling house or other building" within meaning of s. 118—Co-sharers—Partition—Absence of building at time of partition—Plot allotted to plaintiff on partition—Other co-sharers, if have right to remain in possession over that plot.

A heap of manure or a cattle trough is not a "dwelling house or other building" within the meaning of s. 118 of the U. P. Land Revenue Act. A co-sharer to whose share a plot of land, over which another co-sharer has made cattle troughs or stores heaps of manure, is allotted in partition, is entitled to actual possession of the plot. *Ram Kishore Misra* v. *Kalka Dichhit* (2), relied on.

Where a partition has been effected under the provisions of the United Provinces Land Revenue Act, 1901 and the site of the house of one co-sharer has been allotted to the share of another co-sharer, the presumption is that the owner of the house was to retain possession of the house. Where no building existed at the time of partition, the defendants have no right to remain in possession over a plot which has been allotted to the plaintiff in partition. *Sarup Lal* v. *Lala* (1), relied on.

S. C. A. from the decision of the Additional Subordinate Judge of Allahabad, dated April 22, 1933.

Messrs. *N. P. Asthana* and *A. P. Pandey*, for the Appellants.

Dr. *K. N. Katju* Messrs. *Ladli Prasad Zutshi* and *Janki Prasad*, for the Respondent.

Judgment.- This is a defendants' appeal and arises out of a suit brought against them by the plaintiff-respondent for possession over plot No. 196 of *Abadi* and *Parti* land described in the plaint by removal of the defendants' cattle troughs and thatch. The parties were co-sharers. A partition took place between the parties and other co-sharers in 1926. The plot in dispute was allotted to the *patti* of the plaintiff at the time of the partition. There was at the time of partition a *Bagar* "of the defendants" on the plot in dispute. The plaintiff brought this suit on the allegation that he was obstructed by the defendants when he wanted to make some constructions on the plot in dispute. The defendants contended that they had their *Bagar* on the plot in suit and therefore they had a right to remain in possession. The trial Court decreed the suit partly for possession over the plot except over that portion on which the defendants' *chhappar* stood. A cross-objection was filed by the plaintiff and an appeal by the defendants. The learned Additional Subordinate Judge allowed the cross-objection and dismissing the defendants' appeal, decreed the suit. Against this decision, this appeal has been filed by the defendants. The chief point for consideration is whether the defendants have any right of possession over the plot in suit. The defendants' case is that they had a building standing on the plot in dispute at the time of the partition and therefore they had a right to remain in possession. Section 118 of the United Provinces Land Revenue Act

provides that

"If, in making a partition, it is necessary to include in the portion allotted to one co-sharer the land occupied by a dwelling house or other building in the possession of another co-sharer, the latter shall be allowed to retain it with the building thereon, on condition of his paying for it a reasonable ground rent to the co-sharer in whose portion it may be included."

In the Full Bench case of *Sarup Lal* v. *Lala* (1). It was held that

"Where a partition has been effected under the provisions of the United Provinces Land Revenue Act, 1901, and the site of the house of one co-sharer has been allotted to the share of another co-sharer, the presumption is, the owner of the house was to retain possession of the house The mere fact that ground rent has not been assessed cannot deprive the owner of the house of his right to it."

The question therefore that arises for consideration is whether the defendants had any house or building on the plot in suit or not at the time of the partition. At present no building exists on the land in dispute. There are some cattle troughs and pegs and a rotten thatch is supported on some wooden poles. This thatch cannot be called a building. The defendants led evidence to show that they had a mud-house which had a tiled roof and, when it fell down, a thatch was put. This evidence is against the defendants' own allegations in their written statement. In para. No. 9 where they describe the buildings which according to them stood at the time of the partition, they have made no mention of any tiled building. On the other hand, they have referred to the thatch which according to them still exists. If there had been any mud-walls on which the present *chhappar* had been resting, there is no reason as to why those mud-walls were not re-built when they fell down, nor it has been explained as to how the *chhappar* was made to rest on the wooden poles if formerly there were any walls. The allegations in para. 9 of the written statement coupled with those in para. 1 in the defendants' cross-objection leave no room for doubt that the defendants had no such thing as a building, on the land in dispute. They had only some cattle troughs and pegs and a thatch for the shelter of the cattle. These things cannot be called a building. The lower Court has also found that the condition of the cattle troughs and the thatch shows that they have not been in the enjoyment of the defendants since partition. The learned Additional Subordinate Judge has observed: "The broken down condition of the troughs and the rotten condition of the *chhappar* would show that defendant abandoned possession and enjoyment after the partition."

A heap of manure or a cattle trough is not a "dwelling house or other building" within the meaning of s. 118 of the U. P. Land Revenue Act. A co-sharer to whose share a plot of land, over which another co-sharer has made cattle troughs or stores heaps of manure, is allotted in partition is entitled to actual possession of the plot: *vide Ram Kishore Misra* v. *Kalka Dichhit*, 39 Ind. Cas. 575 (2). As already stated, as there was no building at the time of partition, the defendants have no right to remain in possession over the plot in dispute, which was admittedly allotted to the plaintiff in partition. There is no force in the appeal. It is, therefore, ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed.

Permission to file a Letters Patent Appeal is rejected.

N. *Appeal dismissed.*

(1) 42 Ind. Cas. 589; 39 A 707; 15 A L J 757.

(2) 39 Ind. Cas. 575.

ALLAHABAD HIGH COURT

Civil Revision No. 613 of 1934

February 27, 1935

BENNET, J.

CHANDRA SHEKHAR—PLAINTIFF—APPELLANT

versus

Sri Thakurji MAHARAJ AND OTHERS—DEFENDANTS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review—Suit for possession of revenue-free land—Profits—Court taking Fasli year for calculating profits and not applying General Clauses Act (X of 1897)—Whether error on the face of the record—Deductions—Arguments about deductions not made at time of original order—Whether can be made on an application for review—Court Fees Act (VII of 1870), s 7 (v) (a) (b).

Where in a suit for possession of a part of a village which was revenue-free, the Court in calculating the profits under s. 7 (*v*) (c) of the Court Fees Act, took the *Fasli* year and it was urged in an application for review that according to the General Clauses Act, the year to be taken was the calendar year;

Held, that inasmuch as s. 3 of the General Clauses Act states that the definitions would apply unless there was anything repugnant to the context, and in view of sub-s. (*a*) and (*b*) of sub-s. (*v*) of s. 7, Court Fees Act, the Court was right in taking the *Fasli* year for sub-s. (*c*) where the land was revenue-free and that it could not be said that, in not applying the General Clauses Act there was any error apparent on the face of the record.

Held, also that whatever argument about deductions was to be made should have been made at the

time of the original order and not later on an application for review. *Murari Rao* v. *Balvanth Dikshit* (1), distinguished.

C. R. against an order of the Subordinate Judge of Farrukhabad, dated October 2, 1934.

Mr. *M. L. Chaturvedi*, for the Applicant.

Mr. *P. M. L. Verma*, for the Opposite Party.

Judgment.—This is an application in revision by a plaintiff against an order refusing review. The plaintiff brought a suit for possession of a part of a village which was revenue-free and the defendant filed an objection that the court-fee was insufficient. The Court passed an order in regard to the amount of court-fee, and calculated the profits under the Court Fees Act, s. 7 (*v*) (*c*) after hearing the parties. The review asks that the Court should re-consider that order on the ground that there was an error apparent on the face of the record. In the grounds of revision it is set out that there was an error as profits had not been calculted for the next previous yaer but for a period much prior. Learned Counsel explains that the suit was brought on January 26, 1933, and that in his opinion the year to be taken was the year 1932. He bases this on the General Clauses Act, definition of "year" as calendar year. But it is stated in s. 3 that these definitions will apply "unless there is anything repugnant in the subject or context." In the context of this sub-s. (*v*) there are sub-ss. (*a*) and (*b*) relating to land paying revenue to Government. For Government-revenue the period taken is the *Fasli* year. The Court, therefore, naturally took the *Fasli* year 1339 for sub-s. (*c*) where the land was revenue free. I consider that from the context the Court was correct and it cannot be said that in not applying the General Clauses Act there was any error on the face of the record. Moreover from the subject also the Court was correct because the profits in the *patwari's* registers are made up for the *Fasli* year and not for the calendar year. Learned Counsel further argued that the matters in ground No. 4 had not been considered. That was some question of deductions. Whatever argument about deductions was to be made should have been made at the time of the original order and not later on an application for review. Reference was made to *Murari Rao* v. *Balvanth Dikshit* (1). That was a case where there was an error of law apparent on perusal of the record. It cannot be said that the present order was one where there was any such error apparent. For these reasons I dismiss this application in revision with costs.

N. *Application dismissed.*

(1) 76 Ind. Cas. 342; 46 M 955; 45 M L J 309; 18 L W 363; (1923) M W N 761; A I R 1924 Mad. 98.

BOMBAY HIGH COURT

Civil Appeal No. 31 of 1931

August 16, 1934

MURPHY AND MACKLIN, JJ.

MUNICIPALITY OF AHMEDABAD—APPELLANT

versus

RAVJIBHAI BHAILAL CONTRACTOR—RESPONDENT

Civil Procedure Code (Act V of 1908), Sch. II, para. 15—Arbitrator—Procedure opposed to natural Justice—If a misconduct—Plaintiffs asked to re-arrange record and sort out exhibits—Award, if edvitiat

Irregular procedure opposed to the principles of natural justice, amounts to legal misconduct on the part of an arbitrator. *Ganga Sahai* v. *Lekhraj Singh* (1), referred to

Where there has been an opportunity afforded to one side to get an advantage with the arbitrator over the other, either by lack of notice, or by the absence of the other side, and there is even a remote possibility that the advantage so obtained may have unconsciously influenced the mind of the arbitrator, the proceedings are vitiated by a breach of the principles of natural justice, and whether this is so or not must depend on questions of fact [p. 672, col. 2.]

The arbitrator sent for one of the parties (plaintiff) and asked him to re-arrange the record of the case in proper order and to sort out certain exhibits:

Held, that the plaintiff was used to perform only a ministerial act and an award by him was not vitiated on that account.

Case-law referred to.]

C. A. from an order of the First Class Sub-Judge, Ahmedabad, in C. S. No. 581 of 1927.

Messrs. *M. C. Setalvad* and *R. W. Desai*, for the Appellant.

Messrs. *G. N. Thakor* and *N. P. Desai*, for the Respondent.

Murphy, J.—This is an appeal against an order of the learned First Class Subordinate Judge of Ahmedabad directing that an award, Ex. 16, made by Mr. Shivdasani on a reference to him from two arbitrators as final umpire, be filed, and that a decree should be drawn up in its terms and in accordance with certain directions made in the body of the judgment. The defendant Municipality was ordered to pay its own costs and those of the plaintiff. The dispute was between the respondent, Ravjibhai Bhailal, and the

Municipality of Ahmedabad, and the only question we have to decide is whether Mr. Shivdasani, the umpire in question, was guilty of legal misconduct in the proceedings which culminated in his award. The history of these differences is as follows: It appears that in 1921 the Municipal Committee had decided to introduce a new system of scavenging into Ahmedabad City. They entered into a contract with the respondent, and what was contemplated was that there should be a system of what were called 'trailers' drawn by tractors, and that the refuse from the houses collected at certain fixed points should be carried in these trailers to the dumps, where it was to be disposed of. The system was, in the first place, tentative and applied to half the city only, but it was ultimately extended to the other half. Differences however arose apparently after the municipal elections about 1923, and these culminated in a reference to arbitration which was provided for in the agreements between the parties. Each side appointed an arbitrator, and the arbitrators chosen were *Rao Saheb* Dadubhai Purshottamdas Desai and Mr. Himatlal Dalsukhram Saheba. These gentlemen heard the evidence, and in the end differed from each other. *Rao Saheb* Desai was for awarding the contractor something over a lakh in damages, and Mr. Saheba thought that he should get nothing at all. One of the terms of the appointment was that before the arbitrators came to any decision, they should appoint an umpire, who was to decide any differences between them, and Mr. H. B. Shivdasani had been agreed on before the original proceedings began. The matter was accordingly referred to Mr. Shivdasani, and he seems to have received the papers somewhere about the middle of November 1926. He examined the papers, and hearings before him began on December 4, and the award was finally made on December 20, 1926, as the arbitrator having been unable to make his award within time had asked for an extension. Mr. Shivdasani's finding was that a sum of Rs. 54,000 was due to the contractor.

The point taken in this appeal is, as I have already mentioned, that Mr. Shivdasani was guilty of legal misconduct in the course of the arbitration proceedings. Legal misconduct has been defined in *Ganga Sahai* v. *Lekhraj Singh* (1) by Mahmood, J. who quotes with approval a long passage from Russell on Arbitration, on the power and duty of an arbitrator. The passage may be summed up, I think, to this: that legal misconduct ensues where the arbitrator's procedure is so irregular as to be opposed to the principles of natural justice. In the course of the trial in the lower Court seventeen different points were urged before the learned Subordinate Judge, but in the appeal before us these have been reduced to one, or at most two. It appears that when the papers were first sent to Mr. Shivdasani in November, he found that they were in great disorder, and he could not find several of the Exhibits, which had been mentioned in the awards made by *Rao Saheb* Desai and Mr. Saheba. He sent for the plaintiff-contractor and, he says, asked him to sort the papers and find the exhibits which he was in need of and could not lay his hands on. The contractor accordingly came to his office, Mr. Shivdasani being at that time an Official Liquidator, and helped him in arranging the papers which had been sent by the Municipality. This is said to have occurred two or three times and the interview to have lasted about an hour and a half on each occasion. The second point taken is that Mr. Shivdasani must have made some notes as to the plaintiff's case before the trial began on December 4, and this is based on the fact that in Mr. Shivdasani's notes of the proceedings the first paragraph begins:

"Ravjibhai (which is the plaintiff), would have made practically no profit if the contract had gone on owing to the present feelings shown by the Municipality,"

The question as to what happened at the interviews between the contractor and Mr. Shivdasani on the occasion when Mr. Shivdasani says the contractor was only employed in sorting the papers of the reference, is the second item relied on by Mr. Bhagwat, who appeared as an agent for the Municipality in the proceedings, as showing that Mr. Shivdasani must have made notes of the plaintiff's case, and consequently must be held to have heard him in some way or other, and not merely to have employed him for the ministerial purpose of helping him with the exhibits. The fact that the plaintiff had been asked to help with the papers is mentioned by Mr. Shivdasani in the award which he made on December 20. What he there says is:

"I have also to put it on record that the papers when sent to me were very badly arranged and it would have been difficult for me to find my way about had not the contractor kindly volunteered

(1) 9 A 253.

to assist me to find out the various papers and exhibits."

It appears that on December 18, Mr. Bhagwat, who appears to have got on very ill with Mr. Shivdasani in the course of these proceedings, made a report to the Municipality in connection with the arbitrator's request for more time. His argument was that the arbitrator was biassed against the Municipality, and was likely to make an award adverse to them, and he therefore advised his masters that they should not agree to an extension of time, and to put an end to the proceedings by refusing the concession. This report was put before the general body, but it decided to grant the request made by the arbitrator and so impliedly refused to accept the allegation made by Mr. Bhagwat. The cause of the quarrel was that when one Mr. Gore, who was then Municipal Engineer, was being examined before Mr. Shivdasani, Mr. Bhagwat rebuked him for making what Mr. Bhagwat thought were admissions against the Municipal interests. Mr. Shivdasani mentioned this incident in his award and commented very severely on Mr. Bhagwat's conduct in trying to suppress Mr. Gore's truthful evidence. These are the main facts as to the case between Mr. Shivdasani and Mr. Bhagwat. Mr. Shivdasani was examined in the course of these proceedings, and what he said was as follows:

"Then I called Ravjibhai, plaintiff. I do not remember whether I wrote to the plaintiff or sent my clerk to fetch him. I have mentioned this in my award. I have kept no *rojnama* or proceedings about my work in connection with the award. I called Ravjibhai between November 20 and 25, 1926. Plaintiff came to me at my liquidation office. I asked him whether he could find out the exhibits referred to in the award and his statement. He said, yes. I called him again subsequently twice or thrice and he did so come. He came like that for about an hour and a half on every occasion. I had no other talk with plaintiff on other occasions. I was receiving the papers and plaintiff was finding the same out for me. I have kept no notes of this. This went on till the end of November. The papers were not arranged. I did not call plaintiff for that. I called him to find out the papers I wanted as I went on reading I had no talk or discussion with plaintiff about the contents of any papers."

As to the other point Mr. Shivdasani's evidence was:

"I cannot remember whether I had any points jotted down for inquiry after reading the papers. My impression is I had not. The first point noted on December 4, 1926, in Ex. 69 was the statement of plaintiff The words are in inverted commas as the words used by plaintiff himself. They are not my words dictated from any jotting of mine. Mr. Bhagwat did not say then as to from what notes or jottings I dictated the point to the shorthand writer. In fact there was no such note or jotting of mine and there was no occasion to say any such things. I was sent all the papers which were filed before the arbitrators along with their award and I had read them all."

As between Mr. Shivdasani and Mr. Bhagwat, the learned Subordinate Judge has believed Mr. Shivdasani. It is obvious from the facts I have narrated that Mr. Bhagwat was a very zealous municipal partisan, and Mr. Shivdasani seems to us to have given a simple and straight forward account of what happened in his evidence before the learned Judge. On this evidence the facts we accept are that Mr. Shivdasani had no notes of the contractor's case at the opening of the proceedings, and also that Mr. Shivdasani only employed the contractor to sort out the disorderly record, and to find the exhibits which he wanted to consult before the proceedings began.

The next point we must consider is whether this incident amounts to legal misconduct on his behalf. Mr. Setalvad, for the appellant Municiplity, has relied on a series of English cases on arbitration, and the first of these is that of *Harvey* v. *Shelton* (2). What happened in that case was the arbitrator heard one of the parties alone, and becoming satisfied with an explanation which that party gave as to an item in some accounts, accepted it as his own conclusion. The learned Judges in that case held that there had been legal misconduct on the ground that one party alone should not be permitted to satisfy the Court and enable it to come to a conclusion and must not be allowed such means of influencing the Judge. The next case relied on is that of *Walker* v. *Frobisher* (3). In this case the legal misconduct found was that the arbitrator received some evidence from one party after notice to both that he would receive no more, and it was held that he should not have done so, even though he deposed that he had not been influenced by this additional evidence. The third case is that of *Dobson* v *Groves* (4). The *ratio decidendi* of this case is that once the case is within the general probability that the arbitrator's mind may be biassed by something which happened at the proceedings it is within the principle, and an objection subsequently made to the award is sufficient. Counsel next referred to

(2) (1844) 7 Beav 455; 13 L J Ch. 466; 64 R R 116

(3) (1801) 6 Ves. Jur. 70; 5 R R 223.

(4) (1844) 6 Q B 637; 14 L J Q B 17; 9 Jur. 86; 66 R R 509.

W. Ramsden & Co. v. *Jacobs* (5). Here the evidence for each side was heard separately, apparently by agreement between the parties, but the Courts held that such a procedure was wrong and contrary to natural justice it being a procedure unknown to Courts of law. The fifth case relied on was *Toolsimony Dassee* v. *Sudevi Dassee* (6). What happened there was that the defendant had not been given fair notice of the proceedings had *ex parte* against him, and the Court thought that the arbitrator's conduct had been hasty and improper, Finally, there is the case of *Anderson* v *Wallace* (7). Here one of the parties was asked whether he admitted or disputed certain items, and a valuer was consulted. These are the cases relied on by Mr. Setalvad for the appellant.

Mr. Thakor, who appeared for the respondent, has made out a case of what may be called ministerial acts. His contention was that the incident of calling in the plaintiff and employing him to sort the papers and to find exhibits amounted to no more than using him for the purpose of what may be called ministerial as distinguished from judicial acts, and that this principle covers the case.

The first authority relied on by Mr. Thakor was *Bignall* v. *Gale* (8). The irregularity in that case was lack of notice to one of the parties but it was held that since that person had had repeated notice, there was a fair inference that he had given up the whole business and it was held that the continuation of the proceedings in his absencewas not an irregularity. In *Rolland* v. *Cassidy* (9), a point of law which arose out of the proceedings was decided in the absence of the parties. In *Buta* v. *Municipal Committee of Lahore* (10), the arbitrator obtained the opinion of the lawyer who had drafted the agreement as to the meaning of certain clauses, and this action was held not to be legal misconduct. The next case relied on which is not in the official reports is *Manindra* v. *Mahananda* 13 Ind. Cas. 161 (11). It was held that the reception of the written statement put in by one party in the absence of the other is not a judicial act.

(5) (1922) 1 K B 640; 91 L J K B 432; 26 Com. Cas. 287; 126 L T 409.
(6) 3 C W N 361.
(7) (1835) 3 Cl. & F 26.
(8) (1841) 9 Dow 631; 2 Man. & G 830; 5 Jur. 701; 10 L J C P 169.
(9) (1888) 13 A C 770; 57 L J P C 97; 59 L T 873.
(10) 29 C 854; 7 C W N 82; 29 I A 168; 87 P R 1902; 4 Bom. L R 673; 8 Sar 327 (P C).
(11) 13 Ind. Cas. 161; 15 C L J 360.

These are the cases we have been referred to in the course of the arguments as to the limits of the doctrine of legal misconduct. The principle underlying them seems to be that where there has been an opportunity afforded to one side to get an advantage with the arbitrator over the other, either by lack of notice, or by the absence of the other side and there is even a remote possibility that the advantage so obtained may have unconsciously influenced the mind of the arbitrator the proceedings are vitiated by a breach of the principles of natural justice, and whether this is so or not must depend on questions of fact.

In the present case, we have accepted completely Mr. Shivdasani's explanation that when he sent for the plaintiff, it was only for the purpose of getting the disordered records sorted out, and certain exhibits traced and that throughout the three interviews there was no question of the plaintiff stating his case or pressing his contentions before Mr. Shivdasani. We think on the merits that all that the plaintiff did was what Mr. Shivdasani says he did and that so much is covered by the cases relied on by Mr. Thakor for the respondent for in all the cases cited by the other side it seems to us that there was an element of misconduct beyond the mere ministerial acts which are spoken of as having happened in the present case.

The next point raised by Mr. Thakor was that even if there was a technical irregularity, it would not be a ground good enough to set aside the award, since in fact it has been waived by the appellant. The waiver is worked out from the report made by Mr. Bhagwat, which I have already referred to, to the Municipality urging them not to grant a further extension of time. Mr. Thakor also stated that Mr. Bhagwat himself had waived the irregularity, for it seems he was aware of the sorting of the papers from the first day of the proceedings, and continued to attend without protest until December 18. We are not sure that Mr. Bhagwat's waiver of the irregularity would really have the effect of binding the Municipality, but there is no doubt that the fact of this irregularity, if it was one, was brought forcibly to the notice of the Municipality by Mr. Bhagwat on the 18th, that they considered it at a meeting held on the same day, and that they chose to disregard what he said and to grant further time to the arbitrator.

On this point Mr. Thakor has relied on

Cursetji Jehangir v. *W. Crowder*, (12), where a party aggrieved by an irregularity knew of it, but did nothing by way of protest; and on *Ardesar Hormasji Wadia* v. *Secretary of State* (13), where one arbitrator was absent throughout the proceedings before the *Mamlatdar* acting as Land Acquisition Officer, and his absence was never objected to, it was held that the Government could not have the award set aside on this ground as their representative the *Mamlatdar* had acquiesced in the absence of the third arbitrator; also on *Murtaza Hussain* v. *Bibi Bechunnissa*, (14) where the principle enunciated is that a party having taken his choice cannot afterwards be allowed to have the award set aside when he should have objected at the time. The point is put clearly in Russell on Arbitration and Award, Edn. 12, at p. 436, where the learned author observes:

"The obvious course therefore is for a party complaining of irregularity to protest against the irregularity and to continue to conduct his case in the proceedings before the arbitrator under such protest. The other alternative is to submit to the irregularity, and forgo any rights he may have to object to the award on hat ground when it is made, for he cannot lie by and then object to the award if it is against him."

Mr. Setalvad has argued that this doctrine is modified by another passage at. p. 443, where it is stated:

"There is a marked distinction between an irregularity passed over when all parties are present and an irregularity committed when the parties are not present. The latter may be incapable of being set right except by agreement of the party injured."

We think, on considering these cases, that in fact the Municipality did waive this right to protest and to have the award set aside on this ground. But as our finding is that what happened does not amount to legal misconduct, a decision on this point is not necessary to the present appeal. We think that the learned Subordinate Judge was correct in ordering the award to be filed and a decree to be drawn up in its terms, and we confirm his decree and dismiss this appeal with costs.

Macklin, J.—I agree and have nothing to add.

D. *Appeal dismissed.*

(12) 18 B 293.
(13) 9 B H C R 177.
(14) 26 W R 10.

ALLAHABAD HIGH COURT

Letters Patent Appeal No. 73 of 1934.
February 28, 1935.
SULAIMAN, C. J., AND BENNET, J.
THE OFFICIAL RECEIVER, ALIGARH AND OTHERS—DECREE-HOLDERS—APPELLANTS
versus
HIRA LAL—JUDGMENT-DEBTOR AND ANOTHER—RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 182—Application for substitution and for execution—Vakalatnama accompanying it not bearing name and signature of pleader—Application, if one in accordance with law—Court not noticing defect and ordering notice—Judgment-debtor not appearing or objecting—Subsequent proceedings—Judgment-debtor, if can object that the defective application did not save limitation—Execution—Notice—Non-appearance of judgment-debtor—Order to execute—Whether operates as res judicata *by implication*—Res judicata.

Where an application for substitution of the names of the decree-holder's sons for execution is signed by a pleader and accompanied by a *vakalatnama* in which the place meant for the name of the pleader was left blank and the *vakalatnama* did not bear any signature of the pleader showing that he had accepted it, the application as filed is not one filed by a duly authorised person and is not in accordance with law. *Muhammad Ali Khan* v. *Saktu* (1) and *Chitta* v. *Jafo* (2), relied on.

When without noticing the defects in the *vakalatnama*, the Court ordered notice to issue to the judgment-debtors who did not appear to show cause or raise objections to the application for substitution of the sons of the decree-holder and the Court ordered their names to be brought on record and the execution to proceed, but the proceeding did not fructify and the execution case was struck off:

Held, that in subsequent proceedings it was open to the judgment-debtor to object that the defective application could not serve as a fresh starting point for purposes of limitation as not being in accordance with law. *Mungal Pershad Dichit* v. *Girja Kant Lahiri* (3), *Dwarka Das* v. *Muhammad Ashfaqullah* (4), *Dip Prakash* v. *Dwarka Prasad* (5) and *Raja of Ramnad* v. *Velusami Tevar* (6), distinguished.

When after notice has been issued the judgment-debtor does not appear and does not file objections, the Court is not called upon to make any further investigation into the matter, but it is its duty to order the decree to be executed. The order has to be passed automatically and there is no occasion for the Court to exercise its judgment as to the merits of any possible objection that might have been raised if the judgment-debtor had appeared. In such circumstances it is difficult to say that when the Court has no discretion in the matter, its order directing the decree to be executed is an adjudication of the dispute between the parties which operates as *res judicata* by implication.

L. P. A. against the judgment of Mr. Justice Bajpai, dated February 26, 1934.

Mr. *Kamta Prasad*, for the Appellant.

Mr. *L. W. Clarke*, for the Respondent.

Judgment.—This is an appeal by the decree-holder arising out of an execution

proceeding. A simple money decree was passed on August 1, 1924, and an application, which was in accordance with law, was made on July 23, 1927, for execution, but had become infructuous because the decree-holder was unfortunately murdered. On June 18, 1930, an application was made on behalf of his three sons for substitution of their names and for execution of the decree. The application was signed by a pleader and was accompanied by a *vakalatnama* in which, however, the place meant for the name of the pleader was left blank, and the *vakalatnama* did not bear any signature of the pleader showing that he had accepted it. The facts were overlooked by the office, and the Court ordered notices to issue to the judgment-debtors. They did not appear to show cause or raise objections. The Court accordingly ordered that the names of the sons of the deceased decree-holder should be brought on the record in his place and that execution should proceed. The proceeding, however, did not fructify and the execution case was ultimately struck off.

On November 14, 1930, a fresh application for execution of the same decree was made and notice ordered to issue. The judgment-debtor on this occasion appeared and objected that the present application was barred by time inasmuch as the previous application of June 18, 1930, was not an application in accordance with law. The Courts below disallowed the objection on the ground that it was no longer open to the judgment-debtor to raise any such plea. In second appeal a learned Judge of this Court has come to the conclusion that the judgment-debtor is not prevented from raising this matter.

So far as the defect in the *vakalatnama* is concerned, the point is covered by the authorities of this Court, namely, *Muhammad Ali Khan* v. *Saktu* (1) and *Chitta* v *Jafo* (2). The application as filed had not been filed by a duly authorised person and was not in accordance with law.

The only question that remains for consideration is whether it is open to the judgment-debtor to raise this objection now when he failed to appear on the previous occasion.

Four cases have been referred to in this connection. The case of *Mungal Pershad Dichit* v *Girja Kant Lahiri* (3) was a case under the corresponding section of Act IX of 1871, but in that case as pointed out by their Lordships of the Privy Council at p. 60, the attachment of the property in pursuance of the order in execution was continuing and the judgment-debtor had consented to such continuance. The second application was to give effect to that continuing attachment. Accordingly it was laid down that the judgment-debtor was estopped from contesting that the attachment itself was invalid because the order for attachment had been made on an application which itself had been barred by time. The case is accordingly clearly distinguishable. Similarly the case of *Dwarka Das* v. *Mohamed Ashfaqullah* (4) was a case where the Court had actually ordered the substitution of the name of the transferee of the decree-holder, and it was held that at a subsequent stage the judgment-debtor could not be allowed to say that the order directing substitution of names was invalid because no valid transfer had in fact taken place. There the judgment-debtor was impugning the validity of the order directing substitution of names itself. Again in the case of *Dip Prakash* v. *Dwarka Prasad* (5), the order passed for execution was fully carried out and the platforms which the decree-holder wanted to have demolished was actually demolished by the Amin of the Court in pursuance of the order. The judgment-debtor was therefore not allowed to come up at a later stage and claim compensation on the ground that the previous application on which the order had been made was defective.

In the case of *Raja of Ramnad* v. *Velusami Tevar* (6), when notice was issued to show cause why the applicant should not be brought on the record as an assignee of a partially executed decree, the judgment-debtors appeared, denied the assignment and objected that the right to execute the decree was barred by limitation and also questioned the liability of certain properties to attachment. These

(1) 19 Ind. Cas. 674; 11 A L J 458.

(2) 132 Ind. Cas. 566; A I R 1931 All. 767; Ind Rul. (1931) All. 534; (1931) A L J 983.

(3) 8 C 51; 8 I A 123; 11 C L R 113; 4 Sar. 248 (P C).

(4) 60 Ind. Cas. 722; A I R 1925 All. 117; 22 A L J 928; L R 5 A 744 Civ. 47 A 86.

(5) 90 Ind Cas. 83: 48 A 201; L R 6 A 603 Civ.; 24 A L J 91; A I R 1926 All. 71.

(6) 59 Ind. Cas. 880; 48 I A 45; A I R 1921 P C 23; 19 A L J 168; 40 M L J 197; 13 L W 290; (1921) M W N 51; 33 C L J 218; 25 C W N 581; 23 Bom. L R 701; 29 M L T 345 (P C).

objections were overruled, the assignment was recognised and the decree-holder was allowed to execute the decree and was given permission to file a fresh application for attachment, After the order had become final and attachment of some properties was made, the judgment-debtor objected that the execution was barred by time. Their Lordships of the Privy Council overruling the Indian Court held that it was no longer open to the Court subsequently to hold that execution was barred.

It is noteworthy that in the last-mentioned case the judgment-debtor had appeared and filed objections. The Court therefore had to proceed under O. XXI, r. 23 (2) and had to consider the objection and make such order as it thought fit. Its order was therefore binding on the judgment-debtor and appeared as an estoppel by judgment.

None of these cases was a case where the judgment-debtor had not appeared and the order was passed *ex parte*. The scheme of the provisions of O. XXI, seems to be that when an application for execution or for taking a step-in-aid of execution is made, the Court has to see *prima facie*, principally on the office report, whether the application is in accordance with law and not barred by time, and is not otherwise improper. In the absence of the judgment-debtor, the Court not finding any apparent defect in the application or such defect not being brought to its notice, orders notice to issue to the judgment-debtor, under r. 22 where the application is made more than three years after the date of the decree or when it is made against the legal representative of a party. In other cases notice is not even issued. Order XXI, r. 23, provides that where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed. It is, therefore, apparent that when after notice has been issued, the judgment-debtor does not appear and does not file objections, the Court is not called upon to make any further investigation into the matter, but it is its duty to order the decree to be executed. The order has to be passed automatically and there is no occasion for the Court to exercise its judgment as to the merits of any possible objection that might have been raised if the judgment-debtor had appeared. In such circumstances it is difficult to say that when the Court has no discretion in the matter, its order directing the decree to be executed is an adjudication of the dispute between the parties which operates as *res judicata* by implication.

If the order directing the decree to be executed were continuing and were operative and proceedings were being taken in pursuance of it, the judgment-debtor would not be allowed to go behind that order and challenge its propriety when he had not appeared. But if the proceedings some how or other terminated, it would be difficult to say that the *ex parte* order made by the Court at the time when the notice was issued or the necessary order which had to be made by the Court when he did not appear, operates as *res judicata* and must be deemed to have finally decided that the application filed before the Court had been in every way proper and valid.

In the present proceeding the judgment-debtor is not saying that the order for substitution of names made by the Court was invalid, As a matter of fact under O. XXII, r. 12, no application for substitution of names in an execution proceeding is at all necessary. There being no bar of limitation, it would have been open to the Execution Court to have the defect in the *vakalatnama* rectified and order substitution forthwith. But what the judgment-debtor now objects is that the defective application which had been made on June 18, 1930, cannot serve as a fresh staring point for purposes of limitation. He does not challenge the order directing substitution of names, but urges that the application on which the order was made not being in accordance with law does not save limitation. We find it difficult to hold that the judgment-debtor in this fresh proceeding is barred from raising this objection. The view taken by the learned Judge is correct.

We accordingly dismiss this appea with costs.

N. *Appeal dismissed*

ALLAHABAD HIGH COURT

First Civil Appeal No. 238 of 1933
February 22, 1935
NIAMAT-ULLAH, J.

Musammat AMNA—PLAINTIFF—APPELLANT
versus
RATAN LAL—DEFENDANT—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XLI, r. 21, O. V, r. 15 (as amended by Allahabad High Court)—Due service—Pardahnashin *lady—Personal service, how to be effected—Lady present in house—Summons handed over to relation—Whether due service*—Ex parte *decree against lady, if should be set aside.*

Summons can be delivered or tendered to a *pardahnashin* lady even though it may not be possible for the process-server to have access to her: nor can a *pardahnashin* lady be considered to be a person who cannot be personally served. It is the duty of the process-server to make an attempt to find ways and means of delivering or tendering the summons to the *pardahnashin* lady for whom it is intended.

Where, although the lady on whom summons had to be served was not absent from the house, the process-server, without trying for means whereby personal service could be effected, handed over the summons to her husband's brother who did not inform her of it and the appeal against her was consequently dismissed *ex parte*;

Held, that as the process-server did not comply with the requirements of law provided in O. V, r. 15, Civil Procedure Code, as amended by the Allahabad High Court, she could not be considered to have been duly served and consequently under O. XLI, r. 21, the Court was bound to set aside the *ex parte* decree passed against her.

F. C. A. from an order of the First Subordinate Judge, Saharanpur, dated September 23, 1933.

Mr. *M. H. Faruqi*, for the Appellant.

Mr. *S. K. Mukerji*, for the Respondent.

Judgment.—This is an appeal from an order of the learned Subordinate Judge, Saharanpur, refusing to set aside an *ex parte* decree passed in an appeal in which the present appellant was the respondent. That appeal arose out of a suit brought by her for a declaration that a certain property which she claimed to be hers was not liable to be sold at the instance of the opposite party in execution of a decree obtained by him against her husband. She established her claim in the trial Court which declared that the property in dispute belonged to her and not to her husband. The opposite party preferred an appeal to the lower Court (Subordinate Judge, Saharanpur) A summons was issued to the appellant, who is a *pardahnashin* lady. The process-server's report was to the effect that the appellant, who is a *pardahnashin* lady, was in the house, that she was called out but did not answer and that accordingly the summons was handed over to her husband's elder brother Mohammad Bakhsh, who affixed his thumb mark on the back of the summons. On the date fixed for the hearing of the appeal no one appeared on behalf of the respondent (the appellant in this appeal), and an *ex parte* decree was passed against her allowing the appeal and dismissing her suit. The appellant made an application under O. XLI, r. 21, Civil Procedure Code, for an order to set aside the *ex parte* decree. She filed her own affidavit swearing that Mohammad Bakhsh never informed her of the process-server having delivered a summons; nor did she otherwise come to know of the date fixed for the hearing of the appeal in which she was respondent. Mohammad Bakhsh was not examined on behalf of any party. The opposite party filed a counter-affidavit in which the appellant's allegations were traversed. It is, however, clear that a denial of the truth of her allegations by one who had no personal knowledge of the matter is not of any value. The lower Court dismissed her application on the solitary ground that:

"No reason has been shown on behalf of the appellant why her husband's own brother did not inform the appellant of the date of hearing."

That Court did not apply its mind to the question whether in the circumstances of the case service on Mohammed Bakhsh was due service. Order XLI, r. 21, provides like O. IX, r. 13, Civil Procedure Code, that where an appeal is heard *ex parte* and the judgment is pronounced against the respondent, the latter may apply for the appeal being reheard and if the Court is satisfied:

"That the notice was not duly served or that the respondent was prevented by sufficient cause from appearing when the appeal was called on for hearing the Court shall re-hear the appeal."

The appellant's contention is that she was not duly served. In my opinion this contention has force. Order V, r. 15, Civil Procedure Code, as amended by this Court, permits service being effected on a male member of a family only:

"When the defendant is absent or cannot be personally served and has no agent empowered to accept the service of the summons on his behalf."

The process-server's report in this Court makes it abundantly clear that the appellant was not absent; she was inside the house. The learned Advocate for the opposite party has strenuously contended that it was a case in which the party could not be personally served. He argues that every *pardahnashin* lady should be considered to be a person who cannot be personally served. It is said that from her position a

pardahnashin woman cannot appear before the process-server and, therefore, personal service is impossible.

The manner in which personal service is to be effected is mentioned in O. V, r. 10, which provides that:

"Service of the summons shall be made by delivering or tendering a copy thereof."

It is argued that unless a process-server can directly approach the lady to be served or rather unless the lady can appear before the process-server, it is impossible for the latter to deliver or tender the summons to her. I am unable to accept these contentions. Summons can be delivered or tendered to a *pardahnashin* lady even though it may not be possible for the process-server to have access to her; nor can a *pardahnashin* lady be considered to be a person who cannot be personally served. It is the duty of the process-server to make an attempt to find ways and means of delivering or tendering the summons to the *pardahnashin* lady for whom it is intended. He can very often find some one living with her or in the neighbourhood, male or female, who can take the summons to her. If the *pardahnashin* lady accepts service, it is personal service as contemplated by rr. 10 and 15, Civil Procedure Code. He should in ordinary cases obtain the attestation of the witness taking the summons to the *pardahnashin* woman concerned which should also be done in case of refusal by her to accept the summons. If the process-server cannot find any one, male or female, who can take the summons to her, it may be a case referred to in r. 15, namely, that the defendant cannot be personally served. To accept the contention of the learned Advocate for the appellant will be to deprive a *pardahnashin* lady of the privilege of personal service of the summons in cases to which she is a party.

Coming to the facts of the present case it is not suggested that Mohammad Bakhsh would have declined to take the summons to the appellant. Apparently he was quite willing to do what the process-server would ask him to do. He accepted service and signed it in token thereof. It is perfectly clear that if everything was fair and square in this case, the process-server, who could not be expected to know all the niceties of law regarding personal service, considered it sufficient to serve it on the male member of the appellant's family. He did not, however, comply with the requirements of law and the appellant cannot be considered to have been "duly served".

The learned Subordinate Judge was not justified in presuming that Mohammad Bakhsh informed the appellant of the visit of the process-server and of the date fixed for hearing of her case. It is not permissible to have recourse to speculation in a matter of this kind. It might well be that the opposite party, who had lost his case in the First Court, desired to have the appeal heard *ex parte* and arranged for a service in a manner which may not be calculated to convey information of the pendency of the appeal to her. This is, however, a pure conjecture, no better or worse than that made by the lower Court. The question whether the appellant was aware of the date fixed in her appeal and was prevented by sufficient cause from appearing in the case does not arise in view of my finding that the appellant was not duly served. Under O. XLI, r. 21, the Court is bound to set aside an *ex parte* decree if the respondent satisfies it that the summons was not duly served.

The result is that this appeal succeeds. It is accordingly allowed with costs. The order of the lower Appellate Court and the *ex parte* decree are both set aside. The appeal of the opposite party shall be reheard according to law.

N. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT

First Civil Appeal No. 76 of 1931
September 25, 1933

FERRERS, J. C. AND RUPCHAND, A. J. C.

DEV SAMAJ COUNCIL, LAHORE—APPELLANT

versus

AMRITLAL MOTILAL AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 21, 16—General Clauses Act (X of 1897), s. 3 (vii)—Question of jurisdiction depending upon public documents, if one of law—Quetta, if a part of British India—Suit relating immovable property in foreign country—Jurisdiction—Question of jurisdiction not raised in trial Court—Held, it cannot be raised in appeal.

Where a preliminary point, that Quetta not being in British India, the lower Court had no jurisdiction to try the suit, was raised for the first time at the final hearing of the appeal;

Held, (*i*) that the question of jurisdiction at issue was one of law depending upon public documents which required no proof and were presumed under s. 81, Evidence Act, to be genuine and this question could, therefore, be raised at a late stage. [p. 679, col. 2.]

(*ii*) Quetta did not form part of British India as defined in s. 3, General Clauses Act. [p. 680, col. 1.]

(*iii*) the point of jurisdiction involving the question whether a matter in dispute is within the jurisdiction of British Indian Court at all, could be raised, notwithstanding s. 21, Civil Procedure Code. *Ramabhadra Raju Bahadur* v. *Maharaja of Jeypore* (1), relied on. [*ibid.*]

Like Courts in England, the Courts in India have a limited jurisdiction to entertain suits relating to foreign immovable property. These Courts have power to exercise a jurisdiction *in personam*, in respect of foreign immovables against persons locally within their jurisdiction, in cases where there is an equity between the parties arising from contract, fraud, or trust, provided that the decision of title be not directly involved. But such an equity must be of a personal nature, *i. e.*, there must be either a fiduciary relationship or privity of some other kind between the parties. [p. 682, col. 1.]

[Case-law discussed.]

The plaintiffs filed a suit at Shikarpur against their father and brothers who were residing at Shikarpur and the founder and trustees of Dev Samaj, who resided at Lahore. Some of the immovable property in dispute was situated in Quetta. The plaintiffs sought the following reliefs, among others, for declaration: (1) that the release-deed executed by their father and their uncle in favour of their grand-father who was dead was of no effect against the sons or grandsons, or at any rate, against the grand sons; (2) that the partition effected by the grand-father and his sons be set aside as being unfair, or, in the alternative the same be re-opened; (3) that they had subsisting share in the foreign property and (4) that the trust created by their grandfather did not affect their interest and (5) that they be awarded mesne profits of their share in such foreign property:

Held, that (1) so far as that relief went, a British Indian Court would have had jurisdiction to entertain it *in personam* and although a part of the property which was the subject-matter of partition was situate outside, the title to such foreign property was only incidentally and not directly in issue. [p. 683, col. 1.]

(2) The declaratory decree, if any, passed against the Dev Samaj would operate as *res judicata* against them in any suit filed on the strength thereof in the Quetta Court as they were not only British Indian subjects but they had voluntarily submitted to the jurisdiction of the trial Court. [p. 683, col. 2.]

(3) Since a British Indian Court had jurisdiction to entertain the suit as regards some reliefs, the Dev Samaj were barred by the provisions of s. 21, Civil Procedure Code, from raising an objection in appeal as to the place in British India where this suit should have been instituted. They could not say that the suit should have been filed at Lahore and not at Shikarpur, and as some of the defendants resided Shikarpur the Shikarpur Court was competent to grant leave to the plaintiffs to continue the suit in that Court against defendants who were not residing within its jurisdiction if the plea had been raised at proper time. [p. 683, col. 2; p. 684, col. 1.]

F. C. A. from the decree of the First Class Sub-Judge, Shikarpur.

Mr. *Dipchand Chandumal*, for the Appellant.

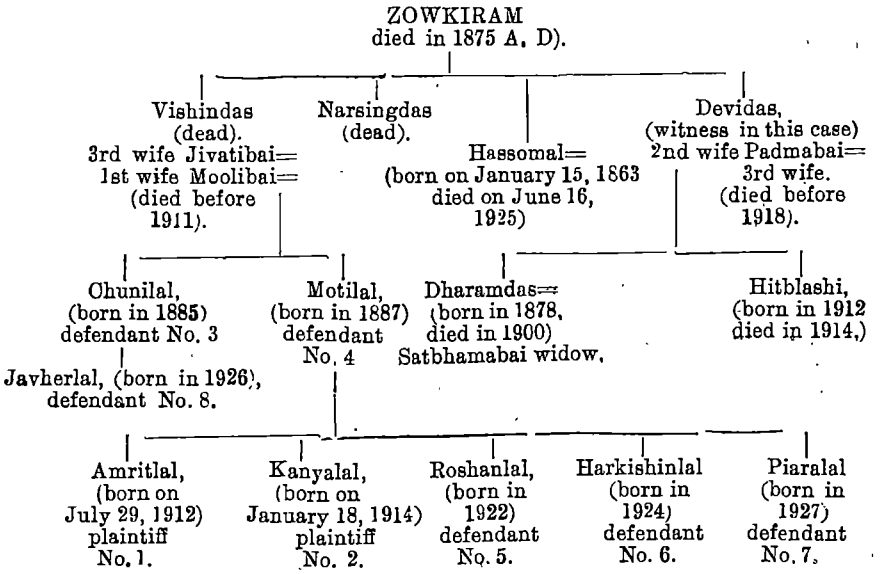
Messrs. *Tolasing K. Advani*, *Kimatrai Bhojraj*, *Fatehchand Assudomal*, *Dingomal Narainsing* and *Mulchand Gurnomal*, for the Respondents.

Rupchand, A. J. C.—This appeal arises out of a suit filed by two out of five sons of one Motilal, a Bhatia, residing at Shikarpur praying for the following reliefs:

"(1) That the release-deed executed by their father and their uncle Chunilal in favour of their own father Hassomal who is now dead, and the trust-deeds executed by the said Hassomal appointing the representatives of an institution called the Dev Samaj as trustees of his property are null and void, or, in the alternative, that the said documents do not affect the rights of the plaintiffs in the joint family property of the said Hassomal and his sons and grand-sons: (2) that the partition effected by Hassomal and his sons be set aside as being unfair, or, in the alternative the same be re-opened, and the proper share of the plaintiffs in the joint family estate be partitioned and awarded to them, and (3) that the mesne profits of the shares of the plaintiffs in the property up to possession be determined and decreed in their favour."

Pending disposal of the suit, the plaintiffs prayed for *interim* relief and asked that the trustees be restrained from alienating the property in their possession and that a Receiver be appointed to take charge of the same. Defendant No. 1 is said to be the founder of the Dev Samaj. Defendants 2 are members of the Dev Samaj Council. All of them reside at Lahore. They were jointly sued as trustees appointed under the two trust-deeds dated July 5, 1911, and February 14, 1918, which were sought to be set aside. Defendant No. 1 denied that he was a trustee. Defendants 2 were the chief contesting defendants. They denied that the documents referred to in the plaint were void, and contended that the property dealt with by these documents was the private property of Hassomal and that the plaintiffs were entitled to no relief. The other parties to the suit were the descendants of Hassomal. In effect they supported the claim of the plaintiffs and claimed relief for themselves on the footing that the deeds referred to in to plaint were void and of no effect. Hassomal was the son of Zowkiram. The following is the tabular statement of the male descendants of Zowkiram showing when some of them were born, when some of them died and how some of them who are

interested in the subject-matter of the suit are ranged as parties in the suit:



The trial Court has found as a fact that the property dealt with under these deeds was joint family property and that although Chunilal and Motilal were bound by the release-deed executed by them in favour of their father, the other co-parceners were not affected by it, and that although the trust deeds executed by Hassomal were valid so far as his interest in the property dealt with by him was concerned, the deeds did not affect the rights of the co-parceners other than Chunilal and Motilal to re-open the partition and get their share of the whole estate. The Court, accordingly, passed a preliminary decree for partition, and appointed a Commissioner and Receiver to ascertain the mesne profits due to the plaintiffs and to partition the property. It is against that decree that the representatives of the Dev Samaj Council, defendants 2 in the suit, have come to us in appeal.

Mr. Dipchand who appears for them has put in an application dated September 14, 1933, for permission to raise at this stage an additional defence on the point of jurisdiction of the lower Court to try the suit. The application is not supported by any affidavit and does not disclose the reason why no such defence was raised in the trial Court or even in the memorandum of appeal. But the learned Advocate has in the course of his arguments made no secret of the reason why this defence was not raised earlier. It appears that defendants 2 were under the impression that Quetta where a part of the property which is in trust with defendants 2 is situate, was a place within the dominions of His Majesty the King-Emperor and as it was being governed through the Governor-General of India or through an officer subordinate to the Governor-General of India, it formed part of British India as defined in s. 3, cl. *(vii)*, General Clauses Act. They were, according to the learned Advocate, disabused of their erroneous impression in consequence of a point of jurisdiction having recently been raised in another case between different parties altogether in the Court of Small Causes of Karachi, which led to the discovery of this important defence.

This application has been objected to on several grounds. It is said: (1) that the question whether Quetta is within British India or not, is a mixed question of fact and law, and that this question cannot therefore be raised at this stage; (2) Quetta is within British India, that defendants 2 are estopped by the provisions of s. 21 of the Code from raising it; (3) that there is no law which prevents a British Indian Court from entertaining a suit which embraces property outside British India, and (4) that, in any case, the trial Court was competent to grant some of the reliefs claimed.

We are of opinion that the question of jurisdiction at issue is one of law depending upon public documents which require no proof and are presumed under s. 81, Evidence Act, to be genuine. This

question can therefore be raised at the present stage. We are also of the opinion that Quetta does not form part of British India as defined in s. 3, General Clauses Act. This part of the territory has been permanently leased to the British Crown: see Imperial Gazetteer, Vol. 6, p. 227, and Aitchison's Treaties, Vol. 9, p. 399. That being so, this part of the territory is not within the dominions of His Majesty the King-Emperor, and although every function of administration is exercised by the Viceroy in virtue of the authority transferred to the British Crown under the lease, it does not comply with one of the two essentials of the definition and does not therefore form part of British India. It is what is known as an "administered area": see Halsbury's Laws of England, Vol. 10, para. 1021.

The third point stated above involves two different and distinct questions: (1) whether a matter in dispute is within the jurisdiction of a British Indian Court at all, and (2) whether a matter undoubtedly within the jurisdiction of a British Indian Court shall be assigned for trial to particular Courts in British India. So far as the first of these two questions is concerned, there can be no doubt that s. 21, Civil Procedure Code, does not refer to it and is no bar to such a question being raised at any stage of the proceedings. But where British Indian Courts have power to deal with the lis, s. 21, Civil Procedure Code, comes into play and operates as an estoppel. If any authority was needed in support of the first question, it will be found in *Ramabhadra Raju Bahadur* v. *Maharaja of Jeypore* (1), at p. 820* where Lord Dunedin has said:

"Some of the lands of which sale had been decreed are situate in what are known as the Agency Tracts. Now, the suit is raised in terms of the Code of Civil Procedure, 1908. By s. 1, sub-s. 3, the Code is, with the exception of certain sections not here in point, excluded from the scheduled districts, and by Act XXIV of 1839 the district in which the lands above referred to are situate was scheduled. The learned Judges of the Court of Appeal thought that the matter was met by s. 21 of the Code, which provides that no objection as to the place of suing shall be allowed by any Appellate Court unless the objection was taken in the Court of first instance, which in this case had admittedly not been done. Their Lordships cannot agree with this view. This is not an objection as to the place of suing; it is an objection going to the nullity of the order on the ground of want of jurisdiction, the order for sale is made under sections of the Code of Civil Procedure which the Code itself says are not to apply to the scheduled districts."

With regard to the question whether a British Indian Court has jurisdiction to entertain a suit of this nature, the learned Advocate has argued that, according to the well recognised principles of international law, partition of property situate in foreign territory cannot be decreed, and as defendants 2 are in no way concerned with property other than that situate at Quetta, the trial Court had no jurisdiction either to order partition of such property or to appoint a Commissioner and Receiver to ascertain the mesne profits and effect partition of the Quetta property by metes and bounds or to grant any other relief claimed in the suit. Now, whatever might be said with regard to the first part of the contention of the learned Advocate, he has been unable to satisfy us that under no circumstances may a decree be passed by a British Indian Court affecting foreign property or a Commissioner or Receiver be appointed in respect of such property. The authorities cited by him are clearly distinguishable. In *Doongersi Haribhoy* v. *Togiji* (2), I declined jurisdiction to partition immovable property situate in a Native State. But in that case, the defendant who claimed the property as his own was a foreigner residing in that State and in no way amenable to the jurisdiction of any British Indian Court. The ground on which I proceeded in that case is stated at p. 48*:

"It is a fundamental principle of international jurisprudence that a sovereign of a country acting through the Courts thereof has no jurisdiction over any matters with regard to which he cannot give effective judgment or which he can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign Court; and an 'effective judgment' has been defined to mean a decree which the sovereign under whose authority it is delivered, has in fact the power to enforce against the person bound by it, and which, therefore, his Courts can, if he chooses to give them the necessary means, enforce against such person."

In *Narsomal Jiwandas* v. *Pessumal* (3), the judgment of this Court in the exercise of its High Court jurisdiction was

(1) 51 Ind Cas. 185; A I R 1919 P C 150; 46 I A 151; 42 M 813; 17 A L J 694; 37 M L J 11; (1919) M W N 502; 26 M L T 127; 21 Bom. L R 914; 30 C L J 209; 23 C W N 1033; 10 L W 362 (P C).

(2) 101 Ind. Cas. 438; A I R 1927 Sind 160; 23 S L R 46.

(3) 114 Ind. Cas. 98; A I R 1929 Sind 45; 23 S L R 205.

*Page of 42 M.—[*Ed.*]

*Page of 23 S L R.—[*Ed.*]

delivered by me setting aside an order of *interim* attachment issued by the trial Court on property situate in foreign territory on somewhat similar grounds referred to in the above case. In *Hashim Osman* v. *Phapubai* (4) I refused to grant an injunction against a foreigner who lived outside British India and possessed no property in British India on the ground that if I issued an injunction, it would be a *brutum fulmen*, and no Court would issue an order which will be idle and inoperative. No such difficulties arise in the present case, as the two defendants are British Indian subjects residing at Lahore and are amenable to the jurisdiction of a British Indian Court. None of these cases turned on the provisions of ss. 16 to 21, Civil Procedure Code. Our attention has been drawn to the observations of Ranade, J., in *Keshav* v. *Vinayak* (5), at p. 31* where his Lordship has said :

"The evident object of the detailed provisions of s. 16 is to limit jurisdiction in respect of claims to immovable property to the Court within whose local jurisdiction such property may be situated, and as a rule, Indian Courts have no power to decide on rights and interests in immovable property lying outside their local jurisdiction : *Prem Chand Dey* v. *Mohanda Debi* (6), *Sreenath* v. *Cally Dass* (7) and *Srimati Kamini Soondari* v. *Kali Prosunna* (8). This same view was approved in *Crisp* v. *Watson* (9) and in *Land Mortgage Bank* v. *Sudurudeen* (10).....There is no allegation of any trust in this case such as distinguished the claim in *Juggadamba* v. *Puddomoney* (11), and in respect of which relief could be claimed in equity by constraining the conscience".

This was a case filed in the Court at Nasik to establish a right in a certain share in two "*varshasans*" (annual allowance) charged on the revenues of two villages in the Nizam's territory, and the High Court rightly held that as the nature of this allowance treating it as immovable property, was itself in dispute, the claim to it should be decided according to the law in force in the Nizam's Dominions. This decision was considered by a Bench consisting of Sir Lawrence Jenkins, C. J., and Candy, J., in the case of *Kashinath* v. *Anant* (12). As pointed out in the later ruling, so far as the finding that the Nasik Court had no jurisdiction in that particular case is concerned, there is nothing to quarrel about. The rule which applies to a case of this kind has, as said by Sir Lawrence Jenkins, been clearly stated by Lord Cottenham in *Ex parte Pollard* (13) at pp. 250 and 251*, thus :

"If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment, the Courts of this country, in the exercise of their jurisdiction over contracts made here or in administering equities between parties residing here act upon their own rules; and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities"

If the observations of Ranade, J., are intended to lay down a rule that a British Indian Court should in no case entertain a suit in respect of foreign property, it is, with all respect, not a correct view of the law, and the case of *Kashinath* v. *Anant* (12), is an authority in support of the contrary view. In this case it was common ground that the property in dispute, *viz.* the income from grants of land situate in a Native State but received by the defendant within the jurisdiction of the Court in which the suit was filed, admittedly belonged to a common ancestor of the parties, and it was held that the title to the property not being in dispute the Court was competent to grant a declaration that the plaintiff was entitled to a share therein. His Lordship, the Chief Justice, has very rightly observed that the jurisdiction of the Courts in this country is governed by and must be ascertained by the same principles as are applied by Courts of Equity in England except so far as they may be at variance with legislative enactment. These observations have been referred to with approval by Sir Norman Macleod, C. J., in *Mahadeo Govind* v. *Ramchandra Govind* (14), and he further held that there is no reason for thinking that s. 16, Civil Procedure Code, lays down any different rule of law than that prevailing in England. The equity relied upon in this last mentioned case was that, under a private award made in favour of the plaintiff in 1915, he had been awarded certain lands in a Native State and that as he had

(4) 134 Ind. Cas. 400; A I R 1931 Sind 136; 25 S L R 269; Ind. Rul. (1931) Sind 144.
(5) 23 B 22.
(6) 17 C 699.
(7) 5 C 82.
(8) 12 C 225; 12 I A 215; 4 Sar. 652 (P C).
(9) 20 C 689.
(10) 19 C 358.
(11) 15 B L R 318.
(12) 24 B 407; 2 Bom. L R 47.

*Page of 23 B.—[*Ed.*]

(13) (1840) Mont. & Chit 239; 4 Deac 27.
(14) 68 Ind. Cas. 510; A I R 1922 Bom. 188; 46 B 108; 23 Bom. L R 903.

*Page of (1840) Mont. & Chit.—[*Ed.*]

not been given possession of those lands by the defendant during the preceding two years, he was entitled to mesne profits for that period, and in holding that the Court would give effect to the equity relied upon, Sir Norman Macleod has said:

"It is not suggested that the law prevailing in Kurandwad State would not permit of the defendant being directed to pay the mesne profits of the lands to the plaintiff to whom the land belongs There appears to be an equity in favour of the plaintiff that the profits of those lands which were awarded to him in 1915 should not remain in the pockets of the defendant, and therefore there is no reason why the Belgaum Court should not have jurisdiction to administer that equity in favour of the plaintiff."

The principles on which the English Courts exercise jurisdiction *in personam* in respect of foreign immovables is stated in Halsbury's Laws of England, Vol. 6, para. 270, thus:

"The English Courts have power to exercise a jurisdiction *in personam*, in respect of foreign immovables against persons locally within their jurisdiction, in cases where there is an equity between the parties arising from contract, fraud, or trust provided that the decision of title be not directly involved. But such an equity must be of a personal nature, *i. e.*, there must be either a fiduciary relationship or privity of some other kind between the parties."

English Courts have always exercised jurisdiction *in per sonam* for the purpose of deciding whether there is or is not in existence a valid trust in respect of foreign immovables: see *Re. Clinton* v. *Clinton* (15), and for the purpose of giving relief against fraudulent and inequitable dealings with regard to foreign immovables: see *Arglasse (Lord)* v. *Muschamp* (16), *Angus* v. *Angus* (17), and Halsbury's Laws of England Vol. 6, para, 276; and have ordered accounts of rents and profits of foreign property, see *Cartwright* v. *Pettus Clinton* (18), and in suitable cases have even appointed a Receiver of foreign property. Although the Courts have not and cannot put the Receiver in possession of foreign property, they have given effect to such orders by dealing for contempt the party who prevents possession being taken: see Halsbury's Laws of England, Vol. 6, para. 277.

The cases of the *British South Africa Co.* v. *The Companhia De Macambique* (19), and *Deschamps* v. *Miller* (20), to which our attention has been invited do not help defendants 2. The first case is of trespass to foreign territory. In the second case, the plaintiff, who was the only son of *D* and *T* both domiciled French subjects and married in France in 1831, claimed a a certain interest in property left by *D*. In 1836 *D* had gone to India, and in 1839 he had gone through a form of marriage with *X* on whom and others by a settlement made in 1865 of which the defendants were trustees, conferred interest in immovable properties in Madras. The plaintiff sought to impeach the settlement of 1865 as being contrary to the law of France, and in contravention of his rights thereunder. Parker, J. non-suited the plaintiff observing:

"The question is whether under these circumstances the Court ought to entertain jurisdiction. In my opinion the general rule is that the Court will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of personal obligation arising out of contract or implied contract, fiduciary relationship or fraud or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property. Thus, in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct as I have referred to, the Court may well assume jurisdiction. But where there is no contract, no fiduciary relationship and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not accordings to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party, I do not think the Court ought to entertain jurisdiction to decide the matter."

No question arises here of the release-deed or the trust deeds being invalid according to any foreign law governing the parties. Now, had Hassomal been alive, and had he not executed deeds of trust in favour of the second defendants, there can be no doubt that a suit filed against him and his sons in a British Indian Court for a declaration that the release-deed executed by his sons in his favour was not binding upon his grandsons would be competent, notwithstanding the fact that the whole or part of the property referred to in the deed was situate outside British India. The title of Hassomal to the foreign property is not in dispute. The main question which the Court in such a case would be called upon to decide concerning the property is whether Hassomal held the property

(15) (1903) 88 L T 17; 51 W R 316.
(16) (1682) 23 E R 322.
(17) (1682) 25 E R 800.
(18) (1675) 22 E R 916.
(19) (1893) A C 602; 63 L J Q B 70; 69 L T 60.
(20) (1908) 1 Ch. D 856; 77 L J Ch. 416; 98 L T 564.

as trustee and manager for the joint family consisting of himself and his issue, and as such whether he is accountable to his coparceners for the same, or whether the release-deed is binding upon all the coparceners. As a matter of fact a suit filed by the sons themselves for having the release-deed executed by them set aside on any equitable ground such as fraud or undue influence would equally be entertainable in a British Indian Court, and the sons have made a prayer in their defence to that effect. Paragraph 5 of the written statement filed by them is as follows:

"5. As regards paras. 9 to 11 it is submitted that the said release was the result of fraud, coercion and undue influence and was executed by these defendants under very great pressure which they were not able to bear, &c. . . . and which this Honourable Court will be pleased to set aside and ignore."

The release-deed referred to is a counterpart of the release-deed executed by Hassomal in favour of his sons in respect of the property which is in British India. Both deeds read together effect a partition. For the purpose of saving stamp, Hassomal and his sons executed separate release-deeds in favour of one another, but this device did not succeed and the parties were made to pay stamp duty in respect of one of them as a partition deed. The suit is therefore in effect a suit for setting aside a partition effected by the father by exercise of undue influence over his sons, or, in the alternative, as being unfair and as such, not binding on his grandsons who were not parties to it. That is one of the main reliefs asked for in the suit. So far as that relief goes, there can be no doubt that a British Indian Court would have had jurisdiction to entertain it as against Hassomal, although a part of the property which was the subject-matter of partition is situate outside, the title to such foreign property being only incidentally and not directly in issue: Halsbury's Laws of England, Vol. 6, para. 269.

Hassomal is dead. He had executed two trust-deeds in favour of defendants 2. They stand in the shoes of Hassomal and represent his estate. Both these deeds conferred and could confer upon them only such rights in the property which Hassomal had and which Hassomal could, under the Indian Law of Transfer of Property transfer. If Hassomal could be made accountable in a British Indian Court in respect of any claim over the property, which is the subject-matter of the trust, there is no reason why the trustees from him who reside in British India should not likewise be amenable to the jurisdiction of a British Indian Court, more so when the trust enjoins them to spend the rents and profits of foreign property in British India. The defendants 2 do not claim the foreign property as transferees for value and without notice so as to prevent the equities to which Hassomal was liable attaching to them. Whether a British Indian Court can decree partition by metes and bounds and separate possession of the property which is outside British India is quite a different matter; and what consequential relief in this behalf the plaintiffs, if successful, should get is a question which may well be discussed after we have heard the appeal on the merits.

For the present it is sufficient to observe that so far as the reliefs for declarations (*a*) that the release-deed is of no effect against the sons or grandsons or at any rate against the grandsons, (*b*) that they are entitled to re-open the partition, (*c*) that they have a subsisting share in the foreign property and (*d*) that the trusts created by Hassomal do not affect their interest and (2) that they be awarded mesne profits in their share in such foreign property, there can be no doubt that these reliefs may be granted by a British Indian Court and enforced *in personam* against the defendants. It may also be observed that the declaratory decree if any passed against the defendants No. 2 would operate as *res judicata* against them as they are not only British Indian subjects but they have voluntarily submitted to the jurisdiction of the trial Court: see *Molony* v. *Gibbons* (21), and *Assets Co. Ltd.* v. *Mere Roihi* (22). Such a decree would be of great use to the plaintiffs in any suit they may file on the strength of this decree in the Quetta Court. So far as these reliefs go, the prosent case falls within the decision of *Kashinath* v. *Anant* (12).

If a British Indian Court has jurisdiction to entertain this suit it goes without saying that defendants 2 are barred by the provisions of s. 21, Civil Procedure Code from raising an objection at this stage as to the place in British India where this suit should have been instituted. They cannot now say that the suit should have been filed at Lahore and not at Shikarpur. It would also appear that as a part of

(21) (1810) 11 E R 778.
(22) (1905) A C 176; 74 L J P C 49; 21 T L R 311; 92 L T 397.

the cause of action in respect of the execution of the release-deed sought to be set aside and re-opening partition of property, a part of which is in Shikarpur, has arisen within the jurisdiction of the Shikarpur Court and as some of the defendants reside there, the Shikarpur Court was competent to grant leave to the plaintiffs to continue the suit in that Court against defendants who were not residing within its jurisdiction; and as defendants 2 raised no objection as to the place of suing, they are now estopped from pleading that the suit is incompetent for want of such leave. We hold, therefore, (1) that defendants 2 are not barred from raising the plea that a British Indian Court has no jurisdiction to entertain this suit or any part of it but not the plea that the suit if within the jurisdiction of a British Indian Court, should have been instituted in another part of British India and not at Shikarpur; (2) that Quetta is not within British India, and (3) that defendants 2 being British Indian subjects, the trial Court could exercise jurisdiction *in personam* against them and could grant the reliefs asked for except decreeing that the immovable property at Quetta be partitioned and separate possession of the plaintiffs' share therein be awarded to them. Whether the plaintiffs are entitled to any of the reliefs claimed by them and in what manner, if any, their share in the Quetta property should be secured to them, are matters which can only be decided after hearing on the merits. We order that appeal be now set down for hearing on October 6, 1933.

D. *Order accordingly.*

ALLAHABAD HIGH COURT

Second Civil Appeal No. 924 of 1931
February 6, 1935

SULAIMAN, C. J. AND BENNET, J.

AMIR AHMAD—PLAINTIFF—APPELLANT
versus
SYED HASAN—DEFENDANT—RESPONDENT

Provincial Insolvency Act (V of 1920), ss. 4, 53—Transfer by insolvent—Transferee transferring property to third party—Receiver's application for annulment of insolvent's transfer—Third party not impleaded—Order of annulment, if binding on third party—Right to show that original transfer was made in good faith.

Where the transferee of an insolvent transfers the property to a third party and the Receiver has knowledge of it, but in a subsequent petition by the Receiver for annulment of the transfer made by the insolvent, the third party is not impleaded, he is not bound by an order of annulment made against the transferee from the insolvent. It will, therefore, be open to him to show that the original transfer by the insolvent was made in good faith and for valuable consideration and also to show that he himself acted in good faith and paid full consideration being unaware of the insolvency proceedings. [p. 686, col. 2.]

S. C. A. from a decision of the First Subordinate Judge of Saharanpur, dated April 14, 1931.

Mr. *A. M. Khwaja*, for the Appellant.

Mr. *M. A. Aziz*, for the Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit for partition in which a question arose as to the title of the rival claimants. On February 2, 1925, one Abdul Ghani, who was heavily in debt sold his share in the house in question to one Abdul Qaiyum. On October 19, 1926, Abdul Ghani himself applied for being adjudicated an insolvent and he was declared an insolvent on December 21, 1926. On the following day, namely, the December 22, 1926, Abdul Qaiyum sold the property to the present defendant, Saiyid Hasan. On June 25, 1927, on an application made by the Official Receiver the sale-deed of February 2, 1925, which had been executed by the insolvent in favour of Abdul Qaiyum was annulled by the Court. In that proceeding Abdul Qaiyum alone had been impleaded and did not appear; the subsequent transferee, Saiyid Hasan, was not impleaded by the Official Receiver at all. After having obtained the order of annulment the Official Receiver on August 4, 1927, transferred the property to the present plaintiff Amir Ahmad. As Amir Ahmad did not obtain possession of the house, the present suit was instituted by him on August 21, 1930, for partition and separation of his share.

The plaint was very vague and did not clearly state how Saiyid Hasan came on the scene. The written statement was in the same way vague and did not contain an express plea that Abdul Qaiyum was a *bona fide* transferee for value nor did it contain any express plea that the application did not lie under the Insolvency Act at all. Both the Courts below have dismissed the claim holding that inasmuch as Saiyid Hasan, the defendant, in the absence of any evidence to the contrary must be taken to have been a *bona fide* purchaser for good consideration his title cannot be impeached.

This view is challenged in appeal. Our attention has been drawn to a large number of cases which have a close bearing on the

point arising in this case, but there is no case which can be said to be directly in point.

It seems quite clear that if a transfer made by a debtor is wholly fictitious and bogus and no interest in the property passes to the transferee, then the transfer is void *ab initio* and subsequent transferees can never be protected because the foundation of their title does not exist. There would be no necessity for the Official Receiver to have such a wholly ineffective, void and fictitious transfer annulled under s. 53, or s. 54 of the Provincial Insolvency Act. In case of dispute he can always ignore it and treat it as a nullity either in a separate suit or in a proceeding under s. 4 of the Insolvency Act.

On the other hand, if the transfer made by the debtor was not wholly fictitious and bogus but the intention of the parties was that property should in fact pass to the transferee, then the result would depend on whether the transferee was a purchaser in good faith and for valuable consideration or not. The transfer for the time being is valid, though it is voidable at the option of the Receiver, and it is discretionary with the Court to annul it under s. 53, of the Provincial Insolvency Act. But so long as the transfer has not been avoided by the Receiver and not annulled by the Court, the title vests in the transferee even though he may not have acted in good faith and might not have paid full consideration. Such a transfer can, however, be annulled, that is to say, declared to have seized to be binding on the Receiver. The annulment, however, cannot be equivalent to a declaration that it was void from the very beginning.

Reliance has been placed on some English cases, but all of them are not of much help because the language of the relevant sections in the various Bankruptcy Acts under which they arose was substantially different. But there are a large number of cases in India in which the view appears to have been expressed that s. 53 of the Insolvency Act has no application when once the transferee from the insolvent has transferred the property to a third party. See:

Jagannath Ayyangar v. *Narayana Ayyangar*, 52 Ind. Cas. 761 (1), *Sudha* v. *Firm Nanakchand-Daulatram*, 88 Ind. Cas. 89 (2), *Ponnammai Ammal* v. *The District Official Receiver, Tinnevelly*, 97 Ind. Cas. 918 (3), *Maung Myint* v. *Official Assignee*, 90 Ind. Cas. 969 (4) and *Gobind* v. *Sonba* (5).

This view is based on the sole circumstance that s. 53 in terms does not apply to a transferee from a transferee. No doubt the transfer that is annulled by the Court is the transfer made by such transferee as is adjudged insolvent, but it does not follow that a subsequent transferee who is a legal representative is not equally bound by the annulment.

There is one significant circumstance which does not appear to have been brought to the notice of the learned Judges who decided the above mentioned cases, and it is that if s. 54 (1) had stood by itself there would have been an equal reason for holding that it would not be applicable to a transferee from a creditor because the language of both the sections is almost similar. But there can be no doubt that the Legislature has thought otherwise and has provided in sub-s. 2 of s. 54, that the rights of any person who has acquired title through or under a creditor will not be affected if he has acted in good faith or for valuable consideration. It follows that out for this sub-section such a second transferee would not have been protected. Reading ss. 53 and 54 together, it would then seem to follow that the sections are general in their scope and if the transfer made by the insolvent has been annulled the annulment is binding on the initial transferee as well as his subsequent representative. It is noteworthy that the language of the first paragraph of s. 53 of the Transfer of Property Act is similar and there too there is a provision in the last paragraph that the rights of a transferee in good faith and for consideration would not be impaired.

This view finds some support from the remarks made by Vaughan Williams, J., *In re Vausittart; Ex parte Brown* (6). In that case the learned Judge was dealing with the plea of pawnee from the wife of the insolvent to whom he had gifted certain jewellery. The learned Judge observed:

"Of course, no question could arise at all unless it is that the respondents were persons claiming in good faith and for valuable consideration."

In that case the pawnee had taken the jewellery from the wife previous to the

(1) 52 Ind. Cas. 761.

(2) 88 Ind. Cas. 89; A I R 1925 Lah. 235, 2 Lah. Cas. 162; 7 Lah. L J 160.

(3) 97 Ind. Cas. 918; A I R 1927 Mad. 58.

(4) 90 Ind. Cas. 969; 3 R 313; A I R 1925 Rang. 351.

(5) 121 Ind. Cas. 663; A I R 1930 Nag. 34; Ind. Rul. (1930) Nag. 119.

(6) (1893) 2 Q B 377 at p. 379; 62 L J Q B 279; 5 R 260; 68 L T 233; 41 W R 286; 10 Morrel 44.

application for insolvency. Nevertheless the learned Judge considered that if he had not been a transferee in good faith and for valuable consideration, no question would have at all arisen.

On general principles also there seems to be no reason why, if the original transfer made by the insolvent is found to be voidable and has been annulled by the Court, the annulment should not be binding on subsequent transferees and affect their title. There is, however, one distinction. Section 54 (1) declares that the transfer made by a person unable to pay his debts to a creditor with a view of giving that creditor a preference shall be deemed fraudulent and void and shall be annulled by the Court. The provision is imperative and the Court has no option but to declare it fraudulent and void and to annul it. It was, therefore, necessary to provide in sub-s. 2 that the rights of any person who in good faith and for valuable consideration has acquired title through or under a creditor would not be affected. On the other hand, the provisions of s. 53, are not so mandatory. A transfer other than one for consideration and made in favour of a purchaser acting in good faith, is only voidable as against the Receiver and it is a matter of discretion for the Court to annul it or not. Obviously the Court would decline to exercise its discretion if the transferee were to satisfy the Court that he acted in good faith, paid full consideration and was entitled to protection on equitable grounds. It was, therefore, not necessary to add any sub-section to s. 53, corresponding to sub-s. 2 to s. 54. The question of good faith and payment of good consideration as well as that of care and precaution can all be considered by the Court itself. But as the annulment made by the Court does not date back to the original transfer and can at the very most, date back to the date of the application for insolvency, it would follow that the avoidance of a second transfer against a second transferee, who took the second transfer before the application for insolvency was made, cannot be annulled under s. 53 of the Act, but if it is either absolutely void from the very beginning or is voidable under s. 53 of the Transfer of Property Act, it can be declared to be void or avoided either in a separate suit or in a proceeding under s. 4 of the Provincial Insolvency Act.

Sections 53 and 54 as laid down by the majority of the Full Bench in the case of *Anwar Khan* v. *Muhammad Khan* (7), do not deal with the jurisdiction of the Insolvency Court but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that Court and in no way control the provisions of s. 4. It, therefore, follows that in order to apply s. 53, the condition precedent is a finding that the transfer was otherwise than one made in good faith and for valuable consideration. That finding of fact can be arrived at only when a dispute as to title arises between two rival claimants. When property has been transferred by the transferee of an insolvent to a third party and the Receiver is aware of the transfer the dispute is really between the Receiver on the one hand and the subsequent transferee on the other and not between the Receiver and the first transferee who has no longer got any interest in the property left. In order to start a proceeding under s. 4, the application should, therefore, be by the Receiver against the person who is now claiming title to the property and an adjudication by the Court on such dispute would be final and would bar a second suit and would be binding on the parties to the proceeding. But if the Receiver chooses to proceed under s. 4, against the first transferee who has no interest left in the property and obtains an order against him either *ex parte* or after contest, he cannot use that order as a final adjudication of the matter in dispute as against the real claimant of the title.

Some difficulty is certainly caused by the phraseology used in s. 4 (2) under which all claimants against the debtor and all persons claiming under claimants are bound. But if the first transferee has ceased to have any interest in the property at all it is difficult to regard him as a claimant against the debtor so as to bind the second transferee. The real situation then is that the claimant is the subsequent transferee in whom the property vests for the time being and it is he and his legal representatives or persons who will claim through him afterwards who would be bound by the order. If a transfer were older than 2 years prior to the application for insolvency, the only remedy open to the Official Receiver would be to avoid the transfer if he can, in accordance with the provisions of s. 53 of the Transfer of Property Act, and he has to establish an intent to defraud or delay creditors. The learned Counsel for

(7) 113 Ind. Cas. 819; 51 A 550; A I R 1929 All 105; (1929) A L J 358 (F B).

the appellant has argued before us that the order of annulment is a judgment *in rem* and operates against the whole world and that it dates back to the initial transfer made by the insolvent. This argument is based on the insolvency jurisdiction of the Court and also on ss. 4 (2) and 28 (7) of the Act. All adjudications as between the Receiver representing the whole body of creditors on the one hand and the insolvent on the other are certainly judgments *in rem* and are binding on the whole world. But when a dispute as to title to property arises between the Receiver representing the creditors on the one hand and a stranger to the insolvency proceeding, the judgment would be binding on the person against whom the decision is given and not against the whole world. Section 28 (7) merely lays down that the order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition. Under s. 28 (2) on the making of an order of adjudication the whole of the property of the insolvent vests in the Court of the Receiver. The result of these two sub-sections is that the vesting of the property in the Receiver dates back to the date of the application for insolvency. There is no provision in the Act under which the vesting of the property dates back to a previous transfer made by the insolvent. Indeed such a transfer stand unless it is annulled by the Court.

It, therefore, seems to follow that the Official Receiver wrongly omitted to implead Saiyid Hasan, particularly as it appears from the record that he was aware of the transfer in his favour, and that the order of annulment which he obtained against the absent Abdul Qaiyum is not binding upon the present defendant Saiyid Hasan and it is open to Saiyid Hasan to show that the original transfer in favour of Abdul Ghani was made to purchaser in good faith and for valuable consideration and that it is also open to him to show that he himself acted in good faith and paid full consideration being unaware of insolvency proceedings. As the pleadings were defective the first question has not been gone into by the Courts below, but it has been assumed as a result of the previous order of annulment passed against Abdul Qaiyum that he was not a purchaser in good faith and for valuable consideration. There is, however, a clear finding that the defendant Saiyid Hasan in the absence of evidence to the contrary must be taken to be a *bona fide* purchaser for good value. As s. 53 applies only to cases of transfer other than those for consideration and in good faith, the burden of proving that the transaction was not in good faith and was without consideration would lie on the Official Receiver in the insolvency proceedings. See *Official Assignee of the Estate of Cheah Soo Tuan* v. *Khoo Saw Cheow* (8), where the language of the statute was almost identical with that before us. Similarly the burden of proof would lie on the present plaintiff who claims through the Official Receiver. That burden has not been discharged. The plaintiff did not come to Court on the allegation that the transfer made by the debt or was voidable under s. 53 of the Transfer of Property Act and the case, therefore, has not been considered from that point of view. In our opinion the plaintiff cannot avail himself of s. 53 of the Insolvency Act when the respondent acted in good faith, and he cannot succeed without making out a case under s. 53 of the Transfer of Property Act which he did not put forward in the plaint. Such a claim cannot be investigated without an amendment of the plaint and without allowing him to make out a new case which he cannot be allowed to do. We, therefore, dismiss this appeal with costs.

N. *Appeal dismissed.*

(8) (1931) A C 67; 100 L J P C 45; 144 L T 130.

CALCUTTA HIGH COURT
Full Bench

Jury Reference No. 51 of 1934

December 11, 1934

DERBYSHIRE, C. J., MUKHERJI AND COSTELLO, JJ.

RAFIQUEUDDIN AHMAD AND OTHERS—ACCUSED

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 103, 307 (3)—Search lists—Prosecution's duty to prove case with regard to different items severally—High Court, if can, under s. 307 (3), order re-trial—Criminal trial—Capital case—Evidence—Nature of—Re-trial when to be ordered—Evidence Act (I of 1872), ss. 8, 27—Joint acts of several persons sought to be proved in order to ask Court to draw inference from such conduct—Nature of evidence necessary.

When in a case there are several search lists, in each of which several items of property are mentioned, the prosecution ought to prove their case with regard to the different items severally, and the different items of property or different groups thereof mentioned in a search list ought to be separately and consecutively numbered either by letters or figures or by some other distinguishing marks and the same numbering should be followed while re-

cording the evidence of witnesses relating to the searches to which those search lists refer. If that procedure is adopted, there will be no difficulty on the part of the Court in appreciating the evidence that is adduced in respect of the searches. [p. 690, col 2.]

In a capital case it is important that the more important of the witnesses should be examined in such a way as would enable the Court to properly appreciate their evidence. The evidence should be led in sufficient detail and with due regard to the sequence of events, the facts which the witnesses saw or the acts which they did and also the reasons which actuated them to do the acts being narrated in an intelligent fashion. It is only by this means that a clear and consistent account of the whole thing may be presented before the Judge and the jury. [*ibid*]

Where joint acts of several persons are sought to be proved in order to ask the Court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the Court to draw the necessary inference from the conduct of each one of the persons concerned in the act. The principle applies not only to evidence relevant under s. 27 but also to that under s. 8, Evidence Act *Queen-Empress* v *Babu Lal* (1) and *Durlav Namasudra* v. *Emperor* (2) relied on.[p. 691, col. 2.]

A re-trial in a criminnl case should not be ordered too lightly and should be avoided as much as possible. A re-trial certainly snould not be ordered, where it can be established that there is really no evidence to go before a jury, because to order a re-trial in such circumstances would be to put the accused to unnecessary harassment. [*ibid*]

Under sub-s. (3), s. 307, Criminal Procedure Code, the High Court has ample power in a case, in which there has been no proper or adequate trial, to make an order that the accused persons should be re-tried. [p. 693, col. 1]

[Case-law referred to.]

Messrs. *Charu Chunder Biswas, Hari Das Gupta, Basania Kumar Mukherji* and *Nirmal Chunder Chuckerburty*, for the Accused.

Messrs. *Khundkar* and *Nirmal Chunder Das Gupta*, for the Crown.

Mukherji, J.—The four accused persons Rafiqueuddin Ahmed, Jyotish Chandra Ghose, Jatindra Nath Ray and Bhengra *alias* Hasimuddin Mamud were tried by the Sessions Judge of Rangpur with the aid of a jury. The charges on which they were tried were for offences under ss. 302 and 392, Indian Penal Code, a charge of murder for having caused the death of one Gobind Ram Marwari and a charge of robbery for having stolen away some valuables and cash which were in the possession of the said Gobind Ram Marwari in the room in which he was murdered. The jury at first brought in a divided verdict of 5 to 4. The Judge thereupon asked them to retire and to see if they could be unanimous. They retired and after a deliberation for over fifteen minutes they came back and said that they were still divided, this time in the proportion of 6 to 3; six of the jurors were of opinion that the case against the accused was reasonably doubtful so that they should be held not guilty and the other three were of opinion that all the four accused persons were guilty under both the charges on which they had been tried. The learned Judge, being of opinion that the verdict of the majority of the jury was unreasonable and that the verdict of the minority should be accepted, has made this reference to this Court under the provisions of s. 307, Criminal Procedure Code.

For our present purposes, it is not necessary to recapitulate the facts of the case: they will be found set out in sufficient detail in the learned Judge's charge to the jury, and a summary thereof is also to be found in his letter of reference addressed to this Court. It will be enough to state for the purpose of the present case that the evidence adduced on behalf of the prosecution, in order to establish the charges against the accused persons, roughly speaking, falls under three heads: first, the confessions which were made by the four accused persons but were subsequently retracted by them; second, the production of some articles, which were alleged to be the proceeds of the crime, at different times and from different places, by the accused persons severally with the exception of one occasion when some articles are said to have been produced by two of them jointly; and third, the identity of foot-prints of three of the accused persons found in the room in wnich the crime was committed. After we had heard the arguments addressed to us on behalf of the Crown and while the case on behalf of two of the accused persons was being argued before us by Mr. Biswas who was appearing on their behalf, it became apparent to us that upon the present state of the record, it would not be possible for us to deal with the case on its merits with any degree of confidence. The difficulty that we felt arose out of certain defects which were noticed in the manner in which the evidence was recorded by the learned Judge and also in consequence of the mode that was adopted on behalf of the prosecution in the matter of leading the evidence that was being adduced in support of the charges. As regards the manner in which the evidence has been recorded, I propose to say a few words in order to explain the

nature of the difficulty that we have experienced. The prosecution case is that the four accused persons, on one occasion two of them jointly and on other occasions some one of them severally took the Police to certain places and produced some of the articles which, according to the prosecution, were in the possession of the deceased Gobind Ram Marwari.

The searches, in the course of which these articles were produced, are evidenced by a number of search lists, out of which it will be sufficient to refer here to four, namely, Exs. 10, 11, 12 and 13. Exhibit 10 is a search list relating to the production by Jatin and Jyotish of certain articles on May 17, 1934, at 8 P. M. I may state here that the occurrence which forms the subject-matter of this case is alleged to have taken place at about 11 P. M. on the night of May 16, 1934. Exhibit 11 refers to the production of articles by Bhengra on May 17, 1934, a 9-30 P. M. Exhibit 13 describes the production of articles by Rafiqueuddin on the same night at 10 or 10-30 P. M. and Ex. 12 relates to the production by Jatin of certain articles on the morning of May 18, 1934, between 7 and 8 A. M. Evidence relating to these productions was given by the Sub-Inspector of Police who conducted the searches and was examined as witness No. 22 on behalf of the prosecution. The search witnesses examined in connection with these searches are witness No. 5, Mahatabuddin Chaudhury; witness No. 6, Fazal Karim Chaudhury; and witness No. 7, Moulvi Busirulla Ahmad. The Sub-Inspector having conducted the searches gave an account of the different searches that he had held and of the different articles that were produced by the accused persons in the course of those searches. I propose to quote here a portion of his deposition as recorded. I quote from p. 28 of the paper-book. He said this:

"At 4-30 P. M. I arrested Jatin and Jyotish who were in the cycle shop of Jyotish. I took them to the *thana*. I arrested Rafiq and Bhengra about 7-30 P. M. Jyotish and Jatin led us to a spot under the mango tree. Jyotish pointed out a spot. Some articles were dug up in the presence of witnesses. I made a list of them attested by witnesses. Proves Ex. 10. Then Bhengra took us to a dried pond; from inside the cavity he produced some ornaments and cash. I made out a search list which the witnesses attested. Proves Ex. 11. Then Rafiq took us to a garden near his house and produced one *kherua* bag. I prepared a search list which was attested by witnesses. Proves Ex. 13, 18th morning Jatin took us to a dried tank; he produced some purses and an empty tin. Proves exhibit (The number of the exhibit is left blank, but there is little doubt upon the other evidence that we have that it is Ex. 12). Jatin took us to the house of Debi Barman where he lived. From inside a suit case he produced notes valued Rs 175. He made over a *lungi* to me. Proves Exs. 6—23."

It will be seen that from this evidence it is not possible to ascertain which of the aforesaid exhibits were recovered in the course of which of the searches. The articles which correspond to these exhibits will be found described in a list that was prepared in the Court of Session and is printed at p. 46 of the paper-book, of the three searches witnesses to whom reference has been made above, witness No. 7, Mr. Basirullah Ahmad, has given very general evidence relating to all the searches: he has not referred to the articles that were produced in the course of the searches—at least he has not tried to identify them: but the other two witnesses, namely, No. 5, Mahatabuddin Chaudhury, and No. 6, Fazal Karim Chaudhury, are very important. When one proceeds to examine the evidence of Mahatabuddin Chaudhury as recorded one finds that after speaking about the preparation of the lists—Exs. 10, 11 and 12 and also speaking about the production of articles by Rafiqueuddin, the witness does not refer to Ex. 13, although he purports to have been a witness to the search that was held in connection with the production of articles by Rafiqueuddin, and proves only Exs. 6 to 24. It is very difficult for one to understand why, if he was speaking about the production of the articles in the course of the searches that he was speaking to, he would not refer either to Ex. 13 or to any of the other articles produced in the searches excepting articles Exs. 6 to 24. An examination of the evidence of P. W. No. 6, Fazal Karim Chaudhury, discloses a still greater confusion. At p. 16 of the paper-book he says:

"The *Daroga* made a list of the articles found —Proves Ex. 10—and took the articles into custody Identifies 6 and 14."

In the lists on p. 46, Exs. 6 to 14 are described in this way:

"*Nima* (*khutis* containing articles written in the search lists, Exs. 8 to 12 as in lower Court's exhibits.")

The record has been made with reference to exhibits which according to the said list were articles found not only in the course of the search evidenced by Ex. 10 but in the course of searches to which Exs. 8 to 12 of the lower Court's exhibits correspond. This clearly is a

confusion which ought to have been cleared up in the course of the trial. Furthermore, I find that when the witness was speaking about Exs. 11 and 13, the record that has been made of his evidence in connection with Ex. 11 is "Proves Ex. 11 and identifies Exs. 15—18": and with regard to Ex. 13 it has been recorded, "Proves Ex. 13 and Ex. 18—24." Exhibit 18 therefore is an article which is found in the record of the evidence of this witness as referring to the search list Ex. 11 as also to the search list Ex. 13. This again is impossible.

Turning to the evidence of identification in respect of the articles, it may be observed that considerable difficulty has been felt because there is nothing to indicate which particular item of the exhibits mentioned in the list at p. 46 corresponds to which particular item in a search list. To take one instance: if the evidence of Nella Mamud (P. W. No. 8) is referred to, it will be found on p. 18 that he says that he kept two *khila balas* or *paunchis* and two *murkunies* as security and the record states that these are Ex. 8, Ex. 23 as well as Ex. 22. Referring now to the list on p. 46 one finds that Ex. 8 and Ex. 23 are *khila balas* and Ex. 22 is a pair of gold *murkunies*. If one turns to the search lists in connection with the searches in the course of which these articles were recovered, one finds that in Ex. 10 'a bangle' is mentioned and in Ex. 13 'a silver bangle with a clip' is mentioned. If the evidence which this witness has given as regards identification of these *khila balas* has to be considered as satisfactory, then one will have to assume that in respect of two items of articles which form a pair, one can properly be described as 'a bangle' and the other as 'a bangle with a clip.' It is not for the Court to be placed in such a situation that it will have to make such an assumption for the purpose of connecting the accused with the crime upon the evidence of identification which is given in this way. Four persons having stood their trial together, it is reasonable to expect that evidence should be given and recorded in such a way that it would be possible for each one of them to know what the allegation of the prosecution is as regards the articles that each of them has produced and how the prosecution has sought to prove that these articles have been identified as being articles belonging to or in the possession of the deceased at the time the crime was committed. When in a case of this nature there are several search lists, in each of which several items of property are mentioned, the prosecution ought to prove their case with regard to the different items severally, and the different items of property or different groups thereof mentioned in a search list ought to be separately and consecutively numbered either by letters or figures or by some other distinguishing marks and the same numbering should be followed while recording the evidence of witnesses relating to the searches to which those search lists refer. If that procedure is adopted, there will be no difficulty on the part of the Court in appreciating the evidence that is adduced in respect of the searches.

As regards the mode of leading evidence that was adopted in this case, I shall now say a few words, because in this respect also some important defects have been noticed by us. In a capital case of this description it is important that the more important of the witnesses should be examined in such a way as would enable the Court to properly appreciate their evidence. The evidence should be led in sufficient detail and with due regard to the sequence of events, the facts which the witnesses saw or the acts which they did and also the reasons which actuated them to do the acts being narrated in an intelligent fashion. And it is only by this means that a clear and consistent account of the whole thing may be presented before the Judge and the jury. What I notice is that with respect to some of the more important witnesses in this case, who should have been examined in much fuller detail, the minimum of evidence that would in law be sufficient to establish the charges was adduced on behalf of the prosecution, leaving it to the defence to find out by cross-examination other facts and circumstances which would either go to support or to destroy the evidence which the witnesses gave. I wish to refer here to one instance and one instance only; but in doing so I wish to guard myself against being understood as indicating either that I consider the point to be of no importance from the point of view of the defence or that it is a point which is fatal to the prosecution. Two of these witnesses, namely witness No. 5, Mahatabuddin Chaudhury and witness No. 6, Fazal Karim Chaudhury, were certainly important witnesses and their evidence is that

although they were residents of places somewhat distant from the place where the *thana* was, they came to the *thana* in the early morning of May 17, 1934, and remained with the Police Inspector for a considerable time. The prosecution thought that it was sufficient for them to have from each of these witnesses a bare statement that he came to the *thana* early in the morning of that day and it was left to the defence to find out why or for what reason the said witnesses thought it necessary to come to the *thana* at all. Such statements, devoid of circumstantial details, if presented before the Court, are of little avail so far as the question of drawing any inference from them is concerned, and can afford but little help to the Court in judging their truth or otherwise. The witnesses, at least the more important witnesses in a case of this nature, should be examined in much greater detail.

Nextly, as regards the production of articles, the evidence is relevant as evidence of conduct under s. 8, Evidence Act. Under that section statements accompanying or explaining conduct are also relevant as part of the conduct itself. What we have on the record, so far as the prosecution witnesses examined on this point are concerned, is only the fact that the articles were pointed out by the accused persons. If there was any statement made by an accused person at the time of the production or just before the production of the articles, then this statement may very well go in as part of the conduct under the provisions of s. 8, Evidence Act. So far as the evidence of conduct as adduced in this case is concerned, no attention seems to have been paid to this matter and the result is that the evidence is in one sense incomplete and imperfect. Lastly, I should also refer to one other matter, and that is this. There is one instance in which two of the accused persons are said to have jointly produced some of the articles. In leading evidence with regard to this part of the case, no attention seems to have been paid to the salutary principle laid down by Straight, J., of the Allahabad High Court in *Queen-Empress* v. *Babu Lal* (1), a principle which has been reiterated by this Court so recently as in *Durlav Namasudra* v. *Emperor* (2), namely that where joint acts of several persons are sought to be proved in order to ask the Court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the Court to draw the necessary inference from the conduct of each one of the persons concerned in the act. The principle applies not only to evidence relevant under s. 27 but also to that under s. 8, Evidence Act.

(1) 6 A 509; A W N 1884, 229.

(2) 138 Ind Cas. 116; A I R 1932 Cal. 297; (1932) Cr. Cas. 266; 33 Cr. L J 546; 59 C 1040; 36 C W N 473; Ind. Rul. (1932) Cal. 417.

Upon this state of the record we have seriously considered the course which ought to be adopted with regard to this case. We are aware that re-trial in a criminal case should not be ordered too lightly and should be avoided as much as possible. A re-trial certainly should not be ordered where it can be established that there is really no evidence to go before a jury, because to order a re-trial in such circumstances would be to put the accused to unnecessary harassment. That, however, cannot be said to be the position here. We are also aware that in a re-trial there is always a danger of the prosecution trying to fill up the gaps in the evidence that has been adduced; but this difficulty may very well be overcome if the Judge who presides at the trial is astute enough and if the jury are properly directed. Having regard to the importance of the case and the gravity of the crime, we think we ought to order a re-trial in this case if we have got the power to make such order.

The question then arises as to whether in a case under s. 307, Criminal Procedure Code, it is within the power of this Court to make an order for re-trial. This question has been argued by Mr. Biswas appearing on behalf of two of the accused persons and it is necessary that we should express our view on it. The argument that has been addressed to us, as I understand it, is this: that although the High Court in a reference under s. 307, Criminal Procedure Code, can exercise the powers which are conferred upon a Court of appeal and which may ordinarily be exercised by a Court dealing with an appeal, the exercise of such powers is subject to the condition that it is the High Court which has got to pass the final order of acquittal or conviction; in other words, it is argued that although this Court sitting on a reference under s. 307, Criminal Procedure Code, may make orders such as are contemplated by s. 426 as regards the release of an accused person on bail or under

s. 428 as regards the calling for further evidence and so on, it is not competent to make any order which would be inconsistent with its function as a Court of appeal which has got the duty to discharge of either convicting or acquitting an accused person. This as I understand it, is the argument that has been put forward by Mr. Biswas in this connection.

Now in support of this argument a good deal of reliance has been placed upon the expression "and subject thereto" which appears in sub-s. (3) of the section and special reliance has been placed upon two words appearing in it, namely the word "and" and also the word "shall." Some difficulty no doubt is felt by reason of the use of words to which Mr. Biswas has thus referred, because the use of the words may be taken as suggesting that the provision which follows them is a mandatory provision. But his argument, if accepted, would amount to this that the words "subject thereto" should be read as being equivalent to the expression "subject nevertheless to the provision that." The sub-section may be divided for the purposes of the present argument into two portions—the first portion saying "the High Court may exercise any of the powers which it may exercise on an appeal," and the second portion saying "it shall, after considering the entire evidence" and after giving due weight to the opinions of the Sessions "Judge and the jury, acquit or convict such accused .....;" and these two portions are joined together by the expression "and subject thereto." As I have said, to adopt this argument would be to regard the expression "and subject thereto" as being equivalent to the expression "and subject nevertheless to the provision that;" in other words, the first portion of the sub-section to which I have referred would have to be treated as being subject to the second portion—the dominating portion which directs, according to the argument, that whatever powers a Court of appeal may exercise in matters under s. 307, Criminal Procedure Code, it will eventually have to pass an order of conviction or acquittal.

I do not think that this argument is well founded. There is, I admit, a certain amount of difficulty in construing this sub-section, having regard to the words that have been used. The difficulty has been created by piecemeal amendments which s. 307, Criminal Precedure Code, has several times undergone, since its original enactment, to meet difficulties pointed out from time to time. There are certainly some difficulties: one of them, for instance, is that although the word "any" is used, there are powers which a Court of appeal possesses under s. 423 but which cannot possibly be exercised by a Court sitting on a reference under s. 307, *e. g.*, the power to order a commitment: again cls. (*a*) and (*b*), s. 423 speak of "conviction," "acquittal" and "finding and sentence" expressions which are wholly inapposite to a case under s. 307. But notwithstanding all these difficulties, to give effect to the sub-section taken as a whole one is forced to the conclusion that the second part of the sub-section is more or less redundant and that the first part of the sub-section contains the governing provision under which the High Court is to act in a reference under s. 307.

It appears that s. 307 first came into the statute book as s. 263, Act X of 1872. Under that section there were cases in which it was held that the High Court was not competent to make an order for re-trial. Later on, the sub-section in its present form, or at least in its present form so far as this particular matter is concerned, came into being by the enactment of Act XIII of 1896. In 1899 Sir Arthur Collins, C. J., and Benson, J., in *Queen-Empress* v. *Anga Valayan* (3) at p. 18* referring to the amendment made by Act XIII of 1896 observed thus:

> "We might no doubt order a new trial by the Sessions Judge for the offence under s. 396, but that would be attended with obvious inconveniences."

So that in the opinion of the learned Judges in that case a re-trial could be ordered under the provisions of sub-s. (3), s. 307, Criminal Procedure Code, as it then stood. Since then there has been, as I understand, no case in which the power to retrial has been disputed and on the other hand, orders of re-trial have been freely and frequently made by this Court while dealing with references under s. 307 of the Code. Some of the instances in which such a re-trial has been ordered will be found in the following cases. *Emperor* v. *Rajendra Raj* (4).—This was a case in which there was a misjoinder of charges in the course of the trial that had been held. *Empero*

(3) 22 M 15.

(4) 47 Ind. Cas 64: A I R 1918 Cal. 237; 19 Cr. L. 868; 27 C L J 311; 22 C W N 596.

*Page of 22 Mad.—[*Ed.*]

v. *Nazir Ali Beg* (5)—In this case the trial was vitiated by misconduct on the part of the jury. *Emperor* v. *Profulla Kumar Mazumdar* (6)—In this case a re-trial was ordered upon a new charge which the High Court thought should have been framed upon the evidence that had been adduced. *Emperor* v. *Nani Mandal* (7). —The trial in this case was held in contravention of the provisions of ss 342 and 364, Criminal Procedure Code.

Coming to more recent times there have been quite a number of cases, not reported, in which orders for re-trial have been passed from time to time by different Division Benches of this Court. I am not suggesting for a moment that because the point was not taken in any of the cases, before now the point has not to be considered, but on a question of construction of a statute the fact that it has been interpreted by the Court in a particular way for a sufficient length of time is relevant. I am of opinion that under sub-s. (3), s. 307, the High Court has ample power in a case, in which there has been no proper or adequate trial, to make an order that the accused persons should be re-tried.

On all these considerations I hold that the reference should be accepted in part, that the verdict of the jury in this case should be set aside and that the case should be sent back to be re-tried upon charges under ss. 302 and 392, Indian Penal Code. Having regard to the circumstances of the case, such re-trial should be held by some Judge other than the Sessions Judge, preferably by an Additional Judge to be deputed for the purpose. If the deputation of an Additional Judge for this purpose cannot be conveniently arranged for, the re-trial should be held by the Sessions Judge of Dinajpore.

Derbyshire, C. J.—I agree.

Costello, J.—I agree.

D. *Re-trial ordered.*

(5) 62 Ind. Cas. 334; A I R 1921 Cal 631; 22 Cr. L J 510; 33 C L J 122; 25 C W N 240.

(6) 74 Ind. Cas. 267; A I R 1923 Cal. 453; 24 Cr. L J 763; 50 C 41.

(7) 86 Ind. Cas. 345; A I R 1925 Cal. 575; 26 Cr. L J 761; 52 C 403; 41 C L J 50.

LAHORE HIGH COURT
Full Bench

Second Civil Appeal No. 1919 of 1932
October 19, 1934
YOUNG, C. J., BHIDE AND DIN MUHAMMAD, JJ.

GURBAKHSH SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
SARDAR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS

Punjab Pre-emption Act (I of 1913), s 3 (5) (a)—Sale of insolvent's property by Receiver, whether a sale in execution of order of Court—Whether subject to pre-emption—Provincial Insolvency Act (V of 1920), ss. 59, 68.

The sale of the property of an insolvent by the Receiver is not a sale in execution of an order of the Court within the meaning of s. 3, sub-s. (5) (*a*), Punjab Pre-emption Act of 1913 and consequently is subject to the right of pre-emption. *Sheobaran Singh* v. *Kulsumunnissa* (1), *Sankaran* v. *Narasimhalu Anjanevulu* (2) and *Venkatachelam Chettiar* v. *Murugesan* (3), relied on.

S. C. A. from the decree of the District Judge, Sialkot, dated May 8, 1932.

Messrs. *M. L. Puri* and *Mehr Chand Sud*, for the Appellants.

Mr. *Nawal Kishore*, for the Respondents.

Judgment*.—This appeal arises out a suit for pre-emption of certain land instituted by one Gurbakhsh Singh. The vendor was a Receiver appointed in the insolvency of the owner of the land. The vendee disputed the right of the plaintiff to claim pre-emption on the ground that the sale by the Receiver was a sale in execution of an order of a Civil Court within the meaning of s. 3, sub-s. (5) (*a*), Punjab Pre-emption Act of 1913. Eventually the point came before two of us sitting in Division Bench. The matter appearing to be of importance and not concluded by the authority of any judgment of this Court, we requested the Chief Justice to appoint a Full Bench.

Mr. Nawal Kishore argues on behalf of the respondents that a sale by the Receiver is a sale in execution of an order of a Civil Court and, therefore, free from pre-emption. We have, therefore, to decide whether such a sale is a sale in execution of an order of a Court or not.

The Receiver is, under s. 56, Provincial Insolvency Act, appointed by the Court. By the same section the property of the insolvent vests in the Receiver. Section 59 of the same Act gives certain powers to the Receiver. One of these is the power to sell any part of the property of the insolvent. That he may do without leave

*The judgment was delivered by Young, C. J.—(Rep.)

of the Court. The same section gives him authority to do other things only by leave of the Court. By s. 68 any person aggrieved by the action of the Receiver has a right to apply to the Court and the Court may affirm, reverse or modify the act or decision complained of. It appears to us, therefore, that the act of the Receiver in selling the property of an insolvent cannot be said to be an act in execution of an order of the Court. If it were such an act, there would then appear to be a right of appeal to the Court from its own order. It is argued, however, that the act of an officer appointed by the Court is the act of the Court itself; that indeed the Receiver is the agent and the Court is the principal in any transaction by the Receiver. We cannot agree. It is not true to say that the act of every person appointed by a superior authority is the act of that superior authority. It depends upon the terms of the appointment and the authority given to the person appointed. The Receiver is appointed by the Court but the power of sale is conferred upon him by the Statute and not by the Court. Further, under s. 28 (2), Provincial Insolvency Act, the whole of the property of the insolvent vests "in the Court or in a Receiver as hereinafter provided." The property vests in the Court if the Court does not appoint a Receiver, but, if a Receiver is appointed it vests in him. It appears to us, therefore, that the proper construction of all the relevant sections in the Act makes it clear that the Act does not make the sale of the property of an insolvent by the Receiver a sale in execution of an order of the Court within the meaning of s. 3, sub-s. (5) (*a*), Punjab Pre-emption Act of 1913.

We are confirmed in our opinion on this point by a consideration of the judgment of the Privy Council in *Sheobaran Singh* v. *Kulzumunnisa* (1). The High Court at Allahabad decided that the sale by an Official Assignee was an involuntary sale carried out against the wishes of the true owner by a Court and that, therefore, the right of pre-emption did not apply. Their Lordships of the Privy Council, however, took the opposite view, holding that the Official Assignee took the property of the bankrupt exactly as it stood when in possession of the insolvent with all its advantages and burdens. Their Lordships were not considering the Punjab Pre-emption Act; but they did decide that a sale by an Official Assignee was not a sale by the Court.

The same point arose in *Sankaran* v. *Narasimhalu Anjanevulu* (2). A Full Bench of five Judges of the Madras High Court decided (one learned Judge dissenting) that a sale by a Official Receiver in insolvency was not a transfer by operation of law or by or in execution of a decree or order of a Court. In *Venkatachelam Chettiar* v. *Murugesan* (3), a Full Bench of the Rangoon High Court decided that a sale of property by a Receiver was an act of the Receiver within s. 68, Provincial Insolvency Act.

We, therefore, answer the question referred to us as follows: The act of an Official Receiver in selling the property of an insolvent is not an act in execution of the order of a Court and is, therefore, subject to the right of pre-emption. The case will now go back to the Division Bench for disposal according to law.

D. *Question answered.*

(1) 101 Ind. Cas. 368; A I R 1927 P C 113; 54 I A 204; 49 A 367; 52 M L J 653; 29 Bom L R 877; 4 O W N 513; (1927) M W N 444; 31 C W N 853; 25 A L J 617; 26 L W 326 (P C).

(2) 99 Ind. Cas. 8; A I R 1927 Mad. 1; 50 M 135; 51 M L J 529; 25 L W 128; 38 M L T 92.

(3) 131 Ind. Cas. 732; A I R 1931 Rang. 122; 9 R 231; Ind. Rul. (1931) Rang. 156.

MADRAS HIGH COURT

Criminal Revision Case No. 308 of 1934
and
Case Referred No. 19 of 1934
August 1, 1934
PANDRANG ROW, J

In re KUPPINI NAIKEN—ACCUSED

Criminal Procedure Code (Act V of 1898), ss. 488, 489, 490—Second Class Magistrate—Power to pass sentence of imprisonment for breach of order directing payment of maintenance.

A Second Class Magistrate is not competent to pass a sentence of imprisonment for breach of an order under s. 488 of the Criminal Procedure Code directing payment of maintenance. The power to enforce an order for maintenance does not necessarily include the power to sentence a person, against whom it was passed, to imprisonment

Case referred for the orders of the High Court under s. 438 of the Criminal Procedure Code by the District Magistrate of Coimbatore in his letter No. 1736 of 1934 D. 3, dated March 29, 1934.

The Public Prosecutor for the Crown.

Order.—I concur in the view of the District Magistrate that a Second Class Magistrate is not competent to pass a sentence of imprisonment for breach of an order under s. 488 of the Code of Cri-

minal Procedure directing payment of maintenance. Even assuming that the words "any Magistrate" in s. 490 of the Code of Criminal Procedure have not been used with reference to the class of Magistrates referred to in ss. 488 and 489 of the Code of Criminal Procedure, the power to enforce an order of maintenance does not necessarily include the power to sentence the person, against whom it was passed, to imprisonment. The order of the Second Class Magistrate, Coimbatore, dated December 8, 1933, is, therefore, set aside.

A. *Order set aside.*

LAHORE HIGH COURT
Special Bench

Criminal Revision Petition No. 4 of 1934
November 30, 1934
YOUNG, C. J., ADDISON AND DALIP SINGH, JJ.

In the matter of CONTEMPT OF HIGH COURT

Contempt of Court—Held, the article amounted to gross contempt of Court.

Any act or writing tending to undermine the authority of Courts of Justice, or to influence the result of pending litigation, is a most serious offence

The gravamen of the article in question was that judgment after judgment was being given in the High Court arbitrarily, and that neither law nor facts were discussed, before judgment was delivered. It further said that it was necessary "to restore the confidence of the public that law is discussed and facts are digested before cases are disposed of." It alleged that summary justice was being administered;

Held, that there could be no doubt that the article was as gross a contempt of Court and misrepresentation of proceedings in Court as it was possible to imagine. Nothing could have been more calculated to bring the Court into contempt and to lower its authority with the general public. *Re: Read and Huggonson* (1), referred to

Diwan *Ram Lal*, for the Crown.

Mr. *Sleem*, for the Accused.

Young, C. J.—A Division Bench of this Court, on November 7, 1934, issued a Rule *nisi* to Mr. S. R. Iyer, Editor, and Mr. J. C. Roy, Printer and Publisher, of a journal called "Roy's Weekly," Delhi, to show cause why they should not be committed or otherwise dealt with in accordance with law for contempt of this Court. In obedience to the Rule, both respondents have, to-day, appeared and are represented by Counsel.

In the issue of the said newspaper, dated October 8, 1934, there was published an article headed "A wayfarer's diary." There also appeared a prominent headline in the front page as follows: "Storm ahead of Lahore High Court." It is unnecessary fully to quote the said article. The gravamen of it however was that judgment after judgment was being given in this High Court arbitrarily, and that neither law nor facts were discussed, before judgment was delivered. It further said that it was necessary "to restore the confidence of the public that law is discussed and facts are digested before cases are disposed of." It alleged that summary justice was being administered. The writer of the article said that the article was based upon information received from various sections of the community.

There can be no doubt that this article is as gross a contempt of Court and misrepresentation of proceedings in Court as it is possible to imagine. Nothing could have been more calculated to bring this Court into contempt and to lower its authority with the general public. It is difficult to believe that any responsible person could have given such information to the writer of the article. As said by Lord Hardwicke, Lord Chancellor, in *Re Read and Huggonson* (1),

"Nothing is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented."

Mr. Sleem, who appears on behalf of the two respondents, has filed affidavits by them. The printer of the article says that he had not read the article, and that he regrets very much that the article and the headline in question should have appeared in the paper. The editor admits that he is the author of the article and the headline complained of, and goes on to say that in writing the article and the headline in question, he was misled by the information he received. He too regrets the writing of the article and withdraws it. He denies the intention to bring the Hon'ble Judges and this Hon'ble Court or the administration of justice and authority of law into disrespect and contempt. He realizes that the language used by him was improper and liable to convey the impression that he intended to scandalise this Hon'ble Court, though that was not his intention. He finally deeply regrets the publication and tenders his sincere and unqualified apology.

As it is now some years since any action has been taken by this Court for contempt, and as both respondents apologise and withdraw, and the writer of the article acknowledges that he was misled, I think it is open to this Court to treat the offence on this occasion, leniently. This, however, must not be taken as a precedent. In

(1) (1742) 2 Atk 469.

future this Court will treat severely anything savouring of contempt of Court, and I consider it only right that this warning should be given to the public in this Province. There are far too many attempts by the public to interfere with the Court and Judges in the discharge of their duty of administering justice, both as regards pending cases and attacks upon Judges themselves. It is primarily the duty of this Court to see that this ceases. Any act or writing tending to undermine the authority of Courts of Justice, or to influence the result of pending litigation, is a most serious offence. I hope this warning will be sufficient to check this practice.

Taking this view of the matter, I am of opinion that the ends of justice will be satisfied in this case by discharging the Rule against the printer, and by ordering the Editor to pay Rs. 150, the costs of the Government Advocate.

Addison, J.—I agree.

Dalip Singh, J.—I agree.

D. *Order accordingly.*

CALCUTTA HIGH COURT

Civil Appeal No. 292 of 1933

June 29, 1934

MUKHERJI AND S. K. GHOSE, JJ.

NIRENDRA LALL BHATTACHARYYA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BEPIN CHANDRA BHATTCHARYYA AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXXII, r. 15—Applicability — Inquiry as to unsoundness of mind—Nature of—Decree in favour of plaintiff who brings suit on behalf of person alleged to be of unsound mind—No inquiry as to unsoundness of mind—Lower Appellate Court directing inquiry by trial Court—Held, that such inquiry should be held by lower Appellate Court.

In order that O. XXXII, r. 15, Civil Procedure Code, should be applicable in the case of a person who has not been adjudged to be of unsound mind the words of the rule require something more than a finding after an inquiry that a person is of unsound mind it should be found on enquiry that by reason of unsoundness of mind or mental infirmity, the person is incapable of protecting his rights as a plaintiff or as a defendant.

Plaintiff brought a suit on behalf of a person alleged to be of a unsound mind. The trial Court, without inquiring as to the unsoundness of mind as required by O. XXXII, r. 15, Civil Procedure Code, passed a decree in favour of the plaintiff. On appeal by the defendant, the lower Appellate Court passed an order directing the trial Court to hold an inquiry:

Held, that the enquiry under r. 15, O. XXXII, should have been held by the Appellate Court itself because the enquiry was not likely to be a lengthy or a protracted one. On the result of such enquiry if such unsoundness of mind as is required by the rule has been made out, the Court would hold that the trial that was held in the Court of first instance, was in order, and it would be necessary for the lower Appellate Court to dispose of the appeal on merits. If, on the other hand, it came to the conclusion that such unsoundness of mind as is contemplated by the rule has not been made out, it will have to be held that the plaint that was presented was not in order and as a necessary consequence of such a finding it would have to be held further that the proceedings that followed were not proceedings taken in accordance with law and consequently the decree that was passed in the suit would have to be held a nullity.

C. A. from a appellate order of the Additional Sub-Judge, Chittagong, dated March 9, 1933.

Mr. *Nripenura Chandra Das*, for the Appellants.

Mr. *Chandra Sekhar Sen*, for the Respondents.

Judgment.—The substance of the contention that has been urged on behalf of the appellant in this appeal relates to the question whether there should now be an enquiry such as is contemplated by r. 15, O. XXXII of the Code. The learned Judge was of opinion that inasmuch as there has been no adjudication of the question of soundness of mind of the plaintiff who has not been adjudged to be of unsound mind, there must be an enquiry for the purpose of determining whether by reason of unsoundness of mind or mental infirmity, the said plaintiff was incapable of protecting his interests as plaintiff. It is true that there is some evidence in the shape of statements that are to be found on the record which would indicate that it was the case of the defendants as well as that the aforesaid person was of unsound mind. But the words of the rule require something more, namely that it should be found on enquiry that by reason of unsoundness of mind or mental infirmity the person is incapable of protecting his rights as a plaintiff or as a defendant. Such a finding will have to be arrived at and it must be arrived at upon an enquiry properly held. This disposes of the main contention that has been urged in support of this appeal. But even though that contention is disposed of against the appellant, the question that arises further is what should be the order which should be made in this case. We think it is not necessary that the enquiry in this case should be held by the trial Court and we are of opinion that the directions which the learned Subordinate Judge had given as regards the course to be adopted on the completion of enquiry are not

correct. We are of opinion that the enquiry under r. 15, O. XXXII should be held by the learned Subordinate Judge himself. In our opinion, such an enquiry should be held by the learned Subordinate Judge himself because we do not apprehend that the enquiry is likely to be a lengthy or a protracted one.

We are further of opinion that if on the result of such enquiry the learned Judge thinks that such unsoundness of mind as is required by the rule has been made out, he will hold that the trial that was held in the Court of first instance, although there was no express order appointing Narendra Lall Bhattacharyya, father of the plaintiff, as his next friend was in order, and in that case it will be necessary for the learned Judge to go into the merits of appeal in order to dispose of it, If, on the other hand, he comes to be of opinion that such unsoundness of mind as is contemplated by the rule has not been made out, it will have to be held that the plaint that was presented was not in order and as a necssary consequence of such a finding, it will have to be held further that the proceeding that followed were not proceedings taken in accordance with law and consequently the decree that was passed in the suit will have to be held as a nullity. In the latter event, it will, of course, be open to the representatives of the alleged lunatic to institute a fresh suit, subject, of course, to any just exception as to limitation or otherwise that may be taken thereof. Costs of this appeal will abide the result, hearing fee two gold *mohurs*.

D. *Order accordingly.*

SIND JUDICIAL COMMISSONER'S COURT

Full Bench

Criminal Acquittal Appeal No. 337-5 of 1934

February 1, 1935

FERRERS, J. C., RUPCHAND AND MEHTA, A. J. Cs.

EMPEROR—PROSECUTOR

versus

KODUMAL OCHIRAM—ACCUSED.

Railways Act (IX of 1890), s. 114—Applicability of—Whether applies to transferors alone—Criminal Procedure Code (Act V of 1898), s. 562—Offences under s. 114, Railways Act—Offender should be punished irrespective of no previous conviction—Precedents—Full Bench not agreeing with interpretation of penal section, by Division Bench—Altered interpretation, if has retrospective effect—Interpretation of statutes.

Section 114, Railways Act, applies to purchasers and transferees of tickets and not to the transferors alone. *Devkisandas* v. *Emperor* (1), Overruled.

Per *Full Bench, Mehta, A. J. C.*, dissenting:—

Offences punishable under s. 114, Railways Act, are easy to commit but not easy to detect. When detection has been successfuly effected, an offender should not go scot-free, even if he has not been convicted before.

Per *Mehta, A. J. C.*—When a particular penal section of a statute like the Railways Act has been interpreted in a particular way in favour of a subject by a Division Bench of a High Court, the subject has a right to say that he has not committed any offence, and that he had no guilty intention whatsoever in doing an act in the belief that the interpretation was correct. If subsequently that interpretation is found fault with by a Full Bench, so that the very act which at one time was not looked upon as an offence is to be regarded as an offence, the altered interpretation should not have a restrospective effect as if the subject should have anticipated the second decision of the High Court. Even if a technical conviction is recorded, the accused should have the benefit of s. 562 (1) (A), Criminal Procedure Code.

Mr. *Partabrai D. Punwani*, for the Crown.

Mr. *N. C. Pinto*, for the Accused.

Ferrers, J. C.—In the Court of the Additional City Magistrate, Karachi, on August 14, 1934, Kodumal, son of Ochiram was charged with purchasing half of two return tickets and attempting to travel therewith. Kodumal admitted that he purchased both the third class and intermediate half tickets and produced the same at the gates to get into the train and travel with these tickets. He did not, however, plead guilty. By the prosecution it was supposed that the acts which Kodumal had admitted were punishable by s. 144 of the Act 9 of 1890. The learned Magistrate did not, however, take this view. His judgment is brief. He says:

"In view of the Sind Court ruling *Devkisandas* v. *Emperor* (1), I acquit the accused under s. 245, Criminal Procedure Code."

The Government was dissatisfied with this conclusion. It considered that the ruling of the High Court in *Devkishindas* v. *Emperor*, (1), requires to be re-considered. Accordingly it directed the Public Prosecutor for Sind, to lodge an appeal against the order of acquittal under s. 417, Criminal Procedure Code. A reference to the case on which the learned Magistrate relies shows that this Court has committed itself to the following proposition:

"Section 114, Railways Act, does not apply to the purchasers or transferees of tickets, the transferors alone being punishable under that section."

This doctrine may justify the learned Magistrate, but we agree with the executive Government in thinking that it requires

(1) 112 Ind. Cas. 771; A I R 1928 Sind 191; 30 Cr. L J 3; 23 S L R 39.

re-consideration. The judgment contains these words:

"It is to be noticed that in some commentaries on the Railways Act the word purchase in s 114 is written 'purchases.' This has apparently led to the erroneous view that the section renders punishable both vendors and purchasers."

The learned Judges who delievered this judgment probably had before them the fifth edition of the Unrepealed General Acts of the Governor-General-in-Council. That edition certainly does show the word "purchase" instead "purchases." This appears to be a mere typographical error. Under s. 78, Evidence Act, the proper method of proving an Act is the Gazette of India. If there is a conflict between the publication in the Gazette and any other copies of the Act printed by the Superintendent of Government Printing, preference should be given to that in the Gazette of India: *Subramania Aiyar* v. *Shanmugam Chettiar* (2). Now, the Act was originally published in Gazette of India on March 22, 1890. We find that the word in question appears in the form of "purchases" and not "purchase." In this form, it was repeated in various editions and the error does not appear to have crept in until the edition of 1928. That it is a typographical error does not admit of any reasonable doubt. It is only by some force that the word "purchase" can be made to bear any sense whatever; and that sense is in conflict with the latter part of the section which, in any case, imposes an "additional" fine upon the purchaser of such a return ticket. The matter is too plain to require any prolonged discussion. We are all of opinion that the decision in *Devkisandas* v. *Emperor* (1), rests upon mere typographical error and requires correction. We think that s. 114, Railways Act, does apply to purchasers and transferees of tickets and not to the transferors alone. This disposes of the only question of law. The facts are admitted by the offender.

One of the Judges composing this Full Bench is of opinion that the offence might be dealt with under s. 562, Criminal Procedure Code, and the offender discharged after due admonition. This view does not commend itself to the majority of the Bench. It is not alleged that the offender knew the ruling in *Devkisandas's case* (1) and was misled by it. Moreover, he did not merely purchase these two tickets. With one of them to attempted to travel. This would be an offence on any reading of the section.

Such offences are easy to commit but not easy to detect. When detection has been successfully effected, we do not think an offender should go scot-free, even if he has not been convicted before. Our order will therefore be, that Kodumal is convicted of an offence punishable under s. 114, Railways Act, and the sentence upon him is a fine of Rs. 5. Out of this fine, if recovered, in accordance with s. 115, Railways Act, Rs. 4-6-0 being the value of the single fare will be paid to the Railway Administration.

Mehta, A. J. C.—On the question of the interpretation of s. 114, Railwas Act, IX of 1890, I am in perfect agreement with the judgment just dictated by the learned Judicial Commissioner. With the final order I regret, however, I cannot agree on principle; although the fact of my differing will not make any difference to the accused because the majority of this Bench is in favour of recording a conviction and inflicting a fine.

I am of the opinion that when a particular penal section of a statute like the Indian Railways Act has been interpreted in a particular way in favour of a subject by a Division Bench of a High Court, the subject has a right to say that he has not committed any offence, that he had no guilty intention whatsoever in doing an act in the belief that the interpretation was correct. If subsequently that interpretation is found fault with by a Full Bench, so that the very act which at one time was not looked upon as an offence is to be regarded as an offence, the altered interpretation should not have a retrospective effect as-if the subject should have anticipated the second decision of the High Court.

I think this is a fit case in which even if a technical conviction is recorded, the accused should have the benefit of s. 562 (1) (A), Criminal Procedure Code. His plea was that he did what according to a decision of this Court was not an offence. The trial Court upheld the plea. On the Railway Company's insistence, the accused actually puchased a fresh ticket and travelled under that ticket. So that he has caused no wrongful gain or wrongful loss to anybody. I do not understand why the Railway Company should get the fare twice over. There is thus no necessity for the imposition of a fine by way of penalty.

P. *Conviction upheld.*

(2) 90 Ind. Cas. 725; A I R 1926 Mad. 55; 48 M 821; 49 M L J 313; 22 L W 335; (1925) M W N 768.

LAHORE HIGH COURT

Second Civil Appeal No. 1455 of 1934
February 14, 1935
AGHA HAIDER, J.

TOOK CHAND AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RADHA KISHEN AND ANOTHER—DEFENDANTS—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 10—Absolute condition or limitation—Property given to son by father on condition that the son will not alienate during father's lifetime—Condition, if void—Hindu Law—Family arrangement.

Where a Hindu father by way of family arrangement gives certain property to one of his sons but imposes the condition that the son will not alienate some of the said property during the lifetime of the father, the condition is not void under s. 10, Transfer of Property Act, the condition not being absolute. *Muhammad Raza* v. *Abbas Bandi Bibi* (1), followed

S. C. A. from the decree of the District Judge, Multan, dated June 28, 1934, reversing that of the Subordinate Judge, Second Class, Multan, dated December 16, 1933.

Mr. *Mukand Lal Puri*, for the Appellants.

Mr. *Hargopal*, for the Respondents.

Judgment.—Took Chand had four sons. Ram Kishen is his son by his first wife, while Daulat Ram, Pokhar Das and Vir Bhan are his issues by the second wife. On January 16, 1932, Took Chand executed Ex. P-1 in favour of Ram Kishen, defendant No. 1. In this document he mentions that Ram Kishen had separated from him some time ago and had been carrying on a shop on his own account and that, as Ram Kishen is desirous of getting his proportionate share in the immovable property, such property may be given to him whereupon he shall relinquish all his claims to the rest of the property. Under these circumstances he was given two houses on account of his relationship as the son of the executor subject to the condition that, so far as house No. 1 was concerned, he was entitled to mortgage or sell it for the purpose of carrying on his shop; but as regards house No. 2 he was not to mortgage or sell or transfer it in any shape or form, and if Ram Kishen transferred the house No. 2, then the executant (the father) would be entitled to recover it by having recourse to formal legal proceedings. It further recited that the restriction as regards transfer has been imposed because Ram Kishen is a spendthrift. By acting under Ex. P-1 Ram Kishen would be enabled to maintain himself and his children on the income of this property. Neither the executant nor his other sons, who lived with him jointly, nor his wife shall have any connection with this property except in the manner stated above. After the death of the executant the obligee shall have the right to transfer the property in house No. 2 in any way he liked.

It would thus appear that the two houses were given to Ram Kishen by his father under Ex. P-1. He was given full power of disposition over house No. 1, but as regards house No. 2, he was prohibited from transferring it during the life-time of his father. Ram Kishen did not keep it very long after this document had been executed in his favour and on December 14, 1932, transferred this house by way of exchange to Radha Kishen. Thereupon on March 14, 1933, the present suit was brought by Took Chand and his three minor sons for possession of a house detailed in the plaint. A number of issues were framed but Issue No. 6 alone needs mention. It runs as follows:—

"Is the condition in restraint of alienation void?"

The trial Court decreed the plaintiffs' suit. Defendant No. 2 went up in appeal and the lower Appellate Court having found that the condition as regards restraint on alienation was not binding upon Ram Kishen, has dismissed the suit. The plaintiffs have come up to this Court in second appeal.

The case was fully and ably argued by the learned Counsel for the parties and a number of cases were cited. Most of these cases were helpful in a way, but they depended naturally upon the interpretation of the particular documents which were before the Courts for consideration, and which had to be considered in order to determine the legal effect of the restraint which was sought to be placed upon the donees of the proprietary title. In the present case we are concerned with the case of Hindus who are governed by the Mitakshara law which has been modified in the Punjab to this extent that during the lifetime of the father his sons cannot enforce a partition. Took Chand's first wife was dead and he had married a second wife with whom he had a second family. Under these circumstances Ram Kishan would naturally be isolated, while Took Chand and his younger children with his wife would form a separate group. As the document shows Ram Kishen demanded his proper share in the family property. The father could have easily refused it and Ram Kishen could not have enforced his

right by bringing a suit for partition. Ram Kishen is stated to be a man of extravagant habits. In view of these circumstances the father wanted to accommodate Ram Kishen to this extent that in his lifetime he gave him a part of his property. Over a portion of it the father gave him absolute power of disposition, but as regards the other moiety, he stipulated that in his lifetime he should not make any transfer of it, although after his death he would be free to do whatever he liked. It was a family arrangement and the mutual differences were composed by Ram Kishen, the eldest son, being given a part of the property, on relinquishing all his interests in the remainder of the property which was left with the father and his minor sons by his second wife.

In deciding this case the principle of law, as embodied in s. 10 of the Transfer of Property Act, must be borne in mind. It lays down that:

"Where property is transferred subject to a condition or limitation, absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition of limitation is void..."

Now in the present case the house No. 2 was transferred completely to Ram Kishen in the sense that neither the father nor his children by his 2nd wife had any interest left in it. But the condition which was sought to be imposed was not absolute, it extended only to the life time of the father after which Ram Kishen would be free to dispose of the property in any manner he liked. It is impossible to define the word 'absolutely' which occurs in s. 10 in a manner which would apply to every possible case that might arise, but the word should be construed in a reasonable manner. The mere fact that in the present case the son, who has obtained a considerable advantage as a result of the family arrangement, is merely asked not to alienate a part of the property during the lifetime of the father, cannot be said to be an absolute restraint upon his powers as a transferee of the house No. 1.

In *Muhammad Raza* v. *Abbas Bandi Bibi* (1), the subject is fully discussed by their Lordships of the Privy Council and the provisions of s. 10 of the Transfer of Property Act, have been considered. In that case there was a compromise under which a lady was given an estate of inheritance which was nevertheless saddled with the restraint that she was not to alienate the property to a stranger, which meant outside the family. The lady did make an alienation in favour of strangers. On the death of the lady her heirs brought a suit for setting aside the alienation made by her in favour of the outsiders. It was argued on behalf of the defendants that the gift in favour of the lady of the estate was complete and that the restriction imposed upon her was void and should be disregarded. This contention was repelled and their Lordships of the Privy Council observed that:

"In this case the restriction was not absolute but partial; it forbids only alienation to strangers."

I quote the following passage from the judgment of their Lordships:—

"Judging the matter upon abstract grounds, their Lordships would have thought that, where a person had been allowed to take property upon the express agreement that it shall not be alienated outside the family, those who seek to make title, through a direct branch of this agreement, could hardly support their claim by an appeal to those high-sounding principles of justice equity and good conscience and it must be remembered in this connection that family arrangements are specially favoured in Courts of Equity."

Referring to the provisions of law, enunciated in s. 10 of the Transfer of Property Act, their Lordships further observed that, in view of the terms of the section, it would be impossible to assert that such an agreement, as they were considering was contrary to justice, equity and good conscience. Their Lordships accordingly treating the document as a compromise agreement held that the provision contained in it restricting the lady from transferring the property outside the family cannot be treated otherwise than as being binding upon her.

In the present case, too, as already mentioned, the restraint is not an absolute one and as between the father on the one side and Ram Kishen on the other, it must be held binding on Ram Kishen. This being so, I would allow the appeal, set aside the decision of the lower Appellate Court on Issue No. 6, and remand the case to the trial Court for decision of the case on the merits. Costs here and hereafter would abide the result.

D. *Appeal allowed.*

(1) 137 Ind. Cas. 321; A I R 1932 P C 158; Ind. Rul. (1932) P C 181; 36 C W N 774; '34 Bom. L R 1048; 55 C L J 510; 9 O W N 577; (1932) A L J 709; 36 L W 69; 63 M L J 180; 59 I A 236; (1932) M W N 1011; 7 Luck. 257 (P C).

OUDH CHIEF COURT

Second Rent Appeal No. 40 of 193
November 30, 1933
NANAVUTTY, J.
Syed MOHAMMAD AGHA—
PLAINTIFF—APPELLANT
versus
BAIJNATH SINGH—DEFENDANT
—RESPONDENT

U. P. Local Rates Act I of 1914), s. 7—Superior proprietor's right to recover cesses from lessees or under-proprietors—Lease deed by which superior proprietor undertook to pay old chaukidari *and* patwari *rates—Whether takes away right to recover cesses—U. P. Land Revenue Act (III of 1901), s. 86, if applies*

Under s. 7, U. P. Local Rates Act, the superior proprietor has a legal right to recover the cesses from his lessees or under-proprietors. A lease under which the superior proprietor undertook to pay the old *chaukidari* and *patwari* rates that were then recoverable from landlords does not take away that right. Nor does an order of the Settlement Commissioner that the defendants-*pukhtadars* (lessees) were not liable for cesses take away the legal rights conferred upon the plaintiff who is the superior proprietor to recover the local cesses imposed by the Local Government under the U. P. Local Rates Act. Section 86, U P. Land Revenue Act has no applicability to the case. *Pirthipal Singh* v. *Hari Saran Das* (1), referred to

S. R. A. against an order of the District Judge of Rae Bareli, dated July 18, 1932.

Mr. *Ali Mohammad*, for the Appellant.

Judgment.—These are three connected appeals filed by the plaintiff from the judgment and decree passed by the learned District Judge of Rae Bareli, dated July 18, 1932, confirming the judgment and decree of the Court of Thakur Birendra Bikram Singh, Assistant Collector of Rae Bareli, who dismissed the plaintiff's claim for cesses.

The plaintiff Syed Mohammad Agha has now come up in Second Appeal. The sole point for determination in these appeals is whether the plaintiff, who is the superior proprietor of the village, is entitled to claim cesses from the defendants-respondents, who are lessees holding under-proprietary rights in the land in suit. The trial Court held that the defendants were not liable to pay any cesses in view of the stipulation made by them or their predecessors-in-interest in the lease of May 28, 1878. The learned District Judge in appeal upheld the finding of the trial Court on this point by making a reference to the order of the Settlement Commissioner, dated March 25, 1931, in which that officer held that the defendants-*pukhtadars* were not liable for cesses. The learned District Judge found that by this order of the Settlement Commissioner, the very foundation of the plaintiff's claim for recovery of cesses was taken away from him and that the lease also provided that whatever taxes besides revenue were to be paid would be borne not by the lessees but by the lessor. I have heard the learned Counsel of both parties at some length. In my opinion these three connected appeals must succeed. Under s. 7 of Act I of 1914 (The U. P. Local Rates Act), the superior proprietor has a legal right to recover the cesses from his lessees or under-proprietors. The agreement or lease of May 28, 1878, upon which reliance is placed on behalf of the defendants-respondents cannot support their contention. In that lease the superior proprietor undertook to pay the old *chaukidari* and *patwari* rates that were then recoverable from landlords. A similar contention to that advanced before me on behalf of the defendants was raised in *Pirthipal Singh* v. *Hari Saran Das* (1). One of the contentions of the appellants in that case was that as there was no proof that at the time of the commencement of Act I of 1914 he was liable for the payment of any rates payable under the U. P. Local and Rural Police Rates Act of 1906, the decision of the lower Court was wrong and it was urged that if he paid anything at all he paid it under an agreement of the year 1866. This contention on behalf of the appellant was rejected by this Court in that case. Reference has also been made to a ruling of this Court reported in *Har Narain Das* v. *Gajraj Singh* (2), but the point decided in that case was different from the one that falls to be decided in the present appeals. In my opinion the decision of the learned District Judge cannot be upheld for the simple reason that the decision of the Settlement Commissioner upon which the lower Court relies cannot take away the legal rights conferred upon the plaintiff-appellant, who is the superior proprietor of the village, to recover the local cesses imposed by the Local Government under Act I of 1914. The agreement of 1878 upon which reliance is placed by the defendants-respondent also does not take away the plaintiff-appellant's right to sue for recovery of local cesses due to him and

(1) 118 Ind Cas. 95; 13 R D 278; Ind. Rul. (1929) Oudh 431; A I R 1929 Oudh 448.

(2) 124 Ind. Cas. 668; 7 O W N. 431; 14 R D 183; A I R 1930 Oudh 219; Ind. Rul. (1930) Oudh 284.

imposed under Act I of 1914. Section 86 of the Land Revenue Act (III of 1901) to which my attention has been invited by the learned Counsel for the respondents has also no applicability in the present case. In my opinion the plaintiff *zamindar* has a legal right under Act I of 1914 to recover the cesses from his lessees.

I accordingly allow these appeals, modify the judgments and decrees of the lower Courts and decree also the plaintiff's claim for cesses with costs throughout.

N. *Appeals allowed.*

CALCUTTA HIGH COURT

Civil Appeal No. 1102 of 1932
February 23, 1934
LORT WILLIAMS AND M. C. GHOSE, JJ.

HARI SADAY SAHA—PLAINTIFF—APPELLANT
versus
MAHENDRA NARAIN RAJ—DEFENDANT—RESPONDENT

Limitation Act (IX of 1908), Sch. I, Art. 11-A—Proceedings under O. XXI, r. 97, Civil Procedure Code (Act V of 1908)—Held, there was sufficient investigation.

In proceedings under O. XXI, r. 97, Civil Procedure Code, the auction-purchaser was present but did not adduce evidence; the opposite party examined only one witness; there was no opposition regarding another lot and the Court passed an order:

Held, that there was an investigation or an inquiry by the Court, so as to bring it under Art. 11-A, Limitation Act. *Sardhari Lal* v *Ambika Pershad* (1), referred to.

A. against appellate decree of the Sub-Judge, Suri, dated January 22, 1932.

Mr. *Apurbadhan Mukherjee* for Mr. *Bijon Kumar Mukherjee*, for the Appellant.

Messrs. *Hari Charan Ganguli* and *Indu Prokash Chatterjee*, for the Respondent.

Lort-Williams, J.—This appeal arises out of a title suit brought by the plaintiff-appellant after his Miscellaneous Case under O. XXI, r. 97, Civil Procedure Code, was dismissed. The only point raised before us is upon the question of limitation. The petition under O. XXI was filed on May 14, 1925. On August 15, 1925, the order sheet shows that the opposite party was ready, but the petitioner prayed for time to produce evidence and one Sheikh Habib, a Civil Court peon, was examined on behalf of the opposite party and discharged. The case was then adjourned until September 5, for hearing. On September 5, the opposite party was ready, but the petitioner again prayed for time to produce evidence and it was ordered that the case be put up on September 12, for hearing. On September 12 the order sheet reads as follows:

"The petition of the auction-purchaser as regards Lot No. 15 is not opposed. A. P. adduces no evidence as regards Lot No. 17 claimed by the O. P. Mahendra N. Raj. Ordered the petition be allowed as regards Lot No. 16 and the A. P. be put in possession of the same. The petition is disallowed as regards Lot No. 17. The opposite party will get costs with Pleader's fee Rs. 4."

This order was signed by the Pleaders of the parties, Mr. G. P. Roy and Mr. D. Banerjee. The learned Advocate for the appellant has argued that this proceeding was not an investigation such as is contemplated by O. XXI, rr. 97, 98 and 99, Civil Procedure Code, and he has referred us to several cases in which a distinction was drawn between a proceeding under these sections which was dismissed for default and one in which an order was made after investigation. He has argued further that if there has been no such investigation, then the order made must have been on default, that such an order is not one which is contemplated by Art. 11-A, Limitation Act, and therefore he is not restricted to the 12 months, mentioned in that article during which he must institute his suit. His argument seems to amount to this, that because the auction-purchaser adduced no evidence with regard to Lot No. 17, and because his petition as regards Lot No. 16 was not opposed, therefore there was no inquiry or investigation by the Court within the meanings of those sections and, in effect, the order was passed in default of appearance. I am at a loss to understand how this argument can be justified. To begin with, one witness was called and examined by the opposite party and was discharged. Further, with regard to Lot No. 16, the opposite party raised no opposition and therefore it was wholly unnecessary to hear evidence with regard to that lot. As regards Lot No. 17, the auction-purchaser himself told the Court that he did not wish to adduce evidence. Yet the learned Advocate says that unless the Court demands evidence in such circumstances, it cannot be held to be an investigation within the meaning of the section. All that I need say is that, in my opinion, in the circumstances to which I have referred, there was clearly an investigation or an inquiry by the Court and an order made thereon. The learned Advocate sought to show by the form of the order sheet itself that his client was

not present but the statement that the auction-purchaser adduced no evidence clearly means that he was present, either himself or by his Pleader, and either he or his Pleader told the Court that he did not desire to adduce evidence with regard to Lot No. 17. There is no substance in the contentions raised by the learned Advocate and this appeal must accordingly be dismissed with costs.

M. C. Ghose, J.—Having regard to the case of *Sardari Lal* v. *Ambika Pershad* (1), there is, in my opinion, no doubt that there was sufficient investigation in this case so as to bring it under Art. 11-A, Limitation Act. I agree that this appeal should be dismissed.

D. *Appeal dismissed.*

(1) 15 C 521; 15 I A 123; 5 Sar. 172 (P C).

RANGOON HIGH COURT
Special Bench
Civil Reference No. 8 of 1934
January 7, 1935
PAGE, C. J., MYA BU AND BAGULEY, JJ.
COMMISSIONER OF INCOME-TAX, BURMA
versus
V. S. U. R. FIRM, RANGOON

Income Tax Act (XI of 1922), s 13—Fresh promissory notes issued by debtor for sum due under old note and interest thereon—Interest under old note treated as received by creditor, and making corresponding entries in accounts—Held, there was material for Income Tax Officer for assessing such interest to income-tax.

Where the assessees have elected to treat the interest due under the original loans as having been received and paid on the execution and delivery of the fresh promissory notes by the debtors, and the interest is entered as having been received both in the interest account and in the personal accounts of the respective debtors, and the creditors accepting the obligations of the debtors under the fresh promissory notes in substitution for the old debts and the interest due thereon, and in past years were content that the interest accruing in this manner should be assessed to income tax, in these circumstances it cannot be held that there were no materials before the Income Tax Officer which would justify him in concluding that these sums represented interest liable to assessment, which the assessee has regarded as being liquidated by delivery of fresh promissory note.

[Case-law referred to.]

In such cases if the assessees want to escape assessment for such interest, they should so adjust their accounts as to make it clear that the acceptance of a fresh promissory note is not taken as effecting payment of the interest due under the old loan.

C. R. from the Commissioner of Income-tax, Burma.

Mr. *A. Eggar*, for the Commissioner of Income-Tax.

Mr. *K. C. Bose*, for the Assessee.

Page, C. J.—This case raises an interesting question but when the facts are understood, in my opinion, it, presents no difficulty. The question propounded is:

"Whether there was material on which the Income-tax officer could conclude that the assessees' method of accounting was the mercantile or accrued method in respect of the sum of Rs. 23,373 interest from non-Chettyar debtors shown in the assessees' accounts as received and taxed in the assessment."

Now, in *Mian Feroz Shah* v. *Commissioner of Income-Tax, Punjab* (1) (at p. 692*) Lord Blanesburgh delivering the judgment of the Judicial Committee, observed:

'Too much emphasis has, they think, throughout the case been attached to the use by income-tax Officer and the Assistant Commissioner of the term 'mercantile system.' The finding of both in its essential substance was that the appellant's system of accounting, by whatever name called, required the inclusion in his accounts of 1925-1927 of the Rs. 90,618 referred to and the only question open to judicial determination is whether there was any evidence before these officers upon which they might so find."

These observations apply with equal force to the present case and the real question that falls for determination is:

"Whether there were materials before the income-tax officer upon which he could find that the sum of Rs. 23,373 was interest upon loans that had accrued to the assessees in the accounting year, and as such was assesseable to income-tax for the year 1933-1934."

The material facts are set out in the revised case stated by the Commissioner of Income-tax as follows:

"The assessees' actual method of accounting for transactions with non-Chettyar is as follows: So long as the original pro-note or document is in force only cash receipts from the debtor are shown in the accounts; but when this pro-note or document is cancelled and a fresh one executed of the principal of the loan and the interest accured on it, the principal and the interest are shown in the accounts as paid by the debtor. And it is only logical that the interest should be shown as paid by him since it now ranks as principal earning interest whereas the original pro-note only bore simple not compound interest In respect, therefore, of loans to non-Chettyars, for which fresh pro-notes or documents are taken, the assessees abandon the cash method and follow the mercantile method of accounting. For many years all Chettyars have been assessed without question on these sums of interest included in their pro-note or document and shown in their accounts as received. This practice was according to the provisions of s. 12 as understood by this department. Accordingly when the income-tax officer came to make the assessees' assessment for 1933-1934 and found that they had omitted to include in their return Rs. 23,373, which represented interest

(1) 144 Ind. Cas 686; A I R 1933 P C 198; 60 I A 325; 14 Lah. 682; 10 O W N 797; 6 R P C 1; (1933) M W N 889; (1933) A L J 1258; 37 C W N 1133; 65 M L J 335; 34 P L R 1090 (P C).

*Page of 144 Ind. Cas.—[*Ed.*]

for which fresh pro-note had been taken from non-Chettyar debtors and which was shown in their accounts as received, he included the amount in the assessment. His order was upheld on appeal."

The Income-tax Officer in his assessment order stated:

"In the present case, however, the assessees according to the custom of the Chettyar community to which he belongs has always been treating interest included in the fresh pro-note or mortgage bond taken in a settlement of account to cover outstanding principal and interest as realised and there has been no objection thereto for the last so many years. Further the amount is shown in the assessees' book as interest realized both in the interest account and in the accounts of the debtors. This method of accounting has been regularly employed by the assessee as well as other members of his community and under s. 13 I am bound to compute income, profits and gains in accordance with the method of accounting regularly employed by the asseesee, and to allow the asseseees to exclude the sum of Rs. 23,373-9-0 would be allowing him to change the methed of accounting hitherto adopted and thereby not properly deduce the income, profits and gains therefrom. It is also to be noted that the debtors in giving fresh pro-notes for the principal and interest already due have capitalized the amount due to the assessee and thereby undertaken to pay interest on the capitalized amounts and that a fresh contract has been entered in place of the old."

The case for the Crown is that the assessees, in order to postpone payment of income-tax until a reduction is made in the rate at which the tax is levied are wrongfully claiming that this sum of Rs. 23,373 is not income that accrued during the accounting year but represents unpaid interest due to them for the repayment of which they have received fresh promissory notes from their debtors as security. Now, it is well settled that a debt may be repaid in kind as well as in bullion: *Gresham Life Assurance Society* v. *Bishop* (2), *Raghunandan Prasad Singh* v. *Commissioner of Income-tax, Bihar & Orissa* (3) and *Commissioner of Income Tax, Bihar & Orissa* v. *Maharajadhiraj of Darbhanga* (4). In *Gresham Life Assurance Society* v. *Bishop* (2), Lord Lindley observed:

"My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, *e. g.*, by the transfer of coin or a negotiable instrument or other document which represents and produces coin and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret. But to constitute a receipt of anything, there must be a person to receive and a person from whom he receives, and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth."

And in *Commissioner of Income-tax, Burma* v. *P. L. S. M. Firm* (5), I had occasion to refer to the following observations of Lord Macmillan when delivering the judgment of the Board in *Commissioner of Income-tax, Bihar & Orissa* v. *Maharajadhiraj of Darbhanga* (4):

"What the officer is directed to compute is not the assessees' receipts but the assessees' income, and *in dubio* what the assessee himself chooses to treat as income may well be taken to be income and to arise when he so chooses to treat it,"

and I added:

"although book entries purporting to relate to the receipt of income are not necessarily conclusive as to the quantum of the income to which they purport to refer, for the real income, profits and gains that have accrued during each accounting year are in every case to be determined by the income-tax officer as a matter of fact."

In the present case the assessees have elected to treat the interest due under the original loans as having been received and paid on the execution and delivery of the fresh promissory notes by the debtors, and the interest is entered as having been received both in the interest account and in the personal accounts of the respective debtors; and the creditors accepting the obligations of the debtors under the fresh promissory notes in substitution for the old debts and the interest due thereon, and in past years being content that the interest accruing in this manner should be assessed to income-tax. In these circumstances I am unable to hold that there were no materials before the income-tax officer which would justify him concluding that these sums, amounting in all to Rs. 23,373, represented interest liable to assessment in the year 1933-1934.

The assessees rely upon two judgments recently delivered by the Judicial Committee in *Raghunandan Prasad Singh* v. *Commissioner of Income-Tax, Bihar & Orissa* (3) and *Commissioner of Income-tax, Bihar & Orissa* v. *Maharajadhiraj of Darbhanga* (4), but, in

(2) (1902) A C 287; 71 L J K B 618; 18 T L R 626; 50 W R 593; 86 L T 693.

(3) 142 Ind. Cas. 446; A I R 1933 P C 101; 60 I A 133; 12 Pat. 305; Ind Rul. (1933) P C 86; (1933) M W N 429; 37 C W N 570; 14 P L T 237; 64 M L J 544; 37 L W 691; (1933) A L J 564: 35 Bom. L R 536 (P C).

(4) 142 Ind. Cas. 437; A I R 1933 P C 108; 60 I A 146; 12 Pat. 318; Ind. Rul. (1933) P C 77; (1933) M W N 439; 64 M L J 612; 37 L W 701; 37 C W N 598; (1933) A L J 527; 14 P L T 341; 35 Bom. L R 731; 57 C L J 318 (P C).

(5) 151 Ind. Cas. 907; A I R 1934 Rang. 274; 12 R 438; 7 R Rang. 125.

my opinion, both these cases, are clearly distinguishable, and afford no assistance to the assessees. In *Raghunandan Prasad Singh* v. *Commissioner of Income-tax, Bihar & Orissa* (3) the assessees kept their accounts on a cash basis and did not regard the interest under the old mortgage as having been liquidated by the execution and delivery to them of the new mortgage, and further, in their books of account the assessees in that case did not treat the interest under the old loan as having been received or paid. In *Commissioner of Income-tax, Bihar & Orissa* v. *Maharajadhiraj of Darbhanga* (4):

"there was an arrangement affecting the whole indebtedness whereby certain assets were accepted in part satisfaction and promissory notes were taken for the balance,"

there was no continuous or open account, and in that case the general rule, therefore, prevailed that the giving of the promissory notes did not amount to payment, the promissory notes being merely conditional payment of the debts. In the present case, however, in my opinion, there is material to justify the conclusion that the assessees regarded the delivery of the fresh promissory notes as amounting to a liquidation of assessees' claim for interest, and the sum of Rs. 23,373 was treated by the assessees both in the interest account book and the books relating to the account of the respective debtors as being interest that had been received by the assessees from their debtors. The remedy for the difficulty in which the assessees find themselves in the present case lies with the assessees themselves; for I see no reason why in the future they should not so adjust their accounts as to make it clear that the acceptance of a fresh promissory note is not taken as effecting payment of the interest due under the old loan.

In the circumstances obtaining in the present case, however, I would answer the question as amended in the affirmative. The assessees will pay the costs of the Commissioner's Advocates fee, 10 gold *mohurs*.

Mya Bu, J.—I concur.

Baguley, J.—I agree.

D. *Question answered.*

MADRAS HIGH COURT
Special Bench

Original Petition No. 264 of 1932

April 27, 1934

BEASLEY, C. J., RAMESAM AND SUNDARAM CHETTY, JJ.

COMMISSIONER OF INCOME-TAX, MADRAS

versus

P. R. A. L. M. MUTHUKARUPAN CHETTIAR—RESPONDENT

Income-tax Act (XI of 1922), s. 4 (2)—Firm—Retirement of one partner—Account taken of capital and profits—Share of retiring partner paid to him—Amount paid, if assessable as profits.

Where the assessee, a partner of a firm, retired from that firm, an account was taken of the capital and of the profits and the assessee was given his share and he went out of the firm with it:

Held, that upon the retirement of the assessee from the partnership, the partnership was dissolved as between all the other members and hence there must be deemed to have been an ascertainment of the shares of all the partners and distribution of the partnership assets. The fact that the other partners continued in business together did not affect the question their doing so being merely in the capacity on a new firm, the legal position being that the old firm had ceased to exist. As the retirement brought about a dissolution of the firm and as on such dissolution the capital and profits of the firm became consolidated, no portion of the amount received by the retiring partner could be assessed to income-tax as profits. *Commissioner of Income-tax, Madras* v. *Siddha Gowdar & Sons* (1) and *Inland Revenue Commissioner* v. *Burrell* (2), followed.

Messrs. *K. Rajah Ayyar* and *V. Ramaswami Ayyar*, for the Assessee.

Mr. *M. Patanjali Sastri*, for the Commissioner of Income-tax.

Beasley, C. J.—The question referred to us is whether on the facts of this case the sum of Rs. 38,305 is a receipt of capital or of profit assessable under s. 4 (2), Income-Tax Act. The petitioner was a partner in the S. P. K. A. A. M. Firm in Colombo. He retired from that firm and an account was taken of the capital and of the profits, etc., and the petitioner was given his share and went out of the firm with it. His contention is that his retirement from the firm brought about a dissolution of the firm and that on such a dissolution the profits and capital, etc., of the firm became consolidated into capital for distribution amongst the partners. He, therefore, contends that the sum in question cannot be assessed to income-tax as profits following the decision in *Commissioner of Income-tax, Madras* v. *Siddha Gowdar & Sons* (1), in which the decision in *Inland Revenue Commissioner*

(1) 137 Ind. Cas. 689; A I R 1932 Mad. 375; 55 M 818; 62 M L J 638; (1932) M W N 610; Ind. Rul. (1932) Mad. 432; 35 L W 806; 55 M 818 (S. B).

v. *Burrell* (2), was applied. The Commissioner of Income-tax contests this position and contends that the principal of the latter decision cannot be applied to the case of a partnership which is not a corporate body. That argument of course proceeds to the length of saying that the decision in *Commissioner of Income-tax, Madras* v. *Siddha Gowdar & Sons* (1), was incorrect. I may here observe, however, that in that case it was put in the forefront of the Income-tax Commissioner's case that the principle laid down in *Inland Revenue Commissioner* v. *Burrell* (2), should be extended to the case of a partnership in India; and if the facts of this case are similar to the facts in that case, then as I see no reason for thinking that that case was incorrectly decided it must be applied. He seeks also to distinguish this case from that because he says that there was no stoppage of business or final dissolution of partnership accompanied by a distribution of assets.

This view completely ignores the provisions of s. 253 (7), Contract Act, which provides that in the absence of any contract to the contrary if from any cause whatsoever any member of a partnership ceases to be so, the partnership is dissolved as between all the other members. The legal position, therefore, is that upon the retirement of the petitioner from the partnership, the partnership was dissolved as between all the other members. It follows, therefore, that there must be deemed to have been an ascertainment of the shares of all the partners and indeed there certainly was one with regard to the petitioner and distribution of the partnership assets. It does not in the least degree, in my opinion, affect this question that the other partners continued in business together. Their doing so was merely in the capacity of partners in a new firm, the legal position clearly being that the old firm had ceased to exist. This case is not at all similar to another case relied upon by the Commissioner of Income-tax, *viz.*, *Arunachalam Chettiar* v. *Commissioner of Income tax, Madras* (3). There what was being considered was a partition of a Hindu joint family. In my view, totally different considerations apply to such a case as that. For the reasons I have already stated, the answer to the question referred must be that upon the facts of this case the sum of Rs. 38,305 is a receipt of capital and not of profit. The assessee will be allowed Rs. 250 costs.

Ramesam, J.—I agree.

Sundaram Chetty, J.—I agree.

A. *Reference answered.*

(2) (1924) 2 K B 52; 9 T C 27; 93 L J K B 709; 40 T L R 552; 131 L T 727.

(3) 122 Ind. Cas 793: A I R 1929 Mad. 769; 57 M L J 300; 30 L W 541; (1929) M W N 642; Ind. Rul. (1930) Mad. 409 (S B).

OUDH CHIEF COURT

Second Civil Appeal No. 178 of 1933

March 27, 1935

NANAVUTTY, J.

SHANKAR PRASAD—PLAINTIFF—APPELLANT

versus

SHEO NARAIN—DEFENDANT—RESPONDENT

Limitation Act (IX of 1908), Sch. I, Art. 23, s. 9—Acquittal of plaintiff—Suit for damages for malicious prosecution—Limitation, when commences—Application for revision—Fresh period for bringing suit—Whether begins to accrue

So far as the first portion of Art. 23 of the Limitation Act is concerned, the limitation for filing a suit for compensation for malicious prosecution is one year from the date when the plaintiff is acquitted. The fact that the defendant files an application for revision against the order of acquittal obtained by the plaintiff in his favour does not enable the latter to assert that though time had once begun to run against him from the date of the order of his acquittal, yet, as he had to contest the application for revision filed against the order of acquittal, a fresh period of limitation for bringing his suit for damages began to accrue to him.

S. C. A. against an order of the Additional Sub-Judge, Unao, dated February 28, 1933.

Mr. *L. S. Misra*, for the Appellnat.

Mr. *P. N. Chaudhri*, for the Respondent.

Judgment.—This is a plaintiff's appeal from an appellate judgment and decree of the Court of the Additional Subordinate Judge of Unao dated February 28, 1933, confirming the judgment and decree passed by the Munsif of Purwa, in Unao, dated August 30, 1932.

The facts out of which this appeal arises are briefly as follows:—

On September 25, 1930, Sheo Narain, defendant-respondent, filed a complaint under s. 325 of the Indian Penal Code against Shankar Prasad, the plaintiff-appellant. The case was tried in the Court of the Honorary Magistrate of Unao District, *Lala* Triloki Nath, exercising Second class magisterial powers, and on September 23, 1930, the Honorary Magistrate acquitted Shankar Prasad. An application for revision was filed by Shiv Narain in the Court of the District Magistrate of Unao against the order of acquittal. The learned District Magistrate dismissed the

application for revision on March 7, 1932. A second application for revision against the order of the District Magistrate and of the trial Court was filed in this Court and was dismissed on June 23, 1931. Shankar Prasad then filed the present suit for damages for malicious prosecution on March 3, 1932. A preliminary objection was raised on behalf of the defendant Sheo Narain that the suit was time-barred under Art. 23 of the Indian Limitation Act. The trial Court upheld the preliminary objection and dismissed the plaintiff's suit on the ground of its being time-barred. On appeal the learned Additional Subordinate Judge of Unao agreed with the Munsif and upheld his decision and dismissed the appeal. Dissatisfied with the judgment and decree of the lower Appellate Court the plaintiff has filed this second appeal.

I have heard the learned Counsel of both parties at great length. The sole point for determination in this appeal is as to when did time begin to run against the plaintiff Shankar Prasad, who has filed this suit for damages for malicious prosecution.

Article 23 of the Indian Limitation Act clearly lays down that the period of limitation for a suit for compensation for malicious prosecution is one year from the date when the plaintiff is acquitted or the prosecution is otherwise terminated. It is clear that, as Shankar Prasad was acquitted by the order of the Honorary Magistrate dated December 23, 1930, and the present suit for damages was not filed until March 3, 1932, it is beyond one year from the date of the order of acquittal.

The learned Counsel for the plaintiff appellant has, however, argued that the cause of action to the plaintiff in the present case accrued on June 23, 1932, when this Court dismissed the application for revision filed by Sheo Narain against the order of the District Magistrate. In support of his contention the learned Counsel has relied upon certain observations made by two learned Judges of the Allahabad High Court in *Madan Mohan Singh* v. *Ram Sundar Singh* (1). He has also relied upon a ruling of the Madras High Court reported in *Tangutri Sriramulu* v. *Virasilingam Garu* 57 Ind. Cas. 635 (2) in which the learned Judges held that time commenced to run against the plaintiff from the date of the High Court's order dismissing the application for revision and that the second part of Art. 23 of Sch. I of the Indian Limitation Act was not necessarily excluded where there had been an order of acquittal.

On the other hand the learned Counsel for the defendant-respondent invited my attention to a decision of the Bombay High Court reported in *Purshottam Vithaldas Shet* v. *Ravji Hari Athavale* (3) in which it was held that under Art. 23 of the Indian Limitation Act the period of limitation for a suit for damages for malicious prosecution commenced to run from the date of acquittal or from the date of discharge and that proceedings taken in revision to get the order of discharge set aside did not suspend the cause of action. The same view was held in *Narayan* v. *Seshayya* (4) in which it was held that time began to run against the plaintiff from the date of the order of his acquittal.

For the purposes of deciding this appeal it is unnecessary for me to discuss the conflict of views between the Bombay and the Allahabad High Courts and to decide which view I was prepared to adhere to. So far as a case of acquittal is concerned, the three High Courts of Madras, Bombay and Allahabad are agreed that in a case where the prosecution of the plaintiff ended in an acquittal, the language of Art. 23 of Sch. I of the Indian Limitation Act left no room for argument, as it provided specifically that limitation was to run, from the date of the order of acquittal. The question whether the second part of Art. 23 of Sch. I of the Indian Limitation Act was not necessarily excluded where there had been an acquittal is a question which I need not discuss in the present appeal.

Section 9 of the Indian Limitation Act lays down that where once time has begin to run no subsequent disability or inability to sue stops it, and the fact that the defendant Sheo Narain filed an application for revision against the order of acquittal obtained by the plaintiff Shankar Prasad in his favour does not enable the latter to assert that though time had once begun to run against him from the date of the order of his acquittal, yet, as he had to contest the application for revision filed against the order of acquittal, a fresh period of limita-

(1) 125 Ind. Cas. 464; 52 A 553; A I R 1930 All 326; (1930) A L J 885; Ind. Rul. (1930) All. 672; (1930) Cr. Cas. 449.
(2) 57 Ind. Cas. 635.
(3) 67 Ind. Cas. 754; 47 B 28; 24 Bom L R 507; A I R 1922 Bom. 209.
(4) 23 M 24.

tion for bringing his suit for damages began to accrue to him.

The question as to when the prosecution of the plaintiff Shankar Prasad finally terminated in the present case does not really arise, because the language of Art. 23 of Sch. I of the Indian Limitation Act is very clear and explicit on this point, and so far as the first portion of Art. 23 of the Act is concerned, all the High Courts are in agreement that the limitation for filing a suit for compensation for malicious prosecution is one year from the date when the plaintiff is acquitted.

I am, therefore, clearly of opinion that the lower Courts were perfectly correct in holding that the plaintiff's suit was time-barred. The result is that this appeal fails and is dismissed with costs.

N. *Appeal dismissed.*

MADRAS HIGH COURT

Second Civil Appeal No. 590 of 1930

April 11, 1934

VARADACHARIAR, J.

GURUSAMI NADAR—PLAINTIFF—APPELLANT

versus

IRULAPPA KONAR AND OTHERS—DEFENDANTS—RESPONDENTS

Hindu Law—Conversion—Hindu convert to Christianity—Marriage with a Christian lady—Husband and wife ceasing to live together as such—Reconversion of husband to Hinduism—Marriage with a convert to Hinduism—Validity of this marriage—Evidence—Death Register—Statement in, if evidence of religion of parties.

A person who was a Hindu by birth became a Christian and married a Christian woman but subsequently he and his wife ceased to live as husband and wife. He then reconverted himself to Hinduism and married a woman who was a convert to Hinduism:

Held, that in view of the fact that no particular expiatory ceremonies were observed among the community to which the parties belonged and the absence of any particular ceremonies being prescribed for them by the *smriti* writers nor the performance of any *Homas* enjoined on them, it was necessary to look to the sense of the community and it was of particular significance that the community was prepared to receive him and the second wife as man and wife and their issue as legitimate. *Emperor* v *Lazar* (7), distinguished, *Muthuswami Mudaliar* v. *Masilamani* (1), *Morarji* v. *Administrator General of Madras* (4), *Kamavathi* v. *Digbijai Singh* (5) and *Abraham* v. *Abraham* (6), referred to.

It is safe to rely upon statements in death registers only with reference to the fact of death and the date of death. As for the description therein of the religion of the deceased, it is doubtful if that statement is admissible, as the statement is not made by him and the statement made by some unknown person as to his religion can carry very little weight.

S. C. A. against the decree of the Sub-Judge, Tinnevelley, in A. S. No. 78 of 1929.

Messrs. *A. Swaminath Ayyar* and *S. Venkatarama Iyer*, for the Appellant.

Messrs. *B. Sitarama Rao* and *S. K. Sundaram Ayyar*, for the Respondents.

Judgment.—This second appeal arises out of a litigation between rival transferees from defendants Nos. 1 and 2 and from defendants Nos. 5 and 6, respectively, of properties belonging to one Vedanayaga, deceased. It is common ground that by birth he was a Hindu and that later in life he became a Christian and married defendant No. 1 who was admittedly a Christian. Defendant No. 2 is the issue of that marriage. Sometime after the marriage, defendant No. 1 would appear to have gone over to Colombo and whatever the reason for the estrangement may be, both the Courts below seem to think that thereafter Vedanayaga and defendant No. 1 did not live as husband and wife. The next stage in the story is that Vedanayaga married defendant No. 5.

The evidence is conflicting, as to the religion of Vedanayaga at the time of the marriage with defendant No. 5 and at the time of his death. The materials are very scanty and it is not perhaps too strong an observation to make if I say that in view of what would appear from the evidence in the case as to the prevalence of unions amongst members of this community without much regard to their religious beliefs and opinions, and in view of the facts referred to in the judgment of this Court in *Muthuswami Mudaliar* v. *Masilamani* (1) their re-conversion to Hinduism is probably quite as simple a matter as their original conversion from Hinduism. The learned Judge also points out that the evidence shows that many of the acts of the members of this group are dubious partaking to some extent of Christian habits and to some extent of Hindu habits. In these circumstances the learned Subordinate Judge has drawn the inference that Vedanayaga must have become a Hindu at the time of his marriage with defendant No. 5 because it would appear in the evidence that the marriage was celebrated in the Hindu form though the rituals seem to have been quite simple. There is no doubt that the community treated Vedanayaga and defendant No. 5 as husband and

(1) 5 Ind. Cas. 42; 33 M 342; 20 M L J 49; 7 M L T 17.

wife and their issue as legitimate. It is stated by some of the plaintiff's witnesses that several acts of Vedanayaga subsequent to the marriage with defendant No. 5 should show that he continued a Christian. But the learned Subordinate Judge has refused to attach importance to this statement. There is a statement in the death register (Ex. D) describing him as a Christian. But it was certainly not his statement and we are not in a position to say who made that statement. I very much doubt if that statement is admissible at all. It is at best safe to rely upon these registers only with reference to the fact of death and the date of death. In a case where there is so much of conflicting evidence as to the religion of this man, a statement made by some unknown person that he was a Christian can carry very little weight. Under these circumstances I see no reason to differ from the view of the learned Subordinate Judge that Vedanayaga and defendant No. 5 must be regarded as having become Hindus at the time they were married.

Mr. Swaminathier referred to certain authorities in the course of his arguments and it is perhaps just as well that I make a brief reference to them. The observation that he relied on at p. 324* in *Skinner* v. *Orde* (2), does not carry one very far. Their Lordships of the Privy Council merely refer with a kind of approval to the doubt entertained by the High Court. But the observations of the High Court extracted at p. 314* show that the High Court put the matter only from what they speak of as the 'Christian' point of view. They were there dealing with the question of guardianship of the child which had been born and bred up a Christian and the claim before the Court was by their mother who had since married or claimed to have married another Christian after both of them had embraced Muhammadanism. No doubt in the case in *Administrator-General of Madras* v *Anandachari* (3), and in the judgment of Anantakrishna Ayyar, J. in T. O. S. No. 9 of 1932 reference is made to the necessity of expiatory ceremonies for reconversion to Hinduism, but in both those cases the alleged reconversion was into the *Brahmin* community of Hindus and it may be possible to suggest that certain *Vedic rites* would have been adopted in such a case. The language used in *Administrator-General of Madras* v. *Anandachari* (3), merely refers to the expiatory ceremonies enjoined by the practice of the community in question: and with reference to the class of people we are now concerned, with no suggestion has anywhere been made in the course of the evidence that any particular expiatory ceremonies are observed amongst them. No particular ceremonies are prescribed for them by the *Smriti* writers nor have they got to perform any *Homas*. One has therefore only to look to the sense of the community and from that point of view it is of particular significance that the community was prepared to receive Vedanayaga and defendant No. 5 as man and wife and their issue as legitimate. In the case in *Morarji* v. *Administrator-General of Madras* (4), Venkatasubba Rao, J., no doubt refers to the several facts proved in that case and relies upon them as establishing the conversion of an Englishwoman to Hinduism; but it is not right to treat this observation as laying down that all those facts must be proved to exist before the Court can give a finding in favour of the conversion to Hinduism. In *Kamavathi* v. *Digbijai Singh* (5), their Lordships held that if a Hindu who becomes a convert to Christianity, lives and dies a Christian, it is not open to him to retain the Hindu Law of Succession. This settles a conflict of decisions in India as to the effect of the provisions of the Succession Act on the principles which were recognised by the earlier decision in *Abraham* v. *Abraham* (6). It has nothing to do with the question of reconversion.

Mr. Swaminatha Ayyar finally relied on the observations in *Emperor* v. *Lazar* (7), at p. 552*, where, after holding that a Christian who has a Christian wife will be guilty of bigamy if he marries a Hindu wife even according to Hindu rites, the learned Judges add *obiter*: "it would make no difference if he had renounced the

(2) 14 M I A 309; 17 W R 77; 10 B L R 125; 8 Moo. P C (N. S.) 261; 2 Suther 524; 3 Sar. 34.

(3) 9 M 466.

*Pages of 14 M. I. A.—[*Ed.*]

(4) 111 Ind. Cas. 364; 52 M 160; 55 M L J 478; 28 L W 674; (1928) M W N 848; A I R 1928 Mad. 1279.

(5) 64 Ind. Cas 559; 48 I A 381; 45 A 525; 42 M L J 87; 15 L W 1; 30 M L T 47; 42 M L J 87; 26 C W N 490; 24 Bom. L R 626; 4 U P L R (P C) 27; A I R 1922 P C 14; (1922) M W N 336 (P C).

(6) 9 M I A 195; 1 W R P C 1; 1 Suth. P C J 501; 2 Sar. P C J 10 19 E R 716.

(7) 30 M 550 at p. 552; 17 M L J 476

*Page of 30 M.—[*Ed.*]

Christian religion." The question of the effect of reconversion did not arise for decision in that case and as pointed out by the learned Judges there is a decision of Holloway and Inns, JJ., to the contrary in proceedings dated November 8, 1866, *Emperor* v. *Lazar* (7). The view taken in the decision in *Reference by S. J. of Guntur* (8), has been followed in *Emperor* v. *Antony* (9), and in Criminal Revision Case No. 608 of 1930 and is in accord with a recent decision of the Allahabad High Court in *Emperor* v. *Maharam* (10).

In the view taken by the lower Appellate Court that both Vedanayaga and defendant No. 5 should be taken to have embraced Hinduism, the further point raised by Mr. Swaminatha Iyer, that even if Vedanayaga had become a Hindu, a marriage between him as a Hindu and defendant No. 5 as a Christian will be void by reason of s. 4 of Act XV of 1872 does not arise for consideration.

Accepting the finding of the learned Subordinate Judge on the question of the religion of the parties, I hold that his legal conclusion was right and dismiss the second appeal. The point is not free from doubt or difficulty and I would, therefore, make no order as to costs of this second appeal.

A./N. *Appeal dismissed.*

(8) 3 M H C R App. 7.
(9) 8 Ind. Cas. 572; 33 M 371; 11 Cr. L J 682.
(10) 45 Ind. Cas. 519; A I R 1918 All. 168; 40 A 393; 16 A L J 414; 19 Cr. L J 615.

CALCUTTA HIGH COURT

Criminal Revision Petition No. 385 of 1934
August 6, 1934
GUHA, J.

R. C. CURTIES—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY

Bengal Motor Vehicle Tax Act (V of 1932), ss. 9, 12—Person paying tax must obtain delivery of token—Non-exhibition of token in cars by such person, whether an offence—Rules 10, 12, 13 under the Act, whether ultra vires *of Local Government.*

It is for the person paying the tax to obtain delivery of the token at the time when the tax was paid to the Taxing Officer under the Bengal Motor Vehclies Tax Act, 1932. So far as the Taxing Officer is concerned, the requirements of the law are fulfilled if he does anything which has the effect of putting the token in the possession of the person paying the tax or of any person authorised by him. It is not intended by the provisions of the Statute and the Rules framed under the statute, which are not in any way *ultra vires*, that the Taxing Officer is to send the token to the person paying the tax. Consequently, the failure on the part of a person to exhibit the token on the car resulting from his not obtaining delivery of the same from the Taxing Officer after tax had been paid, is an offence under the law.

There is nothing contained in rr. 10, 12 and 13 of the Rules under Bengal Motor Vehicles Tax Act which is *ultra vires* of the Local Government, having regard to ss. 9 and 12, Bengal Motor Vehicles Tax Act, 1932, by which it is clearly intended that delivery of the token has to be obtained, and the token exhibited on the car, in the manner provided by the Rules.

Cr. R. P. from a decree of the Additional Presidency Magistrate, Calcutta.

Messrs. *N. K. Bose* and *Sudhangsu Sekhar Mukherjee*, for the Petitioner.

Mr. *Probodh Ch. Chatterjee*, for the Crown.

Order.—The petitioner was tried before, the Additional Presidency Magistrate, Calcutta, for having committed an offence on account of contravention of Rules 12 and 13, Bengal Motor Vehicles Tax Rules, 1933, in not exhibiting the token as enjoined by those rules on a motor car. The Magistrate found him guilty of breach of rr. 12 and 13 and sentenced the petitioner to pay a fine of Rs. 10. According to the Magistrate, there was, on the evidence, an omission on the part of the petitioner, and a neglect of obvious duty in not demanding the token from the person by whom tax was paid on the petitioner's behalf, and which tax was accepted by the Taxing Officer; the petitioner should have demanded the token from the person who paid the tax on his behalf, within a reasonable time and exhibited the same on the car as required by the Rules. On the findings arrived at by the Magistrate, the delivery of the token was not taken, after payment of tax; and the token was not exhibited on the car in question as required by the Rules.

This Rule was isued by this Court, calling upon the Chief Presidencey Magistrate, Calcutta, to show cause why the conviction of and sentence passed upon the petitioner should not be set aside. The grounds urged in support of the Rule were that the Magistrate was wrong in law in holding that a person is guilty of breach of rr. 12 and 13 even where no tcken has been delivered to him, on payment of the tax, and that even if the Magistrate's interpretation of r. 12 and 13 were correct, they would be *ultra vires* of the Local Government, having regard to ss. 9 and 12, Bengal Motor Vehicles Tax Act, 1932. The decision of the question arising for consideration in the case, therefore, depends mainly, if not solely, upon the interpretation to be put on the.

words "shall deliver" as used in s. 9 of the Act and r. 10 of the Rules framed by the Local Government. Was there any duty cast upon the person paying tax to obtain delivery of the token, which the Taxing Officer is required to deliver? There is no question that the person paying the tax is entitled to get a receipt as also a token from the Taxing Officer, as soon as payment has been made. Delivery of the token might be made by doing anything which had the effect of putting the same in the possession of the person paying the tax, or of any person authorised by him to receive delivery. In the case before me, the person paying the tax did not obtain delivery of the token at the time when the tax was paid, resulting in the fact that delivery of the token was not and could not be made by the Taxing Officer. The token not having been obtained, its delivery not having been taken, it could not be, and was not exhibited on the car as required by rr. 12 and 13.

In my judgment it was for the person paying the tax to obtain delivery of the token, at the time when tax was paid to the Taxing Officer under the Bengal Motor Vehicles Tax Act, 1932. So far as the Taxing Officer was concerned, the requirements of the law were fulfilled if he did anything which had the effect of putting the token in the possession of the person paying the tax or of any person authorised by him. It was not intended by the provisions of the statute and the Rules framed under the statute, which were not in any way *ultra vires*, that the Taxing Officer was to send the token to the person paying the tax. I am clearly of opinion as already indicated above, that there is nothing contained in rr. 10, 12 and 13 of the Rules which is *ultra vires* of the Local Government, having regard to ss. 9 and 12, Bengal Motor Vehicles Tax Act, 1932, by which it is clearly intended that delivery of the token has to be obtained, and the token exhibited on the car, in the manner provided by the Rules. In the above view of the questions arising for consideration in the case before me, the failure on the part of the petitioner to exhibit the token on the car resulting from his not obtaining delivery of the same from the Taxing Officer after tax had been paid, was an offence under the law, and the petitioner was rightly convicted by the Magistrate for breach of rr. 12 and 13, Bengal Motor Vehicles Tax Rules, 1933. The Rule is discharged. The conviction of the petitioner and the sentence passed on him are affirmed.

D. *Rule discharged.*

BOMBAY HIGH COURT

Original Civil Jurisdiction Suit No. 1365 of 1932

August 28, 1933

KANIA, J.

POPAT VIRJI—PLAINTIFF

versus

DAMODAR JAIRAM—DEFENDANTS

Hindu Law—Widow—Family business—Widow carrying on business as husband's heir—Business debt—Reversioners, if liable to pay from inherited assets—Civil Procedure Code (Act V of 1908), s. 13, O XXXII, r. 3—Foreign judgment—Court dealing with it, if can inquire, whether decision is right or wrong—Guardian ad litem appointed by Court—Decree against minor—Onus of proof that he was not properly represented—Person executing document for minor—Whether he can be valid guardian in suit, is not pure question of law—Foreign judgment against minor—Minor not represented by proper guardian—Suit in British India on that judgment—Held, there was no cause of action on foreign judgment against minor—No decree against assets of minor.

If a Hindu widow, as an heir, carries on business which she has inherited as an asset, and in doing that business incurs a proper trade debt, which might assume the form of passing a promissory note or *hundi*, the creditor can recover the money from the assets inherited by the reversioners after the death of the widow. *Sakerbhai* v. *Maganlall* (4), *Hanumanpersad Panday* v. *Babooee Munraj Koonweree* (5) and *Raghunathji-Tarachand* v. *Bank of Bombay* (6), referred to. [p. 714, col. 2.]

It is not open to the Court trying a suit on a foreign judgment to decide whether the decision of the foreign Court on the materials put before it was right or not. The duty of the Court is merely to see that the foreign Court had applied its mind to the facts and the law on the point. *Jacobson* v. *Frachon* (1), *Abouloff* v. *Oppenheimer* (2) and *Pemberton* v. *Hughes* (3), referred to. [p. 713, col. 2.]

Where the defendant is a minor, it is the duty of the Court not only to appoint a guardian, but to satisfy itself that the proposed guardian was a fit and proper person to represent the minor in the suit, to put in a proper defence, and generally to act in the interest of the minor and if the Court gives judgment against the minor, the onus is on the minor to prove that he was not properly represented in the former suit. *Ramchandra Das* v. *Joti Prasad* (7) and *Bibi Walian* v. *Banke Behari* (8), followed.

When a person has executed a document or entered into a transaction on behalf of a minor, the question, whether that person can be validly appointed a guardian, in a suit brought against the minor on the document or transaction in question, is not a pure question of law but is one of fact, and for the decision thereof no hard and fast rule of law can be laid down. There is nothing either in the Civil Procedure Code or in the authorities to lay down that such a person cannot be appointed a guardian and under proper circumstances he can be validly appointed a guardian of the minor in

such a suit. *Venkatasomeswara Rao* v. *Lakshmanaswami* (10), followed. [p. 716, col. 1]

A person, having conflicting interest with that of minor was appointed guardian *ad litem* in a suit in a foreign Court. That Court decided the suit against the minor; upon this decision the plaintiff brought an action in British India:

Held, that since the foreign Court had not followed the rules and procedure prescribed in O XXXII, Civil Procedure Code or the rules of natural justice, and the minor was not properly represented in the suit, the appointment being prejudicial to the defence of the minor in the foreign suit, the decree passed in that suit against the minor was not binding on the minor and did not avail the plaintiff;

Held, also that the plaintiff had not filed the suit on the original cause of action but on the foreign judgment alone and as the foreign judgment was pronounced without the minor being represented in the foreign Court, there was no cause of action on the foreign judgment against the minor and the suit against him must fail.

Held, further, that no decree against the assets of the minor would be conclusive under s. 13, Civil Procedure Code, where the minor had no opportunity to defend the action in which that decree was passed. *Grant* v. *Easton* (13), referred to.

Messrs. *M. P. Amin* and *T. K. Thanawala*, for the Plaintiff.

Mr. *Lalji Gokaldas* and *M. C. Setalvad*, for the Defendants.

Judgment.—This is a suit on a foreign judgment. Several years ago one Damodar Jairam started doing business at Zanzibar. On his death his son Keshavji carried on the business in the same name. When Keshavji died in 1901, he left behind him that business at Zanzibar and several immovable properties at Zanzibar, Bombay and Cutch. His widow Zaverbai obtained letters of administration at Zanzibar and at Bombay in 1903, and continued the business at Zanzibar. Keshavji left no issue. Zaverbai resided ordinarily in Bombay and carried on the business at Zanzibar through managers whom she gave powers-of-attorney. In 1912, her brother Mulji Mathuradas was appointed the manager of the business and held a general power-of-attorney from her. In 1918, Mulji, on behalf of the firm of Damodar Jairam, entered into different partnerships with the plaintiff, Jumma Cassum and others. The business done by the firm of Damodar Jairam and the plaintiff in partnership was also done in the name of Damodar Jairam. The business was to purchase and sell piece-goods.

In August 1918, Mulji, on behalf of the firm of Damodar Jairam, passed a promissory note in favour of Cassum Jumma & Co. for Rs. 15,625. Cassum Jumma & Co. endorsed over that note to the plaintiff, who in his turn endorsed it over to the Standard Bank of South Africa at Zanzibar. When the note was presented to the firm of Damodar Jairam for payment, the manager of the firm, *i. e.*, Mulji, gave a cheque upon the Standard Bank of South Africa for the amount of the note but that cheque was dishonoured. The note was therefore returned by the Bank to the plaintiff. In may 1919, Mulji was replaced by Devji Lalji as the manager of the business of Damodar Jairam at Zanzibar. Defendant No. 2 (Haridas Keshavji) was adopted to the deceased Keshavji by Zaverbai in about October 1919. As such adopted son, he became the owner of the properties of Keshavji including the said business at Zanzibar. The plaintiff filed Suit No. 2870 of 1921 in the Court at Zanzibar to recover the amount due under the promissory note as the holder in due course. To that suit he had made the firm of Damodar Jairam, defendant No 2 (Haridas Keshavji, the adopted son), and the partners of the firm of Cassum Jumma & Co., party defendants. On behalf of the firm of Damodar Jairam, Zaverbai was served with the summons and she filed a written statement though Devji Lalji. In that written statement she stated that she had carried on the business in the name of Damodar Jairam till lately, but Mulji had no authority to trade in partnership or pass the promissory note. When that suit was filed, Chhabildas, the natural father of defendant No. 2 (Haridas), was appointed a guardian *ad litem* of defendant No. 2 and as such guardian he filed his written statement (Ex. 3).

In that written statement it was contended on behalf of the minor defendant No. 2 that Zaverbai was not entitled to carry on business other than that of managing the immovable properties and Saraffi and commission agency business on a small scale as was done by Keshavji during his life-time. It was further contended that the managers appointed by Zaverbai had launched into new ventures which were unauthorised and not binding on the firm or the minor. It was further alleged that neither Zaverbai nor Mulji had authority to carry on the business which gave rise to the liability under the promissory note and it was denied that the debt alleged to be due to the plaintiff was a trade debt of the ancestral Hindu family firm as claimed by the plaintiff. While Mulji was in charge of the business at Zanzibar, it appears that he had opened an accoun

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with the Standard Bank of South Africa. That account was largely overdrawn and the Bank held certain securities of the firm of Damodar Jairam. The Bank filed a suit against the firm and that litigation went on between 1921 and 1928. In that suit Mulji gave evidence on behalf of the firm. That suit was ultimately settled in 1928 by the firm of Damodar Jairam admitting liability for a sum of three lacs of rupees. In November 1928, Mulji Mathuradas was substituted in the place of Chhabildas in the Zanzibar suit and he adopted the same written statement on behalf of the minor. On July 21, 1931, the suit reached hearing and the Court passed an *ex parte* decree against defendants Nos. 1 and 2 in terms contained in its judgment and decree (Exs. A and B). The present suit is filed on the judgment and decree in that suit. The defendants contest the conclusiveness of that judgment on the grounds contained in the various issues raised on their behalf. I think that the facts and evidence in connection with this suit and the Zanzibar suit should be considered in three compartments: (1) as to what transpired in respect of the promissory note on which the claim was made in the Zanzibar Court till defendant No. 2 was adopted; (2) from the filing of the Zanzibar suit till the date when Mulji Mathuradas was appointed guardian *ad litem* of defendant No. 2 in that suit; and (3) from that day till the judgment was pronounced at Zanzibar. I think that events should be considered from this point of view because as regards the first portion, the suit was filed at Zanzibar and the rival contentions of the parties were put before the Court there. If the appointment of Mulji as guardian was good, the decision of the Zanzibar Court would be on the merits, and, in my opinion, it is not open to the defendants now to contend in this suit that the claim put forth on behalf of the plaintiff at Zanzibar was not sustainable or that the Zanzibar Court had come to a wrong conclusion in respect of the disputes between the parties. This point is made clear in *Jacobson* v. *Frachon* (1). That decision shows that although according to the opinion of the Court in which the suit was filed on a foreign judgment, the appointment of a particular person as referee was undesirable and the report made by such a referee was "an uncandid production of a biased and prejudiced mind; it was not open to the Court trying the suit on a foreign judgment to decide whether the decision of the foreign Court on the materials put before it was right or not. The duty of the Court was merely to see that the foreign Court had applied its mind to the facts and the law on the point. The accepted proposition of law in this connection, as stated by Lord Coleridge, C. J., in *Abouloff* v. *Oppenheimer* (2) is as follows (page 302*):

" ..... that the Courts of this country in dealing with a foreign judgment will not inquire whether the foreign Court pronounced a judgment correct in point of law, or right and accurate in point of fact."

In the same case Brett, L. J. observed as follows (p. 307*).

" ..... it is immaterial to consider whether it (*i. e.* the judgment of the foreign Court) was erroneous by reason of a wrong appreciation of the evidence or of the law, or by reason of frauds perpetrated on the Courts by witnesses other than the plaintiff and her husband: the only manner in which that foreign judgment can be rendered ineffective upon the ground of fraud, is by proving that it was obtained by the fraud of the plaintiff, who now relies upon it."

Again in *Pemberton* v. *Hughes* (3) Lord Lindley, M. R., stated as follows (p. 790†).

"If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, Engligh Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice."

It is therefore not open to the parties to inquire in this suit whether the decision of the Zanzibar Court was mistaken. It would be open only to inquire whether the Court was misled or imposed upon. For these reasons I do not think that, except on the ground that the Court was imposed upon, the facts and evidence leading to the execution of the promissory note, on which the Zanzibar suit was based, are relevant to be considered in this suit. I shall first deal with the case of fraud and collusion alleged in the written statement. Apart from the documents exhibited, the defendants have sought to support this contention by calling Mulji Mathuradas to give evidence. Taking the evidence as a whole, I think that the defendants' attempt to establish a case of fraud and

(1) (1927) 44 T L R 103.

(2) (1882) 10 Q B D 295; 52 L J Q B 1; 31 W R 57.

(3) (1899) 1 Ch. 781; 68 L J Ch. 281; 15 T L R 211; 47 W R 354.

*Pages of (1882) 10 Q. B. D.—[*Ed.*]

†Page of (1899) 1 Ch.—[*Ed.*]

collusion has entirely failed. That ground for challenging the judgment of the Zanzibar Court is therefore not available to the defendants.

As regards the contention that the decision was not on merits and was against the law in British India, I think that the defendants' contention must fail. After obtaining letters of administration Zaverbai must be considered to have fully administered the estate, within 12 years at the latest, and thereafter her management of the estate was as the heir of Keshavji and not as the administratrix. The evidence does not show that in 1918, when the promissory note on which the Zanzibar suit was filed was executed, anything had remained to be administered in the estate of Keshavji. The statements contained in the pleadings filed in the Zanzibar Court suggest that Zaverbai was doing business on her own account as the heir. In any event the evidence on record does not show that in 1918 Zaverbai was conducting the business in the name of Damodar Jairam as administratrix of the estate of Keshavji. I therefore think that the first contention of the defendants in this connection must fail. As regards the right of Zaverbai to do business as an heir, there appears to be no doubt on the point. In 1918, Zaverbai, as the widow, was undoubtedly the heir of Keshavji. The business which was started several years ago in the name of Damodar Jairam was continued in the same name by Keshavji and was further continued by Zaverbai. The only question which can arise would be whether the debts contracted by Zaverbai as such heir would be binding on the estate. In *Sakerbhai* v. *Maganlall* (4) it was held that trade debts properly incurred by a Hindu widow, on the credit of the assets of the business to which she had succeeded as the heir of her husband, are recoverable after her death out of the assets of the business, as against the reversioners who have succeeded thereto, in the absence of a specific charge. Jenkins, C. J., reviewed the previous decisions on the point and summarised the result as follows (p. 215*):

"These authorities, then establish the following propositions: first, that in Hindu Law a business is a distinct heritable asset; second that a manager can contract debts for the purposes of the business and that even in the absence of a specific charge they are recoverable from the assets of the business; and third, that a widow can under circumstances contract a debt for the purpose of a family business to which she has succeeded, and by specific charge make it payable out of assets of the business even as against the reversioners."

The learned Chief Justice thereafter observed as follows (p. 215*).

"If a widow can, under appropriate circumstances execute as security for a debt of this class a mortgage which after her death will be binding on the reversioners, why cannot the assets of the business in the hands of the reversioners be made liable in the absence of a specific charge? I limit my inquiry to the assets of the business as that will admittedly suffice for the purposes of the case out of which this reference arises."

After considering the decisions of the other High Courts the Full Bench came to the conclusion mentioned above. In support of this conclusion strong reliance was placed on the fact that in this presidency a widow could apply the movable assets of the business as she pleased during her lifetime, and it was, therefore, incongruous to hold that she could not borrow, on the credit of the same assets, as to make them liable for the debts. The observations of the Privy Council in *Hanoumanparsaud Panday* v. *Babooee Munraj Koonweree* (5), in respect of the power of a manager a joint Hindu samily to borrow money and the binding nature of such debts on the other members of the family have been held to be equally applicable to the case of a widow carrying on the business of her deceased husband as an heir after his death.

Having regard to these decisions, it is clear that if a widow, as an heir, carries on business which she has inherited as an asset, and in doing that business incurs a proper trade debt, the creditor could recover the money from the assets inherited by the reversioners after the death of the widow. The decision in *Sakerbhai* v. *Maganlall* (4), was limited to the assets of the business because, as observed by Jenkins, C. J., the necessity for deciding the question whether the creditors could recover the debt from the general assets inherited by the reversioners did not arise in that case as the assets of the business were sufficient to satisfy the particular debt. In principal, however, I do not find any distinction between the trade assets inherited by the reversioners and the other assets inherited by them on the death of the widow. The power of the widow in this presidency to deal with the movable property is not limited to any particular movable property and, therefore, in my opinion, that decision

(4) 26 B 206; 3 Bom. L R 738.

(5) 6 M I A 393; 18 W R 81*n*; 2 Suther 29; 1 Sar 552 (P C).

*Page of 26 Bom.—[*Ed.*]

lays down the general proposition as I have mentioned above. In the present case on the adoption of defendant No. 2, the widow would cease to be the heir of the deceased, and in such circumstances I do not see any reason why the observations of the Privy Council in *Hanoumanpersaud Panday* v. *Babooee Munraj Koonweree* (5), should not be applied.

The only question which then remains to be considered is whether Zaverbai, while conducting the business, had the authority to pass the promissory note on which the Zanzibar suit was filed. In this connection the decision in *Raghunathji Tarachand* v. *Bank of Bombay* (6), is useful. Chandavarkar, J., who was a party to the Full Bench decision in *Sakerbhai* v. *Maganlall* (4), in delivering the judgment in that case, held that where a family carried on business, the member who managed it for the family, had an implied authority to contract debts for its purposes, and the creditor was not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power was necessary for the very existence of the family. In that case the Court had to consider whether a *hundi* passed by the manager of the family, which carried on the joint family business, was binding on the members of the joint family. The *hundis* were signed by the manager in the name of the firm. Having regard to the series of authorities which applied the same principles to the debts incurred by the manager of a joint family and a widow, I think, that if a widow, as the heir of her deceased husband, carries on his business and for the purposes of the business incurs a trade debt, which might assume the shape of passing a promissory note or a *hundi*, the reversioners would be bound to pay the debt out of the assets inherited by them. This appears to be the law in British India. When the Zanzibar suit was heard by that Court, the plaintiff gave evidence and deposed that the business was ancestral and was carried on by Zaverbai through Mulji and the note was properly passed as a trade debt. On a consideration of the evidence led before the Court, judgment was pronounced against the defendants. Under the circumstances, I am unable to hold that the Zanzibar Court had failed to recognize the law in British India or that its judgment is against the law in British India.

(6) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R 255.

The principal ground on which the defendants contest their liability is that defendant No. 2 was not represented in the Zanzibar Court at all, although on the record Mulji was the guardian *ad litem* of defendant No. 2 in that suit. It is urged that the Court should never have appointed Mulji as the guardian under the circumstances of the case, as the interest of Mulji was adverse to the interest of the minor. In the alternative it is urged that the Court failed to observe the rules of natural justice in appointing Mulji as the gurdian *ad litem* of defendant No. 2 and failed to observe the procedure prescribed in that respect in the Civil Procedure Code. As the present suit is filed on the judgment of the Zanzibar Court, the onus is on the defendants to prove the various allegations made by them in this connection.

Where the defendant is a minor, it is the duty of the Court not only to appoint a guardian, but to satisfy itself that the proposed guardian was a fit and proper person to represent the minor in the suit, to put in a proper defence, and generally to act in the interest of the minor: *Ramchandra Das* v. *Joti Prasad* (7). In this connection strong reliance is put on behalf of the plaintiff on the decision in *Bibi Walian* v. *Banki Behari* (8). In that suit one *T* in 1873 executed a mortgage in favour of *C* to secure a sum of money. In 1881 *Z* the son of *C*, brought a suit to recover the money due under the mortgage. *T* being then dead, *G*, his major son, and *M*, as mother and guardian of the four minor sons, were made defendants. In October 1881, *C* obtained an *ex parte* decree under which the mortgaged properties were put up for sale and ultimately purchased by the decree-holder, who was put in possession in January 1883. In 1895, three of the younger sons of *T*. who were described as minors in the first suit filed another suit against the representatives of the original plaintiffs. In that suit they alleged that *T* had borrowed money for immoral purposes and the decree was obtained fraudulently by *T* in collusion with adult son of *C* and that the proceedins in execution and sale were equally fraudulent. It was further alleged that in the first suit no guardian *ad litem* was duly appointed for the plaintiffs in the second suit. It was prayed, *inter alia* that the auction sale, so far as the plaintiffs were concerned, be

(7) 29 A 675; A W N 1907, 225.
(8) 30 C 1021; 30 I A 182; 5 Bom. L R 822; 7 C W N 774; 8 Sar. 512 (P C).

declared to have been held in an illegal way and the plaintiffs be put in possession of the property. The defendants denied the allegations of the plaintiffs, and one of the issues was, whether the plaintiffs were properly represented in the first suit and execution proceedings, and, if not, whether they were void on that ground. It was found as a fact that the plaintiffs' mother had appeared throughout the proceedings in the first suit as guardian. It was also found that no order appointing the mother as guardian was drawn up.

On an examination of the proceedings, however, it was found that the Court admitted the plaint in which the mother was described as a guardian and she was so described in the decree and also in the application for execution. The Subordinate Judge who tried the second suit held that, although no formal order appointing the mother as guardian was drawn up, the Court must be deemed to have sanctioned the appointment and the want of the formal order was at most an irregularity which could not invalidate the proceedings in the absence of proof of prejudice to the plaintiffs. On appeal, the High Court held that it was necessary that the Court should see that a proper guardian was appointed to protect the interests of the minors. Section 443 of the Code of 1882 (corresponding to O. XXXII, r. 3) was imperative upon this point; the Court, after satisfying itself on the fact of the minority, was bound to appoint a proper person to act on behalf of the minors in the conduct of the case. These observations were approved by the Privy Council. Their Lordships emphasized that the Courts should strictly follow the rules contained in the sections as to the appointment on a guardian *ad litem*.

The High Court considered that the absence of the order, appointing the mother as guardian, was fatal and they reversed the decision of the trial Court. Their Lordships of the Privy Council did not agree with that conclusion. They observed that the defects of procedure alleged in that case were at the most irregularities and would not have furnished grounds for reversing the decree, in the former suit, if they had been raised upon appeal in that suit. Having regard to the fact that the minor's interest was in fact continuously safeguarded by the mother, the absence of an order was not considered fatal. Again in *Munnu Lal* v. *Ghulam Abbas* (9), it was pointed out that no affidavit as required by s. 456 of the Code of 1882 (corresponding to O. XXXII, r. 3 (3) of the Code of 1908) was filed. It did not appear whether in fact there was an affidavit or not but assuming that there was no such affidavit, their Lordships thought it impossible to hold that the infants were not properly represented. The learned trial Judge had appointed a guardian *ad litem* the order was on record and their Lordships held that it must be presumed in the absence of evidence to the contrary, that everything was regularly and properly done.

Relying on these decisions it is contended by the plaintiff in this suit, that, unless the evidence led on behalf of the defendant shows otherwise the Court must presume that the Zanzibar Court had done everything regularly and properly in connection with the representation of defendant No. 2 in the Zanzibar suit. I do not think this proposition can be disputed. The question, therefore, is whether on the documents and evidence, the defendants had succeeded in showing that the minor was not represented in the Zanzibar suit. As observed in the Full Bench decision of *Venkatasomeswara Rao* v. *Lakshmanaswami* (10), when a person has executed a document or entered into a transaction on behalf of a minor, the question whether that person can be validly appointed a guardian, in a suit brought against the minor on the document or transaction in question is not a pure question of law but is one of fact, and for the decision thereof no hard and fast rule of law could be laid down. It was held that there was nothing either in the Civil Procedure Code or in the authorities to lay down that such a person could not be appointed a guardian, and under proper circumstances, he can be validly appointed a guardian of the minor in such a suit. I respectfully agree with that decision.

In cases, where, for instance, a document executed by a person on behalf of a minor was alleged to be a forgery or was alleged to have been obtained from that person by coercion or undue influence in the absence of any other conflict of interest, the person executing the document would be the best person to represent the minor as guardian in a suit filed on the document against the minor. It is, however, clear

(9) 6 Ind. Cas 788; 32 A 287; 37 I A 77; 11 C L J 557; 12 Bom. L R 439; 14 C W N 744; 8 M L T 57; 20 M L J 591; 13 O C 123 (P C).

(10) 115 Ind. Cas. 801; A I R 1929 Mad. 213; 52 M 275; 29 L W 125; 56 M L J 175 (F B).

that this rule cannot apply under all circumstances. This is only an illustration of a case showing the circumstances under which the same person may be a proper person to act as such guardian. (His Lordship then discussed the facts and concluded that Mulji was neither a fit and proper person to be appointed guardian in the Zanzibar suit or after his appointment he represented the minor in the Zanzibar suit). In this connection the decision in *Rashid-un-nisa* v. *Muhammad Ismail Khan* (11), is helpful. In that case a suit was filed by the minor for a declaration that two decrees and three sales in execution, affecting her share in her father's estate, were invalid as she was not properly represented in those proceedings. It was found that the minor's married sister was appointed her guardian *ad litem* in one of the proceedings while in the other two the person who was really the plaintiff was appointed her guardian.

Under the Code of 1882 a married woman was not qualified to be appointed a guardian and, therefore, in the first proceeding it was held that the minor was not represented at all. In the other two proceedings it was considered that the minor was never a party, in the proper sense of the term, to the suit in which the decrees were passed and the decrees were therefore, of no effect. The position of Mulji in the present case having regard to the allegations contained in the written statement of the minor appears to be very near the position of the person who represented the minor in that case. This point again came to be considered recently by the Calcutta High Court in *Abdul Karim* v. *Thakurdas Thakur* (12). In that suit the defendants were described as *A*, widow of *B* and *C* a minor, by his mother and certificated guardian, the said first defendant *A*. There was no appointment of the guardian *ad litem* for the minor. The evidence showed that the Court passed an *ex parte* decree as the defendants did not appear. In delivering the judgment Rankin, C. J., reviewed all the authorities. He found that the defendants' Pleader had gone to the house where the defendants lived but did not succeed in having any conversation with the mother. The minor told him on behalf of the mother that the claim was true, that they had had the money and they really could not dispute the debt. Even after considering those instructions as having been given by the mother, was held that the decree was not binding on the minor, because in law the minor was not represented in the suit. It was further held that it was necessary to strictly observe the provisions contained in O. XXXII, in connection with the appointment of a guardian *ad litem*.

Having regard to the decision mentioned above, and having regard to the facts which are clear from the documents, I have no doubt that the minor's interest was in conflict with the interest of Mulji in the Zanzibar suit, and Mulji was not a fit person to be appointed a guardian. The documents do not show that in appointing Mulji as a trustee of the minor in the Zanzibar suit the Court had followed the rules and procedure prescribed in O. XXXII, or the rules of natural justice. I am, therefore, unable to hold that the minor was properly represented in the suit in the Zanzibar Court. Having regard to the attitute adopted by Mulji, I think the appointment has been prejudicial to the defence of the minor in the Zanzibar suit, I therefore think that the decree passed in the Zanzibar suit against the minor is not binding on the minor and does not avail the plaintiff. In the Zanzibar suit the present third defendant was not a party. Inasmuch as the present suit is filed on the judgment of the Zanzibar Court, this suit against the third defendant must therefore fail. Having regard to the judgment which I have just delivered, the suit against the second defendant must also fail. On behalf of the plaintiff it is urged that, although by reason of that judgment the second defendant may not be considered as represented in the Zanzibar suit and therefore the judgment in the Zanzibar suit may not be treated as conclusive according to s. 13, the plaintiff is still entitled to go into the merits of the case and now prove his claim against the second defendant. In this connection no authority is cited on behalf of the plaintiff. On the other hand, I find in Halsbury's Laws of England, Vol. 6 (Edition 2), at p. 525, the following passage :

"Since the foreign judgment constitutes a simple contract debt only, there is no merger of the original cause of action and it is therefore open to the plaintiff to sue either on the foreign judgment or on the original cause of action on which it is based unless the foreign judgment has been satisfied."

(11) 3 Ind. Cas. 861; 31 A 572; 36 I A 168; 13 C W N 1182; 10 C L J 318; 6 A L J 822; 11 Bom. L R 1225; 6 M L T 279; 19 M L J 631 (P C).

(12) 113 Ind. Cas. 843; A I R 1928 Cal. 844; 55 C 241; 32 C W N 665.

In *Grant* v. *Easton* (13), it was held that the plaintiff might sue in England upon the original cause of action, if actionable there, or upon the judgment of the foreign Court or upon both, and such debt might be a subject of a special endorsement. The plaintiff has not filed the suit on the original cause of action as is obvious from the plaint. He has sued on the foreign judgment alone As in my opinion the foreign judgment was pronounced without the second defendant being represented in the Zanzibar Court, there is no cause of action on the foreign judgment against the second defendant, the suit against the second defendant must fail. It is urged on behalf of the plaintiff that inasmuch as the Zanzibar Court had passed a decree against the firm of Damodar Jairam, which firm was also defendant No. 1 in the Zanzibar suit, the decree against the firm must hold good. It is pointed out that the summons in the Zanzibar suit was served on Zaverbai and also on Haridas, the minor. If such service was proper, the firm, as such, was served, and if, therefore, the firm failed to appear at the hearing, the decree should not be set aside as against the firm. I am unable to accept this argument. The judgment of the Zanzibar Court is for the sum mentioned in the decree to be recovered out of the family estate of Damodar Jairam in the hands of Haridas Keshavji Damodar.

In the plaint in the Zanzibar suit the plaintiff alleged that Haridas, as the adopted son of Keshavji, had inherited the estate of Keshavji including the said business of which and of the said estate he had taken possession. It is, therefore, clear that the plaintiff was aware that at the date of the suit Haridas was the sole representative of the firm and was in the sole possession of the business and assets of the firm. If Haridas was not properly represented in the Zanzibar suit, no decree against the assets of the firm in his hands or against him as representing the firm would be conclusive under s. 13 of the Code. The fact that the summons in the Zanzibar suit was served on Zaverbai on behalf of defendant No. 1 firm does not avail the plaintiff because, having regard to para. 10 of the plaint in the Zanzibar suit, the plaintiff was aware that the business was transferred to Haridas. If therefore it was sought to make Haridas or the assets in his hands liable, it was incumbent on the plaintiff to serve the summons on Haridas, and, having regard to the fact that he was a minor, to see that he was properly represented. As that was not done, it is obvious that in so far as Haridas was connected with the firm or the assets of the firm, the decree cannot bind those assets. The effect of accepting the plaintiff's contention would be in fact to nullify the judgment just delivered by me. According to the plaintiff, although the decree against the second defendant would not be available, the decree against the firm of Damodar Jairam must hold good. Therefore the plaintiff would, if that contention was upheld, get a decree against the firm of Damodar Jairam in this suit and execute it against the assets of that firm, including the assets in the hands of the minor. I do not think that such a construction could or should be put on the judgment of the Zanzibar Court if Haridas was not represented in the Zanzibar suit at all. It is significant that no decree is passed against Zaverbai in the Zanzibar suit. It is also clear that no decree is passed against the assets of the firm in the hands of Zaverbai. The effect of the Zanzibar decree, therefore, could only be that the assets in the hands of the minor should be utilised in payment of the decree of the Zanzibar Court. If the minor had no opportunity to defend the action in which such a decree was passed, that decree could not be held binding on the minor and therefore the plaintiff's contention must fail. The result is that the suit will be dismissed.

The defendants in their written statement had formulated grave charges of fraud and collusion which they have entirely failed to substantiate. Their contention that the judgment of the Zanzibar Court was pronounced against the law of British India has also failed. The whole of the oral evidence led on behalf of the defendants has not been helpful at all in establishing the charges made by the defendants. Under the circumstances, I think that the fair order for costs would be that the plaintiff should pay the defendants half the costs of the suit.

D. *Suit dismissed.*

(13) (1883) 13 Q B D 302; 53 L J Q B 68; 32 W R 239; 49 L T 645.

CALCUTTA HIGH COURT

Civil Appeal No. 1136 of 1931
August 25, 1933
JACK AND NAG, JJ.
SHEIKH FAKIR AND OTHERS
DEFENDANTS—APPELLANTS
versus
MOSLEM MANDAL AND OTHERS—
PLAINTIFFS—RESPONDENTS

Easement—Prescription - Immemorial user—Court, whether can infer grant—Grant.

It is open to the Court to infer a grant from immemorial user alone, when such user is open, as of right, and without interruption *Pakala Venkenna G Swetachalapati Ramakrishna Ranga Rao Bahadur* v. *Guru* (1), explained.

C. A. from appellate a decree of the Sub-Judge, Burdwan, dated June 19, 1930.

Messrs. *Bireswar Bagchi, Gopendra Nath Das* and *Byomkes Basu*, for the Appellants.

Messrs. *Pyari Mohon Chatterjee, Bankim Chandra Roy* and *Dwjendra Nath Dutt* for the Respondents

Jack, J.—This appeal arises out of a suit for declaration of plaintiffs right to irrigate their lands *ka* (1) and *ka* (2) of the plaint, from the tank described in schedule *kha*, by easement and prescription and as an ancient grant and also for an order of permanent injunction restraining the defendants from putting obstruction and further for compensation for loss caused by the defendants not allowing the plaintiffs to irrigate their lands from the tank. The trial Court decreed the suit in part against the contesting defendants Nos. 1 to 3 and *ex parte* against the rest, allowing the plaintiff to irrigate *ka* (2) land from the tank. This appeal is by the defendants as regards *ka* (1) land for which also the plaintiffs suit was decreed by the Court of Appeal below. The lower appellate Court held that the plaintiffs were entitled to irrigate the land *ka* (1) in consequence of a grant from the landlord to be inferred from immemorial user, the finding being that the land *ka* (1) is being irrigated from the disputed tank from time immemorial.

This appeal is argued on the ground that to prove a lost grant something more than immemorial user must be proved, *viz.*, it must be shown that there is no other source of irrigation of that land whereas in fact, in this particular case there is another tank Nutanpukur situated very close to the plaintiffs' land and from which also they are accustomed to irrigate the land. Dattapukur from which they claim to irrigate is much further away. Further it is mentioned that the plaintiffs have not shown that they used the water of this tank as of right and there is no finding to this effect. In support of the theory that something further than immemorial user must be shown, the case of *Pakala Venkenna* v. *Swetachalapati Ramakrishna Ranga Rao Bahadur Guru* (1), was cited but that case is no authority for this proposition. There it was held that where it was established that from a long period second crop was grown and the necessary water for it could not be had in ordinary years without erecting a dam, such long continued user thus proved is sufficient to raise a presumption of a lawful origin of the right to do so in the nature of an arrangement between the parties. That is an example of how immemorial user may be proved indirectly, but it is still immemorial user from which the grant is referred; of course if long continued use may be explained in some other way than by a grant, the grant will not generally be inferred. But there is plenty of authority for holding that it is open to the Court to infer a grant from immemorial user alonewhen such user is even, as of right, and without interruption. In this case the finding is that this tank was re-excavated in 1322 by the defendants with whom it was settled in 1322 and the plaintiffs took water from the tank to irrigate their land both before and after this settlement and re-excavation. The fact that the plaintiffs took water after the re-excavation goes to confirm the inference that probably there was an original grant from the landlord allowed for at the settlement. It has been pointed out by the lower Appellate Court that the *patta* by which the defendants received settlement has not been produced. It is suggested that the use may have been permissive but that does not seem very probable inasmuch as apparently there is no necessity for using the water of this tank as the closer tank could have been used. But the fact that there was no necessity does not of course show that there was no original grant.

For the defendants-appellants no alternative explanation of the immemorial user has been offered. They maintain that there was no such immemorial user but on that point we are bound by the finding of fact

(1) 131 Ind. Cas. 312; A I R 1931 P C 198; 54 M 427; 58 I A 195 (P C); 35 C W N 605; Ind. Rul. (1931) P C 120; 33 L W 716; 53 C L J 499; 33 Bom. L R 929; 61 M L J 1; (1931) M W N 817 (P C.)

arrived at by the Court below. The learned Subordinate Judge relied upon the statement of P. W. No. 1 who spoke of user for forty years at least. His age is sixty-eight and he says that from the time he reached understanding he remembers that the tank was so used. Another contention raised by the appellants is that by the re-excavation the user has been interrupted but that does not appear to have been the case because both before and after the excavation, the tank was so used and it appears that there is a channel leading from the tank up to the field though it is said that the channel was originally constructed for inflow of water from the fields to the tank.

Then it is suggested that inasmuch as on the plaintiffs' land there is a pathway used by the public which is to be cut in order to irrigate from this tank, the public should have been made parties in this case as their right of way has been interfered with. But it has been found that this will not interfere with the right of the public to use the pathway and in any case the way is not a public way but rather one used by the public with the permission of the owner of the land. It is contended by the appellants that the existence of the original grants can only be presumed when there is no other way of explaining the facts. The question whether there was any other way of explaining the facts is an important one for consideration when considering whether the inference of a grant can be drawn from immemorial user. But in this case no other way of explaining the facts has been suggested. The existence of another tank closer to the land than the tank in question of course disproves any right of use by necessity. A point has been raised as to non-joinder of the daughter of the sister of the plaintiffs as a party. But it has been found that the plaintiffs sister gave up her right on receiving Rs. 150, therefore her daughter was not a necessary party.

Finally, a point was raised as to the extent of the use of the water which was allowed. The Court of Appeal below finds that the depth of the tank before excavation was four cubits. In 1332 the depth of the tank was increased from four cubits to nine cubits by re-excavation. The original user was based upon the tank when it was four cubits deep. The right which is now given by the decree of the lower Appellate Court is to take water from the tank when the depth of the tank at its centre is five cubits. That means the tank being now in consequence of the re-excavation nine cubits deep, the plaintiffs have the right to use four cubits depth of water. Originally of course if the depth had been reduced by four cubits, there would have been no water in the tank. Therefore on behalf of the appellant it is contended that the plaintiffs should not be entitled to take water from the tank so as to increase the burden on the subservient tenement. We think that there is some force in this contention. In these circumstances it will be right to allow the plaintiffs to take water from the tank at any time when its depth is six cubits or more at the centre but not otherwise. With this modification this appeal is dismissed with costs.

Nag, J.—I agree.

D. *Order accordingly.*

CALCUTTA HIGH COURT

Civil Appeal No. 2008 of 1931

June 12, 1934

HENDERSON, J.

MATI LAL DAS AND OTHERS - PLAINTIFFS —APPELLANTS

versus

ADITYA CHANDRA DAS - DEFENDANT—RESPONDENT

Bengal Tenancy Act (VIII of 1885), ss. 160 (d), 85—Under-raiyati created in contravention of s. 85—Occupancy right by custom, if protected interest under s. 160 (d)—Practice—New point—Point of law—No additional evidence necessary—Whether can be raised in second appeal

A right of occupancy existing by custom is not a "protected interest" within the meaning of s. 160 *(d)*, Bengal Tenancy Act, when the under-*raiyati* is created in contravention of the provisions of s 85. *Kamini Sundari Bewa* v. *Nepal Mondal* (1).

Where a point was one of law and no additional evidence was necessary nor was it necessary to make assumptions before the point could be decided:

Held, that it could be raised in second appeal.

A. against the decree of the Additional Sub-Judge, Jessore, dated March 26, 1931.

Messrs. *Hemendra Chandra Sen* and *Satendra Chandra Sen*, for the Appellants.

Mr. *Joy Gopal Ghose*, for the Respondent.

Judgment.—This appeal is by the plaintiffs. They instituted the suit in order to recover *khas* possession of the land after service of notice under s. 167, Bengal Tenency Act. They had purchased a certain *raiyati* interest. The defendant is holding an under-*raiyati*. His case was

that he had a right of occupancy by custom and in this he is supported by the Record of Rights. The plaintiffs denied the existence of any such custom but both the Courts have held that they failed to rebut the presumption that the Record of Rights was correct.

Mr. Sen has contended that such a right, *i. e.*, a right of occupancy existing by custom is not a "protected interest" within the meaning of s. 190 (*d*), Bengal Tenancy Act, when the under-*raiyati* was created in contravention of the provisions of s. 85. This contention is supported by the decision of Mitter, J., in the case reported as *Kamini Sundari Bewa* v. *Nepal Mondal* (1) and that decision has been approved by a Division Bench in *Sonatan Dafadar* v. *Daulat Gazi* (2). On behalf of the respondent it is argued that this point cannot be taken for the first time in this Court. Of course, if it were necessary to take evidence or to make assumptions in favour of the appellants before the point could be decided it would not be possible for the appellants to raise it here for the first time. But the lease itself is already on the record and it contravenes the provisions of s. 85. As the point is a point of law, it can be taken in this Court.

The result is that the appeal is allowed, the decree of both the lower Courts dismissing the plaintiff's claim for *khas* possession are set aside and they will be given a decree for *khas* possession. The appellants will get their costs in this Court. As the respondent did not appear in the lower Appellate Court, there will be no order as to costs in that Court. The respondent asks for leave to appeal. This is refused.

D. *Appeal allowed.*

(1) 137 Ind. Cas. 688; A I R 1932 Cal.389; 35 C W N 686; Ind. Rul. (1932) Cal. 364.

(2) 141 Ind. Cas. 702; A I R 1932 Cal. 571; 36 C W N 400; 55 C L J 176; Ind. Rul. (1933) Cal. 163.

CALCUTTA HIGH COURT

Civil Rule No. 746 of 1934

August 20, 1934.

MITTER, J.

DEBJI GHELABHAI & BROTHERS —DEFENDANTS—PETITIONERS

versus

R. D. MEHTA & Co., ASANSOL—PLAINTIFF—OPPOSITE PARTY

Limitation Act (IX of 1908), ss. 19, 20—Document denying and repudiating liability to pay, whether sufficient to extend limitation—Written statement cannot be called in aid for purpose of s. 20.

Whether a particular document or letter amounts to an acknowledgment of liability or not within the meaning of s. 19, Limitation Act, must depend upon the terms thereof. Under the Indian statute there need not be a promise to pay, but the document in question must, on a fair reading, amount to an admission of liability, absolute or conditional, and in the latter case the condition must be fulfilled. But where the letter or the document relied upon expressly states that there is no liability, and the liability is in fact denied and repudiated, limitation cannot be said to be extended under s. 19 of the Limitation Act. *Maniram* v. *Seth Rupchand* (1), referred to.

A written statement filed in the suit itself cannot be called in aid for the purposes of s. 20 of the Limitation Act. When the plaintiff institutes the suit beyond the period of limitation prescribed in the Schedule to the Limitation Act, he has to state in his plaint the reasons why the suit is still within time. If there is no such statement the Court has to dismiss the suit. A suit must be tried on the cause of action as laid in the plaint and any inherent defect of the said nature in the plaint cannot be supplied by a written statement in the suit.

C. R. from the decree of the Sub-Judge, (Small Cause Court Judge), Asansol, (Burdwan), dated February 23, 1934.

Messrs. *Bankim Chandra Mukherji* and *Nirmal Kumar Sen* for Mr. *Santimony Mazumdar*, for the Petitioner.

Mr. *Gopendra Nath Das*, for the Opposite Party.

Order.—The defendant has obtained this Rule under s. 25 Provincial Small Cause Courts Act, and the only point pressed on his behalf is that the plaintiff's claim is barred by limitation. The plaintiff agreed to supply to the defendant 2000 pieces of *sal* wood sleepers at his colliery and on September 9, 1930, delivered the same. The defendant paid to the plaintiff some money which I am told amounted Rs. 250. The suit was filed on September 11, 1933, just two days after the period of limitation. Apart from the question of limitation the case of the defendant is that out of the 2000 pieces of sleepers 800 pieces were bad and had been rejected. For the purpose of getting over the bar of limitation the plaintiff relied upon a letter written by the defendant to the plaintiff on September 12, 1930, which is in these terms:

"Dear Sirs,

We are in receipt of your letter No. nil of 7-9-30 and noted the contents thereof.

In reply we beg to inform you that asper amicable settlement between you and ourselves about 800 pieces of the sleepers purchased from you are lying rejected near our siding of our above colliery. Please therefore, arrange to remove them at your earliest convenience and thereafter adjusting the account let us hear about your dues if any.

Please note and do the needful."

The 800 pieces of sleepers mentioned in this letter were, however, not removed by the plaintiff and his suit includes the price of these which forms the substantial part of his claim. The letter in answer to which this letter was sent has not been produced. The learned Small Cause Court Judge relied upon this letter as an acknowledgment of liability and has decreed the suit. In my opinion it cannot be regarded as an acknowledgment of liability in respect of the 800 pieces of sleepers but is an acknowledgment of liability in respect of the balance of the price that may be due on the accounts for the remaining 1200 pieces. Whether a particular document or letter amounts to an acknowledgment of liability or not within the meaning of s. 19, Limitation Act, must depend upon the terms thereof and other decisions cannot often be helpful. It is quite true that under the Indian statute there need not be a promise to pay but the document in question must on a fair reading amount to an admission of liability absolute or conditional, and in the latter case the condition must be fulfilled: see *Maniram* v. *Seth Rupchand* (1). But where the letter or the document relied upon expressly states that there is no liability and the liability is in fact denied and repudiated I do not see on what principle it can be said that limitation is extended under s. 19 of the Act. In the letter in question the defendant stated that he was under no liability for the price of the 800 pieces of rejected sleepers. I would accordingly hold that the claim of the plaintiff for the price thereof is barred by time, but the last part of the letter amounts to an acknowledgment of liability in respect of the balance of the price for the accepted 1200 pieces according to the principle laid down in *Maniram* v. *Seth Rupchand* (1).

Mr. Dass has sought to support the decree of the lower Court on another ground. He says that the defendant paid Rs. 250 on the basis of the contract, and although at the time when that payment was made there was no writing in the hand of or signed by the defendant the fact that the defendant recited the payment in his written statement in the suit which was signed by him brings the case within s. 20, Limitation Act. I do not see my way to give effect to the said contention. The defendant has maintained in his written statement that the said payment was towards the payment of the price of the 1200 accepted pieces and his written statement cannot be dissected in the manner suggested by the opposite party. Besides I am of opinion that a written statement filed in the suit itself cannot be called in aid for the purposes of s. 20 of the Act. When the plaintiff institutes the suit beyond the period of limitation prescribed in the schedule to the Limitation Act, he has to state in his plaint the reasons why the suit is still within time. If there is no such statement the Court has to dismiss the suit. Further a suit must be tried on the cause of action as laid in the plaint and any inherent defect of the said nature in the plaint cannot be supplied by a written statement in the suit. For these reasons I overrule the said contention and make the Rule absolute in part and dismiss the claim of the plaintiff in respect of the price claimed for the 800 pieces of rejected sleepers. The Advocates of parties are agreed that the decree should be for Rs. 19-1-0 which is made up of Rs. 14 and interest thereon at 12 per cent. per annum from September 9, 1930, to the date of suit. The decree of the lower Court is modified accordingly. The parties will bear proportionate costs in the Court below but I make no order for costs in the Rule.

D. *Decree modified.*

(1) 33 C 1047; 2 N L R 130; 33 I A 165; 10 C W N 874; 4 C L J 94 (P C).

LAHORE HIGH COURT

Second Civil Appeal No. 1031 of 1934

October 13, 1934

SKEMP, J.

BAKHSHI SINGH AND OTHERS—APPELLANTS

versus

BACHAN SINGH—RESPONDENT

Contract Act (IX of 1872), s. 65—Mortgage of insolvent's property by Receiver set aside and adjudication annulled—Mortgagor, when entitled to possession.

A mortgage was effected of the insolvent's property by the Receiver and it was set aside by the District Judge and the adjudication was annulled. The mortgagor subsequently brought a suit against the mortgagee for possession :

Held, that until he was re-paid the sum advanced on the security of the land the mortgagee was entitled to remain in possession. *Labh Singh* v. *Jamnu* (1), relied on.

S. C. A. from the decree of the Additional District Judge, Ferozepore, dated May 12, 1934.

Dr. *Nand Lal*, for the Appellants.

Mr. *Shamair Chand*, for the Respondent.

Judgment—This judgment will dispose

of Second Appals Nos. 1081 of 1934 and 147 of 1933, which have arisen out of the same case. The facts as stated by the learned District Judge in the order appealed against in the first mentioned appeal are as follows:

In 1922 one Gurmukh Singh was adjudicated an insolvent. A Receiver was appointed who, in 1926, mortgaged some of the land of the insolvent in favour of Gurdit Singh and others for Rs. 3,600. Possession of the property was delivered to the mortgagees, but the mortgage was set aside by the Additional District Judge in 1927. In 1928 the trial Court annulled the order of adjudication because the insolvent had not applied for discharge, but under s. 37 of the Act, he ordered that the insolvent's property should vest in the Official Receiver. Gurmukh Singh brought a suit for recovery of possesion of the property mortgaged, but it was dismissed on a preliminary point in 1929. In 1932 he died and his son then brought the present suit for possession of the land against the mortgagees. The trial Court decreed the suit and the learned Additional District Judge dismissed the appeal. He overruled the contention that the mortgagees should be allowed to retain possession of the mortgaged land until the sum of Rs. 3,600 was paid to them. The mortgagees have preferred this second appeal through Dr. Nand Lal, who relies on s. 65, Contract Act, as interpreted in *Labh Singh* v. *Jamnu*, (1). Section 65, Contract Act, runs:

"When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

Accordingly the Full Bench held that where an occupancy tenant has alienated the occupancy tenancy without the consent in writing of the landlord and the alienation has been set aside at the instance of the landlord the mortgagee is entitled to sue the mortgagor for refund of the mortgage money. The principle governs this case and I hold that the mortgagees are entitled to recover their mortgage money Rs. 3,600 before they are dispossessed. I therefore set aside the decree of the learned Additional District Judge and dismiss the suit holding that the mortgagees are entitled to remain in possession until they are repaid by the mortgagor the sum advanced on the security of the land. The mortgagor respondent is to pay the appellants' costs throughout.

The other appeal is now very simle. After the Official Receiver got the mortgage money of Rs. 3,600 he distributed it among nine creditors of the insolvent who were paid *pro rata* in March 1931. When the mortgage was set aside, the Sub-Judge in June 1932, directed the creditors to repay this money in order to satisfy the claim of the mortgagees. The creditors appealed and their appeal was accepted by the lower Court. They have come up here in order to have the judgment of the first Court restored. As I have held that the mortgagees are entitled to retain possession until the mortgage money is repaid to them by the mortgagor it is now unnecessary to hold that the creditors ought to repay what they have received. The appeal is therefore rejected. I may add that when giving the order it would have been very difficult, and it would now be impossible to enforce it in view of the fact that some of the creditors must have died and other gone away and all spent the money which they had received. There will be no order as to costs in this appeal.

D. *Appeal accepted.*

(1) 151 Ind. Cas 1; A I R 1934 Lah, 853; 7 R L 100; 36 P L R 233; 15 Lah. 751 (F B).

CALCUTTA HIGH COURT

Civil Appeal No. 389 of 1933

July 16, 1934

MUKERJI, ACTG. C. J. AND S. K. GHOSE, J.

RAFATULLA FARAZI—JUDGMENT-DEBTOR—APPELLANT

versus

KUNDARMAL AGARWALLA AND ANOTHER—DECREE-HOLDERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 11—Ex parte finding that execution application is not time-barred—Notice to judgment-debtor—Both parties absent—Application dismissed—Another execution application—Judgment-debtor, if estopped from raising objection that first application is not within time—Execution—Estoppel.

An execution application was *prima facie* time-barrred but on the evidence of the decree-holder an *ex parte* finding that it was not time-barred was recorded. After this, notice was sent to the judgment-debtor to show cause why the execution should not be proceeded with against him, and both parties being absent on the fixed, date the execution application was dismissed. The decree-holder filed a second application whereupon the question of limitation of the firstapplication was taken by the judgment-debtor:

Held, that the *ex parte* order which had been recorded against the judgment-debtor and which was to the effect that the application for execution was *prima facie* within time could not be taken to operate as *res judicata* or by way of estoppel or on any principle analogous to it.

C. A. from appellate order of the Special Sub-Judge, Assam Valley Districts, dated March 31, 1933.

Mr. *Nagendra Kumar Dutt*, for the Appellant.

Judgment.—This appeal must be allowed. The judgment-debtor is the appellant in this appeal. He objected to the execution that was being taken against him on the ground that the execution was barred by limitation. The facts necessary to be stated are that on the second occasion when the decree was sought to be executed the application for execution was filed on September 1, 1931 a date which was *prima facie* 13 days beyond three years from the date on which the first application for execution was disposed of. On receipt of this application for execution the executing Court made an order on the decree-holders asking them to show that the application was not barred by limitation. On the date fixed for the aforesaid purpose one of the decree-holders was examined and the Court recorded an order that "limitation had been *prima facie* proved," obviously meaning that the application was not barred by limitation. At the same time the Court issued notice to the judgment-debtor to show cause why the execution should not be proceeded with against him and he fixed the case for November 28, 1931. On the date last mentioned an order was recorded in the order-sheet which shows that the notice which had been issued on the judgment-debtor had been served but the judgment-debtor did not appear and that the decree-holders also were absent and had taken no steps.

The Court on those facts made an order dismissing the second application for execution. The present execution case was then started by filing an application on January 9, 1932. On the facts stated above the judgment debtor's contention was that the second application for execution had been filed beyond the period of limitation which would be allowable under the law. The Courts below have concurrently overruled this objection holding that by reason of the order which the executing Court had made on the second application the plea that the second application was barred by limitation is no longer open to the judgment-debtor. We are of opinion that this view of the Courts below cannot possibly be supported. The finding that a *prima facie* case had been made out showing that the application for execution was not time-barred was a finding arrived at *ex parte*. It was after that finding that notice was served on the judgment-debtors. But neither of the parties thereafter came to Court and got any decision on the question of limitation which arose. The *ex parte* order which had been recorded against the judgment-debtor and which was to the effect that the application for execution was *prima facie* within time cannot, in our opinion, be taken to operate as *res judicata* or by way of estoppel or on any principle analogous to it.

The result is the question whether the second application for execution was within time or not is a question which can be raised by the judgment-debtor even on the present application. The appeal is accordingly allowed and the decisions of the Subordinate Judge and of the Munsif are set aside and the case is sent back to the Court of first instance so that the parties may now be given an opportunity to produce such evidence as they may desire to do, in support of their respective contentions as regards the second application for execution being time-barred or within time. Costs of this appeal, hearing fee being assessed at two gold *mohurs*, will abide the result.

D. *Appeal allowed.*

OUDH CHIEF COURT

Criminal Reference No. 12 of 1934

April 9, 1934

NANAVUTTY, J.

EMPEROR—COMPLAINANT

versus

MR. B. A. PETERS—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 438—Reference—When can be made to High Court—No question of law involved—Reference to be rejected.

A reference can only be made to the High Court if after accepting loyally the finding of facts arrived at by the trial Magistrate some question of law arises which necessitates interference with the order passed by the trial Court. When no question of law is involved the reference is to be rejected.

Cr. R. made by the Sessions Judge of Hardoi under s. 438 of the Criminal Procedure Code.

Mr. *H. K. Ghosh*, Assistant Government Advocate, for the Crown.

Mr. *M. Talha*, for the Opposite Party.

Judgment.—This is a reference made by the learned Sessions Judge of Hardoi under s. 438 of the Code of Criminal Procedure recommending that the conviction and fine imposed upon the accused Mr. B. A. Peters be set aside. The learned

Sessions Judge has written a most elaborate order in making his reference to this Court, but he has failed to realise the cardinal and fundamental principle that a reference can only be made to the High Court if after accepting loyally the findings of facts arrived at by the trial Magistrate some question of law arises which necessitates interference with the order passed by the trial Court. In the present case the trial of the accused was summary under s. 260 of the Code of Criminal Procedure and there is no record of the evidence of the witnesses examined on behalf of the prosecution, but the trial Magistrate in a very full judgment has given his reasons for finding the accused guilty of an offence under s. 120 of the Railways Act, and in his explanation submitted to the learned Sessions Judge he has made still more clear what he held as proved in the present case. Upon the facts found proved by the learned Magistrate the conviction of the accused is perfectly legal and justifiable. The contention that the findings of facts arrived at by the trial Magistrate are incorrect cannot for a moment be allowed by me in this reference. There is no question of law involved in this reference. The conviction of the accused Mr. Peters is fully justified upon the findings of the trial Magistrate. I accordingly reject this reference and direct that the file of the case be returned to the Court concerned.

N. *Reference rejected.*

CALCUTTA HIGH COURT

Civil Appeal No. 357 of 1933
August 24, 1934

M. N. MUKERJI, ACTG. C. J. AND S. K. GHOSE, J.

RADHANATH DAS AND ANOTHER — JUDGMENT-DEBTORS—APPELLANTS

versus

SADHAN CHANDRA DEY— DECREE-HOLDER—RESPONDENT

Execution—Decree for khas *possession of certain plot—Whether can be changed in execution—Decree-holder getting symbolical possession—No objection—Subsequent application for execution for actual possession—Competency.*

Where a decree is given for *khas* possession of a certain plot, it cannot be changed at the time of execution.

Where in execution of a decree, the decree-holder gets possession and there is no objection, a second application for execution of same decree on the ground that in the former application the decree-holder has obtained only symbolical possession, is not competent.

Mr. *Sudhir Kumar Khastagir*, for the Appellants.

Messrs. *Shagirath Chandra Das* and *Jajneswar Mandal*, for the Respondent.

Judgment.—This appeal in our opinion, must succeed. The decree in the present case was one for possession of a plot of land which was described therein as settlement plot No. 612, consisting of one *bigha* and odd of land, and tank lying within certain boundaries. It was executed as a decree for *khas* possession. The writ issued was in accordance with O. XXI, r. 35 and that writ being executed, a receipt was given on behalf of the decree-holder stating that possession to the exclusion of others had been received. No objection to the delivery of possession was taken either by the decree-holder or by anybody else and the Court made the following order :

"Possession delivered on May 10, 1931. No objection put in. No other steps taken. Order that the execution case is dismissed on part satisfaction."

Part satisfaction was recorded because the decree as to costs was yet unrealised. Thereafter the present execution has been started by the decree-holder in respect of the same decree, and the substance of his case is that he now wants to have *khas* possession of the decretal lands by ousting the judgment-debtors because as he alleges, on the previous occasion only symbolical possession was asked for by oversight, that it was only such possession that was given and that in the previous petition for execution the decretal land had been wrongly described as dag No. 612 in the place of dag No. 577. The Courts below have ordered the execution to proceed. The allegations on which the present case is founded are not true ; the decree was in respect of dag No. 612, the writ issued was for *khas* possession and it was *khas* possession that was delivered. To let the present petition proceed would be clearly to go behind the decree, and to allow the decree-holder to execute the decree a second time for getting the same kind of possession that he has admitted he got. If dag No. 612 and not No. 577 was the correct number of the dag or if only symbolical possession was what was delivered, his remedy does not lie in a second execution, whatever other remedy if any he may have. The appeal is allowed, and the orders of the Courts below being set aside it is ordered that the execution petition be dismissed with costs in all the

Courts, hearing fee in this Court being assessed at one gold *mohur*.

D. *Appeal allowed.*

OUDH CHIEF COURT

Criminal Reference No. 11 of 1934
April 9, 1934
NANAVUTTY, J.

DULARE—OPPOSITE PARTY—APPLICANT
versus
Musammat SUNDARIA—COMPLAINANT—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 438—Reference to High Court—When can be made—Question of law—Necessity of—Reference contrary to findings of facts of trial Court—Legality of.

The High Court will not accept any reference or revision which involves no question of law. The Sessions Judge should not, therefore, make any reference to the High Court or submit any application for revision of any order contrary to the findings of facts arrived at by the trial Court.

Where in an application for maintenance the trying Magistrate finds that the husband was residing within his jurisdiction it must be accepted as correct and it is not open to the Sessions Judge to hold anything to the contrary.

Cr. Ref. made by the Sessions Judge of Rae Bareli.

Mr. *S. M. Ahmad*, for the Applicant.

Judgment.—This is a reference made by the learned Sessions Judge of Rae Bareli under s. 438, of the Code of Criminal Procedure. An order for maintenance was passed under s. 488 of the Code of Criminal Procedure by Khan Bahadur Mirza Ali Sajjad Husain, Magistrate of the first class in the District of Rae Bareli, directing Dulare to pay a maintenance of Rs. 4 a month to his wife *Musammat* Sundaria. The learned Sessions Judge has held that this order for maintenance was passed by the trying Magistrate without jurisdiction inasmuch as Dulare was residing in Bahlolpur in the District of Fatehpur and was not living within the jurisdiction of the Magistrate of Rae Bareli. The learned trying Magistrate in his explanation, which he has submitted to the Sessions Judge, pointed out that he understood that Dulare was living with his wife *Musammat* Sundaria in Dalmau within the Jurisdiction of the Magistrate and that the expression "*mujh muddaiya ka kul zewar chhin kar chala gaya*" in deposition of the complainant clearly indicated to his mind that Dulare was living with his wife in Dalmau and left her and not that *Musammat* Sundaria was living apart from her husband. In this matter the opinion of the trying Magistrate and what he understood the parties to say must be accepted as correct, and if the husband was residing within the jurisdiction of the trying Magistrate, then no question of the illegality of the order passed by the learned Magistrate can arise. In this connection I would invite the attention of the learned Sessions Judge to the well settled rule on this point, that he must not make any reference to this Court or submit any application for revision of any order contrary to the findings of facts arrived at by the trial Court. No reference or revision can be accepted by this Court which involves no question of law. In the present case the learned trying Magistrate upon his interpretation of the evidence of the complainant held that Dulare, the husband of *Musammat* Sundaria, was living within his jurisdiction and it is not open to the learned Sessions Judge to hold anything to the contrary. I see no reason to interfere with the order of the learned trying Magistrate and I reject this reference and direct that the file of the case be returned to the Court concerned.

N. *Reference rejected.*

NAGPUR JUDICIAL COMMISSIONER'S COURT

First Civil Appeal No. 10-B of 1933
January 31, 1935
STAPLES, A. J. C.

Mir GHULAM ALI AND OTHERS—APPELLANTS
versus
RAHIMUDDIN KAJIMUDDIN MUSALMAN OF ELLICHPUR—RESPONDENT

Decree—Two conflicting decrees—Which prevails

In case of conflicting decrees the later one must prevail The reason for this is that the previous decree cannot be looked into and must be held to have been discharged by the later decree. *Dambar Singh* v. *Munawar Ali Khan* (1), *Amar Singh* v. *Gobind Ram* (2) and *Rajani Kumar Mitra* v. *Ajmaddin Bhuiya* (3), referred to.

The judgment-debtors objected to the execution on the ground that in a previous case the District Judge had held that the assignment in favour of the opposite party was null and void. The lower Court, however, followed the earlier decision of his predecessor, which held that the assignment was good, on the ground that he was bound by the previous order of his own Court. The order of his predecessor was passed on October 5, 1925, whilst the order of the District Judge, on appeal was passed on July 16, 1926, when the matter was in issue in another case:

Held, that the later order *i. e.*, of the District Judge must prevail.

F. C. A. against the order of the Second Additional District Judge, Amraoti, dated

November 5, 1932, in execution case, arising out of Civil Suit No. 12 of 1919, of the order of the Second Additional District Judge, Amraoti, dated January 28, 1920.

Mr. *J. R. Mudholkar*, for the Appellants.

Mr. *G. V. Deshmukh*, for the Respondent.

Judgment.—The appellants, who are judgment-debtors, appealed against the order of the Second Additional District Judge, Amraoti, allowing execution against them to proceed at the instance of the respondent, who is an assignee of the decree. The appellants objected to the execution on the ground that in Civil Appeal No. 20 of 1925 the District Judge has held that the assignment in favour of the respondent was null and void. The lower Court, however, has followed the earlier decision of his predecessor, which held that the assignment was good, and has further held that he was bound by the previous order of his own Court. It may be noted that the order of the Second Additional District Judge was passed on October 5, 1925, whilst the order of the District Judge, Amraoti, on appeal was passed on July 16, 1926, when the matter was in issue in another case.

It is clear that the view taken by the lower Court is wrong and that in case of conflicting decrees the latter must prevail. The reason for this is that the previous decree cannot be looked into and must be held to have been discharged by the later decree. In this view I would refer to the following authorities: *Dambar Singh* v. *Munawar Ali Khan* (1), *Amar Singh* v. *Gobind Ram* (2) and *Rajani Kumar Mitra* v. *Ajmaddin Bhuiya* (3). I would also refer to Mulla's Commentary on s. 11, in the Code of Civil Procedure, 10th Edition, at p. 91.

The order of the lower Court, is, therefore, set aside and instead it is directed that the application of the respondent to execute the decree in Civil Suit No. 12 of 1919 in the Court of the Second Additional District Judge, Amraoti, be dismissed with costs. Costs of this appeal will be borne by the respondent. I fix pleader's fees at Rs. 25.

D. *Order set aside.*

(1) 30 Ind. Cas. 775; 37 A 531; 13 A L J 764.

(2) 101 Ind. Cas. 501; 49 A 606; L R 8 A 122 Rev.; 25 A L J 387.

(3) 114 Ind. Cas. 129; A I R 1929 Cal. 163; 48 C L J 577.

CALCUTTA HIGH COURT

Privy Council Appeal No. 15 of 1934

August 28, 1934

MITTER AND EDGLEY, JJ.

B. N. RY. CO. LTD.—DEFENDANTS—APPELLANTS—PETITIONERS

versus

RUTTANJI RAMJI AND OTHERS—PLAINTIFFS—RESPONDENTS—OPPOSITE PARTIES

Civil Procedure Code (Act V of 1908), s. 110—Lower Court's decree modified by High Court—Liability of appellant reduced as a result—High Court decree, if one of affirmance.

Where as a result of the High Court decree which modifies the decree of the lower Court, the liability of the appellant under the decree is reduced to a certain extent, the decree of the High Court is not one of affirmance. *Anna Purna Bai* v. *Ruprao* (3) and *Homeswar Singh* v. *Kameshwar Singh Bahadur* (4), relied on, *Raja Sree Nath Roy* v. *Secretary of State* (1) and *Narendra Lal* v. *Gopendra Lal* (2), referred to

P. C. A. for leave to appeal to His Majesty in Privy Council.

Messrs. *Beagram* and *Ambika Pada Choudhury*, for the Petitioners.

Messrs. *S. M. Bose* and *Pramatha Nath Mitter*, for the Opposite Parties.

Mitter, J.—This is an application of the Bengal Nagpur Railway Company, Limited, for leave to appeal to His Majesty in Council. It appears that a suit was brought against them by the plaintiffs now respondents to recover a sum of Rs. 1,66,493 odd on account of the price of the work done by the plaintiffs as members of a joint Mitakshara family for a certain construction known as Amda-Jamda branch of the said railway. That suit was decreed in part by the trial Court. There were appeals and cross-appeals against this decision to this Court. As a result of the appeal by the Railway Company the decree against them was reduced to a certain extent. The contention of the Railway Company is that they are not at all liable for any amount claimed in the suit, and so the Railway Company is not satisfied with the reduction of the claim against them by this Court.

The decree of this Court is more (in) their favour than the decree made by the Court of first instance. The company have accordingly applied for leave. One of the points for consideration which arises is as to whether the High Court judgment is to be regarded as a judgment of affirmance seeing that the decision reducing the amount of claim against them to a certain extent was really a decision of

affirmance of the judgment of the Court below with reference to the amount claimed less the amount ultimately decreed by the High Court against the company. The question really arose in view of a previous decision of this Court in *Raja Sree Nath Roy* v. *Secretary of State* (1) where it was held in circumstances somewhat similar to the present that the decree was really a decree of affirmance and leave could not be granted unless a substantial question of law arose with regard to the application. That case has been considered by Sir George Rankin, C. J., in *Narendra Lal* v. *Gopendra Lal* (2). The facts in *Raja Sree Nath Roy* v. *Secretary of State* (1) were that the lower Court Judge gave an award of compensation and the High Court increased that amount. The applicant desired that the said amount might be still further increased, and it was held that the two Courts were at one on the only matter which was going to the Privy Council *viz.*, whether beyond the amount awarded by the High Court the applicant had any claim. As has been pointed out by Sir George Rankin, C. J.

"that case is the origin of the doctrine that the language of s 110 of the Code is to be construed with reference to the subject-matter in appeal to the Privy Council."

The reasoning of that case is that a decree which merely dismisses the appeal or confirms the decree of the immediate Court below is not the only decree of affirmance for the purposes of an appeal to the Privy Council. It has been held in a later decision of the Privy Council in *Anna Purna Bai* v. *Ruprao* (3) that the rule which originated in the doctrine which we have just enunciated in the case of *Raja Sree Nath Roy* v. *Secretary of State* (1) was erroneous. In view of this decision of the Privy Council we are of opinion that the decree of this Court is not a decree of affirmance. Other authorities have been cited before us to which reference may be made. We have been referred to a decision of the Patna High Court of Chief Justice Sir Courtney-Terrell in *Homeswar Singh* v. *Kameshwar Singh Bahadur* (4) where the same view was taken. The learned Chief Justice made this pertinent observation which may be usefully quoted here:

"It is immaterial whether the efect of the modification is in favour of the appellant or adds to his detriment that is the effect of the wording of the section. Had the legislature chosen to lay down a criterion of the right of appeal depending upon whether the appellant would suffer by the modification or not, it would have said so."

(1) 8 C W N 294.
(2) 103 Ind. Cas. 65; A I R 1927 Cal. 543.
(3) 86 Ind. Cas. 504; A I R 1925 P C 60; 51 I A 319; 51 C 969 (P C).
(4) 144 Ind. Cas. 320; A I R 1933 Pat. 262; Ind. Rul. (1933) Pat. 235.

Reliance has been placed on behalf of the appellants on the case of Annapurna with reference to the observations of the Judicial Committee to which reference has already been made. In this view the judgment of the High Court is not a judgment of affirmance and there is no dispute with regard to the value of the appeal to His Majesty in Council. So we are bound to grant certificate that the case fulfils the requirements of s. 110, Civil Procedure Code. The certificate is accordingly granted.

Edgley, J.—I agree.

D. *Certificate granted.*

LAHORE HIGH COURT

First Civil Appeal No. 1448 of 1932
October 31, 1934
ADDISON AND DIN MOHAMMAD, JJ.
RAMCHAND—PLAINTIFF—APPELLANT
versus
CENTRAL FLOUR MILLS OF KASUR AND OTHERS—DEFENDANTS—RESPONDENTS

Contract—Repudiation of, by plaintiff—Earnest money, if can be recovered by plaintiff.

When a plaintiff repudiates the contract into which he had entered with the defendants, he would not be entitled to recover that portion of the earnest money which he had paid. *Roshan Lal* v. *Delhi Cloth and General Mills Co.* (4), followed.

F. C. A. from a decree of the Additional Sub-Judge, First Class, Delhi, dated February 5, 1931.

Messrs. *Shamair Chand* and *Qabul Chand*, for the Appellant.

Mr. *Shuja-ud-Din* for Mr. *G. M. Din* and Mr. *Bashir Ahmad*, for the Respondents.

Judgment.—The appellants brought a suit for recovery of Rs. 5,250 from the defendants on the following account:

Rs.	a.	p.	
2,500	0	0	by way of damages on account of non-delivery of 5,000 maunds of bran at Re 0-8-0 a maund.
1,500	0	0	by way of damages on account of non-delivery of 2,000 maunds of flour at Re. 0-12-0 a maund.
703	2	0	by way of damages on account of non-delivery of 937½ maunds of maida at Re 0-12-0 a maund.
400	0	0	on account of advance.
153	0	0	on account of the price of 612 empty bags at Re. 0-4-0 a bag.
5,256	0	0	Total

The total amounted to Rs. 5,256-2-0, but the appellants remitted Rs. 6-2-0. The defendants pleaded that the appellants were not entitled to any amount by way of damages or even to the refund of the money alleged to have been paid by way of advance or to the price of empty bags, as they themselves had been responsible for the breach of contract. The Senior Subordinate Judge dismissed their suit *in toto*; and burdened them with special costs of Rs. 200 in addition to the ordinary costs of the suit. From this decision an appeal has been preferred to the extent of special costs and Rs. 800 only calculated in the following manner: (*a*) Rs. 400 which were paid to the defendants as advance, (*b*) Rs. 153 as the price of 612 empty bags, and (*c*) Rs. 247 by way of damages for the defendant's breach of contract in failing to deliver 612 bags of bran.

We may say at once that the appeal as regards the last item of Rs. 247 is not competent, as this sum was never claimed in the Court below. We are also clear that the appellants are entitled to a sum of Rs. 153 as the price of the empty bags that were admittedly delivered to the defendants by the appellants. We are, however, not inclined to allow the refund of Rs. 400 as we are satisfied that it was the appellants who were guilty of the breach of contract and the money had not been deposited as an advance in the technical sense of the term. The learned Counsel for the appellants has relied on *Pasumarti Seethanna* v. *Thammandra Yasikalappa* (1), and *Manepalli Satyanarayanamurthi* v. *Kakaraparthi Krishna Murthi* (2), in support of his argument that this sum is legally refundable. In *Pasumarti Seethanna* v. *Thammandra Yasikalappa* (1), there was, as in the present case, no definite written contract and the learned Judge followed with approval the following observations made in *Habib Ullah* v. *Arman Dewan* (3):

"The deposit, if nothing more is said about it is according to the ordinary interpretation of business men, a security for the completion of the purchase so that in the event of the contract being performed, it must be brought into account, and if the contract is not performed by the payer, it is forfeited to the payee."

"In *Manepalli Satyanarayanamurthi* v. *Kakaraparthi Krishna Murthi* (2), it was no doubt observed by a Bench of the Madras High Court that it is never the practice in mercantile contracts to hold that whatever be the damage suffered or not suffered, the seller is to be entitled to keep the deposit, but the facts of that case were different from those of the present case and the remarks made by the learned Judges do not in any way support the contention raised by the appellant's Counsel before us. In *Manepalli Satyanarayanamurthi* v. *Kakaraparthi Krishna Murthi* (2), again, a case from Madras, the learned Judge remarked that, in sales of goods it is not customary to give money paid in advance, the peculiar characteristic of a deposit, and that it would be hazardous to infer that when a vendor accepts what he calls 'advance' he is taking a deposit clothed with all the implications which that term has acquired in the West throught the course of European civilization."

They considered it safer to rely on the findings of the learned Senior Subordinate Judge that as the so-called advance was treated as part payment of purchase money in the account books of the defendants, it was not a deposit in the strict sense of the word.

We, therefore, consider that these authorities do not help the appellants. As against this it was laid down by a Bench of the Allahabad High Court in *Roshan Lal* v. *Delhi Cloth and General Mills Co.* (4), that when a plaintiff repudiated the contract into which he had entered with the defendants, he would not be entitled to recover that portion of the earnest money which he had paid. The law on the subject has been very carefully reviewed by Pollock and Mulla in the Treatise on the Indian Sale of Goods Act, (p. 45, 1933 Edition), and is in accord with the pinciple enunciated above. In these circumstances, while accepting the appeal to the extent of allowing the appellants a sum of Rs. 153 with proportionate costs, we dismiss the appeal otherwise and allow the respondents their costs of the appeal on the balance.

D. *Appeal partly accepted.*

(1) 91 Ind Cas. 765; A I R 1926 Mad. 117; 22 L W 634; (1926) M W N 64.

(2) 106 Ind. Cas. 482; A I R 1928 Mad. 526; 54 M L J 40; 27 L W 639.

(3) 53 Ind. Cas. 875; A I R 1920 Cal. 679; 30 C L J 113; 24 C W N 40.

(4) 7 Ind. Cas. 791; 33 A 166; 7 A L J 1019.

PATNA HIGH COURT

Criminal Reference No. 57 of 1934

December 5, 1934

MOHAMMAD NOOR, J.

EMPEROR—PROSECUTOR

versus

BISHI SAHARA AND OTHERS—RESPONDENTS

Criminal Procedure Code (Act V of 1898), s 109 (a), (b)—*Cl.* (a), *meaning and effect of—Person found with house-breaking implements near wealthy man's house—Admission of object of being there—Person, if can be dealt with under cls.* (a) *and* (b)—"A

satisfactory account of himself,' meaning of—Simply avoiding Police or taking unfrequented route—Whether by itself ground for action under s. 109—Words 'is taking' in cl. (a), *significance of.*

Section 109, cl. (*a*), Criminal Procedure Code, does not mean that the man is taking precautions to conceal the fact of his being present within the local limits of such Magistrate; but it means that he is taking precautions to conceal his presence and that the concealment is to be within the local limits of such Magistrate [p. 731, col. 2.]

If a man be found by the Police with implements of house-breaking lurking near the house of a wealthy man thereby indicating that he is about to commit burglary there and when challenged by the Police he admits the object of his being there, he can be dealt with under cls. (*a*)and (*b*). [p. 732, col. 2.]

" A satisfactory account of himself " does not necessarily mean that he should give his correct name and address or even the object of his being present at night, but that he should satisfy the authorities by explaining the suspicious circumstances appearing against him. Simply avoiding the Police by a bad character or taking an unfrequented route is by itself no ground for action under s. 109, Criminal Procedure Code. It may be that in some cases simply not giving an explanation may not be enough, for instance, an apparently respectable person returning from the house of his mistress very late at night is using unfrequented streets and avoiding being seen. He cannot come under s. 109, Criminal Procedure Code: Each case must be decided on its own facts. *Emperor* v. *Phuchai* (6) followed. [p. 733, col. 1.]

In s. 109, cl. (*a*), the words 'is taking' mean 'has taken' or 'has been taking'. [p 732, col. 2]

Cr. Ref. from a letter of the Deputy Commissioner, Sambalpur, dated September 29, 1934.

Mr. *B. C. De*, for the Crown.

Judgment.—This is a reference made by the Deputy Commissioner of Sambalpur under s. 438, Criminal Procedure Code, recommending that the order of the Sub-Divisional Officer of Bargarh discharging Bishi Sahara, Dileshwar Binjhal, Manjhi Ganda, Bhikari Sahu and Banshi Ganda from a proceeding under s. 109, Criminal Procedure Code, be set aside and further inquiry ordered.

The facts as stated by the learned Deputy Commissioner and disclosed from the judgment of the learned Sub-Divisional Officer are these. The officer in charge of the Bargarh Police Station got information at 6-30 P. M., of June 21, 1934, that some persons of suspected character of village Khuntpali abour 6 to 7 miles off were about to commit burglary in the town of Bargarh on that night. The officer with several men picketted a place by the side of a temple near a tank in the outskirt of the town of Bargarh. At about 11 P. M., they noticed some persons inside the compound of the temple. On being challenged these persons began to run away after scaling the wall of the compound of the temple. The Police Officer chased them, and eventually three persons were arrested at a distance of about 15 paces from the place. There was a scuffle in which two other persons, who had run away, also joined. They are said to have received *lathi* injuries from the constable. The Police also found house-breaking instrument called *sendhkati*, a bottle of liquor and two *lathis* on a platform inside the compound of the temple. The three arrested persons were taken to the Police Station, and on some information supplied by them accused Bhikari Sahu and Banshi Ganda were also arrested. It is said that they had marks of *lathi* upon their person which were bleeding. These five persons, namely, the three persons who were arrested on the spot and the two who were arrested later on were proceeded against under s. 109, Criminal Procedure Code. After completing the inquiry the learned Sub-Divisional Magistrate discharged them, as in his opinion the circumstances disclosed did not warrant the accused persons being bound down under s. 109, Criminal Procedure Code. The learned Sub-Divisional Magistrate has relied upon the following decisions:

Emperor v. *Himayatullah* (1), *Reshu Kabiraj* v. *Emperor* (2), *Gohra Badia* v. *Emperor* (3), *Gajan Chandra De* v. *Emperor* (4) and *Emperor* v. *Bhairon* (5). In my opinion the view taken by the learned Sub-Divisional Officer is not correct. The two Allahabad cases relied upon by him, namely, *Emperor* v. *Himayatullah* (1) and *Emperor* v. *Bhairon* (5), were overruled by a Full Bench of that Court in *Emperor* v. *Puchai* (6). This was not brought to the notice of the learned Sub-Divisional Officer. I shall come to this case in a moment, but before I do so, I wish to examine the three Calcutta cases relied upon by him. The first is that of *Reshu Kabiraj* v. *Emperor* (2). In this case the fact that Reshu Kabiraj, who was a dealer in cocaine was found at about midnight in a lane in the

(1) 107 Ind Cas. 501; A I R 1927 All. 592; 28 Cr. L J 567; 49 A 841; L R 8 A 196 Cr.; 25 A L J 679; 8 A I Cr. R 102.

(2) 41 Ind. Cas. 649; A I R 1918 Cal. 887; 18 Cr. L J 825; 22 C W N 163; 27 C L J 382.

(3) 122 Ind. Cas. 295; A I R 1929 Cal. 729; (1929) Cr. Cas. 365 50 C L J 181; 31 Cr. L J 40; Ind. Rul. (1930) Cal 231.

(4) 123 Ind. Cas. 747; A I R 1929 Cal. 775; (1929) Cr. Cas. 519; 34 C W N 194; Ind. Rul. (1930) Cal. 379 31 Cr. L J 563.

(5) 97 Ind. Cas. 428; A I R 1927 All 50; 27 Cr. L J 1116; 49 A 240; L R 7 A 183 Cr.; 25 A L J 94.

(6) 113 Ind. Cas. 417; A I R 1929 All. 33; 30 Cr. L J 145; 50 A 909; 10 A I Cr. R 531; 26 A L J 1257.

town of Raghunathganj in association with two others who had in their possession house-breaking implements; that on being discovered he fled and that when arrested he remained silent and that the explanation offered to the Magistrate of his presence at the time and place in question was found to be false. It was urged on his behalf that sub-cl. (*a*), s. 109, Criminal Procedure Code did not apply as the accused's presence or residence within the jurisdiction of the Magistrate was well-known and that there was no attempt on his part to conceal the same and that the petitioner's attempt to conceal his presence at a particular spot and at a particular time even if it were with the object of assisting in the commission of house-breaking did not bring him within the mischief of the clause. It was also urged that sub-cl. (*b*) also did not apply as the accused's name, address and profession were known and his possession of means has been found. It must, therefore, be taken that he gave a satisfactory account of himself within the meaning of cl. (*b*). It was further urged that the accused having been charged only under sub-s. (*a*), sub-s. (*b*), could not be invoked to bind him down. Unfortunately there is no discussion in the judgment of their Lordships of the points taken before them. Teunon, J., only said:

"On the whole though speaking for myself with some hesitation we have arrived at the conclusion that the facts found do not bring the petitioner within either clause of s. 109 of the Code."

Shamsul Hoda, J., agreed and added that the cl. (*a*), s. 109 refers to a continuous act of concealment. He was also of opinion that the provisions of s. 109 (*a*) could not apply to the case of a person brought under arrest, as it cannot be said of such a person that he is taking precautions to conceal his presence. This case was also expressly dissented from in the Full Bench case of Allahabad referred to above and also in this Court. Another case referred to by the learned Magistrate is *Gobra Badia* v. *Emperor* (3). Two points seem to have been decided in it. One is that if a man gives his correct name and address when questioned by the Police the mere fact that he did not give a satisfactory account of what he was doing at the time of his arrest cannot justify an action under s. 109, Criminal Procedure Code. The second point is the same which was decided in the two earlier cases of the Calcutta High Court, namely, that of *Reshu Kabiraj* v. *Emperor* (2) and *Piru* v. *Emperor* (7). The next case is that of *Gajan Chandra De* v. *Emperor* (4), there also following the cases of *Reshu Kabiraj* v. *Emperor* (2), it was held that in order to bring a man within the purview of cl. (*a*), s. 109, Criminal Procedure Code, there must be a continuous act of concealment by him.

Now, from the cases relied upon by the learned Sub-Divisional Magistrate the following propositions may be deduced. (1) That cl. (*a*), s. 109, Criminal Procedure Code, only applies when a man takes precautions to conceal the fact of his being present within the jurisdiction of the Magistrate, and not when he takes precautions only to conceal himself and the act of concealment takes place within the jurisdiction of the Magistrate. (2) That the act of concealment must be continuous. (3) That cl. (*a*) does not apply when a man is brought under arrest as he is not taking precaution to conceal his presence. (4) That cl. (*b*) does not apply when a man gives his correct name and address, but is unable to explain the reason of his being present at a particular time and place. The second and third propositions have been dissented from in this Court and all of them by the majority of the Judges in the Full Bench case of the Allahabad High Court. In *Rambirich Ahir* v. *Emperor* (8), Sir Dawson Miller, C. J., after referring to the case of *Reshu Kabiraj* v. *Emperor* (2), and the case of *Piru* v. *Emperor* (7), which followed it, observed:

"I am not prepared to go so far as to limit the application of the clause to cases where a person has not been brought under arrest. A reference to s. 55 of the Act shows that an officer in charge of a Police Station may arrest any person found taking precautions to conceal his presence within the local limits of such station under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence, or any person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself. If it is to be held that after he is once arrested and brought before the Magistrate no action can be taken under s. 109 (*a*) on the ground that the arrested person is no longer taking precautions to conceal his presence, there would appear to be little object in allowing him to be arrested at all, for the only manner in which he can be dealt with is under s. 109, and a large proportion of the cases dealt with under that section are cases where the person has already been arrested. Nor am I prepared to say that it must in all such cases be proved that the accused has followed a continuous course of conduct in taking precautions to conceal his pre-

(7) 86 Ind. Cas. 666; A I R 1925 Cal. 616; 26 Cr. L J 842; 41 C L J 142.

(8) 97 Ind. Cas. 648; A I R 1926 Pat. 569; 27 Cr. L J 1128; (1926) Pat. 290; 8 P L T 95; 6 Pat. 177.

sence, I consider however that a person, whether he be of good or bad character, who merely shows a disinclination for the society of the Police and endeavours to avoid them by running away on their approach, cannot be said to come within the mischief aimed at in cl. (a) . . . . . It is perhaps impossible, it is certainly undesirable, to lay down any general principles as to the conditions which would bring a case within the purview of the clause, for the circumstances which may arise are so multiple and various; but I think it may be said that there must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise, or otherwise, indicating a desire to hide the fact that the accused if present within the local limits of the Magistrate's jurisdiction. The clause is one which should be used with proper discretion and was never intended to apply to a person merely found talking at night time with bad characters in a place which is open to the public."

This case also, which has been referred to by the learned Deputy Commissioner, does not seem to have been brought to the notice of the learned Sub-Divisional Officer. It was followed by James, J., in *Sukhan Ahir* v. *Emperor* (9), and it was held that a continuous act of concealment is not necessary.

I now take up the Full Bench case of *Emperor* v. *Puchai* (6). The facts of that case were almost exactly similar to the facts before me. Unfortunately the learned Judges were sharply divided. Banerji, J., who was a party to the decision in *Emperor* v. *Himayatullah* (1), adhered to his former view. Sulaiman, Ag. C. J., was of opinion that cl. (a) applied, and not cl. (b). Boys, J., was of opinion, that cl. (b) was applicable, and not cl. (a). Kendall, J., was of opinion that both clauses of s. 109 were applicable, while Weir, J., was of opinion, that cl. (a) undoubtedly applied, but perhaps cl. (b) was also applicable. I do not propose to discuss the grounds of the learned Judges for holding the different views they expressed. It is sufficient to say that I adopt the view of Sulaiman, Actg. C. J., and Kendall and Weir, JJ, and I am of opinion, that cl. (a) is applicable to the facts as disclosed in this case. I also agree with Boys and Kendall, JJ. and hold that cl. (b) will also apply to the circumstances as disclosed in this case. Section 109 authorizes a Presidency Magistrate, District Magistrate and Sub-Divisional Magistrate to take action when he is informed :

"(a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to to committing any offence, or (b) that there is within such limits a person who has no ostensible means of subsistence or who cannot give a satisfactory account of himself."

Sulaiman, Actg. C. J, has pointed out with which I entirely agree, that cl. (a), does not mean that the man is taking precautions to conceal the fact of his being present within the local limits of such Magistrate ; but it means that he is taking precautions to conceal his presence and that the concealment is to be within the local limits of such Magistrate. He has pointed out that the ordinary rule of grammar is that an adverb of place should refer to the nearest verb, and not to the one more remote. He observes :

"To say that the expression 'within the local limits of such Magistrate's jurisdiction' is a part of the predicate 'to conceal his presence' is, I would say with great respect, using ambiguous language, inasmuch as it does not clearly bring out, the point which causes a difference of opinion, namely, whether the expression is an adjectival clause qualifying the noun 'presence' or an adverb of place modifying the verb 'to conceal.' If it is the former, it would mean concealing the fact of his being present inside the jurisdiction, while if it is the latter, it would mean that the act of concealing his presence must be within the jurisdiction. The former construction narrows considerably the scope of the sub section, for which there seems to be no justification. In ordinary grammar an expression indicating a place is treated as an adverb of place of modifying the nearest verb in the sentence, and not as an adjective qualifying a substantive noun"

He has also pointed out that the words "is taking" in the clause though unhappy mean "has taken" or "has been taking," as Sir Dawson Miller, C. J., in *Rambirich Ahir* v. *Emperor* (8), has pointed out otherwise no action can be taken against a man after he has been arrested, and the arrest itself will become futile. Coming to cl. (b), can it be held that if a man be found by the Police with implements of house-breaking lurking near the house of a wealthy man, thereby indicating that he is about to commit burglary there and when challenged by the Police he admits the object of his being there, no action can be taken against him. Section 55 of the Code, also uses almost the same language as s. 109 and if the latter section is not applicable in order to bind him down, the former is also not applicable to authorize the Police to arrest him. Assuming, however, that he can be arrested under s. 54, cl. (b), for being in possession of house-breaking implement, there is no law under which he can be dealt with after the arrest. No section of the Penal Code is applicable to him. The result will be that though the legislature provided for the arrest of such a man, no

(9) 126 Ind. Cas. 855: A I R 1930 Pat. 497; 31 Cr. L. J 1125; Ind. Rul. (1930) Pat. 646; (1930) Cr. Cas. 925.

provision has been made for dealing with him after such arrest. I fail to understand how the Police can prevent such a person from repeating the act night after night. It will lead to this situation that if a man is timid and does not tell his real object or his correct name or address, he is liable to be dealt with under s. 109; but if he be audacious and tells that he is a thief and was there to commit burglary, he should be left off free to persue his design with impunity. All these points of law have been considered by the several learned Judges of the Allahabad High Court, and I respectfully agree with their conclusions. In my opinion, such a man is liable to be dealt with under s. 109 and he comes under both the clauses. "A satisfactory account of himself" does not necessarily mean that he should give his correct name and address or even the object of his being present at night, but that he should satisfy the authorities by explaining the suspicious circumstances appearing against him. I agree with those learned Judges who have held that simply avoiding the Police by a bad character or taking an unfrequented route is by itself no ground for action under s. 109, Criminal Procedure Code. It may be that in some cases simply not giving an explanation may not be enough, for instance, an apparently respectable person returning from the house of his mistress very late at night is using unfrequented streets and avoiding being seen. He cannot come under s. 109, Criminal Procedure Code. Each case must be decided on its own facts.

The result is that I accept the reference, set aside the order of the learned Sub-Divisional Magistrate of Bargarh and direct that the proceeding against the accused under s. 109, be revived and disposed of according to law on merits. The learned Sub-Divisional Magistrate has expressed doubts about the truth of the evidence of sons of the witnesses and has also said that evidence against two of the accused, is weak. I have not considered the evidence. No doubt, the learned Magistrate will consider this at the time of the passing of the order. If the learned Magistrate, who has passed the order, is still the Sub-Divisional Officer at Bargarh, he will dispose of the case after such hearing as may be necessary, otherwise the case will be re-heard by his successor. As some interval will elapse between the incident which is the basis of the proceeding and the final disposal of the case, it will be for the Magistrate in case he orders the furnishing of security to decide what should be the period for which it should be required.

Reference accepted.

CALCUTTA HIGH COURT

Civil Appeal No. 2189 of 1931

August 8, 1934

MITTER, J.

SUNDAR ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

NUR MAMUD AND OTHERS—RESPONDENTS

Appeal—One of defendants-respondents dying pending appeal—Suit if instituted without him would have been proper—Legal representative not brought on record in appeal—Appeal, if competent—Landlord and tenant—Tenancy, proof of—Suit by tenant against trespasser—Proof, whether sufficient if tenant proves that landlord received rent from him.

Where the suit would have been quite all right even if it had been instituted by the plaintiffs against the contesting defendants without impleading the deceased defendant-respondent as a defendant and there is no apprehension of there being any inconsistent decree if the appeal were to be allowed, the appeal does not become incompetent by not bringing on record the legal representative of the deceased on his death pending the appeal.

A tenancy can be proved by documentary or oral evidence.

In a suit for possession by a tenant against a trespasser in order to succeed, the plaintiff is not bound to prove the terms of the tenancy. If he can simply prove that the landlord had accepted rent from them, that would be quite sufficient for the purpose of maintaining a suit against the trespasser.

C. A. from the appellate decree of the Sub-Judge, Fifth Court, Dacca, dated April 27, 1931.

Mr. *Bijan Kumar Mukherjee*, for the Appellants.

Mr. *Phani Bhusan Chakravarti*, for the Respondents.

Judgment.—This appeal is on behalf of the defendants and arises out of a suit for possession. The plaintiffs' case is that the land in suit belonged to *pro forma* defendant No. 23 who had let it out to them. It is on the basis of this tenancy that the plaintiffs have instituted the suit for possession. The defendants in their written statement challenged the title of the plaintiffs and they further set up a right to use the land for the purpose of steeping jute, etc., a right in the nature of an easement. The Court of first instance found that the plaintiffs had not been able to establish

their tenancy under defendant No. 23 and also found that the contesting defendents had not been able to substantiate their claim of easement as against the landlord. In this view of the matter, it negatived the claim of the principal defendants and also dismissed the plaintiff's suit on the basis that they had no title. An appeal was preferred by the plaintiffs. The lower Appellate Court found that the plaintiffs had establishsd their tenancy right and accordingly decreed the suit with a direction for ascertainment by the Court of first instance of mesne profits. Before the lower Appellate Court it seems that the defendants did not re-agitate their claim to easement rights. Against the judgment and decree of the lower Appellale Court, the defendants have preferred this appeal.

While the appeal was pending here, *pro forma* defendant No. 23 died and no attempt was made to bring on record his legal representatives. Mr. Chakravarty who appears for the respondents accordingly urges before me a preliminary point, namely that the appeal is incompetent by reason of the death of defendant No. 23 and that the plaintiffs did not bring on record his legal representatives. I do not think that there is any substance in this preliminary objection. The suit would have been quite all right even if it had been instituted by the plaintiffs against the contesting defendants without impleading this person as a defendant. There is no apprehension of there being any inconsistent decree if the appeal were to be allowed by me, on the ground that no decree had been made either in favour or against the *pro forma* defendant No. 23 and could not have been made, having regard to the frame of the suit. It is for these reasons that I overrule the preliminary objection. To come back to the merits: for the purpose of proving the tenancy, the plaintiffs produced before the Court a document which is called a *Hukumnama*. Both the Courts below have come to the conclusion that that document is not simply an order for delivery of possession to the defendants by the landlord but is a present demise. Both the Courts below, therefore, have ruled that document out of evidence on the ground that it is not registered. The lower Appellate Court however has held that there is oral evidence to support the tenancy which the plaintiffs obtained from the *pro forma* defendant No. 23. In the first place, the *pro forma* defendant No. 23 filed his written statement admitting the tenancy. Secondly, there is oral evidence which has been believed by the lower Appellate Court in support of the tenancy of the plaintiffs. Dr. Mukherjee who appears for the appellants urges that this oral evidence is not admissible at all. A tenancy can be proved by documentary or oral evidence. It is a suit by the plaintiffs against a trespasser and in order to succeed the plaintiffs are not bound or are required to prove the terms of the tenancy which they obtained from the *pro forma* defendant No. 23. If they could simply prove that defendant No. 23 had accepted rent from them, that would have been quite sufficient for the purpose of maintaining a suit against the defendant who is a trespasser. In these circumstances, I hold that the lower Appellate Court is right in holding that the plaintiffs had established their tenancy right under defendant No. 23 by the evidence which I hold is admissible in law. The result is that this appeal is dismissed with costs.

D. *Appeal dismissed.*

PATNA HIGH COURT

Appeal from Original Order No. 36 of 1935

March 27, 1935

COURTNEY TERRELL, C. J. AND AGARWALA, J.

BANSI RAM—APPELLANT

versus

FIRM ANANDI RAM MOHAN AND OTHERS —RESPONDENTS

Evidence Act (I of 1872), s. 41—Final order in earlier insolvency proceedings—Judgment in rem—*Whether can be disturbed by subsequent applications—Provincial Insolvency Act (V of 1920), ss. 4, 52—Execution sale —Judgment-debtor adjudicated insolvent—Insolvency proceedings—Court refusing to set aside sale—Subsequent application by insolvent and another creditor to set aside sale—Maintainability.*

Under s. 41, Evidence Act, a final judgment, order or decree of a competent Court in insolvency proceedings has the effect of a judgment *in rem* and cannot be disturbed by subsequent applications even if not between the same parties.

In certain execution proceedings the property of the judgment-debtor was put up for sale and sold. The debtor was declared insolvent. In the proceedings in insolvency taken by the Receiver under s. 4, Provincial Insolvency Act, the Court found that no fraud was committed in respect of the sale. Subsequently, some year after confirmation of the sale, an application was made by the insolvent together with another creditor and they asked under s. 4 or the Act for a declaration that the very sale, which had been the subject of the earlier decision by the Judge in insolvency on the application of the Re

ceiver, was invalid, and again raised the question of the jurisdiction of the Court under s. 52 of the Insolvency Act. The sale was held to be illegal and without jurisdiction :

Held, that the matter had been already decided in the earlier application and that decision being a judgment *in rem* could not be disturbed by subsequent applications even if not between the same parties

Held, also that the Receiver not having taken any steps to appeal from the order in the earlier proceedings, it was not right, having taken that definite attitude and taken advantage of that attitude, that the auction-purchaser should be prejudiced either on behalf of the insolvent or on behalf of the creditors by an attempt to set aside the sale which took place so long ago and when a previous attempt to set aside the sale had failed.

C. A. from a decision of the District Judge, Gaya, dated February 4, 1935.

Messrs. *S. M. Mullick*, *B. K. Prasad* and *K. N. Varma*, for the Appellant.

Messrs. *Manohar Lal*, *S. N. Bose* and *R. K. Prasad*, for the Respondents.

Courtney Terrell, C. J.—On August 12, 1931 a sale was held in execution of a decree which had been obtained by one Ramlochan Ram against a firm called Ramcharan Ram Kardhan Ram and a certain property of the judgment-debtors was put up for sale and sold. Later on the judgmedt-debtor was declared insolvent. The application for insolvency had been made on June 13, 1931, and the petition was admitted on July 9, 1931, an *interim* Receiver being appoined on August 5, 1931 but not being clothed with power to take possession of any of the properties. The Receiver took proceedings under s. 4 of the Insolvency Act, applying for possession of the properties which had in fact been sold on the ground that the sale had been effected without jurisdiction and asking that the sale be annulled. But on August 3, 1934, the Judge in insolvency held that the sale was perfectly valid and refused the application. After the date of the sale which as I have said took place on August 12, 1931, power was given to the receiver to take possession of the insolvent's property, the power being given by the order of the Judge in insolvency on September 28, 1931. On November 28, 1931, the order for adjudication was made. The Judge in the proceedings taken by the Receiver under s. 4 dealt with the allegations by the Receiver that the sale was attended with circumstances of fraud and he found that there had been no fraud in fact committed.

As to the point taken by the Receiver that the sale had taken place in the Executing Court without jurisdiction, it was contended on behalf of the Receiver that under s. 52 of the Insolvency Act inasmuch as the Court had notice of the insolvency petition, it should thereupon have stayed the proceedings for sale and should have directed that the property should have been delivered over to the Receiver. The learned Judge expressly declined to deal with this part of the argument on behalf the Receiver and refused the application which was then made.

The present application, with the decision of which we are now concerned, was made on August 10, 1934, some years after the sale had been confirmed; furthermore long after the Receiver had taken course of being vested with the sale proceeds. It was made by the insolvent together with another creditor and they asked under s. 4 of the Act for a declaration that the very sale, which had been the subject of the earlier decision by the Judge in insolvency on the application of the Receiver, was invlaid, and again raised the question of the jurisdiction of the Court under s. 52 of he Insolvency Act. The argument which was urged before the District Judge and which found favour with him was that the sale in execution was illegal and without jurisdiction.

Now the question of the proper construction of s. 52 is said to be attended with some difficulty inasmuch as different High Courts have taken different views and I do not propose to express any opinion on it. My reason for rejecting the application and for holding that the learned District Judge was wrong in his decision, in effect to set aside the sale in the execution proceedings, is that the matter had already been decided in the earlier application under s. 4. The proceedings in that earlier application were taken by the Receiver. Under s. 41 of the Evidence Act which deals amongst other things with judgments in insolvency proceedings, it is laid down that a final judgment, order or decree of a competent Court in such matters, as was in this case the judgment in the earlier case, has the effect of a judgment *in rem* and it cannot be disturbed by subsequent applications even if not between the same parties. Moreover, it is to be noticed that the Receiver took no steps as he might have done to appeal from the order which was made against him in the earlier proceedings and that for some years the pur-

chaser has been left in possession of the property, and in the earlier proceedings in 1931 there was an order that the *interim* Receiver should take possession of the sale properties. It is not right having taken that definite attitude and taken advantage of that attitude that the auction-purchaser should be prejudiced either on behalf of the insolvent or on behalf of the creditors by an attempt to set aside the sale which took place so long ago and when a previous attempt to set aside this sale had failed.

The appeal will accordingly be allowed with costs in so far as the sale to the appellant is concerned.

The order for costs will be against the respondent No. 1 and the estate.

Agarwala, J.— I agree.

N. *Appeal allowed*

SIND JUDICIAL COMMISSIONER'S COURT
Full Bench

Criminal Appeal No. 280 of 1934
February 18, 1935

FERRERS, J. C., RUPCHAND AND HAVELIWALA, A. J. C.

SHAHU AND OTHERS—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 419, 421, 561-A, 369—Order dismissing appeal filed under s. 419—Whether final—When can be set aside—Whether conditions under s. 421 have been fulfilled, is a question of fact—Interference by High Court—Dismissal of appeal summarily in exercise of powers under s. 421—Whether judgment—Compliance with s. 421—Appellant or his pleader, if must be heard—Criminal Trial—Review—Case decided by Court of competent jurisdiction—Same Court, whether by same Judge or another, cannot review it.

An order passed under s. 421, Criminal Procedure Code, dismissing an appeal filed under s 419, Criminal Procedure Code is *prima facie* final.

Such an order cannot be vacated under s. 561-A, Criminal Procedure Code unless it is proved that either of the conditions precedent to the passing of the order as laid down by s 421 has not been fulfilled and this is a question of fact depending on the circumstances of each case. The burden of proving that either of the conditions has not been complied with, lies heavily on the person challenging the finality of the order.

Where it is proved that either of the conditions precedent has not been complied with, the High Court has power to interfere under s. 561-A and in such a case it is immaterial whether the Bench which is called upon to interfere is composed of the same or different Judges. Where there is no proof that either of the conditions have not been complied with, the High Court, whether the Bench is composed of the same or other Judges, has no power to interfere.

(Case law reviewed.)

There is no dismissal of a criminal appeal for default of appearance by a party as in a civil case and therefore when an appeal is summarily dismissed deliberately and openly by a Court of competent jurisdiction in the apparent exercise of the powers vested in it under s. 421, Criminal Procedure Code, it is *prima facie*, a judgment within the meaning of s. 369, Criminal Procedure Code. *Damu Ganpati* v. *Sridhar* (1), referred to.

Section 421, Criminal Procedure Code, does not require that the appellant or his pleader shall be heard before the appeal is decided, but all that it requires is that a sufficient opportunity should be afforded to them of being heard. If a sufficient opportunity of being heard is afforded to either of them, the neglect of the appellant or his pleader who is his agent debars him from claiming a second hearing.

Under s. 561-A, Criminal Procedure Code, inherent powers in that behalf may be exercised by the High Court and not by a Court of inferior jurisdiction.

A Court of competent jurisdiction may decide a case rightly or wrongly; and it is not open to the same Judges much less to other Judges of co-ordinate jurisdiction to review that decision

Mr. *M. Aslam*, for the Appellants.

Mr. *Partabrai D. Punwani*, for the Crown.

Rupchand Bilaram, A. J. C.—To a certain extent there is a divergence of judicial opinion with regard to the powers of a High Court to rehear an appeal which has been summarily dismissed without hearing the appellant (except when he is in jail) or his Counsel if he has any; and it is in consequence of this, that the learned Judicial Commissioner has referred the following three points of law to the Full Bench.

1. Whether an order under s. 421, Criminal Procedure Code dismissing an appeal filed under s. 419, Criminal Procedure Code is final ? 2. Can it be vacated under s 561-A, Criminal Procedure Code? 3. If so, can this be done by a Divisional Bench other than that which passed the original order ?"

The order of summary dismissal which has given rise to the present reference was passed by a Bench of this Court consisting of the learned Judicial Commissioner and Mr. O'Sullivan, acting Additional Judicial Commissioner. Mr. O'Sullivan's period of office is over and a Bench differently constituted is required to rehear the appeal. Now, an order of summary dismissal under s. 421, Criminal Procedure Code may not only be passed by a High Court, but by a Court of Appeal which is not a High Court. And there can be no question that where an order purporting to be an order under s. 421, Criminal Procedure Code, has been passed by a Court of Appeal which is not a High Court, the right of the appellant to have it set aside or reviewed is not by resort to that Court, but to a

higher Court, whether it be by way of appeal or revision however wrong such order may be. This is clear from the provisions of s. 369, Criminal Procedure Code, as amended by s. 101 of Act XVIII of 1923, which limits the power of a Court to review its own orders except under certain circumstances.

There is no definition of judgment in the Criminal Procedure Code. In the Law Dictionary by Morley and Whitelay, "judgment" is said to mean "sentence or order of the Court in a civil or criminal proceedings." In *Damu Ganpati* v. *Sridhar* (1), at p. 127*, it is said that a judgment means expression of opinion of the Judge in a trial arrived at after due consideration of the evidence. There is no dismissal of a criminal appeal for default of appearance by a party as in a civil case and, therefore, when an appeal is summarily dismissed deliberately and openly by a Court of competent jurisdiction in the apparent exercise of the powers vested in it under s. 421, Criminal Procedure Code, it is *prima facie* a judgment within the meaning of the rule laid down in the Calcutta case and within the meaning of s. 369, Criminal Procedure Code.

In view of the provisions of s. 369 an order so passed may not be reviewed by the Court which passed it, unless empowered to do so by any provision in the Criminal Procedure Code, or by any other law for the time being in force, or in the case of a Chartered High Court (which this Court is not) by the Letters Patent of such High Court. There is no provision in the Code or in any other law for the time being in force empowering a Court to review an order of summary dismissal. It is, however, argued and not without considerable force that as this Court is a High Court within the meaning of s. 3, cl. 23, General Clauses Act X of 1897, it has inherent jurisdiction to interfere when the interests of justice so require not only with the orders of Courts subordinate to it, but with its own orders.

It is argued that although the inherent powers of Criminal Courts had an uncertain career in the past, the Amending Act of 1923 has given legislative sanction to the exercise of such powers by adding s. 561-A to the present Code. Our attention has been invited to several decided cases where High Courts have either reviewed or refused to review orders of summary dismissals of appeals. But before we refer to some of them, it will be profitable to refer to the pertinent sections of the Code in issue. Section 421 imposes two distinct conditions which must be fulfilled before a Court of competent jurisdiction summarily dismisses an appeal. The first condition is, that the Court must apply its mind to the merits of the case and come to a conclusion that the order appealed against is one which should not be disturbed. For that purpose the Court may send for the record of the lower Court if it thinks fit to do so; but it is not bound to do so. The Court cannot refuse to apply its mind to the merits of the case as appearing from the judgment of the lower Court or the record if it has been sent for merely and solely because the appellant or his advocate has failed to appear.

The second condition is, that where an appeal has been presented to the Court under s. 419 and not under s. 420 of the Code, that is to say, where the appeal has not been presented by an appellant who is in jail, or where the appellant whether in jail or not is represented by a Pleader, the Court is bound to afford to the appellant or if he is represented, to his Pleader a reasonable opportunity of being heard. If both these conditions are fulfilled, the order passed by a Divisional Bench of the High Court is a perfectly valid order, and cannot be reviewed either by the same Bench or by another Bench of the same Court whether it be a Divisional Bench or a Full Bench. In such a case it is difficult to see how the interests of justice require that the litigation which has been properly brought to its termination should be re-opened. A Court of competent jurisdiction may decide a case rightly or wrongly; and it is not open to the same Judges much less to other Judges of co-ordinate jurisdiction to review that decision.

Even in civil cases the powers of review are limited; and Courts whether such Courts come within the definition of High Courts or not, have no power whether inherent or otherwise to review their judgments on the ground that such judgments were wrongly decided; much less can the Courts claim to review criminal judgments on similar grounds. But it is different where either of the conditions mentioned above is not fulfilled. In that case the

(1) 21 C 121.

*Page of 21 C.—[*Ed.*]

judgment given by the Court is *prima facie* defective and may be reviewed *ex debito justitiæ*. On the other hand, if both conditions have been duly complied with, *cadit quaestio*, the judgment must stand and neither the same Bench nor a differently constituted Bench is competent to go behind it. Whether both or either of these conditions are fulfilled in any particular case or not, are questions of fact and their decision must depend upon the facts of that case. But generally speaking, where an appeal has been summarily dismissed there is a presumption in favour of the first condition having been complied with. The Judges of a High Court may fairly be presumed to know the provisions of s. 421, of the Code; and merely because they have noted in their order that the party or his pleader is absent at the hearing or that they summarily dismiss an appeal in the absence of the appellant or his pleader, is no criterion for holding that they have not applied their minds to the merits of the case unless there is an admission in that behalf by the Judge or Judges who have passed the order.

With regard to the second condition again, if timely notice has been given to a party or his pleader to be present at the hearing, it goes without saying that the party or his pleader as the case may be was afforded a reasonable opportunity of being heard; and if he is absent, there is a *prima facie* presumption against him that he failed to appear without a reasonable cause. In that case the burden is on him to prove that notwithstanding the fact that he had timely notice, other circumstances supervened which made it impossible for him to appear when the appeal was called on for hearing, and that the failure on his part to appear was not due to his own neglect or default. In this connection it is sufficient to observe that s. 421 does not require that the appellant or his pleader shall be heard before the appeal is decided, but all that it requires is that a sufficient opportunity should be afforded to them of being heard. If a sufficient opportunity of being heard is afforded to either of them, the neglect of the appellant or his pleader who is his agent debars him from claiming a second hearing.

Now, I am in a position to refer to the case law on the point, and if it is carefully analysed in the light of the above observations, it would appear that the divergence in most of these cases is more apparent than real. The earliest case on the point is the case of *Queen-Empress* v. *Godal Raout* (2). In that case the only point in issue before the Full Bench was, whether the High Court, had power to review its own judgment which had been passed on the merits. There Counsel for the appellant had been heard before the appeal was dismissed and an application for review was made on the ground that the decision arrived at by the Court was wrong in law. Sir Barnes Peacock propounded the question before the Court at p. 64* in the following words:

"But we are speaking of cases where the judgment has been recorded and the Court is called upon to grant a review of its judgment for the purpose of showing that it ought to have come to a different conclusion either upon the facts or upon the law."

In answering the above question in the negative the learned Chief Justice has said:

"The learned Counsel has pointed out that the consequences would be monstrous if this power or review were not given. But the same argument would apply to trials in the Courts in England. Suppose a jury should find a party guilty. There would be no appeal or writ of error, nor could the prisoner tender a bill of exceptions. The only mode of remedying the evil would be by appealing to the mercy of the Crown. So in the present case, if it should be discovered that the Court has come to a wrong conclusion either upon a matter of fact or upon a matter of law, the case may be brought to the notice of the Executive Government, either for the purpose of mitigating the sentence or of pardoning the offender, as the case may require. There would be no end to cases of this kind, after the Court has duly recorded its judgment, the matter is to be re-opened on the ground that the Court has come to an erroneous conclusion . . . . . It appears to us that it was the intention of the legislature that the Crown should not exercise the power of reviewing its own judgment in criminal cases. In civil cases where such a power was intended to be given it was conferred by express words in the Civil Procedure Code."

These observations stand good and unchallenged by any subsequent ruling upto this day, and not only that, but they have received legislative sanction by the introduction of the provisions of s. 369 in the Acts passed subsequent to Act XX of 1861, which was then in force. In *Proceedings 7th November* 1873 (3) on a reference made by a District Magistrate whether he had power to set aside an order of summary dismissal passed by him without hearing the Pleader of the appellant who was absent, under s. 278, Crimina

(2) 5 W R 61 Cr.
(3) 7 M H C R App. 29.

Procedure Code, then in force, the Madras High Court held that where an adequate excuse had been made for the Pleader's non-appearance, it was open to the Appellate Court to rehear the appeal on its merits. The High Court, however, added a rider that such a power should be sparingly used. Now, it goes without saying that in view of the express provisions of s. 369 and 561-A of the present Code, which expressly prohibit a review of judgment except under certain circumstances and limit the inherent jurisdiction of the Courts in criminal matters only to a High Court, this ruling no longer applies to a Court other than a High Court; and that with regard to the review by a High Court, it depends upon "adequate excuse", whatever be the meaning of that expression, being made out by the party concerned to the satisfaction of the Court.

In *Queen-Empress* v. *Mahomed Yashin* (4), it was pointed out that an order of summary dismissal of an appeal without calling for the record and proceedings of the case was a final order and not subject to review. The argument turned on the provisions of ss. 280 and 285 of the Code, then in force which were differently worded than the corresponding provisions of the present Code and this is apparent from the bare reading of the old sections which are as follows:

"Section 280—The Appellate Court after perusing the proceedings of the lower Court and after hearing the appellant, his Counsel or agent, if they appear and the Public Prosecutor, Government Pleader or other officer empowered by Government or by the Magistrate of the District in that behalf, if he appears, may alter or reverse the finding and sentence or order of such Court, and may if it sees reason to do so, enhance any punishment that has been awarded; provided that if the appeal is from the sentence of a Magistrate of any class, the Appellate Court shall not inflict a greater punishment than might have been inflicted by a Magistrate of the First Class. Section 285, Judgment sentences and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in ss. 272 and 297."

In *Ranga Rao* v. *Emperor* (5), it was held that the High Court has no power to review an order made by it in the exercise of its Criminal Revisional Jurisdiction even when the revision petition has been "dismissed for default." But a careful reading of the judgment makes it abundantly clear that the order was based on the assumption that the "dismissal for default" was a dismissal by the Court after applying its mind on the merits and not a dismissal without regard to the merits merely and solely because the applicant had not appeared. This is clear from the following observations made by the Court with regard to the case reported in *Proceedings* 7th *November*, 1873 (3).

"We have no doubt that this is correct, for the language of s. 421 requires a reasonable opportunity to be given and if such reasonable opportunity is not given the Court has no jurisdiction to dismiss the appeal. He also relies on some unreported cases of the High Court of Calcutta. In our opinion in cases of Criminal Revision no distinction can be made between an order passed without hearing the petitioner and one in which he is heard. It must be borne in mind that the revisional power of the High Court is exercised at its own discretion. No petitioner has a right to be heard and the High Court is not compelled to interfere with a judgment brought to its notice unless it so thinks fit"

The order complained against was an order passed in revision and not on appeal, and the applicant and his pleader had no right to be heard. In *Kanhammad Haji* v. *Emperor* (6), the appeal was from jail and after due notice to the prisoner, it was disposed of during the vacation period by a Single Judge. An application for review to two Judges was dismissed. One of the points urged before the Bench was that as the appellant had no reasoable opportunity of being heard in support of the appeal, there was no bar to a rehearing. This argument was negatived by both the Judges: one of the Judges Devadoss, J., however, had made the following observations at p. 432* which are *obiter dicta*:

"The only way of reconciling the conflicting decision on this point is to hold that when a criminal appeal or criminal revision petition is dismissed for default of appearance, there is no decision on the merits and therefore there is no proper disposal of it according to law and the Court may re-hear it. The order of dismissal for default of appearance in such cases is no judgment at all and the order is tantamount to an adjournment of the case till some one appears and moves the Court to hear him. With due respect to the learned Judges who decided in *Ranga Rao* v. *Emperor* (5), I think that the High Court, though it is not bound to hear the practitioner in support of a criminal revision petition, is not entitled to dismiss it for default of appearance but could only dispose of it on the merits."

These observations again lay stress upon the fact that the Court is not entitled to dismiss an appeal or revision application merely for default of appearance as is done in civil cases, but the dismissal should be on the merits of the case. As pointed out above where a Judge dismisses an appeal or application summarily he is

(4) 4 B 101.

(5) 16 Ind, Cas. 518; 13 Cr. L J 710; 12 M L T 350; 23 M L J 371; (1912) M W N 982.

(6) 72 Ind. Cas. 599; A I R 1923 Mad. 426; 24 Cr. L J 439; 46 M 382; (1923) M W N 94; 44 M L J 450.

*Page of A. I R. 1923 Mad.—[*Ed.*]

presumed to have applied his mind to the merits of the case and where there is nothing to rebut this presumption, there can, in my opinion, be no review, on the simple ground that a party or his pleader had not been heard although a sufficient opportunity was afforded to them. In *Raju* v. *Emperor* (7), a revision petition of Raju and Sadan two of the prisoners was rejected by Agha Haidar, J. A similar revision petition by two other prisoners in the same case was allowed by Zafar Ali, J., and their sentence reduced. An application for review was then made by Raju and Sadan and the application was rightly dismissed. In delivering the judgment of the Court, Fforde, J., has *inter alia* said:

"This (s. 369) does not affect any powers inherent in the Court, as there never has been an inherent power in the High Court to alter or review its own judgment in a criminal case once it has been pronounced and signed except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits. With this view all the Courts in India are in accord, and it is not disputed that this was the law prior to the addition of s. 561-A, Criminal Procedure Code, by the Act of 1923."

The learned Judge has further said:

"The concluding words of the section, or otherwise to secure the ends of justice, can only mean that such other inherent power as the Court possess is likewise preserved. The High Court is not given nor did it ever possess an unrestricted and undefined power to make any order which, it might please to consider was in the interests of justice. Its inherent powers are as much controlled by principle and precedent as are its express powers by statute."

Now, the Code does not make any provision for the procedure which is to be adopted by an aggrieved party when the High Court dismisses an appeal without due compliance with the provisions of s. 421. An appeal to the Privy Council even if competent is a far-cry, and it would appear that the inherent powers of the High Court to interfere in such cases are not controlled either by any express provision of the law or by precedent. In civil matters even Courts of inferior jurisdiction have exercised their inherent powers under s. 151 in redressing grievances of a like nature. The latest case on that point is *Nelakanti Sundara Sivarao Sammanji* v. *Gangamma* (8), where it is said at p. 67*

"There is no specific provision in the Civil Procedure Code, which prescribes the procedure to be followed by a Court when it discovers that judgment has been pronounced by it under the mistaken belief that both parties had been fully heard, and in the absence of such specific provision, the Court must necessarily have recourse to its inherent powers in order to remedy the mistake. It is a duty which the Court has to perform *exdebito justitiae* in order to satisfy its judicial conscience. It is with the object of enabling Courts to perform their duties in contingencies of this kind, *i. e.*, when their mistakes have led to injustice, that their inherent powers are preserved intact by s. 151, Civil Procedure Code."

Of course I need hardly repeat that under the Criminal Procedure Code, inherent powers in that behalf may be exercised by the High Court and not by a Court of inferior jurisdiction. In *Dahu Raut* v. *Emperor* (9), the point at issue was whether it was competent for the High Court to reduce the sentence of imprisonment without notice to the Crown, after summarily dismissing the appeal of the prisoner. This point was answered in the affirmative. As the orders complained against were passed with jurisdiction the dictum of Lort-Williams, J., is perfectly correct. This decision has therefore no direct bearing upon the point in issue in the present case. The learned Judicial Commissioner has in his referring judgment relied upon the head-note of this case which is based upon the following observations of Mcnair, J., at p. 166*

"With great respect I am entirely in agreement with the view that was expressed by the Lahore High Court in *Raju* v *Emperor* (7) that s. 561-A in no way adds to the powers of the High Court. It merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code, The inherent powers of the Court do not include the power to revise an order which has been made in the criminal appellate jurisdiction."

There is nothing to quarrel with these observations except to point out that the last words mean and can only mean that the order complained against has been made after due compliance with conditions precedent to the passing of a valid order as prescribed by the Code. In this case reliance has been placed on the Full Bench case of *In re Gibbons* (10). But that case again does not touch the first or second points, but only the third part submitted for our consideration. In that case the Divisional Bench of the High Court had after a due hearing reversed the verdict of acquittal and convicted the petitioner of the offence with which he was charged,

(7) 110 Ind. Cas. 221; A I R 1928 Lah. 462; 29 Cr. L J 669; 10 Lah. 1; 10 A I Cr. R 494.

(8) 151 Ind. Cas 899: A I R 1934 Mad. 506; 58 M 84; 68 M L J 66; 40 L W 34; (1934) M W N 920; 7 R M 146.

*Page of 63 M L J—[*Ed*].

(9) 145 Ind. Cas. 937; A I R 1933 Cal. 870; (1933) Cr. Cas. 1481; 34 Cr. L J 1100; 61 C 155; 6 R C 168; 38 C W N 25.

(10) 14 C 42.

*Page of 61 C—[*Ed*].

and an application was then made for a review. Section 369 of the Code, then in force was differently worded and provided that:

"No Court other than a High Court when it has signed its judgment shall alter or review the same except as provided in s. 395 or to correct a clerical error."

Whatever doubt which might have existed at the time about the powers of a High Court to review its judgement has been set at rest by the subsequent amendment of s. 369 of the Code. The order which was the subject-matter of review was passed in accordance with law. That being so, it was rightly held that neither the Judges other than those who passed the order sought to be reviewed nor even the same Judges who passed the order can review it. There can be no question about the soundness of the principles laid down in the above Full Bench case, so far as it goes. I am now in a position to give my findings upon the points submitted to us for our, opinion.

First point.—An order passed under s. 421, dismissing an appeal filed under s. 419, is *prima facie* final.

Second point.—Such an order cannot be vacated under s. 561-A unless it is proved that either of the conditions precedent to the passing of the order as laid down by s. 421 has not been fulfilled and this is a question of fact depending on the circumstances of each case. The burden of proving that either of the conditions has not been complied with, lies heavily on the person challenging the finality of the order.

Third point.—Where it is proved that either of the conditions precedent has not been complied with, the High Court has power to interfere under s. 561-A and in such a case it is immaterial whether the Bench which is called upon to interfere is composed of the same or different Judges. Where there is no proof that either of the conditions have not been complied with the High Court whether the Bench is composed of the same or other Judges has no power to interfere.

Ferrers, J. C., agreed with the above judgment).

Haveliwala, A. J. C.—The questions referred to the Full Bench are: (1) Whether an order under s. 421, Criminal Procedure Code, dismissing an appeal filed under s. 419, Criminal Procedure Code, is final. (2) Can it be vacated under s. 561-A, Criminal Procedure Code? (3) If so, can this be done by a Divisional Bench other than that which passed the original order?

Now, the facts of this case and the points, of law arising therefrom are fully mentioned by me in my referring judgment and I do not wish to recapitulate them again. We have heard the arguments and I have discovered nothing afresh to enable me to change my view both as to the facts and the law which I have expressed in that judgment and I am convinced more than ever that the view taken by me with regard to this question is correct. Mr. Partabrai, the learned Public Prosecutor, was good enough to point out the case of *Kunji Lal* v. *Emperor* (11), which lays down that there never has been an inherent power in the High Court to alter or review its own judgment in a criminal case once it has been pronounced and signed except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits.

I have had the advantage of reading the judgment of my learned brother Rupchand and I agree with him that, under s. 421, Criminal Procedure Code, whether a reasonable opportunity was given or not is a question of fact depending on the facts of each particular case. If once the Court is convinced that no reasonable opportunity was given while dismissing the appeal under s. 421, Criminal Procedure Code, that is to say, the order of dismissal passed under the section was passed not in compliance with the proviso to that sectiton, then that order would be a mere nullity inasmuch as it was passed without jurisdiction. I am supported in this view by a ruling of the Lahore High Court in *Muhammad Sadiq* v. *Emperor* (12), in which it has been held that where an appeal has been dismissed without the appellant or his pleader being given a reasonable opportunity of being heard in support of the same, the order dismissing the appeal must be held to have been passed without jurisdiction and the Court has inherent power to make an order that the appeal should be reheard after giving the appellant or his Counsel a reasonable opportunity of being heard in support of the same.

If the order of dismissal is a nullity, it follows that it can be vacated under s. 561-A, Criminal Procedure Code. I am

(11) 151 Ind. Cas. 714; A I R 1935 All. 60; (1935) Cr. Cas. 102; 36 Cr. L J 1485; (1934) A L J 701; 7 R A 119; L R 15 A 161 Cr.

(12) 88 Ind. Cas. 593; A I R 1925 Lah. 355; 26 Cr. L J 1169; 7 Lah L J 108.

also of the opinion that it can be vacated by a Divisional Bench other than that which passed the original order as the wording of the s. 561-A is wide enough to cover the case before a Full Bench.

D. *Questions answered.*

RANGOON HIGH COURT

Criminal Revision Application No. 658-A of 1933

December 6, 1933

MACKNEY, J.

MAUNG SOE HLAING—APPLICANT

versus

MA THEIN KHIN—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 386—Salary not yet drawn by salary earner—Whether can be attached—'Movable property,' meaning of.

The expression 'movable property' as used in s. 386, Criminal Procedure Code does not include salary not yet drawn by a salary earner. Consequently a Magistrate acting under s. 386, Criminal Procedure Code, cannot attach salary, which the salary-earner has not only not drawn, but has not even yet earned. The warrant can issue only after the salary has come into the salary-earner's possession or into that of the bailiff in his behalf.

Cr. R. App. from an order of the First Additional Magistrate, Rangoon, in Criminal Miscellaneous No. 341 of 1933.

Mr. *B. Win*, for the Applicant.

Mr. *A. K. Chatterjee*, for the Respondent.

Order.—This is a review of the order of the First Additional Magistrate of Rangoon in his Criminal Miscellaneous Proceedings No. 341 of 1933, directing the issue of a warrant for the attachment of the salary of the applicant, who is employed in the establishment of the High Court of Judicature at Rangoon, and for the remittance of the sum attached in payment of arrears of maintenance which he has been ordered to pay to his wife and child. The amount in arrears was Rs. 351-8-0, and the warrant was issued on June 19, 1933. Since that date the sum of Rs. 280-7-0 has been seized in three monthly instalments under the authority of this warrant from the applicant's pay and remitted to the First Additional Magistrate's Court. The warrant is addressed to the Registrar of the High Court of Judicature at Rangoon, and the seizures and remittances have been made under his orders. On October 14, 1933 this Court stayed further execution of the warrant, pending disposal of this review. Under the provisions of s. 488, sub-s. (3), Criminal Procedure Code, if any person ordered to pay maintenance, fails without sufficient cause to comply with the order,

"the Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner hereinbefore provided for levying fines."

The manner in which a warrant for levying fines may be issued is set out in s. 386, Criminal Procedure Code, which provides that in taking action for the recovery of a fine,

"the Court may : (*a*) issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender : (*b*) issue a warrant to the Collector of the District, authorizing him to realize the amount by execution, according to civil process against the movable or immovable property, or both, of the defaulter.'

Evidently, the warrant in question has been issued under cl. (*a*). The question to be decided is whether "movable property" can be held to include salary not yet drawn from the treasury for or by the person who is entitled to it. Section 4 (2), Criminal Procedure Code, provides that

"all words and expressions used herein and defined in the Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code".

The expression "movable property" is not "hereinbefore defined," but it is defined in the Penal Code. That definition is as follows (s. 22) :

"The words 'movable property' are intended to include corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth"

"Corporeal property" is property which may be perceived by the senses. On this definition it is clear that a Magistrate, acting under s. 386, Criminal Procedure Code, cannot attach salary, which the salary-earner has not only not drawn, but has not even yet earned. The warrant could issue only after the salary had come into the salary-earner's possession or into that of the bailiff in his behalf. My attention has been drawn to the decision of a Full Bench of the High Court of Judicature at Madras in *Appalamma* v. *Yellayya* (1) and No. 505 of 1896 *Perianayagam* v. *Krishna Chetti* where it was held that the opening words of sub-s. (1), s. 4, Criminal Procedure Code, covered sub-s. (2) of that section, and therefore that words and expressions used in the Criminal Procedure Code,

"and defined in the Penal Code and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code," unless a different intention appears from

(1) 20 M 470; 7 M L J 303; 2 Weir 643.

the subject or context. I do not think that it is necessary to go into this question now, because from the subject matter and the context I cannot see that the expression "movable property" as used in s. 386, Criminal Procedure Code, could be held to include salary not yet drawn by a salary-earner. There is certainly nothing in the section which shows that the expression was intended to include such salary. If salary has not yet been drawn from the Treasury, it does not yet belong to the salary-earner nor is there any sense in directing the attachment and "sale" of such salary.

The Magistrate's warrant should have been so worded as to make it clear that only money actually belonging to the defaulter was to be attached. There is no doubt, however, he intended it to be executed in the same manner in which a prohibitory order under O. XXI, r. 48, Civil Procedure Code, is executed. For these reasons I hold that the Magistrate's order directing the issue of the warrant of attachment of the applicant's salary was irregular and I direct that the warrant be cancelled.

D. *Warrant cancelled.*

PRIVY COUNCIL.

Appeal from the Allahabad High Court.

February 28, 1935

LORD BLANESBURGH, LORD THANKERTON, LORD ALNESS, SIR LANCELOT SANDERSON AND SIR SHADI LAL.

FANNY SKINNER *alias* NASIRA BEGAM AND ANOTHER—APPELLANTS

versus

THE BANK OF UPPER INDIA, LTD., IN LIQUIDATION AND OTHERS—RESPONDENTS

Assignment—Mortgagee Bank going into liquidation—Agreement between Bank and purchasing Trust—Agreement not completed—Non-registration—Suit on mortgage by Bank—Maintainability—Appeal—Privy Council—Practice—Defence raised in trial but not taken in High Court—Whether can be raised before Privy Council.

The defendant mortgagor executed a deed of simple mortgage in favour of a Bank, the deed containing a covenant on the mortgagor's part for payment of the mortgage-debt with compound interest. In default of payment, the mortgagee Bank had the ordinary right of proceeding by Court sale to realise its security. The Bank went into liquidation and in 1923 the Liquidator filed a suit on the mortgage. In 1917, an agreement was entered into between the Bank and a concern known as the Trust of India, the purpose of the agreement being to make it possible to come to an arrangement with the other creditors of the Bank so that by the appropriation and realisation of certain assets for their benefit, with the consent of the trustees for the debenture stock, all claims against the Bank would be got rid of, and subsequently in due course the Bank would be dissolved. The mortgage-debt was included in such assets, but the agreement was not registered under the Transfer of Property, nor was the transfer completed. It was contended that all interest had passed into the Trust and the Bank had no right to sue:

Held, that the transfer of this mortgage-debt was effective as between the transferor and the transferees; but as there was no completion of the agreement and the transfer of the agreement was of no effect by reason of non-registration, any proceedings to recover the debt brought against the mortgagor must be, not in the name of the transferee, but in that of the transferor. Consequently, the Bank rightly sued to recover the mortgage-debt. The transaction as between the transferor (the Bank) and the transferee may be taken to be complete although there was no completion and no legal assignment or transfer of the assets included in the agreement and not legally transferred by virtue of the agreement itself. *Imperial Bank of India* v. *Bengal National Bank* (1), explained and applied. [p. 747, col. 2.]

Held, also as the mortgagor had not raised in the High Court the defence as to her disability on the ground of her being a *pardahnashin* lady, a defence which she raised in the trial Court, leave could not be granted to re-open that question before the Privy Council. *Dhanukdhari Singh* v. *Mahabir Pershad Singh* (2), referred to. [p. 748, col. 1.]

When an application is made to raise a defence not raised in the High Court though taken in the trial Court, it cannot be said that in no case could such leave be granted The Board, acting under the Prerogative, must never abrogate their duty to tender to His Majesty in such a matter any advice which the nature of the case seems, in justice, to be called for. But the circumstances in which such an application will be entertained are necessarily exceptional. Apart from special circumstances there is no distinction in principle between the position of an appellant who abandons in the High Court a ground of appeal of which he had given notice and the position of a respondent in the High Court who does not raise a point in his favour which was open to him without notice. It is quite true that it would be open to the Board on proper terms to refer to the High Court the question for their consideration. But even that the Board would not do except under special circumstances. [p. 748, col. 2.]

Messrs. *A. M. Dunne*, *K. C.* and *S. Hyam*, *J. M. Parikh*, for the Appellants.

Messrs. *L. DeGruyther*, *K.C.*, *W. Wallach*, for the Respondents.

Lord Blanesburgh.—This is an appeal from a decree of the High Court at Allahabad, in a mortgagee Bank's suit to realise its security. In decreeing the suit the Court reversed a decree of the Subordinate Judge of Meerut, who had dismissed it. The suit was commenced on December 8, 1923. The mortgage had been granted, on December 8, 1911, by a Mrs. Fanny Skinner, to the Bank of Upper India, Limited. The deed was in the ordinary form of a simple mortgage with a covenant on the part of the mortgagor for payment of the mortgage-debt with compound interest at the rate of 7 per cent.

per annum. In default of payment, the mortgagee Bank had the ordinary right of proceeding by Court sale to realise its security.

The property comprised in the mortgage included, among other items, a one-eighth undivided share of the mortgagor in the village of Siswal and a one-tenth similar interest in the village of Badopal. The mortgagor's brother, the second appellant, another brother and her sister were the co-sharers with her in these villages. The further relevant facts with reference to them will be alluded to later. The Bank of Upper India was in 1911 still a going concern. Subsequently it went into liquidation, and the suit when brought in 1923 was commenced by the Bank acting through its Liquidator. Fanny Skinner, the mortgagor, was then still alive, but she has died since the decree of the High Court was made and her interests are now represented by the two first appellants, who are her heirs. To the suit as brought there was at first only one substantial defence put forward by Fanny Skinner. It was that she was a *purdanasheen* lady; that the mortgage had been procured from her by her brother (not the second appellant), whom she had entrusted with her power-of-attorney, that he had by means thereof obtained in her name from the Bank an advance of 15,000 rupees; that no part of that advance was ever received by her; that in point of fact she had not desired to go into the transaction at all, and that there was insufficient compliance with the formalities and conditions requisite before a mortgage executed by a *purdanasheen* lady can be enforced against her. That was, in the first instance, the only substantial defence Fanny Skinner put forward to the suit. Subsequently, and in the course of the proceedings, on her statement that the fact had only just come to the knowledge of her legal advisers, she was allowed to put forward a further defence, to the effect that the plaintiff Bank was not entitled to sue by reason of the fact that there had been in 1917 an arrangement come to between the Bank by that time in liquidation and its creditors by virtue of which the whole of the assets of the Bank had been transferred to a purchasing company, the Trust of India, Limited: that all interest in this mortgage-debt had passed to the Trust, so that the Bank had no longer any right to sue in respect of it. Accordingly the following further issue was settled for decision: Were the assets of the Upper India Bank transferred to the Trust of India, Limited; if so, is the plaintiff entitled to bring the present suit?

There was a separate defence put forward by the mortgagor's brother hereinafter referred to as the second appellant. He had since the date of the mortgage acquired in severalty the entire village of Siswal. In that character he and twenty-two purchasers from him were made defendants to the suit as persons interested, subject to the mortgage in the one-eighth undivided share of the village included therein. His separate defence was that after the date of the mortgage of her undivided interest in the two villages by Fanny Skinner there had been a partition between the co-sharers, with the result that Siswal, had passed to the brothers as representing their several interests in the entirety, while the second village, Badopal, had passed to the mortgagor and her sister. Since that partition the second appellant had acquired his brother's entire interest in the village, Siswal. Accordingly, his contention was that as a result two things had happened: The first that the sisters had no longer any interest in Siswal, and the second, that he now owned the entire village in severalty and owned it free from any charge or any interest therein created by the mortgage-deed in suit. If any decree was made for the realisation of the Bank's security, that decree should exclude entirely from its operation any interest whatever in the village Siswal.

On that record the suit came on for trial and the Subordinate Judge dealt with the three defences in this way: With regard to the mortgagor's defence which may be called the defence of disability, he held that the lady knew all about the transaction and that the evidence satisfied him that she was in all respects bound by it. He rejected that defence. The second defence, however, he held to be well founded. He was of opinion that the Bank had no right to sue. He came to the conclusion that under the arrangement made in 1917 all the assets of the Bank included in the sale had in truth and in fact passed to the Trust of India, and that no right of action remained in the Bank in respect of any of these assets. Accordingly, as in his judgment the mortgage-debt in suit was one of the assets of the Bank included in the sale or transfer, it followed that the suit failed. He dismissed it.

With regard to the separate defence put

forward by the second appellant, the Subordinate Judge expressed the opinion not of course necessary to his actual decision that it was mistaken in point of law as no charge which attached to the mortgagor's undivided interest in Siswal at the date of the mortgage could be affected by any subsequent transaction in relation to that interest to which the mortgagee Bank was no party.

The Bank appealed to the High Court and there the argument was directed exclusively to the issue whether the appellant, the Bank, through its Liquidator, had any right to sue. Upon that issue the High Court came to the conclusion, differing in this from the Subordinate Judge, that the right to sue in respect of this mortgage-debt remained with the Bank unaffected by the arrangement just stated. No other question was raised before the High Court. The mortgagor did not there revive what has been called the disability defence. It was agreed before their Lordships that she was perfectly entitled to do so had she been so minded, although she had given no notice of cross-appeal. But the question was not raised by her at all. She confined her answer to the appeal solely to her contention that the Bank had no right of suit. With regard to the second appellant, he went one step further in the direction of abandoning his separate defence.

He did not appear on the appeal at all. The question therefore whether his village Siswal was or was not any longer included in the security was never brought into discussion. In the result the High Court came to the conclusion on the only question presented to it for consideration, that the Bank through its Liquidator had a clear right to sue as mortgagee, and the Court made a decree in its favour in the ordinary form, including among the property to be sold the undivided interests in both villages covered by the mortgage, a decree which so far as the undivided interest in the village Siswal is concerned, may, if left, be final so far as the second appellant and those claiming under him are concerned, although he was not actually present before the Court when it was made. From the decree of the High Court, the mortgagor's representatives, the mortgagor having died in the meantime, presented an appeal to His Majesty in Council, and their main contention has been that the Subordinate Judge was right in his view that the Bank had no right to sue and they maintained that contention through Mr. Dunne in a very careful and interesting argument. That is the first point which their Lordships have to determine. It depends, first of all, upon the construction of the agreement, which in England would be called an agreement of reconstruction and arrangement, under and by virtue of which this particular asset was agreed to be transferred to the Trust of India, Limited, by the Bank. The agreement contains one or two provisions to which it is desirable to refer. It is dated July 16, 1917. It is a very carefully and elaborately drawn document and it sets forth in its recitals the whole history of the transaction to which it gives effect. The Bank of Upper India had in the liquidation issued to some of its creditors in respect of their claims against it certain debenture stock secured by a trust deed. The purpose of the agreement was to make it possible to come to an arrangement with the other creditors of the Bank so that by the appropriation and realisation of certain assets for their benefit, with the consent of the trustees for the debenture stock, all claims against the Bank would be got rid of, and subsequently in due course the Bank would be dissolved. The way in which all this was done was as follows: Special resolutions were passed authorising the execution by the Liquidator of the Bank of the agreement of sale to the Trust of India now in question. The agreement was thereafter duly executed and no question is raised as to its complete validity according to its tenor. The only question to be determined now is its effect so far as the transfer of this particular mortgage-debt from the Bank to the Trust is concerned. That the mortgage-debt was included in the agreement cannot, their Lordships think, be questioned. Among the assets so included are those in para. 1 of the agreement as "all the book and other debts due to the Bank in connection with the said business and the full benefit of all securities for such debts."

The terms of sale are important. It is provided that the Trust is to make payment by means of a transfer of certain shares of its own and of certain other shares of another company of which apparently it was possessed, and is further to indemnify the Bank against all its debts and liabilities of every kind. There is a special provision with regard to completion not unimportant. It is found in para. 7, which is as follows:

"The purchase shall be completed on July 16,

1917, or on such other date as the parties hereunto shall mutually agree at Meerut and the Trust shall thereupon cause to be allotted issued or transferred the said share and fixed deposit receipts forming the consideration for the said sale and the Bank and its Liquidators and the trustees and all other necessary parties (if any) shall at the expense of the Trust execute and do all such assurances and things for vesting the said premises on the Trust or as the Trust shall direct and giving to it the full benefit of this agreement as shall be reasonably required."

Then para. 8 says this:

"The possession of the said premises shall be retained by the Bank and its Liquidators up to the said July 16, 1917, and in the meantime they shall carry on the said business in the same manner as heretofore so as to maintain the same as a going concern and they shall as from July 1, 1917, be deemed to have been and to be carrying on such business on behalf of the Trust and shall account and be entitled to be indemnified accordingly."

Apparently it happened in this case, as it has happened in so many others, that this agreement was executed on a date subsequent to that on which the draftsman supposed that it would be executed. In terms the purchase was to be completed on the very day of its execution the July 16, 1917, and the business was to be carried on by the Bank up to the date of the agreement as from a previous date, July 1. All that, however, is unimportant in regard to the transaction with which their Lordships have to deal. Quite obviously, the completion might take place at a date than the date of the agreement, as is amply enough provided for by the agreement itself, and on completion all those things would have to be done which are therein stated,—the consideration would have to be paid and satisfied, the formal transfers would have to be executed, and so on. Nothing of that kind took place. There never was in that sense any completion at all, nor was this agreement registered under the Transfer of Property Act. Accordingly, and their Lordships think this is common ground—the agreement as a transfer of the security was of no effect by reason of non-registration, and so far as appears, this particular asset has never found its way into the legal ownership of the Trust at all, or, putting it in another way, it has never passed out of the ownership of the Bank so as to deprive the Bank of any right that it had before to sue in respect of it. On such grounds as these, the High Court came to the conclusion that the right to sue had not passed from the Bank and that the Bank was, therefore, entitled to maintain the suit. But they came to that conclusion, as Mr. Dunne pointed out, by reason of the view they took that there was no possibility of treating the agreement as an assignment to the Trust of the benefit of Fanny Skinner's covenant to pay, apart from the security given to provide for payment. Accordingly, so it was contended, the reasoning of the High Court was not apt to meet all the facts of the case. While Counsel had to agree, and in fact it became part of his case, that there had been no legal transfer of the security, he contended on the authority of a decision of this Board, which will be referred to in a moment, that the transfer of the unsecured debt had been completed and that in respect of that unsecured debt no one could sue except the Trust, so that the effect of the transfer of the unsecured debt to the Trust, a transfer, complete and effective without registration—had been to deprive the Bank of any right whatever to take any step in respect of the security although on that footing it still remained in it. That was Mr. Dunne's contention. Their Lordships will only say before meeting it otherwise that it would, if sound, produce a very remarkable result, namely, that so far as the transaction of transfer is concerned, the mortgagor, unless the transferor and transferee could agree, was released so far as the security was concerned from all liability whatever, for the mortgagee after transfer of the debt could take no steps in relation to the security. That is truly an extraordinary result, and their Lordships would hesitate long before they came to the conclusion that it was one necessarily involved in the transaction. But it was said that such was the effect of a judgment of this Board in a case to which allusion has already been made; namely, the case of *Imperial Bank of India* v. *Bengal National Bank* (1). The judgment was given on May 21, 1931, that is to say, after the decree of the High Court in this case. There two debentures had been issued to the Imperial Bank of India by the Bengal National Bank, which had later gone into liquidation. The debentures charged by way of a floating charge all the assets whatsoever of the Bengal Bank. These consisted largely of loans and advances that had been made by that Bank to customers secured in many instances by the deposit of the title deeds of immovable property. The debentures

(1) 131 Ind. Cas. 651; 58 I A 323; A I R 1931 P C 245; 35 C W N 1034; 54 C L J 117; (1931) A L J 801; (1931) M W N 910; 33 Bom. L R 1338; 34 L W 569; 61 M L J 589; Ind. Rul. (1931) P C 299; 59 C 377 (P C).

had neither of them been registered under the Indian Registration Act, 1908, though both had been duly registered pursuant to s. 109 of the Indian Companies Act, 1913. It was contended in these circumstances that the debenture holders, the Imperial Bank, as a result of liquidation, were entitled to no remedy whatsoever, direct or indirect, against the immovable property that had been pledged to the Bengal Bank. It was with such a case that their Lordships dealt in a judgment delivered by Lord Atkin. It was admitted there by the Imperial Bank, without its having been argued, that they had no charge upon the immovable property of the Bengal Bank. The Board accepted and acted upon the admission but they definitely refrained from holding that in the case of a company it was necessarily true, that a debenture charging immovable property and registered under the Companies Act must, in order to have complete effect be registered also under the Registration Act. While not indicating any view one way or the other on that point, their Lordships treated the case as one in which it must, as between the parties, be assumed that the debentures created no charge upon any portion of the immovable property of the Bengal Bank whether its interest therein was by way of deposit of deeds or otherwise. Therefore, that was a case of what might be called a clean debt owing to the Bengal Bank and unsecured so far as immovable property was concerned, being included in the debenture charge; and the question was whether the charge upon that clean debt operated to give to the Imperial Bank, as debenture holders, the right themselves to sue the debtors for payment. On this, it was held that the debentures did not constitute actionable claims which by virtue of the Act in that behalf could be sued upon after due notice of transfer had been given to the debtor. The claims had to be placed in an entirely different category; and the category to which Lord Atkin relegated them was this: The claims were such as might be made by the debenture holders against the Bengal Bank; but so far as any recourse might be competent to them in respect of any security taken by the Bengal Bank in respect of any of the debts, the debenture-holders must enforce such security in the name of the Bengal Bank and not otherwise, and if any difficulty arose, the Bengal Bank would be required on proper terms to lend its name as plaintiff in any proceedings that might be necessary. This case, therefore, when examined, instead of supporting the view for which it was cited by Mr. Dunne, appears to destroy it, because Lord Atkin clearly states that, if any proceedings are taken for the purpose of vindicating the rights of the holder of such a debenture as was there in question, these must be taken not in the name of the transferee, the debenture-holder, but in the name of the original creditor, the Bengal Bank. Applying that case, which need not be gone into in more detail, to the present the result is this, as it appears to their Lordships: The transfer of this mortgage debt was effective as between the transferor and the transferees. But any proceedings to recover the debt brought against the mortgagor must be, not in the name of the transferee, but in that of the transferor. Accordingly, what was here done by the Bank of Upper India in suing in its own name to recover this mortgage debt was rightly done. It was, indeed, the only course that could have been appropriately adopted. The decree in its favour cannot be disturbed on this ground. But it must not be taken to be the view of their Lordships that there would not be other difficulties in the way of the contention put forward by the first appellants that the Bank has no title to sue. As has been said, there has been no completion of this agreement in any sense whatever; it remains just where it was so far as any substantive legal assignment are concerned, although, no doubt, one may at this distance of time almost assume that the consideration has been paid and satisfied. Their Lordships can have no doubt that the debts of the Bank have been satisfied or discharged, and that the transaction as between the transferor and transferee may be taken to be complete. But this has only been by mutual arrangement and acceptance by the transferees of less than they were entitled to; it remains that there has been no completion in any legal sense of the word and no legal assignment or transfer of the assets included in the agreement and not legally transferred by virtue of the agreement itself. When learned Counsel for the appellants were asked what was the moment of time at which, in their view of this transaction, the debt passed to the Trust so that the Bank remained with no interest to sue in respect of it,

the first answer made was that it passed from the moment of execution of the agreement; an answer which meant that the whole interest in the property agreed to be transferred passed before any part of the purchase price has been paid. This answer was not pressed. Then it was suggested by Mr. Hyam that, if that was not so, the whole interest certainly passed when all this property had been beneficially transferred and had become vested in that sense in the purchasing Trust. To which there was made these answers. First, there was no evidence at all as to when that stage was reached, if it ever has been reached, and secondly, if that stage ever has been reached, it would be very important on this question of right to sue to know what the terms were on which the transfer was effected. The High Court in their judgment have said that there was an arrangement as between the Bank and the Trust under which the right to recover these outstanding debts was to remain vested in the Bank, although when recovered, the proceeds would be handed over to the Trust. But whether that be the fact or not, there is no evidence of any transaction which would justify the conclusion that this purchase had been completed in accordance with the terms of the agreement, and, therefore, the result is that for this reason also the suit was properly brought.

Two subordinate questions already foreshadowed in the course of this judgment must now be dealt with.

The first is that the appellants having stated that they had not in the High Court again raised the disability defence, asked leave to re-open that question. Their Lordships were not disposed to grant any such leave in this case; it appears to be one which comes within the general view of the Board as expounded by Lord Robertson in the case of *Dhanukdhari Singh* v. *Mahabir Pershad Singh* (2). Their Lordships do not think that the Board in that case intended to lay it down that in no case could such leave be granted. The Board, acting under the Prerogative, must never abrogate their duty to tender to His Majesty in such a matter any advice which the nature of the case seems, in justice, to be called for. But the circumstances in which such an application will be entertained are necessarily exceptional.

Mr. Dunne contended that in the case before the Board in *Dhanukdhari Singh* v. *Mahabir Pershad Singh* (2), the question which the appellants then desired to raise was one which they might have raised as appellants in the High Court. Indeed, it was included in their notice of appeal to the High Court, but was not raised by them there. In the present case, however, the point which the appellants desire to revive was one which would only have been open to them as respondents in the High Court and not as appellants. Their Lordships, however, apart from special circumstances which have not been shown to exist here can see no distinction in principle between the position of an appellant who abandons in the High Court a ground of appeal of which he had given notice and the position of a respondent in the High Court who does not raise a point in his favour which was open to him without notice. It is quite true that it would be open to the Board on proper terms to refer to the High Court this question for their consideration. But even that the Board would not do except under special circumstances. These do not exist in this case, the real truth being that here the appellants before the High Court were content to rely on a technical point, altogether abandoning the defence of substance which had failed in the Court below. Now, having failed on that technical point, they ask as a last resort to set up again their abandoned defence of substance. That consideration shows how little is the warrant here for interfering with the usual practice of the Board in such matters. Accordingly, the application made to re-open their disability defence either before their Lordships or in the High Court is one that cannot be acceded to.

The other matter that has to be dealt with is that raised by the second appellant with reference to the inclusion in the decree of the village Siswal. He desires that he may be permitted to establish, if he can, at the proper time that by virtue and as a result of the partition effected as already stated, and of the subsequent transactions, he is now the registered owner of this village in its entirety, subject to the rights which he has created in it but discharged from the respondent's

(2) 34 I A 161; 34 C 709; 9 Bom. L R 651; 11 C W N 739; 6 C L J 11; 17 M L J 353; 2 M L T 193; 14 Bur. L R 1 (P C).

security. He seeks to establish that this village is now excluded altogether from the security which is held by the Bank, and that no sale of property directed for the purpose of realising that security should be permitted to touch or affect his village, and he relies for the success of that contention which he desires to put forward on the case of *Mohammad Afzal Khan* v. *Abdul Rahman* (3), the head-note, which quite clearly expresses the judgment, being this:

"Where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly, the mortgagee takes the security subject to the right of the other co sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition and the mortgaged properties are allotted to a co-sharer or co-sharers other than the mortgagor, they take the allotted properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution for his undivided share."

When Mr. Parikh, on behalf of the second appellant, asked to have the decree amended in that respect, so as to discharge his village from this security altogether, it was, of course, objected by Mr. DeGruyther, on behalf of the respondents, that Mr. Parikh was no longer in a position to raise this point by reason of the fact that he had abandoned it in the High Court, secondly, it was contended by Mr. DeGruyther that there was no material upon which any decision in the second appellant's favour could be made, and thirdly, he contended that the application was unnecessary because the point would be open to Mr. Parikh in execution proceedings, when an application would have to be made to the Court for directions for sale. It would then be open to the second appellant to come forward and claim that his village be excluded from the property to be sold. But, when it was made plain that Mr. Parikh's client was a party to the proceedings in which the decree of the High Court was made, and that an undivided share in Siswal was thereby stated to be within the security, it became clear that it would be difficult, if not impossible, for the second appellant successfully to apply that the one-eighth share in the village should be excluded from the sale. It was then agreed that there should be inserted in the advice which their Lordships would humbly tender to His Majesty a recommendation that a provision should be made in the Order in Council to the effect that notwithstanding the terms of the decree of the High Court at Allahabad of the December 3, 1928, it was to be open to the second appellant in any execution proceedings thereunder to establish, if he could, that no undivided or other interest in the village Siswal is any longer comprised in the mortgage of December 8, 1911. Had this agreement not been reached it would not have been possible for their Lordships to make any order either in favour of or against the second appellant on this head, if only for the reason that the circumstances in relation to the alleged partition are not really known to them.

In these circumstances, their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellants must pay the costs. There will be inserted in the advice which they will so tender a recommendation to the effect just stated with reference to the claim put forward by Mr. Parikh on behalf of his client.

N. *Appeal dismissed.*

Solicitors for the Appellants.—Messrs. *Barrow, Rogers & Nevill* and *Hy. S. L. Polak & Co.*

Solicitors for the Respondents.—Messrs. *T. L. Wilson & Co.*

(3) 139 Ind. Cas. 85; 59 I A 405; Ind. Rul. (1932) P C 285; 9 O W N 829; 36 C W N 1129; 36 L W 456; A I R 1932 P C 235; (1932) M W N 1063; 63 M L J 661; (1932) A L J 909; L R 13 A 350; 16 R D 522; 13 Lah. 702 (P C).

CALCUTTA HIGH COURT

Civil Appeal No. 272 of 1932

August 9, 1934

MUKERJI, ACTG. C. J. AND S. K. GHOSE, J.

ATUL CHANDRA SEN—APPELLANT

versus

KAUNAMMAL AND OTHERS—RESPONDENTS

Provident Funds Act (XIX of 1925), ss. 4, 5 (2)—Nominee holding certificate, whether entitled to preference to another having obtained prior certificate.

The effect of s. 4, Provident Funds Act, is that in a competition between two persons it is the nominee who holds a certificate who is entitled to the money. Where, therefore, a widow holds a succession certificate in respect of assets of her deceased husband but subsequently a nominee of her husband obtains a succession certificate for the provident fund amount, the latter is entitled to the money and the former's certificate is no bar.

C. A. from original order of the District Judge, Chittagong, dated March 31, 1932.

Messrs. *Jitendra Kumar Sen Gupta* and *Paresh Chandra Sen*, for the Appellant.

Judgment.—The question in this case

is what is the true meaning of s. 5, sub-s. (2), Provident Funds Act (XIX of 1925). The appellant applied in the Court of the District Judge of Chittagong for a Succession Certificate in respect of a debt in favour of a deceased person recoverable from the A. B. Railway Co., Ltd. The debt was an amount of Provident Fund money due to the deceased, in respect of which the appellant was the nominee. The respondent as widow of the deceased had, prior to the said application, obtained a Succession Certificate in respect of the assets of the deceased from the Court of the District Judge of Trichinopoly. The appellant's application has been refused by the learned Judge on the ground that the certificate previously obtained by the respondent affords a bar. The question turns on the meaning of sub-s. (2) of s. 5, Provident Funds Act (XIX of 1925). The relevant words of the sub-section are:

"Notwithstanding anything contained in the Succession Certificate Act, 1889 . . . . . any such person (*i. e.*, a nominee) shall, on the death of the subscriber or depositor, be entitled to the grant of a certificate under that Act . . . . entitling him to receive payment, etc."

Does it mean only this that the nomination will entitle the nominee to a certificate without any proof of his right thereto such as an applicant for a certificate has otherwise to establish (*vide* s. 373, Succession Act XXXIX of 1925)? Or, does it go further and mean that other provisions of the Act which may afford as a bar will also be oprative. The matter is one of first impression and it is not easy to see what exactly was the intention of the Legislature. But it appears that there is no provision in the Act laying down that no certificate shall be granted in respect of assets for which a previous certificate has been obtained. Section 385, Succession Act, merely says that a certificate subsequently granted would be invalid under certain circumstances. Moreover, the effect of s. 4, Provident Funds Act, is that in a competition between two persons it is the nominee who holds a certificate who is entitled to the money. We therefore think it would be reasonable to hold that the former meaning should be attributed to the subsection in question. The result is that, in our judgment, the appeal should be allowed and the order complained of being set aside, the case will go back to the Court below, and that the application for certificate, if it is otherwise in order, should be granted. No order as to costs.

D. *Appeal allowed.*

PATNA HIGH COURT

Civil Appeals Nos. 108, 111 and 174 of 1929

December 31, 1933

JAMES AND AGARWALA, JJ.

Musammat RAMJHARI KUER AND OTHERS —APPELLANTS

versus

SHEONARAIN SINGH AND OTHERS—RESPONDENTS

Bengal Public Demands Recovery Act (Beng Act III of 1913), s. 20—Liability to pay cess—Nature of—Whether attaches to estate of proprietor—Hindu widow's estate sold under the Act—Reversion, if passes to purchaser.

The liability to pay cess is a mere personal liability which does not attach to the estate of the proprietor who has to pay it. Consequently, the sale of a Hindu widow's estate under the Bengal Public Demands Recovery Act conveys only the widow's estate to the purchaser and not the reversion. *Shekaat Hussein* v. *Sasi Kar* (1), *Jiban Krishna Roy* v. *Brojo Lal Sen* (2) and *Baijun Doobey* v. *Brijbhookan Lal* (3), relied on.

C. A. from a decision of the Sub-Judge, Muzaffarpur, dated February 28, 1929.

Messrs. *S. C. Mazumdar*, *B. P. Sinha*, *S. N. Roy*, *K. P. Jayaswal* and *B. B. Saran*, for the Appellants.

Mr. *S. M. Mullick*, *A. B. Mukharjee*, and *H. P. Sinha*, for the Respondents.

James, J.—The suit out of which these appeals arise was instituted by *Musammat* Ramjhari Kuer as daughter and heir of the late *Musammat* Uma Kuer in order to set aside several alienations made by or on behalf of *Musammat* Uma Kuer while she was in possession of the widow's estate. The plaintiff has joined in one suit alienations made to different persons; but she ought to have been required at the outset to sever her different causes of action. One result of the joinder has been that the unsuccessful defendants have been treated as jointly and severally liable for a larger amount of costs than would ordinarily be justified by the value of their interest, while the litigation has been unduly prolonged owing to the necessity from time to time of substitution, as one or other among the unwieldy mass of defendants died. The suit was in part decreed and in part dismissed by the Subordinate Judge. The plaintiff has appealed from that portion of his decision which is in favour of Sheonarain Singh and other defendants, while two sets of defendants have appealed from so much of the decision as sets aside the alienations made to them. (After dealing with the Appeals Nos. 108 and 174, His Lordship proceeded). I now come to Appeal No. 111. In 1908, *Musammat* Uma

Kuer fell into arrears in payment of public cesses, which resulted in the issue of certificates and the sale of a portion of the estate under the Public Demands Recovery Act. The plaintiff sued for recovery of this property and her prayer has been allowed by the Subordinate Judge on the ground that nothing beyond the right, title and interest of *Musammat* Uma Kuer passed by the sale which must be interpreted as meaning that the purchaser acquired nothing more than *Musammat* Uma Kuer's life interest in the property.

Mr. S. N. Roy, on behalf of the appellants, who have purchased this property from the original auction-purcharser, argues that the sale, treated as a sale of the reversion, has been ratified by the plaintiff; and that in any event the sale for arrears of public cesses should be regarded as a sale of the property in respect of which the arrears were due, so that the whole interest, the life estate and the reversion should be held to have passed by it. There was litigation over this Court sale which began in the time of *Musammat* Uma Kuer and concluded after her death. Harinarain, the purchaser of the property with which we were concerned in Appeal No. 174, found after he had acquired a one anna share from the lady that she had mortgaged a two annas share which included the property conveyed to him; and he was faced with the necessity of losing his property or paying off the mortgage. He paid off the mortgage when the property was brought to sale by the mortgagee and he then sued Paltan Singh and *Musammat* Ramjhari Kuer, the present plaintiff, for contribution. The one anna share, part of which had already been transferred by the Court sale, had been sold after the Court sale to one Paltan Singh who according to Harinarain was a mere *farzidar* for *Musammat* Uma Kuer. *Musammat* Ramjhari Kuer by her written statement in that litigation attacked the whole transaction of purchase by Harinarain, but she subsequently prayed that she might be exempted from the suit on the ground that Paltan Singh was not a *farzidar* and that he was the person liable, if any was liable.

It is suggested that this recognition by *Musammat* Ramjhari Kuer of the rights of Paltan Singh makes it impossible for her now to claim any title in herself to the one anna share; but Mr. S. M. Mullick on behalf of the respondents points out that the transfer by *Musammat* Uma Kuer was valid during her lifetime and that all that *Musammat* Ramjhari Kuer was seeking to do was to shift the liability to pay of this mortgage debt from herself to the assignee of *Musammat* Uma Kuer's life estate. *Musammat* Ramjhari Kuer was not questioned on this matter when she gave evidence and the petition is too vague and general in its terms to be treated as an admission of anything beyond the fact that *Musammat* Uma Kuer had purported to transfer the one anna share to Paltan Singh. The purchaser Abhilak Thakur from whom the present appellants derived title was also a party to that litigation; but there is no admission anywhere by the plaintiff of any rights acquired by him. Paltan Singh had alreday sued the puchaser Abhilak Thakur for a declaration that the sale under the Public Demands Recovery Act was bad. In that litigation *Musammat* Uma Kuer was originally named as a defendant: but she subsequently transferred to the category of plaintiffs. After her death the present plaintiff was substituted; but there is nothing to indicate that she took any part in the litigation. The suit was dismissed by the trial Court; and Paltan Singh appealed to the District Judge, and to the High Court, in each case making *Musammat* Ramjhari Kuer a respondent.

The suit failed; but, as I have said, there is nothing to indicate that *Musammat* Ramjhari Kuer took any part in the litigation or that she made any admission of anybody's rights. Mr. S. M. Mullick on behalf of the respondent supports the finding of the learned Subordinate Judge that nothing, but the life interest of the widow passed by the Court sale. Mr. S. N. Roy, suggests that the sale must be set aside before the purchaser can be ousted; but in this case as the matter stands at present, the respondent is not attacking the sale itself, but is merely asking that proper effect may be given to it. Mr. S. M. Mullick now concedes that the sale was a perfectly valid sale and that title passed by it; but he argues that the only title which passed was title to the life interest of *Musammat* Uma Kuer. He does not, therefore, seek to set aside the sale, but to enforce it in such a manner that it should have its legal effect and no more. Mr. S. M. Mullik cites first the decision in *Shekaat Hossein* v. *Sasi Kar* (1), in which it was held that cess due under the Bengal Cess Act of 1880 is only a personal debt and cannot be recovered from the property on which it is assessed, when such property

(1) 19 C 783.

belongs to a third person who may not be recorded as the proprietor in the Collector's land registers: that is to say, the estate of which the debtor is recorded as the proprietor is not itself burdened with the liability to cess, which is a personal liability, though of course if the person from whom cess is being recovered is the owner of the estate, the estate may be sold like any other property for the debt of its owner. Mr. S. M. Mullick then proceeds to demonstrate that a sale of a widow's estate in execution for a personal debt of the widow will convey nothing more than the limited interest which the widow acquired on her husband's death. In *Jiban Krishna Roy* v. *Brojo Lal Sen* (2), a tenure held by a limited owner was brought to sale for arrears of rent accruing after her father's death.

The Judicial Committee held that the liability for rent should be regarded as the personal liability of the debtor and should not be regarded as attaching to the reversion. Again in *Baijun Doobey* v. *Brijbhookan Lal* (3), where a widow's estate had been sold in execution of a personal decree against her, it was held by the Judicial Committee that it was only the widow's estate that passed to the purchaser. Therefore it appears that if the liability to pay cess is a mere personal liability, not attaching to the estate of the proprietor who has to pay it, the sale of the widow's estate under the Public Demands Recovery Act, conveyed only the widow's estate to the purchaser and not the reversion. In the Public Demands Recovery Act as amended in 1914, s. 26 makes it clear that nothing passes by the sale beyond the right, title and interest of the judgment-debtor and this would appear to be a correct view of the law as it stood before the amendment of the Act in 1914, as has been held by the learned Subordinate Judge. It is suggested that when *Musammat* Uma Kuer purported to transfer the one anna share to Paltan Singh after the Court sale, she could not, on the hypothesis that her life interest had already been sold, have intended to convey to Paltan Singh anything, but the reversion and *Musammat* Ramjhari Kuer has no *locus standi* to contest the Court sale. But we do not know what was actually conveyed to Paltan; and indeed it would appear to be more likely that what was conveyed was the right to contest the validity of the sale, and that *Musammat* Uma Kuer had no idea of distinguishing between her life interest and the reversion. In any view of the matter, since Paltan Singh's family are parties to the present suit and they make no claim, it cannot be said that the plaintiff is disqualified from claiming to recover this property.

I would affirm this part of the decision of the Subordinate Judge and dismiss the appeal with costs. For the purpose of assessment of costs in this Court and in the Court below the hearing fee of Rs. 100 will be taken as the hearing fee. The appeals are thus dismissed except that the decree of the Subordinate Judge must be amended so far as it describes the amount of costs to which each party is entitled and which each party is liable to pay.

Agarwala, J.—I agree.

N. *Appeal dismissed.*

(2) 30 C 550; 30 I A 81; 8 Sar. 444; 5 Bom. L R 428; 7 C W N 441 (P C).

(3) 1 C 133; 2 I A 275; 24 W R 306; 3 Suther. 207; 3 Sar. 541 (P C).

LAHORE HIGH COURT

First Civil Appeal No. 2761 of 1928

July 2, 1934

ADDISON AND BECKETT, JJ.

BULAQI DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

LAL CHAND—PLAINTIFF—RESPONDENT

Hindu Law—Joint family—Suit based on adjustment of partnership accounts signed by father only—Sons, liability of—Court Fees Act (VII of 1870), Sch. I, Art. 1—Appeal against personal liability only—Court-fee payable.

Under Hindu Law, in a suit based on an adjustment of a partnership where the father alone has signed the deed, the sons are not personally liable but their liability extends to the extent of their share in the joint family property.

An appeal merely against the personal liability of the appellants can be filed on a court-fee of Rs. 10 only.

F. C. A. from an order of the Senior Sub-Judge, Delhi, dated March 12, 1928.

Mr. *Shamair Chand*, for the Appellants.

Mr. *Naual Kishore*, for the Respondent.

Judgment.—The plaintiff Lal Chand sued Bhondu Mal and his two sons, Bulaqi Das and Shimbhu Dayal, for Rs. 72,937-10-0 and he obtained a decree for that amount with future interest with costs against these defendants. The two sons of Bhondu Mal, Bulaqi Das and Shimbhu Dayal, have been allowed to appeal in *forma pauperis* against this decree.

Though the appeal is to the effect that the appellants are not in any way liable,

Counsel appearing on their behalf has rightly confined his arguments to ground No. 2 which is to the effect that it should have been held that the appellants are not personally liable. This is correct. The suit was based on an adjustment of a partnership which took place on July 4, 1924 when a deed was written. This deed was signed by Bhondu Mal, the father of the appellants, and under it he is undoubtedly personally liable for the sum fixed in it, namely, Rs. 62,223-4-6. The remaining sum of Rs. 10,714-5-6 is interest. The appellants were not parties to the deed. The suit is based on this acknowledgment only and though there is no doubt that it was rightly held that Bhondo Mal is personally liable, it cannot be held that his sons are so liable. They are of course liable to the extent of the joint family property. In these circumstances the appeal must be accepted to this extent that it be declared that defendants Nos. 2 and 3, *i. e.*, the appellants are not personally liable for the amount of the decree.

As the appeal is frivolous to the extent that it attacks the whole decree, the plaintiff-respondent cannot be held liable for the whole of the court-fee in appeal. The appellants, if they had appealed merely against their personal liability could have done so on a court-fee of Rs. 10. Under O. XXXIII, rr. 10 and 11, Civil Procedure Code, we therefore direct that the amount of the court-fee on appeal should be calculated. The plaintiff-respondent shall pay Rs. 10 of the court-fee and the appellants shall pay the rest of it themselves. There will be no other order as to the costs of the appeal.

N. *Appeal accepted.*

OUDH CHIEF COURT

Criminal Revision Application No. 155 of 1934

March 22, 1935

NANAVUTTY, J.

HORI LAL AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s 428—Sessions Judge hearing appeal from decision of Assistant Sessions Judge in trial with aid of assessors—Additional evidence, recording of—Legality—Such evidence, if admissible—Sessions Judge forming opinion as to guilt of accused on such evidence—Re-hearing—Transfer to another Judge—Necessity of—Criminal trial—Government Pleader not producing certain eye-witness—Appellate Court if can summon him.

It is only when the Court of Session is sitting to hear an appeal from a judgment of a Magistrate has it got power under s. 428 of the Criminal Procedure Code to record additional evidence itself, or direct it to be taken by a Magistrate, and it is only the High Court, which is the Appellate Court of the Court of Session, that can, under s. 428 of the Code, direct a Court of Session or a Magistrate to record additional evidence in a case pending before it in appeal. The Sessions Judge is not justified by the provisions of s. 428, Criminal Procedure Code, in recording additional evidence while deciding an appeal against the judgment of the Assistant Sessions Judge who tried the case with the aid of assessors. Such evidence is not legally admissible and the accused cannot legally be convicted upon that evidence. *Queen-Empress* v. *Ram Lal* (1) and *Emperor* v. *Jaisook* (2), referred to, *Emperor* v. *Laxman Ramshet* (1) distinguished.

When once a Sessions Judge has formed an opinion as to the guilt of the accused upon the additional evidence recorded by him, it is desirable that a re-hearing of the appeal is not made before the same Judge. An application for transfer to another Court, should, in the circumstances, be granted.

It is true that it is the duty of the prosecution to produce before the Court all eye-witnesses of the occurrence, but if the Government Pleader takes upon himself the responsibility of not producing a certain eye-witness, then it is not the duty of the Appellate Court to fill up the gap in the prosecution evidence by summoning that witness.

Cr. R. App. against the order of the Sessions Judge, Hardoi, dated October 10, 1934.

Dr. *J. N. Misra* and Mr. *Raghubar Dayal*, for the Applicants.

Mr. *H. K. Ghosh*, Assistant Government Advocate, for the Crown.

Order.—This is an application for revision under s. 439 of the Code of Criminal Procedure, against an appellate judgment of the learned Sessions Judge of Hardoi upholding the judgment of the Assistant Sessions Judge of the same place, convicting the applicants of offences under ss. 147 and 325 of the Indian Penal Code, and sentencing each of them to six months' rigorous imprisonment.

At the outset an interesting question of law was raised on behalf of the applicants by their learned Counsel, who has argued that the learned Sessions Judge should not have, while hearing the appeal against the judgment of the Assistant Sessions Judge of Hardoi recorded additional evidence as that was not only illegal but was clearly tantamount to giving the prosecution an opportunity to fill up the gaps which had been left in the prosecution evidence for no valid reason.

The first question for determination in this application for revision is, therefore,

whether the learned Sessions Judge of Hardoi was legally authorised to record additional evidence in hearing an appeal from a judgment of an Assistant Sessions Judge who tried the case with the aid of assessors. The learned Assistant Government Advocate has relied upon the provisions of s. 428 of the Code of Criminal Procedure in defence of the action of the learned Sessions Judge of Hardoi. Section 428 of the Code runs as follows:—

"In dealing with any appeal under this Chapter the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself or direct it be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or by a Magistrate."

It is clear from the very language of s. 428 that only when the Court of Session is sitting to hear an appeal from a judgment of a Magistrate has it got power under s. 428 of the Code to record additional evidence itself, or direct it to be taken by a Magistrate, and it is only the High Court, which is the appellate Court of the Court of Session, that can under s. 428 of the Code, direct a Court of Session or a Magistrate, to record additional evidence in a case pending before it in appeal.

I have heard the learned Counsel for the applicants as also the learned Assistant Government Advocate at great length and have carefully considered the question of law involved in the plea raised on behalf of the applicants, and it seems to me on mature consideration that the action of the learned Sessions Judge of Hardoi in recording additional evidence while deciding this appeal against the judgment of the Assistant Sessions Judge was not legally justified by the provisions of s. 428 of the Code of Criminal Procedure.

In *Queen-Empress* v. *Ram Lal* (1), it was held by two learned Judges of the Allahabad High Court that where in a trial for murder conducted with the aid of assessors the Court of Session relied upon a statement by the deceased and the evidence necessary to prove such statement was not recorded until after the close of the trial and the discharge of the assessors, that this procedure of the Sessions Judge amount to a material irregularity which was not covered by s. 537 of the Code of Criminal Procedure. In this ruling a reference was made to s. 268 of the Code which provides that all trials before a Court of Session shall be either by jury or with the aid of assessors, and that the evidence recorded by the Sessions Judge after the opinion of the assessors had been recorded and they had been discharged was in fact evidence recorded *coram non judice*. The learned Judges in the course of their judgment made the following observation:—

"In only one instance is a Court of Session authorised to record evidence in the absence of jury or assessors and that is when additional evidence is called for by the Appellate Court (*vide* s. 428, Criminal Procedure Code)".

The Appellate Court of the Court of Session is the High Court, and the view taken by the learned Judges of the Allahabad High Court seems to be correct, because sub-s. 2 of s. 309 makes it quite clear that once the opinion on the assessors has been recorded in cases tried by the Court of Session with the aid of assessors, the Judge has got nothing else to do but to give judgment. This was the view laid down by the learned Chief Justice and Mr. Justice Ryves of the Allahabad High Court in *Emperor* v. *Jaisook* (2). In this case it was held that where a Sessions Judge is trying a case with the aid of assessors, it is the Judge *plus* the assessors who constitute the Court and not the Judge alone, and that where a Sessions Judge recorded evidence after the assessors had been discharged, it was held that this was a material irregularity which vitiated the trial and the learned Judges observed that the case of *Queen-Empress* v. *Ram Lal* (1), was a distinct authority for the very salutory proposition that evidence must not be taken by a Sessions Judge unless that Sessions Judge has the assessors sitting with him.

It has been argued by the learned Assistant Government Advocate that if it is open to the High Court as an Appellate Court, to direct the Court of Session or a Magistrate to record additional evidence under s. 428 of the Code of Criminal Procedure, then it is equally open to the Court of Session as an Appellate Court to record additional evidence under s. 428 of the said Code. The fallacy in this reasoning lies in the cool assumption that the Court of Session has got the same powers under s. 428 of the Code as are vested in the High Court but a careful perusal of s. 428 itself will show that section contemplates that the Court of Session has got the right to take

(1) 15 A 136; A W N 1899, 50

(2) 59 Ind. Cas. 559; 43 A 125; 19 A L J 1; 22 Cr L J 127.

additional evidence itself or direct it to be taken by a Magistrate when there is an appeal before it from a decision of a Magistrate of the first class, but no such power is vested in the Court of Session when the Court of Session hears an appeal from a subordinate Court of Session which has decided the case with the aid of jurors or assessors.

The learned Assistant Government Advocate invited my attention to a ruling reported in *Zamir Uddin* v. *Emperor* (3), decided by the Patna High Court in which it was held that the High Court had power to direct the Sessions Judge to re-hear an appeal after obtaining additional evidence. As I have said above, the powers of the High Court are far greater than those of the Court of Session hearing an appeal against a decision of an Assistant Sessions Judge. I have also been referred to a ruling of the Bombay High Court reported in *Emperor* v. *Laxman Ramshet* (4). That, however, was a case decided by a Magistrate and the appeal was heard by the Sessions Judge. The powers of the Court of Session to have additional evidence recorded under s. 428 of the Code are co-extensive with those of the High Court, but only in case the Court of Session is hearing an appeal from a decision of a Magistrate, and not in a case where the Court of Session is hearing an appeal from a decision of an Assistant Sessions Judge with the aid of assessors. It is only when the Appellate Court is a High Court that additional evidence can be taken by a Court of Session when it is directed to do so by the Appellate Court. This is clear from the observation made in *Queen-Empress* v. *Ram Lal* (1).

For the reasons given above, I am clarly of opinion that the evidence recorded by the learned Sessions Judge in appeal is not legally admissible and the accused-applicants cannot legally be convicted upon that evidence.

The learned Counsel for the applicants has further contended that apart from the question of the legality or otherwise of the order of the learned Sessions Judge of Hardoi directing the taking of additional evidence, there were no valid grounds even for recording that evidence. Durjan was a prosecution witness and he was present in Court but was discharged by the learned Government Pleader when the case was being tried in the Court of the Assistant Sessions Judge of Hardoi. It is true that it is the duty of the prosecution to produce before the Court all eye-witnesses of the occurrence, but if the Government Pleader takes upon himself the responsibility of not producing a certain eye-witness, then it is not the duty of the Appellate Court to fill up the gap in the prosecution evidence by summoning that witness. The learned Counsel for the applicants also complains that a very improper use of the Police diaries has been made in this case by the learned Sessions Judge sitting in appeal against the decision of the learned Assistant Sessions Judge. There is a sub-stratum of truth in this complaint also but I need not enlarge upon it, as in my opinion the appeal should have been heard and decided only upon the evidence recorded by the Assistant Sessions Judge in the presence of the assessors.

In the circumstances of this case, I must, therefore, allow this revision, set aside the judgment of the learned Sessions Judge of Hardoi, dated October 10, 1934, and direct that the appeal of the applicants filed in the Court of the learned Sessions Judge of Hardoi against the judgment of the learned Assistant Sessions Judge of that place be heard *de novo* and decided only upon the evidence which was before the Assistant Sessions Judge and the assessors when the judgment was pronounced by the trial Court.

I have been asked by the learned Counsel for the applicants to have the hearing of the appeal transferred to the Court of another Sessions Judge who has not formed any opinion as to the guilt or innocence of his clients. It seems to me that, in the circumstances of this case, this is a very proper request, although it is opposed by the learned Assistant Government Advocate, who has contended that such a procedure would cast an undeserved reflection upon the learned Sessions Judge of Hardoi. In my opinion the learned Sessions Judge of Hardoi would himself be the first to request that he might be relieved of the duty of deciding this appeal afresh, when once he has formed an opinion as to the guilt of the accused upon the additional evidence recorded by him. I, therefore, transfer the hearing of the appeal of the accused-applicants from the Court of the Sessions Judge

(3) 47 Ind. Cas. 274; 3 P L J 632; 19 Cr. L J 902.

(4) 121 Ind. Cas. 588; 53 B 578; 31 Bom. L R 593; A I R 1931 Bom. 309; 31 Cr. L J 309; Ind. Rul. (1930) Bom. 76.

of Hardoi to the Court of the Sessions Judge of Lucknow and I direct that the learned Sessions Judge of Lucknow should himself decide the appeal of the applicants upon the evidence that was recorded by the learned Assistant Sessions Judge in the presence of the assessors.

N. *Case remanded.*

PATNA HIGH COURT

Civil Appeal No. 26 of 1930

December 22, 1933

JAMES AND AGARWALA, JJ.

BIRENDRA KESHRI PRASAD AND NARAIN SAHEE—DEFENDANTS—APPELLANTS

versus

BAHURIA SARASWATI KUER AND OTHERS—PLAINTIFFS—RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 123, 95, 65—Mere unexpressed intention to dedicate—Effect—Subsequent transfer, whether invalidated—Subrogation—Interest to be paid to co-mortgagor—Discretion of Court—Co-mortgagor, if can enforce terms of mortgage bond on subrogation—Redemption of portion of mortgage—Charge, when accrues.

A mere unexpressed intention to dedicate certain property cannot have the effect of a formal dedication so as to invalidate the transfer of that property to a third person made after the idea had been formed in the mind of the transferor. Although it may be true that in spite of the provisions of s 123, Transfer of Property Act, such a dedication may be effective without an instrument in writing, there must be a real dedication whereby the property is completely given away and the owner completely divests himself of his ownership. *Harihar Prasad* v. *Sri Gurugranth Sahib* (1), followed. [p. 758, col. 1.]

The effect of the old s. 95, Transfer of Property Act, was not to place the person claiming to enforce the charge completely in the position of the mortgagee in such a manner that he could enforce the terms of the mortgage deed against those mortgagors who had not borne their share in the redemption. The question of what interest should be payable to the co-mortgagor paying the debts, on what amount, and from what date, is one at the discretion of the Court; and the plaintiff is not entitled to claim as a matter of right that interest should be calculated at the rate specified in the bond. The limited right of subrogation created by s. 95, Transfer of Property Act, must not be treated as if in fact it entitled the co-mortgagor to enforce the terms of the mortgage bond. *Digambar Das* v. *Harendra Narayan Pande* (3), relied on.

A charge created by redemption of a mortgage by the holder of a portion of a mortgaged property, does not accrue until payment of the whole mortgage debt.

C. A. from the original decree of the Sub-Judge, Muzaffarpur, dated July 25, 1929.

Messrs. *S. N. Ray, B. N. Ray*, for Mr. *G. P. Sahi*, for the Appellants.

Government Pleader, for the Respondents.

James, J.—On June 1, 1913, Babu Ganesh Prasad Narain Sahi borrowed Rs. 30,000 on a mortgage of certain property. On July 16, 1914, he made a settlement of the whole of his property, including that which had been mortgaged in the previous year. Certain property was dedicated to the deities of a temple at his own home, and certain other property was dedicated to a temple at Benares, the settlor constituting himself the *shebait* of both of these endowments and making provision that this office should descend to any sons who might be born to him. The rest of the property of which he was then in possession was settled on his second wife, *Musammat* Saraswati Kuer for life with remainder to his expected male issue, in default of male issue, to the religious endowment in his own village which was already endowed by the settlement. The estate thus settled on *Musammat* Saraswati Kuer was made subject to certain charges which provided for allowances to the settlor himself, to his mother, to his first wife, and to his daughter, providing also for an annual subscription to a school. Certain property was also definitely charged for the payment of Government revenue, and for the costs of repairs to the family house. At some time after executing this document, Ganesh Prasad Narain Sahi married a third wife, by whom he had a son who is now the *shebait* of the endowments which have been mentioned above. After the death of Ganesh Prasad the Court of Wards took charge of the property of *Musammat* Saraswati and in due course the mortgage of 1913 was redeemed by the Court. The suit with which we are concerned was then instituted in order to enforce the charge on the endowed property, which had been created by the operation of s 95, Transfer of Property Act, (as the section stood before the recent amendment), when the mortgage was redeemed by Saraswati Kuer. It was alleged by the defendant that the dedicated property was not liable on the ground that the dedication had been actually made before the execution of the mortgage, but on this point the decision of the Subordinate Judge was in favour of the plaintiff. It was also suggested that *Musammat* Saraswati Kuer stood in some way or other in the shoes of the mortgagor, so that the redemption of the mortgage on her behalf was equivalent to redemption by the mortgagor himself which would create no charge on any property

not then in his possession. It was also suggested that the suit was barred by limitation. The Subordinate Judge ascertained the value of the dedicated property from the road cess returns, from which it appears that the value is something less than that stated in the plaint. But on the valuation as he found, he decreed the plaintiff's suit, allowing interest at six per cent. on the amount paid for redemption treating the plaintiff as being entitled to interest on the instalments paid from the date of the first instalment. The defendant appeals from that decision.

Mr. S. N. Ray on behalf of the appellant suggests in the first place that the deed of July 16, 1914, constituted *Musammat* Saraswati Kuer a trustee of the mortgagor, so that the redemption on her behalf should be regarded as payment by the mortgagor of a personal debt which he had undertaken to pay. He argues in the second place that the dedicated property had been dedicated before the execution of the mortgage, so that it could not be properly hypothecated by Ganesh Prasad Narain Sahi, and no charge on it could be created when the mortgage was redeemed by the holder of another portion of the mortgaged property. He argues also that the suit should be regarded as barred by limitation; and that in any event interest ought not to have been awarded on the amount decreed for any period antecedent to the date of the institution of the suit. On behalf of the plaintiff a cross-objection has been preferred, claiming interest from the date of the payment of the first instalment at the rate specified in the mortgage bond.

The deed of gift, or settlement, of July 16, 1914, conveyed a portion of the mortgaged property to *Srimati* Saraswati Kuer for life with remainder to any sons which might be born to the settlor. The deed recites that the property has been given to Saraswati Kuer who is placed in possession and occupation thereof instead of Ganesh Prasad Narain Sahi; she is to remove his name from the Government registers and substitute her name; but Mr. S. N. Ray suggests that the directions that the property shall be charged for certain purposes amount to such directions regarding the expenditure of the income as to take Saraswati Kuer out of the category of a life tenant and to make her merely a trustee or managing agent for Ganesh Prasad Narain Sahi. No such inference can be drawn from the charges created for the maintenance of other members of the family, or for payment of the Government demands. For the rest the deed directs that:

> "the pay of the servants shall be disbursed out of the balance of the income of the said properties left after payment of the aforesaid annual and monthly amounts and Government demands; and the balance then left shall be spent by her in meeting her personal and diet expenses and in performing necessary ceremonies in connection with my family which should not also be extravagant and improper."

Mr. S. N. Ray suggests that by these provisions Ganesh Prasad Narain Sahi assumes complete control of the income of the property of which he makes a settlement, and that in consequence Saraswati Kuer should be regarded as in some way or other standing in his shoes. But this deed can in my judgment be read as nothing more than a deed creating a tenancy for life, subject to certain charges which are specified. The direction that the lady's living expenses, and expenses to be incurred on account of ceremonies to be performed in connection with the family should not be extravagant or improper is from the legal point of view mere surplusage, and expression of the desire of the donor which could not be enforced, which does not in any way limit the powers of Saraswati Kuer in dealing with the income. No right to alienation is given by the deed but Saraswati Kuer is made a tenant for life; and subject to the charges created, she has complete discretion as to how she will deal with the income. Indeed where the donor has entered into such details in the expression of his intentions regarding the expenditure of the income of the property, the omission of any mention of the mortgage deed would imply that he did not intend that this portion of the property should be charged with the whole of that debt. However, that may be, the property is not so charged by the deed, and it cannot be said that by this deed Saraswati Kuer is made in any sense the trustee of the donor.

On the question of fact some attempt was made to prove at the trial that there had been a formal dedication before the date of the mortgage, by the evidence of two witnesses on behalf of the defendant; but it was proved by the evidence of Lachmi Tewari on behalf of the plaintiff that this oral dedication had been made in October 1913, after the date of the mortgage. The learned Subordinate Judge has believed the evidence of

Lachmi Tewari in preference to that of the evidence given on behalf of the defendant; and his view of the effect of this evidence must be accepted. In the deed of gift there is vague mention of the fact that the donor had already dedicated mentally the property which he formally dedicates by the deed; but although the provisions of s. 123, Transfer of Property Act, may have been somewhat modified by judicial decisions, (whittling them down, in our opinion, in a manner not contemplated when the Act was made law), it could never have been suggested that a mere unexpressed intention to dedicate certain property would have the effect of a formal dedication, so as to invalidate the transfer of that property to a third person made after the idea had been formed in the mind of the transferor. Indeed, although it may be true that in spite of the provisions of s. 123, Transfer Property Act, such a dedication may be effective without an instrument in writing, there must be a real dedication, whereby the property is completely given away and the owner completely divests himself of his ownership, *Harihar Prasad* v. *Sri Gurugranth Sahib* (1).

The position thus is, that Ganesh Prasad Narain Sahi mortgaged this property, part of which he subsequently dedicated for the two endowments, and part of which he subsequently settled on his family. The whole mortgage, has been redeemed by the tenant for life of the settled estate; and by the provisions of s. 95, Transfer of Property Act (as it stood before the amendment made in 1929), a charge has been created on the mortgaged property in possession of the trustees of the endowments for their proportionate share of the mortgage debt. Mr. S. N. Ray has drawn attention to the fact that there was formerly some difference of opinion as to the effect of s. 95, Transfer of Property Act; but I need here refer only to the decision in *Malik Ahmed Wali Khan* v. *Shamsi Jahan Begam* (2); decided by the Judicial Committee of the Privy Council on March 21, 1905.

The mortgage debt was satisfied by two payments, the first on January 8, 1921, and the second on April 1, 1926. The payment on January 8, 1921, may have given cause of action for a claim to contribution from the trustees of the endowment. Mr. S. N. Ray suggests that as no suit was instituted within three years from the recovery of this sum the claim should be regarded as barred by limitation. But the suit with which we are here concerned is definitely a suit to enforce the charge created by the redemption of the mortgage by the holder of a portion of the mortgaged property; and the right to enforce such a charge did not accrue until the whole mortgage debt had been paid off. It certainly cannot be held that limitation affecting the right to enforce the charge, began to run before the right had accrued; and the plaintiff was entitled to institute the suit at any time within twelve years after April 1, 1926.

In preparing his decree the Subordidate Judge has allowed interest on the amount which the defendant would have paid in 1921 when the first instalment was paid if he had then borne his proportionate share. Mr. S. N. Ray argues that no liability to pay interest on the amount paid by the co-mortgagor should be held to accrue until the whole amount of the mortgage debt is paid off, pointing out that the payment of the first instalment was in effect only payment of a portion of the plaintiff's own share of the mortgage debt. The learned Government Pleader on behalf of the plaintiff respondent asks for interest at the rate specified in the bond from the date of the first instalment. It appears to be clear that the effect of the old s. 95, Transfer of Property Act, was not to place the person claiming to enforce the charge completely in the position of the mortgagee in such a manner that he could enforce the terms of the mortgage deed against those mortgagors who had not borne their share in the redemption. He obtained a charge on the property but the question of what interest should be payable to the co-mortgagor paying the debts, on what amount, and from what date, is one at the discretion of the Court: and the plaintiff is not entitled to claim as a matter of right that interest should be calculated at the rate specified in the bond *Digamber Das* v. *Harendra Narayan Pande*, 5 Ind. Cas. 165 (3). The limited right of subrogation created by s. 95, Transfer of Property Act, must not be treated as if in fact it entitled the co-mortgagor to enforce the terms of the mortgage bond and in the present case I consider that interest

(1) 128 Ind. Cas. 791; A I R 1930 Pat. 610; 11 P L T 653.

(2) 28 A 432; 33 I A 81; 8 Sar. 918; 3 A L J 360; 10 C W N 626; 3 C L J 481; 1 M L T 143; 8 Bom. L R 397; 16 M L J 269 (P C).

(3) 5 Ind. Cas. 165.

should be allowed at the rate of six per cent. per annum only from the date at which the plaintiff became entitled to the charge which is now to be enforced.

I would accordingly amend the decree of the Subordinate Judge by disallowing interest for the period from January 28, 1921, to April 1, 1926. In other respects I would affirm the decision of the lower Court and dismiss this appeal with costs. Hearing fee in this Court may be assessed at Rs. 250. The cross-objection is dismissed.

Agarwala, J.—I agree.

Decree modified and
N. *cross-objections dismissed.*

OUDH CHIEF COURT
Full Bench.

Execution of Decree Appeals Nos. 54 and 65 of 1933
March 27, 1935
KING, C. J., SRIVASTAVA AND ZIA-UL-HASAN, JJ.

SHEO BEHARI LAL—DECREE-HOLDER—APPELLANT
versus
MAKRAND SINGH AND OTHERS—JUDGMENT-DEBTORS - RESPONDENTS

Execution—Execution Court, when can refuse to execute decree—Decree a nullity—Whether sufficient ground—Decree in terms of compromise against persons, proceedings against whom were ex parte *—Question of want of jurisdiction or of decree being nullity if arises.*

An execution Court can refuse to execute a decree, on the ground of its being a nullity in the sense of its not being a decree at all in the eye of law either for want of inherent jurisdiction to pass it or for any other reason. [p. 762, col. 2.]

[Case-law discussed.]

M, B and *T* executed a mortgage deed in favour of *S*. Subsequently *B* alone executed a deed of further charge in favour of *S* who brought a suit for sale on the mortgage and the deed of further charge and impleaded *V, J* and *C* as subsequent mortgagees. The parties entered into a compromise and a preliminary decree for sale was passed in terms of it. *S* then made an application for a final decree for sale against the six defendants. Though all defendants were served, *B* alone appeared and as no objection was raised by him, a final decree was passed. Subsequently, *V* made an application to have the final decree set aside as he had not been served with notice of the application for final decree being passed. Notice of this application was issued to the decree-holder alone, but when the application came up for disposal, two of the other judgment-debtors, *C* and *J* also appeared besides the applicant and the decree-holder. The Judge was wrongly informed that the other judgment-debtors had been served, although as a matter of fact no notice had been sent to them. He, therefore, made a note in the proceedings that the other judgment-debtors were absent, though served, and proceeded *ex parte* against them. The application was granted and the final decree set aside. The same day, February 22, 1930, the plaintiff *S* and the three defendants who were present filed a fresh compromise, in which some variation was made as regards the order in which some portions of the mortgaged property were to be sold according to the terms of the first compromise. A final decree for sale was prepared in terms of the new compromise. Then *S* made an application for execution of the last-mentioned decree against all the judgment-debtors. Two of the mortgagors, objected to the execution on the ground that they were not bound by the decree as they were not parties to it:

Held, that the final decree passed on February 22, 1930, was not a nullity as against *M, B* and *T*, as the case was not one of the Court passing a decree against the mortgagors on the basis of a compromise to which they were not parties but merely one of a decree being passed in terms of the compromise against persons, proceedings against whom were *ex parte*. The defect was no more than one of an irregular exercise or improper assumption of jurisdiction. The mortgagors might have their remedy by means of proper proceedings against the irregularity complained of, but they could not in the circumstances treat the decree as a nullity. [p. 762, col. 2]

Ex. D. A. against the decree of the Subordinate Judge, Mohanlalganj, Lucknow, dated August 9, 1933.

Order of Reference to a Full Bench.

King, C. J. and Zia-ul-Hasan, J.—(*November* 2, 1934).—As the questions raised in these appeals are of great importance and involve the interpretation of the Full Bench case of this Court in *Ram Narain* v. *Sura Narain* (1), we refer the following questions of law to a Full Bench—

(1) Whether an execution Court can refuse to execute a decree only on the ground that the Court had no jurisdiction to pass it or whether it can refuse on the ground of the nullity of the decree for any other reason?

(2) Whether the final decree passed by the Court on February 22, 1930, in the present case is a nullity as against the respondents Nos. 1 to 3?

(3) If the answer to question No. 2 is in the affirmative, can the decree-holder proceed against the property of Jagannath, respondent No. 5?

Messrs. *Mohammad Ayub* and *Daya Kishan Seth*, for the Appellant.

Messrs. *H. Husain* and *Makund Behari Lal*, for the Respondents.

Judgment of the Full Bench

Srivastava, J.—(*March* 5, 1935.)—The facts of the case which has given rise to this reference are that on March 25, 1901, Makrand Singh, Bharat Singh and Thakur Din Singh, respondents Nos. 1 to 3,

(1) 147 Ind. Cas 1209; 11 O W N 169; A I R 1934 Oudh 75, 6 R O 368; 9 Luck 435.

executed a mortgage-deed in favour of the appellant Sheo Behari Lal. On June 15, 1915, Bharat Singh alone executed a deed of further charge in favour of the mortgagee. Sheo Behari Lal brought a suit for sale on the basis of the aforesaid mortgage and the deed of further charge and impleaded therein also Shiam Behari Vaish and Jagannath, respondents Nos. 4 and 5 and one Chandika as subsequent mortgagees. On December 18, 1926, the parties entered into a compromise and a preliminary decree for sale was passed in terms of it. On December 14, 1929, Sheo Behari Lal made an application for a final decree for sale against the six defendants. All the defendants were served with notice of this application but Bharat Singh alone appeared, and as no objection was raised by him, a final decree for sale was passed on January 11, 1930. On February 8, 1930, Shiam Behari made an application to have the final decree set aside on the ground that he had not been served with notice of the application for the final decree being passed. Notice of this application was issued to the decree-holder alone, but on February 22, 1930, when the application came up for disposal, two of the other judgment-debtors, namely Chandika and Jagannath also appeared besides the applicant Shiam Behari and the decree-holder Sheo Behari Lal. The learned Subordinate Judge was wrongly informed that the other judgment-debtors had been served, although as a matter of fact no notice had been sent to them. He, therefore, made a note in the proceedings that the other judgment-debtors were absent, though served, and proceeded *ex parte* against them. After hearing the arguments of the parties present, the Subordinate Judge granted the application of Shiam Behari and set aside the final decree, which was passed on January 11, 1930, and proceeded to re-hear the application of Sheo Behari Lal for the passing of a final decree for sale. The same day the plaintiff Sheo Behari and the three defendnts who were present filed a fresh compromise, in which some variation was made as regards the order in which some portions of the mortgaged property were to be sold according to the terms of the first compromise. A final decree for sale was prepared in terms of the new compromise. On February 20, 1933, Sheo Behari Lal made an application for execution of the last-mentioned decree against all the judgment-debtors. Two of the mortgagors, Makrand Singh and Bharat Singh, objected to the execution on the ground that they were not bound by the decree dated February 22, 1930, as they were no parties to it. They also pleaded that the said decree was fraudulent and collusive and that the application for execution was barred by time. The learned Subordinate Judge held that the decree dated February 22, 1930, was not binding on the objectors as they were no parties to the second compromise. He accordingly ordered the names of the three mortgagors, who had not signed the second compromise, to be struck off from the array of the judgment-debtors and ordered execution to proceed only against the three subsequent mortgagees who had entered into the compromise. The decree-holder, Sheo Behari Lal and one of the puisne mortgagees, Jagannath, preferred appeals against the order of the Subordinate Judge to this Court *inter alia*, on the ground that the mortgagors, respondents Nos. 1 to 3, could not challenge the final decree dated February 22, 1930, in execution proceedings. The Divisional Bench, which heard the appeal, being of opinion that the questions raised in the appeals were of great importance and involved interpretation of the Full Bench decision of this Court in *Ram Narain* v. *Suraj Narain* (1), referred the following questions of law to a Full Bench:—

(1) Whether an execution Court can refuse to execute a decree only on the ground that the Court had no jurisdiction to pass it or whether it can refuse on the ground of the nullity of the decree for any other reason?

(2) Whether the final decree passed by the Court on February 22, 1930, in the present case is a nullity as against the respondents Nos. 1 to 3?

(3) If the answer to question No. 2, is in the affirmative, can the decree-holder proceed against the property of Jagannath, respondent No. 5?

The main question propounded before the Full Bench as regards the circumstances in which an execution Court can question the validity of the decree is one of considerable difficulty which has given rise to a sharp conflict of opinion in the different High Courts in the country. The question came up for consideration not long ago before a Full Bench of this Court of which I was a member in *Ram Narain* v. *Suraj Narain* (1). The conclusion reached by me in that case was that the decree in question passed by the Munsif was a mere nullity because he lacked inherent juris-

diction to take cognizance of the matter and that in such a case the executing Court could refuse to execute it. I took care to add that I confined my decision to this ground. I am glad to avail myself of this opportunity to explain my position a little more fully. A decretal Court may be lacking in jurisdiction, territorial, pecuniary, personal or inherent to pass the decree. It is only when the lack of jurisdiction is such as to make the decree *coram non judice*, a mere nothing or what is not a decree at all in the eye of law, that it can be treated as a mere nullity and disregarded by the execution Court. Although such cases must, if at all, be very rare, yet if in any case it can be shown that a decree passed by a Court of competent jurisdiction was a nullity in the sense just stated by me, then I think it must be governed by the same principle and the execution Court ought to be able to disregard such decree also.

Section 21 of the Civil Procedure Code provides that a defect of want of territorial jurisdiction will not be entertained by any appellate or revisional Court, unless the objection was taken at the earliest possible opportunity and unless there has been a consequent failure of justice. It shows that the defect of lack of territorial jurisdiction, if any objection as regards it has not been taken as provided by that section, must be deemed to be cured for all purposes. It seems to follow that the execution Court cannot entertain such an objection in the execution proceedings. Similarly s. 11 of the Suits Valuation Act (VII of 1887) shows that a plea as regards lack of pecuniary jurisdiction can also be waived. Thus in my opinion a defect in the territorial or pecuniary jurisdiction, such as can be cured by s. 21 of the Code of Civil Procedure or s. 11 of the Suits Valuation Act, does not make the decree *ab initio* void and a nullity, so as to justify the execution Court going behind it. As regards the personal jurisdiction the most familiar instance is that of a case in which a decree is passed against a dead person. In such a case it needs no argument to say that the decree is not a decree at all in the eye of the law, and can be disregarded as a nullity on account of absolute lack both of personal and inherent jurisdiction, by any Court before which it is presented. I refrain from expressing any opinion as regards another class of cases in which the question of personal jurisdiction sometimes arises, namely the case of decrees against persons under a legal disability, as it is not necessary for me to do so in the present case. Cases of lack of inherent jurisdiction may be illustrated by the case of *Rabindranath Chakrabarti* v. *Jnanendra Mohan* (2), which was confirmed by their Lordships of the Judicial Committee in *Jnanendra Mohan* v. *Rabindra Nath* (3), a case under the Indian Arbitration Act in which the Statute did not give the Court any jurisdiction to pass a decree but authorised it only to order the award to be filed, and by the case, which formed the subject of reference to the Full Bench of this Court in *Ram Narain* v. *Suraj Narain* (1), in which a final decree for sale was passed by the Munsif of Bilgram, although the suit had been instituted and a preliminary decree passed by the Subordinate Judge of Hardoi and the case had never been transferred to the Munsif's Court.

In support of my view I might also point out that the Legislature in enacting O. XXI, r. 7, of the Civil Procedure Code (V of 1908) has omitted the words "or of the jurisdiction of the Court which passed it" which found place in the corresponding s. 225 of the Code of Civil Procedure (XIV of 1882). This omission appears to be a deliberate one and clearly manifests the intention that an execution Court is not to be allowed to question the jurisdiction of the Court which passed the decree. But as I have said before, a case in which the decree is an absolute nullity for lack of inherent jurisdiction to pass it, appears to stand on a different footing. Such a decree has no existence in law and can be ignored altogether. The view which I have expressed above appears to me to be the only reasonable view of the matter, because an execution Court is merely a hand-maid or a servant of the Court which passed the decree, and it would be opposed to sound principles to allow a servant to question the authority of the master, except of course in cases where the decree or order can be treated as non-existent or a mere nothing. I do not think it necessary to discuss the case law bearing on the subject because of the great divergence in the views expressed by the various High Courts and because it has been reviewed at length in the

(2) 136 Ind. Cas. 466; 58 C 1018; 35 C W N 537; Ind. Rul. (1932) Cal. 194; A I R 1932 Cal. 9.

(3) 142 Ind. Cas. 324; 60 I A 71; 60 C 670; A I R 1933 P C 61; 37 L W 327; (1933) M W N 178; Ind. Rul. (1933) P C 63; 35 Bom. L R 327; 37 C W N 401; (1933) A L J 243; 57 C L J 143; 64 M L J 341 (P C).

leading judgment in our Full Bench decision in *Ram Narain* v. *Suraj Narain* (1).

Turning now to the facts of the present case, the question is whether the decree dated February 22, 1930, can be regarded as an absolute nullity for any lack of inherent jurisdiction in the Court which passed it. It has properly been conceded by the learned Counsel for the respondents that there was no lack of inherent jurisdiction in the Subordinate Judge to pass the decree. It is, however, contended strongly that a compromise decree stands on the same footing as a contract, and as the mortgagors-respondents were no parties to the compromise, therefore, the compromise was absolutely void as against them and the decree passed on it is, therefore, to be treated as a mere nullity. No doubt there is ample authority for the proposition that a compromise decree is a creature of the agreement and merely carries out the terms of the agreement embodied in the compromise *Amrita Sundari Debi* v. *Seraj-ud-Din Ahmad* (4), but I am of opinion that even though the principle may be conceded, it cannot help the respondents in the present case. The decree in question is a subsisting decree and was passed by a duly constituted Court in a suit to which all the respondents were parties. The compromise in question was arrived at between the mortgagee plaintiff and the puisne mortgagees. The mortgagor though not parties to the compromise were properly parties to the litigation. No notice of the application for setting aside the previous decree was served on them, but the Court acted under the impression that they had been served with notice and, therefore, decided to proceed *ex parte* against them. It is not denied that if the order for *ex parte* proceedings had been regularly made, it would have been competent for the Court to pass a decree against the absent mortgagors on the same terms as were agreed to by the parties which were present in their compromise. It seems to me that there is no difference in principle between a case like the present one and a case in which a Court passes an order for *ex parte* proceedings, where the service has not been properly made. In either case it seems to me that there is no lack of jurisdiction in the Court passing the decree, but they are cases merely of an irregular exercise of jurisdiction. In other words, the view I take of the proceedings dated February 22, of the Subordinate Judge is that he did not treat the compromise as binding upon the mortgagors-respondents inspite of their not being parties to it, but merely passed a decree *ex parte* against them in the same terms as were embodied in the compromise entered into by other parties. Although the ordinary practice is to send notice to the mortgagors when an application is made for a final decree for sale, yet it should be noted that O. XXXIV, r. 5, does not prescribe such a notice being sent. It was so held also by the Allahabad High Court in a case of foreclosure, *Mahadeo Pande* v. *Somnath Pande* (5). Obviously the mortgagee had as against the mortgagors a right to sell the whole and every portion of the mortgaged property. By means of the compromise the puisne mortgagees, who were interested only in certain portions of the mortgaged property agreed to portions of the mortgaged property being sold in a particular order which was agreed between them and the decree-holder. If the proceedings *ex parte* had been regularly taken against the mortgagors no legitimate exception could, under the circumstances, have been taken against the Court passing an *ex parte* decree against the mortgagors in terms of the compromise made by the other parties. The case, therefore, in my opinion is not one of the Court passing a decree against the mortgagors on the basis of a compromise to which they were not parties but merely one of a decree being passed in terms of the compromise against persons, proceedings against whom were *ex parte*. In this view of the matter no question of want of jurisdiction or of the decree being a nullity arises. The defect is no more than one of an irregular exercise or improper assumption of jurisdiction. The mortgagors may have their remedy by means of proper proceedings against the irregularity complained of, but they cannot in the circumstances treat the decree as a nullity.

For the above reasons my answers to the questions referred to the Full Bench are as follows:

(1) That an execution Court can refuse to execute a decree on the ground of its being a nullity in the sense of its not being a decree at all in the eye of law either for want of inherent jurisdiction to pass it or for any other reason.

(2) The final decree passed on February 22, 1930, is not a nullity as against the respondents Nos. 1 to 3.

(4) 29 Ind. Cas. 156; 19 O W N 565.

(5) 97 Ind. Cas. 211; 43 A 823; 21 A L J 914; A I R 1926 All. 757.

(3) In view of the answer given to question No. 2, this question does not arise.

King, C. J.—(*March* 9, 1935).—I agree. The question has been very fully discussed by my learned brother and I have nothing to add.

Zia-ul-Hasan.—(*March* 11, 1935).—I also agree.

King, C. J. and Zia-ul-Hasan, J.—(*March* 27, 1935).—In view of the opinion expressed by the Full Bench this appeal must succeed. The appeal is, therefore, decreed with costs as against the contesting respondents.

N. *Appeal allowed.*

BOMBAY HIGH COURT

Second Civil Appeal No. 196 of 1929
March 2, 1934
N. J. WADIA, J.

SECRETARY OF STATE—APPELLANT
versus
RAJARAM PARASHRAM DESHPANDE
—RESPONDENT

Bombay Hereditary Offices Act (III of 1874), s 15—Sanad *to* inamdar *by which holder agreed to pay fixed annual* judi *in lieu of service*—Judi *arrived at after deducting assessment on* shet-sanadis *lands*—*Discontinuance of service of* shet-sanadis *and full assessment imposed*—*Held, grant to* shet-sanadis *was* kadim—Inamdar, *if estopped from contending that it was not* kadim—*Estoppel*—*Civil Procedure Code (Act V of 1908), s. 100*—*Question, whether* sanadi inam *lands are* kadim *or* jadid *is one of law*—Inam.

In 1902 a *sanad* was granted to the *inamdar* under s. 15, Bombay Hereditary Offices Act (III of 1874), by which the holders agreed to pay to Government a fixed annual *judi* in lieu of service. There were certain lands granted as *inam* in the village for *shet-sanadi* service. The *judi* was arrived at after deducting the assessment of certain lands including the *shet-sanadi* lands, which were held in *inam* by village servants. In 1920 Government ordered a discontinuance of the service of *shet-sanadis* and imposed full assessments on the lands. The respondent contended that the *sanadi inam* lands had been given by his ancestors to the *sanadis* for the performance of Police duties, that they were *jadid inams*, and that he, and not the Government, was entitled to receive the full assessment which had been imposed on the lands after the discontinuance of service. Government contended that the *sanadi* lands were *kadim inams* and not *jadid* and that the *inamdar* was not entitled to the full assessment levied on the lands;

Held, the agreement between the parties evidenced by the *sanad* was based upon the assumption that the *sanadi inam* lands were *kadim inam* and the assessment of *judi* was made on that assumption, and that the respondent was not entitled to the assessment. The respondent *inamdar* had by his conduct led Government to believe that he accepted this assumption. By giving Government this impression and allowing them to act upon it, he obtained the benefit of a lower *judi* in perpetuity. The fact which he led Government to believe and act upon was that he agreed to the *sanadi inam* lands being treated as *kadim inam* and hence he could not now be allowed to contend that they are not *kadim*. [p. 768, col. 1.]

The question whether the *sanadi inam* lands were *kadim inam* or *jadid inam* is one, the determination of which depends on the legal effect of certain facts which have been proved by the evidence in the case. Consequently, it is a question of law, into which the High Court is entitled to go, in second appeal. [p. 764, col. 2.]

S. C. A. from the decision of the District Judge, Satara, in Appeal No. 398 of 1927.

Mr. *B. G. Rao*, for the Appellant.

Messrs. *H. C. Coyajee* and *J. G. Rele*, for the Respondent No. 1.

Judgment.—Respondent No. 1, Rajaram Parashram Deshpande is the *inamdar* of the village of Padamale in the Tasgaon *Taluka* of the Satara District. The village was originally granted to his ancestors in Deshpande *inam* by the Mahratta Government in the year 1739 the *inam* being a grant of the soil of the village and conferring full proprietary rights exclusive of *hakdars* and *inamdars*. The *inam* was continued by the British Government. In 1902 a *sanad* was granted to the *inamdar* under s. 15, Bombay Hereditary Offices Act (Bom. III of 1874), by which the holders agreed to pay to Government a fixed annual *judi* in lieu of service. There were certain lands granted as *inam* in the village for *shet-sanadi* service. In 1920 Government ordered a discontinuance of the service of *shet-sanadis* and imposed full assessments on the lands. The respondent contended that the *sanadi inam* lands had been given by his ancestors to the *sanadis* for the performance of Police duties that they were *jadid inams* and that he and not the Government was entitled to receive the full assessment which had been imposed on the lands after the discontinuance of service. Government contended that the *sanadi* lands were *kadim inams* and not *jadid* and that the *inamdar* was not entitled to the full assessment levied on the lands. The respondent *inamdar* thereupon gave a notice to Government in accordance with the provisions of s. 80, Civil Procedure Code, and filed a suit for a declaration that he was entitled to the assessment on the lands for an injunction restraining the Secretary of State from recovering the assessment and for recovering from him Rs. 300 in respect of the assessment wrongfully recovered by him for five years.

The Assistant Judge of Satara by whom the suit was tired dismissed it on the ground that the *shet-sanadi* lands were *kadim inam* lands and not *jadid* and that

the plaintiff *inamdar* was estopped by his conduct from contending that the *inams* were *jadid*. On appeal the District Judge of Satara held that the *shet sanadi* lands were *jadid inam* and not *kadim* and that the plaintiff was not estopped from contending that they were not *kadim inams*. He, therefore, decreed the plaintiff's suit with costs. Against this decree Government have filed the present appeal.

The issues for determination are whether the grant of lands to the *shet sanadis* was a *kadim* or a *jadid inam* and whether respondent No. 1 was estopped from contending that the grant was not a *kadim inam*. On Issue No. 1 the lower Appellate Court had found that the grant was a *jadid inam*. Mr. Coyajee for respondent No. 1 contends that the finding is one of fact and that this Court is, therefore, precluded in second appeal from going behind the finding. Questions of law and of fact are not always easy to disentangle. In the present case the contention raised on behalf of the Secretary of State that the *shet-sanadi inam* was a *kadim inam* was based on certain documents, *viz.*, the *sanad* (Ex. 21) granted to the *inamdar* by the British Government in 1902, the *tharavbands* of the village for the yeer 1856-57 1861-62 and 1863-64 (Exs. 56, 57 and 58) and the entries relating to this village in the Register of Alienated Villages (Ex. 71). The *sanad* (Ex. 21) mentions the assessment on which the *judi* for the village was fixed. The preamble refers to the entries relating to the village in the Government accounts of the year 1886-87 and says that as the holders of the village have agreed to pay to Government a fixed annual sum in lieu of service it is declared that the said lands and cash allowances shall be continued hereditary by the British Government on condition that the holders and their heirs shall continue faithful subjects of the British Government and shall pay certain fixed yearly dues mentioned in the *sanad*.

In consideration of the fulfilment of these conditions, the lands and cash allowances were to be continued to them by Government without demand of service and without increase of land tax over the fixed amounts. The *judi* of Rs. 821-10-0 which was fixed for the village of Padamale was the amount shown in the Alienation Register of 1886-87, a copy of which has been produced (Ex. 71). This document shows that in arriving at the amount of Rs. 821-10-0, a sum of 568-4-0, which was the assessment on an area of 83 *bighas*, 19¼ *pands* which was granted in *inam* to *Patils Kulkarnis* and other village servants (including *shet sanadis*), was deducted from the total assessment of the village and one fourth of the balance of assessment so arrived at was fixed as the *judi*. The fact that the *judi* has been so arrived at, after deducting the assessment of certain lands including the *shet sanadi* lands which were held in *inam* by village servants is not disputed. The question, therefore, whether the *sanadi inam* lands are *kadim inam* or *jadid inam* is not entirely one of fact. The decision depends upon the right construction to be put upon the *sanad* (Ex. 21) and the village accounts as shown in the Alienation Register (Ex. 71) to which the preamble of the *sanad* refers and upon which the calculation of the *judi* was based. The question is not whether the *sanad* and the accounts prove that the *shet-sanadi inam* lands were *kadim* or *jadid* but what is the legal inference to be drawn from the fact proved by these two documents *viz.*, that the assessment of the *sanadi inam* lands was deducted from the total assessment of the village for arriving at the figure on which *judi* was calculated. This is a question of the proper inference to be drawn from a certain fact which had been proved, and such a question is, in my opinion one more of law than of fact. In *Dhanna Mal* v. *Moti Sagar* (1), where the question in issue was whether a certain tenancy was a permanent one or not, their Lordships of the Privy Council said (p. 185*):

"It is clear, however, that the proper effect of a proved fact is a question of law and the question whether a tenancy is permanent or precarious seems to them in a case like the present to be a legal inference from facts and not itself a question of fact."

The question of the interpretation of s. 109, Civil Procedure Code, was again considered by their Lordships of the Privy Council in *Wali Muhammad* v. *Muhammad Baksh* (2). Their Lordships said (p. 91†)

"No doubt questions of law and fact are often difficult to disentangle but the following propositions are clearly established;

1. There is no jurisdiction to entertain a second

(1) 101 Ind. Cas 355; A I R 1927 P C 102; 54 I A 178; 8 Lah. 573; 52 M L J 663; 29 Bom. L R 870; 31 C W N 677; (1927) M W N 481 (P C).

(2) 122 Ind. Cas. 316; A I R 1930 P C 91; 57 I A 86; 11 Lah. 199; (1930) A L J 292; Ind. Rul. (1930) P C 124; 31 P L R 145; 31 L W 321; 32 Bom. L R 380; 51 C L J 518; 49 M L J 53 (P C).

* Page of 54 I. A.—[*Ed.*]

†Page of 57 I. A.—[*Ed.*].

appeal on the ground of erroneous finding of facts, however, gross the error may seem to be; ... ...
(2) The proper legal effect of a proved fact is essentially a question of law but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact. (3) Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights but were really historical materials, have to be construed for the purpose of deciding the question ....."

Mr. Coyajee has contended that the present case comes within the third proposition laid down above. According to him the question whether the *sanadi inam* lands were *kadim inam* or *jadid inam* was one of fact and it does not become a question of law merely because documents like the *tharavbands* and the Alienation Register, which are not in themselves instruments of title, have to be referred to and construed for the purpose of arriving at a finding I am unable to accept this reasoning. The question appears to me essentially to be one of the proper inference to be drawn from certain facts which are proved by these documents and by the *sanad* itself, *viz.*, the amount of the *judi* and the manner in which that amount has been arrived at. If so, the case falls under the second proposition laid down by their Lordships of the Privy Council. It is a question of the proper legal effect of a proved fact, and as such is a question of law.

In another case, *Amiruddi Gazi* v. *Makhan Lal* (3) their Lordships of the Privy Council held that the finding of the District Judge, based upon the documents, as to whether the particular property in suit passed to the auction-purchaser, was not, in the true legal sense, a finding of fact at all and was not therefore final. As the whole of the relevant evidence in the matter was documentary, and the documents themselves constituted the foundation of the rights claimed by the plaintiffs, the right construction of these documents was a question of law which the High Court was not precluded from considering in second appeal. The question, whether the *sandi inam* lands were *kadim inam* or *jadid inam*, is one the determination of which depends on the legal effect of certain facts which have been proved by the evidence in this case. It is, therefore, a question of law and this Court is entitled in second appeal to go into it.

(3) 121 Ind. Cas. 514; A I R 1930 P C 83; Ind. Rul. (1930) P C 50; 34 C W N 285; 32 Bom. L R 520; 51 C L J 162; 58 M L J 218; 31 L W 561 (P C.)

Coming now to the evidence, the case for the appellant is based on certain entries in the three *tharavbands* (Exs. 56, 57 and 58), the Alienation Register (Ex. 71) and the *sanad* (Ex. 21). The first of the *tharavbands* of the year 1856-57 has been signed by one of the *inamdars* and the other two *tharavbands* of the years 1861-62 and 1863-64 are signed only by the village officers and do not bear the signatures of any of the *inamdars*. The genuineness of the *tharavbands* has, however, not been disputed. The *tharavbands* of the years 1856-57 (Ex. 56) shows that a sum of Rs. 551 was deducted from the assessment due to the *inamdars* on account of "*inam* lands with other persons". Under this heading were included the service *inam* lands held by the *Patils, Kulkarnis, chougulas* and *shet-sanadis*. The *shet-sanadi* lands were shown in the names of three persons, each holding three *bighas*, their total assessment being Rs. 54-9-8. In the *tharavbands* of 1861-62 (Ex. 57) and of 1862-63 (Ex. 58) the same land measuring nine *bighas* and assessed at Rs. 54-9-8 are clearly shown under the heading of

"*Kadim inam* lands as settled in accordance with the certificate received from Meherban Assistant Revenue Commissioner Saheb Bahadur."

The *tharavband* of the year 1861-62 contains a separate heading

"Details in respect of persons enjoying *inams* granted out of *Jadid* by the *Inamdars* of the Village."

Under this heading various persons are shown; but the *shet-sanadi inam* lands do not appear here. It is clear from these entries in the three *tharavbands* that from as early as 1856-57 the *shet-sanadi* lands were definitely shown in the Village Accounts as *kadim inam* lands. The Register of Alienated Villages for the year 1886-87 (Ex. 71) shows the *sanadi inam* lands measuring nine *bighas* under the heading of "Village servants useful to Government" and under the heading "Duration of tenure", the remark against them is "So long as services required by Government." The register also shows that the *judi* of Rs. 821-10-0 fixed for the village was arrived at after deducting from the total assessment of the village the assessment on the *inam* lands granted to various village servants useful to the community and to Government, including *shet-sanadis*. These documents establish clearly that the *shet-sanadi* lands have been treated in the village records and in the fixing of *judi* at the time of the issue of the *sanad* of 1902 as *kadim inam* lands.

The plaintiff *inamdar* relied on four documents (Exs. 52, 50, 51 and 66) as showing that the lands were *Jadid* and not *Kadim inam*. Ex. 52 is a copy of the accounts of the village of the year 1833 produced before the Inam Commissioner by the plaintiff's ancestor in 1852. This statement refers to four *bighas* of land as *sanadi pyady*.

Mr. Coyajee for respondents No. 1 has frankly admitted that this document does not really throw much light on the question. The learned District Judge in dealing withit says that it appears that four *bighas* of land mentioned as *sanadi pyady* in it had reverted to the *inamdars*. I find nothing whatever in the document itself or in the other evidence to support this inference. The document at least shows that even as early as 1833 there were some *sanadi inam* lands. Whether they were *Kadim* or *Jadid inam* does not appear from it.

The next two documents (Exs. 50 and 51) are statements made on behalf of the three *inamdars* of the village by their *Mukhtyars* before the Inam Commissioner in 1852. They give details of the *kadim inam* lands of the village. In the list of such lands the *shet-sanadi inams* are not mentioned. They also give a list of the *Jadid inam* lands given by them and their ancestors subsequent to the grant of the village to them. In this list nine *bighas* are shown as *shet-sanadi inams* in the names of the same three persons who are mentioned in the *tharavband* of 1856-57. Exhibit 66 is an extract from a Barnishi Register which shows that in 1861 the Settlement Officer, Southern Division, wrote to the Collector of Belgaum to say that the descriptive roll of the lands of Padamale village prior to its being granted in *inam* was not to be found in his office, but that in a written statement submitted to him by the *inamdar* the *kadim* lands of the village were mentioned in detail. He enclosed with his letter a copy of this statement. The copy so sent was a copy of Ex. 51. He recommended that the lands mentioned in the list as *kadim* should be treated as *kadim*.

All that these documents produced by the *inamdar* show is that in 1852 the *inamdars* made statements before the Settlement Officer in which they showed the *shet-sanadi inam* lands as *jadid*, and that the Settlement Officer recommended to the Collector in 1861 that this statement should be accepted. It is clear, however, from the *tharavbands* of 1861-62 and 1862-63 that the recommendation of the Settlement Officer was not accepted, and that under express orders from the Assistant Commissioner the *sanadi inam* lands were treated as *kadim*. In their statement (Ex. 50) made before the settlement officer in 1852, the *inamdars* had shown certain other *inams* also as *jadid*, *viz.*, Rs. 52-15-9 *Dharmadaya Sarva inam* and Rs. 56-4-0 *sarva inam* to Piraji *bin* Appaji Patil. In the *tharavband* of 1861-62 these *inams* are shown as *jadid*. The learned District Judge says in connection with this that as two out of the three *inams* claimed as *jadid* by the *inamdars* were treated as *jadid* in the *tharavband*, there was no reason to suppose that the *inamdar's* statement that the *inam* to the *shet-sanadis* was also *jadid* was not correct. The inference appears to me to be absolutely unwarranted. The fact that the *inamdar's* claims with regard to two of the *jadid inams* were accepted, and that with regard to the *shet-sanadi inams* specific orders were passed by the Assistant Commissioner directing that they should be entered as *kadim inams*, in spite of the recommendation of the Settlement Officer in 1861 that the lands should be treated as *jadid*, would, on the contrary, warrant the inferenee that the treatment of the *shet-sanadi* lands as *kadim* was the result of an inquiry in which the *inamdar's* claim was overruled. The two *tharavbands* of the years 1861-62 and 1862-63 prove clearly that the lands were treated as *kadim inam* lands. The same fact appears from the Alienation Register of 1886-87, and it is on the basis that the *shet-sanadi inam* lands were *kadim* that their assessment was deducted from the total assessment of the village when calculating the *judi* which was fixed in the *sanad* granted to the *inamdar* in 1902. Mere statements made by the *inamdar's* ancestors in 1852 which were clearly not admitted by the Revenue Authorities, cannot be of any use in proving that the *sanadi inam* lands were *jadid*. The entry of these lands as *kadim* in the village records of 1861-62 and 1862-63 was evidently acquiesced in by the *inamdars* and was taken as the basis of the settlement arrived at by the *inamdars* and the Government in 1902 when the *sanad* was issued.

It has been argued that as the *tharavbands* of the years 1861-62 and 1862-63 do not bear the signatures of any of the *inamdars*, it cannot be assumed that they were aware of the entries made. It appears to me that the facts of the case cannot justify one in holding that the

inamdars could possibly have remained ignorant of the entries made in the accounts of their own village. These entries were not made in one year only. They appear in the two *tharavbands* and in the Alienation Register. The question of the nature of these *inams* must again have been considered by both the *inamdars* and the Revenue Authorities in 1902, when the commutation of the *watan* was effected and the *sanad* (Ex. 21) was granted. The commutation has been made under s. 15, Hereditary Offices Act (Bom. III of 1874). Under that section the Collector may, with the consent of the holder of a *watan*, given in writing, relieve him and his heirs and successors in perpetuity of their liability to perform service upon such conditions, whether consistent with the provisions of the Act or not, as may be agreed upon by the Collector and such holder. Clause 3 of the section provides that every settlement made or confirmed under this section shall be binding upon both Government and the holder of the *watan* and his heirs and successors. The *sanad* must therefore have been issued with the full consent of the *inamdars*, and after a full consideration of the details relating to the *inam* since both parties knew that they were binding themselves permanently by the terms of the commutation agreement.

In my opinion, therefore, the finding of the lower Appellate Court that the *shet-sanadi inams* were *jadid* and not *Kadim* is not a correct inference from the facts proved by the documents which have been adduced in evidence by the parties. The *tharavbands* and the Alienation Register prove satisfactorily that the *shet-sanadi* lands were *kadim inam* lands and that in working out the *judi* which was permanently fixed in the *sanad* of 1902 these lands were treated as *Kadim*. The next question is whether the respondent *inamdar* was estopped from contending that the lands were not *Kadim inam*. I have already referred to the fact that the *judi* which was fixed in 1902, and which by the terms of the *sanad* was permanently fixed, was the *judi* shown as due from the *inamdar* in the Alienation Register of 1886-87. In calculating that *judi* the assessment of the *shet-sanadi inam* lands was deducted from the total assessment of the village. The *inamdars* accepted the settlement by which the assessment of the *sanadi inam* lands was deducted to their benefit for the purpose of fixing the *judi*. I am unable to agree with the view taken by the learned District Judge that it would be unfair to the *inamdar* to assume that the *shet-sanadi inam* was treated as *kadim inam* to the knowledge of the *inamdar* in the offer and acceptance of the Gordon Settlement.

The commutation was based on the consent of the *inamdars* given in writing, and it is, I think, a legitimate presumption to make that both sides were fully aware of the basis upon which the settlement was arrived at especially when, as in this case, we find that the facts which were accepted as the basis of the settlement had been mentioned in the accounts of the village for forty years prior to the settlement. The respondent *inamdar* by entering into this settlement obtained the benefit of a lower amount of *judi* in perpetuity. That amount, which was one-fourth of assessment of the village, was fixed on the assumption that the *inamdar* was not entitled to the assessment of the *shet-sanadi inam* lands. By now claiming the assessment of these lands the *inamdar* is trying to increase the assessment to which he is entitled without giving up the benefit of the lower *judi* which has been fixed once and for all, and which Government, under the terms of the *sanad* and under s. 15 of the Bombay Hereditary Offices Act, cannot increase. He claims the benefit of the lower *judi* while repudiating the basis on which that *judi* was arrived at. It was argued by Mr. Coyajee for respondent No. 1 that even if it is assumed that the *judi* fixed in the *sanad* was based on the assumption that the *shet-sanadi inam* lands were *kadim*, and that the assessment on them was not to be taken into account in calculating the *judi*, there is nothing to show that the action of Government in treating the *shet-sanadi* lands as *kadim inam* and omitting them from consideration when calculating the *judi* was due to any representation made by the *inamdar*. On the contrary it appears that prior to 1852 at least the *inamdars* had been contending that the *shet-sanadi inam* lands were *jadid*. The *sanad*, however, was granted as the result of a commutation agreement voluntarily entered into by the *inamdar*. In that commutation the *inamdar* must be taken to have agreed that the *shet-sanadi inam* lands should be taken as *kadim* and be omitted from calculation when fixing the *judi* to which he was liable. If at that time he had refused to allow the *shet-sanadi inam* lands to be treated as *kadim*, and if this contention had been accepted

by Government, he would have been held liable to a higher amount of *judi*. He had, by his act in agreeing to the terms of that commutation, led Government to believe that the *sanadi inam* lands were *kadim*, and induced them to fix a lower amount of *judi* than they would have fixed if those lands had been treated as *jadid*. He cannot now be allowed to repudiate the agreement on the basis on which the *judi* was fixed to his advantage.

Mr. Coyajee for respondent No. 1 has referred to the ruling of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (4) in support of his contention that s. 115, Indian Evidence Act, does not apply to a case where a statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement, and that there can be no estoppel where the truth of the matter is known to both parties. The facts of that case, however, were different. In that case one Brahmo Dutt had taken a mortgage from one Dharmodas Ghose. It was found that Brahmo Dutt knew at the time that Dharmodas Ghose was a minor. In order to safeguard himself, Brahmo Dutt had taken a declaration from the minor that he was of age at the time. On a suit by the minor praying for a declaration that the mortgage entered into by him was void and inoperative owing to his being under age at the time, Brahmo Dutt contended *inter alia* that the minor's declaration as to his age was fraudulently made to deceive the defendant and disentitled the minor to any relief. Their Lordships on these facts held that there could be no estoppel in this case where the statement of the minor had been made to a person who knew the real facts and who had not been misled by the untrue statement. In the present case there is no question of any untrue statement. The agreement between the parties evidenced by the *sanad* was based upon the assumption that the *sanadi inam* lands were *kadim inam*. The respondent *inamdar* had by his conduct led Government to believe that he accepted this assumption. By giving Government this impression and allowing them to act upon it, he obtained the benefit of a lower *judi* in perpetuity. The fact which he led Government to believe and act upon was that he agreed to the *sanadi inam* lands being treated as *kadim inam*. He cannot now be allowed to contend that they are not *kadim*. In *Sarat Chunder Dey* v. *Gopal Chunder Lala* (5), their Lordships of the Privy Council in dealing with the question of estoppel said (p. 215*):

"The learned Counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel, and their Lordships entirely adopt that view. The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it."

Judged by this principle the action of the respondent *inamdar* in agreeing as he did to the terms of the *sanad* of 1902, which was based on the assumption that the *sanadi* lands were *kadim inam*, clearly estops him from now contending that they were not *kadim inam*. The ruling in *Secretary of State* v. *Indoorai* (6), on which the learned Assistant Government Pleader on behalf of the appellant has relied, is, in my opinion, applicable to the present case. The facts in that case were very similar. The plaintiffs, who were *inamdars* of certain villages, paid a quit rent to Government at the rate of two annas in a rupee of the gross rental after deducting certain cash allowances for annual expenses to be incurred in the villages. The amounts for such expenses were settled in 1886 and Alienation Registers were made according to this settlement. In 1888 *sanads* were prepared in which the cash allowances were mentioned under the heading—"Alienations more ancient than the grant." The Government decided that the cash allowances should be disbursed in the villages by their Officers and not by the *inamdars* and that the allowances should not be paid to the *inamdars*. The *inamdars* were served with notices to refund the amounts which they had received since 1914. They thereupon sued Government for a declaration and injunction. In dealing with the *inamdar's* contention

(4) 30 C 539; 30 I A 114; 8 Sar. 374; 5 Bom. L R 421; 7 C W N 441 (P C).

(5) 20 C 296; 19 I A 203; 6 Sar. 224 (P C).

(6) 98 Ind. Cas. 933; A I R 1927 Bom. 40; 50 B 698; 28 Bom. L R 1308.

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Fawcett, J., observed (p. 1318*):

"First of all, they have accepted the settlement by which these amounts are deducted to their benefit for the purpose of fixing the payment of quit rent to Government, and the reason for that deduction, as I have already mentioned is clearly that Government treated them as *kadim* allowances. Having accepted this settlement and obtained the benefit of that part of it which allows this deduction, they cannot, under a well-known legal principle, repudiate merely that part of the agreement that they do not like, namely, that Government should have a free hand in regard to the payment and management of these particular allowances. This cannot be allowed under the principle laid down by the House of Lords in the well-known case of *Crossley* v. *Dixon* (7) which has often been followed by this Court as, for instance, in *G. I. P. Ry.* v *Tamboli* (8)."

The respondent *inamdar*, in my opinion, is clearly estopped from contending that the *shet-sanadi* lands are not *kadim inam*. The plaintiff's suit must, therefore, fail. The appeal must be allowed. The decree of the lower Appellate Court is reversed and the plaintiff's suit dismissed with costs throughout.

D. *Appeal allowed.*

(7) (1863) 10 H L C 293; 32 L J Ch. 617; 11 W R 716; 8 L T 260.

(8) 96 Ind. Cas. 293; A I R 1926 Bom. 390; 50 B 284.

*Page of 28 Bom. L. R.—[*Ed.*]

PATNA HIGH COURT

Civil Appeals Nos. 225, 226 and 274 to 277 of 1931

September 5, 1933

COURTNEY-TERRELL, C. J. AND SAUNDERS, J.

CHANDMAL MARWARI AND OTHERS —APPELLANTS

versus

Raja SHIB PRASAD SINGH AND ANOTHER —RESPONDENTS

Jurisdiction—Suit for possession—Land situated in Sub-Division D—Suit filed in Court in M sitting at P—Establishment of Court at D in M District—Execution—Court in M sitting at P, if has jurisdiction to execute decree—Bengal, Agra and Assam Civil Courts Act (XII of 1887), s. 3—Costs—Privy Council—Whether carries interest—Interest.

A suit was instituted by the appellants in the year 1911 in the Court of the Subordinate Judge of *M* (who at that time sat at *P*), for possession of certain lands situated in the Sub-Division of *D* and for mesne profits. The suit was decreed, but an appeal by the respondents to the High Court was successful and the judgment of the High Court was affirmed by the Privy Council. The suit was accordingly dismissed with costs. In the month of February 1931, the respondents, the present decree-holders, applied for execution in the Court of the Subordinate Judge of *M* sitting at *P*. Since 1911, when the suit was begun, by an order of the Lieutenant-Governor of Bihar and Orissa in 1917, a Subordinate Judge's Court was established at *D* in the District of *M* and the local limits of his jurisdiction ceased to be included in the local limits of the Subordinate Judge of *P* from October 31, 1917. The respondents decree-holders sought to sell in execution lands situated in the Sub-Division of *P*, that is to say, outside the Sub-Division of *D*. The appellants judgment-debtors resisted the execution on the ground that the proper Court in which to institute an execution case was that of the Additional Subordinate Judge of *D* and argued that the Subordinate Judge sitting at *P* had no proper jurisdiction though it was admitted that the case might afterwards be transferred to him :

Held, that the effect of the Notification was not to transfer the jurisdiction of the Court sitting at *P* to the Court sitting at *D*, but to divide the jurisdiction of the Subordinate Judge in the District of *M*, and that the mere fact that for administrative purposes the Court of the Subordinate Judge was now divided between the Subordinate Judge and an Additional Subordinate Judge and that a certain class of business or an area was allotted to the Additional Subordinate Judge did not make the Court of the Subordinate Judge sitting at *P* any the less the Court of the Subordinate Judge of *M* nor did it prevent it from executing the decree. The decree-holder had always the right to apply as of course to the Court which passed the decree for its execution even if it be in respect of property outside the territorial jurisdiction of such Court and even if execution by such Court can be no more than execution by transmission to another Court. *Seeni Nadan* v. *Muthusamy Pillai* (1), *Prem Chand Dey* v. *Mokhoda Debi* (2) and *Sreenath Chakravarti* v. *Priyanath Bandopadhya* (3), referred to.

The costs of the Privy Council do not carry interest unless such interest is specifically mentioned.

C. A. from original order of Sub-Judge, Manbhum, dated August 29, 1931.

Messrs. *P. R. Das & M. K. Mukharji*, for the Appellants in M. A. Nos. 225 & 226 & for the Respondents in M. A. Nos. 274 to 277.

Sir *Sultan Ahmad* (with him Messrs. *S. C. Bose, N. N Roy*), for the Respondents in M. A. Nos. 225 & 226 & for the Appellants in M. A. Nos. 274 to 277.

Courtney-Terrell, C. J.—The first point for decision in these appeals is as to the proper Court for the execution of a decree against the appellants in favour of the respondents. The suit was instituted by the appellants in the year 1911 in the Court of the Subordinate Judge of Manbhum (who at that time sat at Purulia), for possession of certain lands situated in the Sub-Division of Dhanbad, and for mesne profits. The suit was decreed, but an appeal by the respondents to the High Court was successful and the judgment of the High Court was affirmed by the Privy Council. The suit was accordingly dismissed with costs.

In the month of February 1931, the respondents, the present decree-holders applied for execution in the Court of the Subordinate Judge of Manbhum, sitting at Purulia. Since 1911 when the

suit was begun, by an order of the Lieutenant-Governor of Bihar and Orissa. (No. 233-A. P., dated December 1, 1917, duly published in the *Bihar and Orissa Gazette*):

"In exercise of the powers conferred by s. 13, sub-s. (1) of the Bengal, Agra and Assam Civil Courts Act (Act XII of 1887) the Lieutenant-Governor in Council is pleased to establish with effect from October 31, 1927, a Subordinate Judge's Court at Dhanbad in the District of Manbhum, and to fix with effect from that date the local limits of the executive Sub-Division of Dhanbad as the local limits of his jurisdiction."

By an order of the same date (No. 235 A. P.):

"In exercise of the powers conferred by s. 13, sub-s. (1) of the Bengal, Agra and Assam Civil Courts Act (Act XII of 1887), the Lieutenant Governor in Council is pleased to declare that the local limits of the executive Sub-Division of Dhanbad ceased to be included in the local limits of the Subordinate Judge of Purulia with effect from October 31, 1917."

The respondents decree-holders sought to sell in execution lands situated in the Sub-Division of Purulia, that is to say, outside the Sub-Division of Dhanbad. The appellants judgment-debtors resisted the execution on the ground that the proper Court in which to institute an execution case was that of the Additional Subordinate Judge of Dhanbad and argued that the Subordinate Judge sitting at Purulia had no proper jurisdiction though it was admitted that the case might afterwards be transferred to him. They rely on ss. 13 (1) and 17 (1) of Act XII of 1887. This Act established Civil Courts for Bengal, Bihar and Assam. By s. 3 it is enacted:

"There shall be the following classes of Civil Courts under this Act, namely; (1) the Court of the District Judge; (2) the Court of the Additional Judge; (3) the Court of the Subordinate Judge; and (4) the Court of the Munsif."

By s. 13 (1), the Local Government may, by notification in the Official Gazette, fix and alter the local limits of the jurisdiction of any Civil Court under this Act and by sub-s. (2) if the same local jurisdiction is assigned to two or more Subordinate Judges or to two or more Munsifs, the District Judge may assign to each of them, such civil business cognizable by the Subordinate Judge of Munsif, as the case may be, as, subject to any general or special orders of the High Court, he thinks fit. Section 17 is as follows:—

"(1) Where any Civil Court under this Act has from any cause ceased to have jurisdiction with respect to any case, any proceeding in relation to that case which, if that Court had not ceased to have jurisdiction, might have been had therein may be had in the Court to which the business of the former Court has been transferred. (2) Nothing in this section applies to cases for which provision is made in s. 623 or s. 649, Civil Procedure Code, or in any other enactment for the time being in force."

Under the Civil Procedure Code of 1908, the references are to ss. 36, 37 and 114 and r. 1, O. XLVII. By s. 37, Civil Procedure Code:

"The expression 'Court which passed a decree or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include; (*b*) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit."

Now it is clear that the various classes of Courts are established by s. 3 of Act XII of 1887, and no such Court as that of the "Additional Subordinate Judge of Dhanbad" exists. When there is too much work for a single Subordinate Judge to do an Additional Subordinate Judge is appointed to assist him. The division of work between the Subordinate Judge and his assistant may be settled in one of two ways. Either the Government under s. 13 (1) may prescribe territorial limits as was done in this particular case or the matter may be left to the discretion of the District Judge who may divide the work either according to territorial limits or according to the magnitude or class of cases as he may think fit. In either case there is, but one Court of the Subordinate Judge though two or more individuals may exercise the jurisdiction of that Court within the District. Suits are not instituted "in the Court of the Additional Subordinate Judge," but in the Court of the Subordinate Judge the question of the individual before whom the case is ultimately heard depending upon the orders which may be passed in pursuance of sub-ss. (1) and (2), s. 13 above quoted. Section 17 (1) has no application at all. The case is not one in which "a Civil Court under this Act" has ceased to have jurisdiction with respect to any case. Moreover, sub-s. (2) expressly states that nothing in the section applies to cases for which provision is made by s. 37, Civil Procedure Code, and by para. (2), s. 37, the words "Court which passed the decree" are to include the Court which would have jurisdiction to try the suit if it were instituted at the time of making the application for execution. That section, however, though including such Court

does not exclude the Court wherein the decree was passed.

In my opinion, the effect of the Notifications issued under the Act was not to transfer the jurisdiction of the Court sitting at Purulia to the Court sitting at Dhanbad, but to divide between two individuals the jurisdiction of the Subordinate Judge in the District of Manbhum and in this case the suit was begun in the Court of the Subordinate Judge at Manbhum. It is true that at that time the business of the Court was transacted at Purulia and the Subordinate Judge stayed there, but it was open to the Government to fix the holding of the Court for the District of Manbhum at any convenient place. The suit was instituted in the Court of the Subordinate Judge of Manbhum sitting at Purulia and the decree was passed by that Court. The mere fact that for administrative purposes the Court of the Subordinate Judge is now divided between the Subordinate Judge and an Additional Subordinate Judge and that a certain class of business or an area has been allotted to the Additional Subordinate Judge does not make the Court of the Subordinate Judge sitting at Purulia any the less the Court of the Subordinate Judge of Manbhum, nor does it prevent it from executing the decree. If as between two or more Subordinate Judge's Courts within a District the identity of any particular Court had to be fixed by territorial limits the identity of the Court might easily change from time to time and applicants for execution would have an intolerable burden thrown upon them in finding the Court for execution of their decrees. In the case of *Seeni Nandan* v. *Muthusamy Pillai* (1), at p. 830* Chief Justice Sir John Wallis said:

"The question really is, whether a litigant who has been authorized to bring his suit in a particular Court and has obtained a decree in such Court in his favour, which he is strictly bound to execute within the time limited in Art. 182, is not entitled to apply as of course to that Court as the proper Court for the purpose of saving limitation under the Article, or whether, when he decides to apply for execution, possibly at the last moment, he is bound to stop and inquire whether the limits of the territorial jurisdiction of the Court which passed the decree have been altered, and if so, whether the immovable property which is the subject of the suit or the place where the cause of action arose was within the limits of the transferred area on pain of losing his right to execute under the article if he omits to make these inquiries or comes to a wrong conclusion when he makes them This last proposition is so unreasonable and involves such hardships to the decree-holder in a country such as India with a stringent law of limitation that we should hesitate to impute such an intention to the legislature if we can possibly avoid it."

(1) 53 Ind. Cas. 213; 42 M 821; A I R 1920 Mad. 427; 37 M L J 284; 26 M L T 223; (1919) M W N 640; 11 L W 63.

*Page of 42 M.—[*Ed.*]

If it had been the fact that the Court of the Subordinate Judge of Manbhum, sitting at Purulia neither at the time of the suit nor at the time of the application for execution had jurisdiction over the property against which execution was asked, it is clear that the application would have been bad: see *Prem Chand Dey* v. *Mokhoda Debi* (2). That is not the case. Both at the time of the suit and at the time of the application for execution the Court at Purulia had jurisdiction over the property now sought to be sold. But the decree-holders had always and still have the right to apply, as of course to the Court which passed the decree for its execution even if it be in respect of property outside the territorial jurisdiction of such Court and even if execution by such Court can be no more than execution by transmission to another Court. Such an application can be entertained by such a Court and if made within time would save limitation; see *Sreenath Chakrawarti* v. *Priyanath Bandopadhya* (3). Here the execution case was instituted in the proper Court and there is no force in the contention of the appellants on this point.

A further point urged by the appellants related to the question as to whether the decree of the Privy Council covered interest on the costs of the High Court and those of the trial Court in view of the fact that the judgment of their Lordships contains no reference to such interest. But the decree of the Privy Council affirms the judgment of the High Court which admittedly would have carried such interest. The learned Subordinate Judge thought that the lack of specific mention of interest in the Privy Council decree would eliminate such interest from the amount sought to be raised by execution. It was not seriously argued that his view could be supported on this point.

There is also a cross-appeal by the decree-holders against the decision of the learned Subordinate Judge refusing to

(2) 17 C 699.

(3) 132 Ind. Cas. 149; A I R 1931 Cal. 312; 58 C 532; 52 C L J 569; 35 C W N 77; Ind. Rul. (1931) Cal. 533.

allow interest on the costs awarded by the Privy Council. In this matter it is clear that the Subordinate Judge was right and the learned Advocate for the decree-holders admitted that he could not seriously support the appeal. It has long been held that the costs of the Privy Council do not carry interest unless such interest is specifically mentioned. In the result I would, save in the matter of the interest on the High Court and trial Court costs, dismiss the appeals both of the judgment-debtors and the decree-holders. There will be no order as to costs.

Saunders, J.—I agree.

N. *Appeal dismissed.*

MADRAS HIGH COURT

Original Suit Appeals Nos. 92 and 93 of 1933

May 4, 1934

BEASLEY, C. J. AND BUTLER, J.

R. M. A. R. A. R. R. M. ARUNACHALAM CHETTIAR—APPELLANT

versus

OFFICIAL ASSIGNEE, MADRAS, AND ANOTHER—RESPONDENTS

Religious endowment—Bona fide *endowment—Test—Trust—When effective—Communication to* cestui que *trust.*

One test of a *bona fide* or a nominal endowment is to see how did the founder treat this property, or how have descendants treated it and has the income of the endowed lands been continually applied to the object of dedication. [p. 774, col. 1]

The general rule is that a trust to be effective must be communicated to the *cestui que* trust or that he should at least know about it. The question as to whether there has been an irrevocable trust or not must be a question of fact in almost every case.

Where a certain fund is set apart in the books for the purpose of charity and it is so continued for 60 years but there is no evidence that the owners of the fund intended to part with the ownership and control of it, and its existence was never communicated to the general trustees of the temple and there is no document creating the trust except the entry in account book and this fund is treated as an asset in partition, no irrevocable trust fund is created.

[Case-law referred to.]

O. S. A. from judgments of Stone, J., dated September 26, 1933.

Mr. *M. Patanjali Sastri* for Mr. *V. Varadaraja Mudaliar*, for the Appellant.

Messrs. *Moresly* and *Thomas* and *S. Subramaniam*, for the Respondents Nos. 1 and 2.

Beasley, C. J.—This is an appeal from a judgment of Stone, J., and is a matter arising out of the insolvency of a firm known as the Ar. Ar. Sm. Firm. There are two insolvents, namely, Arunchalam Chettiar and Sundaresan Chettiar, sons of Ar. Ar. Sm. Somasundaram Chettiar (deceased). The petitioner is the brother's son of Ar. Ar. Sm. Somasundaram Chettiar. In his petition in the Insolvency Court he asked for a direction that the Official Assignee should pay him out of the assets of the insolvents the sum of Rs. 19,481-7-2 alleging that that sum was due to a charity being the principal and interest of half of a trust fund. The question before our learned brother was whether there had in fact been an irrevocable trust created in favour of a charity of which the amount claimed by the petitioner was half.

The petitioner's case is that for the purpose of conducting Uchikala Kattalai in Sri Nataraja temple in Chidambaram Rm. Ar. Ar. Arunachalam Chettiar, the father of Ar. Ar. Sm. Somasundaram Chettiar (deceased) and the grandfather of the petitioner founded and established a Kattalai and set apart certain sums of money as a permanent endowment thereof constituting himself as the trustee on behalf of his family. He invested the money in the family business in accordance with the custom prevailing among the Nattukottai Chetties to carry interest at the Madras Nadapu rate with yearly rests. It is alleged that he managed the trust fund during his lieftime maintaining distinct accounts headed with the name of the charity and that the fund accumulated by accrual of interest from time to time. After his death in 1901 a partition was effected between the petitioner and Ar. Ar. Sm. Somasundram Chettiar on April 18, 1901, and it was then agreed and arranged that the several family trusts should be continued and for the purpose of administration should be divided and held in two equal shares, one share being under the control and management of the petitioner and the other under the control and management of Somasundaram Chettiar, the amounts carrying interest at the same rate as before.

The trust fund as then shown in the account books was divided and half of it, namely, Rs. 3,016-9-8, was received by Somasundaram Chettiar and the other half was received by the petitioner. Somasundaram Chettiar invested his half share of the fund in the business he was carrying on on behalf of his branch of the

family and kept distinct accounts in respect of it under the name and heading of the said charity. Somasundaram Chettiar died in 1923 and then his sons, the insolvents, took possession of the estate and assumed the control and management of the fund, it is alleged, with full knowledge that it was to be applied for the specific charitable purpose already mentioned, and it was held by them in a fiduciary capacity and as trustees thereof. The insolvents were adjudicated on July 16, 1925, and the Official Assignee, respondent No. 1 here, took possession of all the property including the assets of the business in which the alleged trust fund had been invested.

The origin of the fund is unknown but it is said that it has a continued existence of 60 years. There is no deed of gift and all that there appears to be is an entry in the account books the ledger page being headed with the name of the temple in the following way: "Credit and debit account of Uchikala Kattalai of Chidambaram temple." It is alleged that the object of this trust was to provide for the performance of certain duties in the temple by people who are known as Dikshithars and who received a fee for the performance of those duties. The sums of money so expended from time to time are debited against this account and in the account maintained by the petitioner, interest according to the Madras Nadappu rate is credited to that account. It is contended that these duties have been performed by the Dikshithars, who are persons forming the general trustees of the temple a very large body, continuously, and there being no deed of gift, the petitioner relies upon the following matters in support of his case that the fund was an endowment for the charity, namely, the Uchikala Kattalai of this temple.

They are, (1) that the fund was set apart in the books, (2) that it has continued for 60 years, (3) that an entry is found showing that a stranger to the family contributed Rs. 100 in 1899, (4) that the duties have been continuously performed, (5) that interest was paid for 11 years up to the date of partition and after the partition upto the present time by the petitioner showing that this interest did not belong to the petitioner but to the fund, and (6) that where wrong debits had been made there has been a re-credit. All these matters it is contended on the appellant's behalf show that a trust fund was created. Stone, J., however, held against this contention. The respondents contend that the entry in the account books is nothing more than a credit entry in favour of the temple and rely further on the fact that the existence of the trust was never communicated to the trustees of the temple.

On this point, *Taylor* v. *London and County Banking Co.* (1) was relied upon by the appellant. There, one of the two trustees of a settlement received a sum of money belonging to the settlement and without the knowledge of his co-trustee fraudulently applied it to his own use. By entries in his books, under the heading of the trust, he purported to appropriate his own mortgage debt to answer the sum of which he had defrauded the trust estate, but he never communicated the purported appropriation either to his co-trustee or to his *cestui que* trust all of whom were *sui juris*. It was held by Vaughan Williams and Stirling, L., JJ., (Rigby, L. J., dissenting), that there had been a good appropriation in favour of the settlement though not communicated by the trustee either to his co-trustee or to his *cestui que* trust. This is certainly a case where there was no communication to a *cestui que* trust of an appropriation in favour of trust. But this clearly was an exceptional case and is certainly distinguishable on the ground that there was without question a settlement and one of the trustees had acted fraudulently and in order to cover up his fraud made an appropriation of his own money concealing that fact and the fraud from his co-trustee and the *cestuis que* trust.

It is very different where a trust is originally started and the beneficiaries of the trust are kept unaware of its existence or of its obligations and this in my view is of serious importance because it bears strongly upon the question of irrevocability of the trust. An uncommunicated trust can much more conveniently be revoked than one of which the beneficiaries are aware and the revocation of which they are likely to oppose. This case was considered in *In re Cozens Green* v. *Brisley* (2). There it was held that in all cases where it is alleged that a defaulting trustee has appropriated securities to make good his breaches of trust and a dec-

(1) (1901) 2 Ch. D 231; 70 L J Ch. 477; 17 T L R 413; 49 W R 451; 84 L T 397

(2) (1913) 2 Ch. D 478; 82 L J Ch. 421; 57 S J 687.

laration of trust is relied on, the Court must be satisfied that a present irrevocable declaration has been made. The Court refused to accept as evidence of such a declaration of trust pencil entries in private accounts kept by the defaulting trustee never communicated to any one, and which in some cases, appeared to have been altered and stated that the absence of communication in itself raised a strong inference against an intention to make the appropriation irrevocable. Neville, J., in that case was of the opinion that the finding in *Taylor* v. *London and County Banking Co.* (1), was not necessary for the decision of the case. In my view, *Taylar* v. *London and County Banking Co.* (1) can hardly be relied upon as an authority against the general proposition that a trust must be communicated to its beneficiaries. Another case relied upon by the appellant was *Gopal Jew Thakur* v. *Radha Binode* (3), when an extract from a judgment in *Ganga Narain* v. *Brindabun Chunder* (4), was quoted with approval, namely :

"One test of a *bona fide* or a nominal endowment is to see how did the founder treat this property, or how have descendants treated it; has the income of the endowed lands been continually applied to the object of dedication."

Clearly these principles cannot be disputed. *Maruti Rama Rao* v. *Mallapur Shri Gopal Kristna* (5) is to the same effect. A passage in a judgment in an income-tax case was also referred to in support of the appellant's case. The case is *Aruna Challam Chettiar* v. *The Commissioner of Income-tax, Madras* (6) and the passage reads as follows :

"We are far from saying that it is necessary in order to create a trust that the person in whose favour the trust is created should know about it."

That is an extract from my own judgment and I feel sure that I must be understood to have meant only that there may be some exceptions to the general rule that a trust to be effective must be communicated to the *cestui que* trust or that he should at least know about it. The question as to whether there has been an irrevocable trust or not, must, in my opinion, be a question of fact in almost every case, and no doubt the facts relied upon by the appellant are strong ones but against them there are put the following matters, namely, that there is no evidence here that the owners of the fund intended to part with the ownership and control of it, that its existence was never communicated to the general trustees of the temple and that on a division the fund appears to have been treated as an asset in the partition. It is further contended that, if it were a trust fund, it could not have been partitioned. Further, there is no evidence about its original deed or document. There is only a ledger entry in 1901 and that does not mention that the sums credited there are held in trust for the temple. There is certainly no recital of a trust in it nor are its objects defined. It is, I think, quite clear that no third party could enforce this trust which seems to be entirely for the benefit of the founders of it and the family and not of strangers and thus there is an absence of charitable object. The general trustees of the temple have not sought to enforce it and its continuance, it seems to me, is purely voluntary. One test in such cases must be what those who are alleged to be obliged to carry out the trust would do in certain eventualities, for instance, when hard pressed for money. What happened in this case? It is perfectly clear that even during the life-time of the father of the insolvents the services which were being performed at the temple were stopped without objection being raised by any person. It is true that when Mani Chetty failed to carry out the objects of the alleged trust the burden was shouldered by another member of the senior branch but there is nothing to show that it was anything more than a voluntary act on the part of the latter. A letter from the petitioner to one of the Dikshathars certainly seems to me to shed some light upon this question. It is Ex. 16. There the appellant asks :

"Is it necessary that Thirupakshi and Pavadai should be conducted on the 27th instant or can it be stopped."

Thirupakshi is one of the offices, the performance of which, according to the appellant, the trust had in view and in this letter he himself makes a suggestion that it should cease. In Ex. X dated January 1, 1922, reference is made to Mani Chetty's difficulties and it is there stated that the expenses of Thirupakshi and Pavadai would be sent as soon as better times come. In Ex. 1 it is stated :

"S. M. A. R. Avergal (1st insolvent) has sent word that Uchikala Kattalai may be stopped"

But there is, to my mind, a still more

(3) 88 Ind. Cas. 616; A I R 1925 Cal. 996; 41 C L J 396.

(4) 3 W R 142.

(5) 138 Ind. Cas. 433; A I R 1932 Bom. 305; 34 Bom. L R 415; Ind. Rul. (1932) Bom. 376.

(6) 3 1 T C 38.

important matter. Whereas in the accounts of the appellant interest at the Madras Nadappu rate was credited to the temple, in the accounts kept by the insolvents' branch in respect of that half share of the fund no interest at all was credited. That is clearly indicative of the fact that it was not regarded as a fund invested on behalf of the temple. No doubt the appellant has continued to have the offices performed at the temple but care must be taken to distinguish the voluntary acts of charitably-minded people from those who have no option in the matter, and after taking all the circumstances into consideration, I am not satisfied that the appellant was bound to apply the fund for the purposes for which it has been applied particularly having regard to the fact that the other branch of the family ceased to so apply it. The splitting up of the alleged trust into two on a partition seems to me also to be inconsistent with a trust; and the case relied upon by the appellant, namely, *Ramanathan Chetty* v. *Murugappa Chetty* (7) does not really support the appellant's contention. In that case there was no splitting up of a trust fund. It was the management of the fund which was split up and it was there held that it was competent for co-trustees to settle a scheme of management by each of the co-trustees in rotation; and on appeal to the Privy Council, it was held that such an arrangement was not improper and was not a breach of trust: see *Ramanathan Chetty* v. *Murugappa Chetty* (8). The decision was considered in *Ayiswaryanandaji Saheb* v. *Shivaji Raja Saheb* (9), where Kumaraswami Sastriar, J., points out that the decision of their Lordships of the Privy Council rested on usage as regards the trusteeship and on p. 146* says:

"I find nothing either in *Ramanathan Chetty* v. *Murugappa Chetty* (7) or *Ramanathan Chetty* v. *Murugappa Chetty* (8) which compels us to hold that the office should be treated as partible property that and on partition of the other properties of the family this office should be held by turns,"

and on p. 141.*

"I do not find anything in the decision of their Lordships of the Privy Council in *Ramanathan Chetty* v. *Murugappa Chetty* (7), to warrant the rule even in the case of public charities and trusts, the claims of the dividing co-parceners should override the interests of the institution and the observation of their Lordships in *Sethuramat swamier* v. *Meeruswamier* (10) rather suggests that the rule laid down as to turns of management on partition applies only to private charities.'

It seems to me to follow that, if the office of a trustee is not partible, then the trust itself must also not be so, and the fact that it was partitioned appears to me to be entirely inconsistent with the existence of a trust. There is a further difficulty indicated by the learned trial Judge and that is that assuming that the trust fund was incapable of being so divided, the result has been that two trusts have been formed, one created by one branch of the family and the other by the insolvents' branch of the family, and as I have pointed out before, dealt with by the latter in a different way, namely, by its discontinuance and non-payment of interest to the trust. How can a trustee of trust *A* claim to enforce trust *B* of which he is not a trustee at all? Stone, J., has, in my opinion, correctly answered that he cannot do so. For the reasons I have stated, in my view, this application was rightly dismissed. It follows that this appeal also must be dismissed with costs on same scale as in the trial Court.

O. S. Appeal No. 93 *of* 1933.—Dismissed with costs.

Butler, J.—*O. S. Appeal No.* 92 *of* 1933.—I respectfully concur. There is one aspect of the matter to which I consider it desirable to draw attention. After the division of the alleged trust fund in 1901 the two funds were treated in different manners by the petitioner and the insolvents. The former allowed interest on the amount placed to the credit of the Kattalai, and the latter did not. The amount as per account was then Rs. 3,016 odd with each trustees. The insolvents' accounts now show (Ex. G) a credit balance of Rs. 1,244-2-4 whereas the petitioner's accounts (Ex. A) show a balance of Rs. 24,556-5-0. Thus the fund with the petitioner, after meeting all charges on his share, has increased by eight-fold in less than 30 years, and there is nothing to indicate how the surplus is ever to be employed, and it would seem that the *cestuis-que* trust would have no right to apply for its application, provided that the service of the Kattalai is properly maintained. The petitioner claims that there

(7) 27 M 192; 13 M L J 341.

(8) 29 M 283; 33 I A 139; 10 C W N 825; 3 A L J 707; 8 Bom. L R 498; 4 C L J 189; 16 M L J 265; 1 M L T 327 (P C).

(9) 92 Ind. Cas. 928; A I R 1926 Mad. 84; 49 M 116; 49 M L J 568.

(10) 43 Ind. Cas. 806; A I R 1917 P C 190; 45 I A 1; 41 M 296; 7 L W 22; 4 P L W 91; 34 M L J 130; 16 A L J 113; 27 C L J 231; 22 C W N 457; 20 Bom. L R 514 (P C).

*Pages of 49 M.—[*Ed.*]

should be set apart as trust moneys from out of the assets of the insolvents, not the amount shown to the credit of the Kattalai in the insolvents' accounts, but the amount, which the account should have shown, if it had been treated in the same manner as in petitioner's. This would entail the setting aside of a large fund to the benefit of a trust of an ill-defined nature, the expenses of which on their present scale fail to absorb a large portion of the interest. Supposing, therefore, that interest should have been allowed on the fund, the result would have been that an ever smaller proportion of the amount at credit would be paid towards the Kattalai, while the balance, which could be continually increasing would stand to the credit of the alleged trust in the accounts, but in effect would be employed by the "trustee" in his own business for his personal benefit. The conduct both of Mani Chetty and of the present insolvents shows that when the business gets into difficulty, the so-called trust fund is drawn on to make good the losses incurred in trade, and the trust was treated as being of a revocable nature. I would, therefore, hold that the trust is both indefinite in character and of a revocable nature, and fails to comply with the requirements of a valid trust. I, therefore, agree that the appeal must be dismissed with costs.

A.-D. *Appeal dismissed.*

RANGOON HIGH COURT

Civil Miscellaneous Appeal No. 138 of 1933

May 22, 1934

PAGE, C. J. AND BA U, J.

MA JOO TEAN AND ANOTHER—APPELLANTS

versus

COLLECTOR OF RANGOON—RESPONDENT

Civil Procedure Code (Act V of 1908), O XL, r. 1—Receiver during pendency of mortgage suit — Sums realized by him from mortgaged property, whether form part of mortgaged property—Receiver, when can be appointed—Deed—Construction — Mortgage—Held on interpretation, that Receiver appointed during pendency of mortgage suit held rents collected, as part of mortgage security—Transfer of Property Act (IV of 1882), s. 8.

The nature of the office of a Receiver is simply this: that he is an impartial person appointed by the Court to collect and receive, pending the proceedings, the rents, issues and profits of land or personal estate or other things in question which it does not seem reasonable to the Court that either party should collect or receive. The object sought by the appointment of a Receiver is the safeguarding of property for the benefit of those entitled to it. His possession is on behalf and for the benefit of all the parties to the suit in which he is appointed, and is the possession of all the said parties according to their titles. Th property in his hands is in *custodia legis* for the person who can make a title to it. The title of the real owner is in no way affected either in theory or on principle by his appointment. He collects and receives the rents, issues and profits not upon his own title but upon the title of some persons, parties to the action The appointment of a Receiver by the Court under O XL, r. 1, Civil Procedure Code, in no way diminishes or enlarges the title to the property which comes into his possession so far as the person otherwise entitled to it is concerned. It follows therefore, that the sums of money in the hands of the Receiver are not sums payable to the mortgagor, but form part of the mortgaged property upon which the debt due to the mortgage was secured. *Rameshwar Singh* v. *Chun Lal Shaha* (10) and *Venkata Kumara Mahipathi Surya Rao* v. *Gokuldoss Goverdhandas* (11), dissented from. *Eastern Mortgage & Agency Co. Ltd*, v. *Muhammad Fuzlul Karim* (1) and *Maung Ohn Tin* v. *P. R. M. P. S. R. M. Chettyar Firm* (2), relied on.

The propriety of appointing a Receiver in a suitable case cannot be challenged. *Jaikissondas Gangadas* v. *Zenahai* (3) and *Pratchett* v. *Drew* (4), relied on.

A mortgage deed provided that the property mentioned therein was mortgaged with "all appurtenances to the said premises belonging and all the estate, right, title, interest, property, claim and demand whatsoever of the mortgagors into and upon the said premises to hold the said premises unto the mortgagees subject to the proviso for redemption hereinafter contained :"

Held, that the mortgage was in the form of an English mortgage and that the mortgagee was entitled as a secured creditor of the mortgagor to the rents and profits of the land of which the Receiver was in possession.

Held, also that even if no reference had been made specifically to the transfer of "all the estate, right, title, interest, property, claim and demand whatsoever of the mortgagors into and upon the said premises" by reason of the provisions of s. 8, Transfer of Property Act, in the like manner the rents and profits arising out of the mortgaged land in the hands of the Receiver would form part of the mortgage which was created to secure re-payment of the loan. *Ashgar Reza* v. *Mohamad Mehdi Hussain* (5) and *Chandra Gajapati* v. *Narayan Deh* (6), relied on.

C. Mis. A. from an order of the High Court, in C. R. S. No. 141 of 1931.

Facts.—Plaintiff obtained a mortgage-decree against the defendants-mortgagors. At the instance of the mortgagees, the Court appointed a Receiver during the pendency of the suit. The Receiver held moneys collected by him as rents.

The Collector of Rangoon claimed Rs. 1,029 being the amount of forfeiture imposed under s. 19 (*g*), Court Fees Act, from the defendants, and applied to the Court for payment of the same out of the rents held by the Receiver.

Mr. *Hormasji*, for the Appellant.

Mr. *A. Eggar*, for the Crown.

Page, C. J.—This appeal must be allowed. The plaintiff in a mortgage-suit obtained a decree against the defendant. Pending the determination of the suit a Receiver was appointed by the Court on May 18, 1931, "to take possession of the suit property" with the exception of a small strip of land. Now, what is the nature of the possession of a Receiver so appointed?

"The nature of the office of Receiver is simply this: that he is an impartial person appointed by the Court to collect and receive, pending the proceedings, the rents, issues and profits of land or personal estate or other things in question which it does not seem reasonable to the Court that either party should collect or receive. The object sought by the appointment of a Receiver is the safeguarding of property for the benefit of those entitled to it. His possession is on behalf and for the benefit of all the parties to the suit in which he is appointed, and is the possession of all the said parties according to their titles. The property in his hands is in *custodia legis* for the person who can make a title to it. The title of the real owner is in no way affected either in theory or on principle by his appointment. He collects and receives the rents, issues and profits not upon his own title but upon the title of some persons, parties to the action;"

[per Mukerji, J., in *Eastern Mortgage & Agency Co., Ltd.* v. *Muhammad Fuzlul Karim* (1) and *Maung Ohn Tin* v. *P. R. M. P. S. R. M. Chettyar Firm* (2).]

The question in the present case is with respect to who is entitled to the rents and profits which were collected by the Receiver. At one time the Court felt some diffidence in appointing a Receiver at all in a mortgage-suit, but both in England and in India the propriety of appointing a Receiver in a suitable case cannot now be challenged. *Jaikissondas Gangadas* v. *Zenabai* (3) and *Pratchett* v. *Drew* (4). In the petition of the Collector of Rangoon the petitioner states that he:

"is desirous of having an order passed directing the Official Receiver to pay to your petitioner the said sums (*i. e.*, sums due to Government) as a first charge on such of the rents collected by him as may be payable to the defendant."

The question therefore is:

"are the sums in the hands of the Receiver representing the rents and profits of the land which was subject to the mortgage payable to the defendant, *i. e.*, the mortgagor."

In my opinion they are not. Under the terms of the mortgage in suit which is dated January 3, 1928, it is *inter alia* provided that:

in pursuance of the said agreement and in consideration of the sum of Rupees thirty thousand (Rs 30,000) paid by the mortgagees to the mortgagors on or before the execution of these presents (the receipt whereof the mortgagors hereby acknowledge) the mortgagors hereby convey unto the mortgagees all that piece or parcel of garden land situate in Kwin No. 78, Thayetken Circle, Rangoon Town District, and known as Holding No. 1 of 1926-27 and measuring acres 10-15 or thereabouts (formerly known as Holding No. 11 of 1916-17 in Kyetshazun Kwin Mingaladon Circle Insein Township) together with the buildings and structures thereon and bounded on the North by Cart Track, on the East by Prome Road; on the South by land of U Nun Han and others and Ywathet Village and on the West by Insein Road and all appurtenances to the said premises belonging and all the estate, right, title, interest, property, claim and demand whatsoever of the mortgagors into and upon the said premises to hold the said premises unto the mortgagees subject to the proviso for redemption hereinafter contained."

This mortgage is in the form of an English mortgage, and in my opinion under the terms thereof the rents and profits arising out of the land subject to the mortgage form part of the property subject to the mortgage upon which repayment of the mortgage-debt is secured as between the mortgagor and the mortgagee. In my opinion under the express terms of the deed of mortgage the mortgagee was entitled as a secured creditor of the judgment-debtor to the rents and profits of the land of which the Receiver was in possession. As at present advised I am further of opinion that even if no reference had been made specifically to the transfer of:

"all the estate, right, title, interest, property, claim and demand whatsoever of the mortgagors into and upon the said premises"

by reason of the provisions of s. 8, Transfer of Property Act, in the like manner the rents and profits arising out of the mortgaged land in the hands of the Receiver would form part of the mortgage which was created to secure repayment of the loan. *Ashgar Reza* v. *Muhammad Mehdi Hussain* (5), *Chandra Gajapati Narain Deb* v. *Makunda Deb* (6), *Bank of Upper India* v. *Administrator-General of Bengal* (7) and *Tilok Chand Surana* v. *J. B Beattie & Co.* (8).

Although the Court when construing a statute such as the Transfer of Property Act must exercise caution in referring

(1) 90 Ind Cas. 851; A I R 1926 Cal. 385; 52 C 914; 41 C L J 571.

(2) 120 Ind Cas 142; A I R 1929 Rang. 311; 7 R 425; Ind Rul (1930) Rang. 14.

(3) 14 B 431.

(4) (1924) 1 Ch. 280; 93 L J Ch. 137; 40 T L R 167; 68 S J 276; 130 L T 660.

(5) 30 C 556; 30 I A 71; 8 Sar. 439; 7 C W N 482 (P C).

(6) 9 C W N 710.

(7) 47 Ind. Cas. 529; A I R 1919 Cal. 908; 45 C 653; 22 C W N 793.

(8) 94 Ind. Cas. 538; A I R 1926 Cal 204; 29 C W N 953.

either to English statutes or English authorities, in my opinion the view which I have expressed is in consonance with the rule obtaining in English Law: for in *Wilson* v. *Wilson* (9) at page 40*, I find Malins, V. C., observing:

"We know perfectly well that a mortgagee of land has a right, from the very day of his mortgage, to receive the rents. We also know that if he does not choose to enter into possession or give notice to the tenants, but regards his security as sufficient and allows the mortgagor to receive the rents, those rents can never be recovered back again as rents."

Now, that means, I apprehend, not that the mortgagee has not a legal title to the rents as forming part of his security, but that if he allows the mortgagor in possession to receive the rents he may be precluded from recovering those rents from the mortgagor in the particular circumstances of the case.

I desire further to state, with all due deference, that as at present advised I am not satisfied that the *ratio decidendi* of *Rameshwar Singh* v. *Chun Lal Shaha* (10) and *Venkatakumara Mahipathi Surya Rao* v. *Gokuldoss Goverdhandoss* (11) was correct, namely, that:

"the possession of a Receiver in a mortgage-suit was *prima facie* for the benefit of the party who had obtained the appointment. On this principle it has been argued that the Receiver who was appointed at the instance of the first mortgagee holds the property for his benefit alone, and is bound to make over to him the entire income for the satisfaction of his dues. In our opinion this contention is clearly well founded."

With all respect I am disposed to think that the appointment of a Receiver by the Court under O. XL, r. 1, in no way diminishes or enlarges the title to the property which comes into his possession so far as the person otherwise entitled to it is concerned. It follows, therefore, that the sums of money in the hands of the Receiver are not sums payable to the mortgagor, but form part of the mortgaged-property upon which the debt due to the mortgagee was secured. In these circumstances, in my opinion, the Crown is not entitled to claim to be paid this sum in priority to the party entitled to it, namely, the mortgagee-decree-holder. The appeal must be allowed, the order of Leach, J., set aside, and the application dismissed with costs five gold *mohurs* in each Court.

Ba U, J.—I agree.

D. *Appeal allowed.*

(9) (1872) 14 Eq. 30.

(10) 56 Ind. Cas. 839; A I R 1920 Cal. 545; 47 C 418; 31 C L J 385.

(11) 133 Ind. Cas 504; A I R 1931 Mad. 626; 54 M 565; 61 M L J 111; 34 L W 165; Ind. Rul. (1931) Mad. 744.

*Page of (1872) 14—[*Ed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT

Second Civil Appeal No. 336 of 1933

January 18, 1935

POLLOCK, A. J. C.

MOHANLAL MARWADI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GYANIRAM PLAINTIFF—RESPONDENT

Contract—Sale—Breach by buyer—Vendor, if can keep it alive for recovering heavier damages—Measure of damages—Civil Procedure Code (Act V of 1908), s. 100—Finding as to who broke the contract, if can be challenged in second appeal—Contract Act (IX of 1872), ss. 55, 82, 107, 93, 94—Mercantile contract—Presumption that time is essence, whether arises—Goods neither ascertained nor appropriated—Sale, if complete—Right of re-sale—Delivery to be given at godown of seller—Telegraphic notice by buyer, whether adequate application for delivery.

In a contract to sell and buy it is open to the seller to avoid the contract when the buyer fails to take delivery but he cannot elect to keep alive the broken contract in the hope that he might recover heavier damages for the breach of the contract than he would be entitled to recover at the time of the breach of the contract. In such cases the measure of damages is the difference between the contract rate and the market rate at the expiry of the period agreed upon as the time for delivery in the contract; it is, however, open to the parties to agree that the time for performing the contract of sale should be postponed. In such circumstances, the damages for non-delivery or non-acceptance of the goods will be calculated at the market price of such goods on the last day to which the contract was extended if a date was fixed, or at the date when the plaintiff refused to grant further indulgence, or at a reasonable period after his last grant of an indulgence. *Mutthaya Maniagaram* v. *Lekku Reddiar* (1), referred to, *Coorla Mills* v. *Vallabhdas* (2), relied on.

In a contract to sell and to buy, a finding by the lower Appellate Court as to who broke the contract is a finding of fact which cannot be challenged in second appeal

There is no place in mercantile contracts for the presumption that time is not of the essence of contract.

Where the goods are never ascertained or appropriated, the property in the goods does not pass from the seller to the buyer, and so there is no question of re-sale. Even if the seller has power to re-sell under s. 107, Contract Act, he has no right to re-sell without notice to the buyer. *Angullia & Co.* v. *Sassoon & Co* (3)and *Narainda*s v. *Kunjilal* (4), referred to. [p. 780, col. 2.]

Under ss. 93 and 94 of the Contract Act, the seller is not bound to deliver goods until the buyer applies for delivery, and delivery is to be given at the place at which goods were at the time of the contract for sale. A telegraphic

notice is not an adequate application for delivery of goods. The buyer is bound to send some one to take delivery at a place where the goods are and until that is done the seller is not bound to make delivery. [p. 781, col. 2.]

S. C. A. against the decree of the District Judge, Raipur, in Civil Appeal No. 26 of 1933, dated July 31, 1933, arising out of Civil Suit No. 107 of 1931, in the Court of the Second Sub-Judge, Second Class, Raipur, dated February 13, 1933.

Mr. *M. R. Bobde*, for the Appellants.

R. B. *M. R. Kinkhede* and Mr. *R. M. Bhagade*, for the Respondent.

Judgment.—This judgment will also dispose of Second Appeal No. 337 of 1933.

It is common ground that the parties through their agents, entered into a contract for the sale of *urad* at the rate of 1 *katha* 10 *pohas* per rupee, not at Re. 1-10-0 per *katha* as stated in the judgment of the lower Appellate Court. The buyer never paid the price or took delivery, and eventually each party sued the other for damages for breach of contract. Each suit was decided in favour of the buyer in the Court of first instance and in favour of the seller in the Court of the District Judge, who awarded the seller as damages the difference between the contract price and the price obtained by re-sale.

According to the plaint in the suit filed by the seller, the buyer offered on December 4, 1928, to buy *urad* stocked in the Seller's godown at Raipur at the above rate, and this offer was accepted on the same day, the buyer agreeing to purchase *urad* about 300 bags and promising to have the goods measured on the next day, December 5. To this the buyer replied that he had contracted to buy 300 bags of *urad* and this allegation was not contradicted in the pleadings. It was assumed in the issues that the contract was for the purchase of 300 bags of *urad* and thereafter it was never suggested that the contract was for the purchase of the entire stock of *urad*, which admittedly was 303 bags 7 *kathas*. As the Indian Sale of Goods Act was not then in force, the case is governed by the Indian Contract Act, and it is clear from s. 82 and the illustration thereto that the goods were not ascertained at the time of making the contract of sale and that, therefore, the sale was not complete, nor was there any subsequent appropriation to complete the sale under s. 83.

According to the seller's pleadings, the contract was made on December 4, and delivery was to be made on the 5th. On the 6th the seller was informed that the buyer had refused to take delivery on the 5th, so the seller went to Raipur and saw the buyer's *munim* on the 8th and the *munim* stated that he would certainly take the goods; but in spite of this the buyer took no steps to take delivery up to December 12, when the seller again spoke to the buyer's *munim* who promised to take delivery in a day or two. The seller then left Raipur and was informed by a letter on the 14th that the buyer's *munim* had declined to take the goods on the ground that they were old stock. The seller again returned to Raipur and made further attempts to get the buyer to take delivery, but finally on the 19th the buyer's *munim* declined to keep the contract. The buyer alleged that the contract was made on December 6, that no specific date for delivery was fixed, that in spite of demands the seller continually postponed giving delivery and that ultimately the buyer sent to the seller a telegraphic notice on December 15, demanding delivery within 24 hours. It is now conceded that the contract was made on December 4, as alleged by the seller, and the learned District Judge has accepted the story given by the seller that the buyer broke the contract, a finding, of fact that cannot now be challenged in second appeal.

The learned District Judge, however, has given no finding when the contract was broken. The seller in his plaint stated that the cause of action arose on December 19, when the defendants made a "final breach." Subsequently in his pleadings, however, he stated:

"The breach took place on December 5 or 6, 1928, and the conduct of the plaintiff in making endeavours with defendants to keep up the contract did not prolong the breach to December 19, 1928, so as to make the rate on December 19, 1928, as the basis of calculation of damages. Plaintiff does not know the rate of *urad* on December 19, 1928. On December 5, 1928, the rate of *urad* was at 1 *katha* 10 *pohas* per rupee. The plaintiff is entitled to get damages according to rate on December 19, 1928."

From this it is difficult to make out what the plaintiff's case actually was and possibly the word "not" has been omitted from the last sentence in the pleadings quoted above.

According to the plaintiff, then, the contract was to be performed on December 5. It is well settled that there is no place in mercantile contracts for the presumption that time is not of the essence of contract see Pollock and Mulla's Indian Contract, 6th Edition, p. 334; nor was there any pleading in this case to that effect. Under s. 55, of the Indian Contract Act:

"When a party to a contract promises to do a

certain thing at or before specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

It was, therefore, open to the seller to avoid the contract when the buyer failed to take delivery on December 5, but he could not elect to keep alive the broken contract in the hopes that he might recover heavier damages for the breach of the contract than he would be entitled to recover at the time of the breach of the contract. In such cases the measure of damages is the difference between the contract rate and the market rate at the expiry of the period agreed upon as the time for delivery in the contract: See *Mutthaya Maniagaran* v. *Lekku Reddiar* (1).

It was, however, open to the parties to agree that the time for performing the contract of sale should be postponed. In such circumstances, the principle on which the damages must be calculated is stated, as follows, by Mayne on Damages, cited with approvel in *Coorla Mills* v. *Vallabhadas* (2):—

" Where the time for performing a contract of sale has been postponed, at the request either of vendor or purchaser, and the contract is ultimately broken, this has the effect of deferring the period at which the breach takes place, and, therefore, alters the date with reference to which the damages are to be calculated. The old contract continues, but the date of the breach is shifted. The damages for non-delivery or non-acceptance of the goods will be calculated at the market price of such goods on the last day to which the contract was extended if a date was fixed, or at the date when the plaintiff refused to grant further indulgence, or at a reasonable period after his last grant of an indulgence."

On the February 22, 1929, the seller sold 151 bags of *urad* of which the buyer failed to take delivery, and on various dates in December 1929 and January 1930 he sold the remaining 144 bags 5 *kathas*, the other 8 bags, and 2 *kathas* having disappeared into dust. The learned District Judge awarded him as damages the difference between the contract price and the price realised by these sales. The seller had no right of re-sale by the terms of cantract and such a right, if it existed at all, existed under s. 107, of the Indian Contract Act. I have pointed out above that the goods were never ascertained or appropriated, and, therefore, the property in the goods had not passed from the seller to the buyer, and so there was no question of re-sale. In discussing the construction of this section, Jenkins, C. J., in *Angullia & Co.* v. *Sassoon & Co.* (3), stated :

" What then is the scope of this power of re-sale ? The goods would have come within its operation if they had been ascertained, or even if they had been appropriated for the purpose of the agreement. But in my opinion it would be going beyond the true meaning of the words to extend the operation of the clause to goods which had not even been appropriated, and thus had in no sense become the subject-matter of the contract."

Even if the seller had power to re-sell under s. 107, he had no right to re-sell without notice to the buyer, and it is admitted that no notice was given. There was, therefore, no lawful exercise of the power of re-sale: See *Naraindas* v. *Kunjilal* (4).

The damages to which the seller is entitled, are the difference between the contract rate and the rate prevailing on the date on which the breach of contract occurred. It seems to be the seller's case that the breach of contract occurred on December 5, but it has been argued on his behalf that the breach occurred on the 19th. It is admitted that the rate prevailing on December 5, was the same as prevailed on the previous date when the contract was made, and there is no evidence to show what was the rate on the 19th. It is for the plaintiff to plead and prove the facts on which he relies to show the quantum of damages. As he has failed to prove the facts which would entitle him to damages, his claim for damages must fail. It was stated in the judgment of the learned District Judge that there was no argument before him as to the actual sum in either suit, but this seems to me merely to mean that the contract rate and the prices realised by the subsequent sales were admitted. I do not think that it can be said there was an admission that the seller was entitled to the difference between the contract price and the price obtained by the subsequent sales.

I have stated above that the lower Appellate Court's finding that the buyer had broken the contract has now to be accepted. It is suggested that the lower Appellate Court has ignored the fact that the goods in question were pledged with the Imperial

(1) 14 Ind. Cas. 255; 37 M 412; A I R 1914 Mad. 573; 11 M L T 301; (1912) M W N 436; 22 M L J 413.

(2) 94 Ind. Cas. 575; A I R 1925 Bom. 547 at p. 551; 27 Bom. L R 1168.

(3) 13 Ind. Cas. 705; 39 C 568 at p. 581; 16 C W N 593.

(4) 78 Ind. Cas. 1026; A I R 1924 Nag. 162.

Bank and were not released until December 10, and that the buyer sent to the seller a telegraphic notice on December 15, demanding delivery within 24 hours. Under ss. 93 and 94 of the Indian Contract Act the seller is not bound to deliver goods until the buyer applies for delivery, and delivery was to be given at the place at which goods were at the time of the contract for sale, *i. e.* the godown. A telegraphic notice is not an adequate application for delivery of goods. The buyer was bound to send some one to take delivery at the godown, and until that was done, the seller was not bound to make delivery. There is no reason to suppose that the seller could not have redeemed the goods earlier, if an application for delivery had been made.

The result is that the appeal in the suit brought by the seller is allowed, and the appeal in the suit brought by the buyer is dismissed, *i. e.* both suits stand dismissed with costs.

D. *Appeal allowed.*

OUDH CHIEF COURT

Second Civil Appeal No. 175 of 1933

March 25, 1935

ZIA-UL-HASAN, J.

RAM DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM SEWAK TEWARI—DEFENDANT—RESPONDENT

Hindu Law—Stridhan—*Property purchased from income of property settled upon widow in lieu of maintenance—Whether* stridhana—*Right of alienation.*

Property purchased by a Hindu widow from the income of property settled upon her in lieu of her maintenance becomes her *stridhan* and she is competent to transfer it

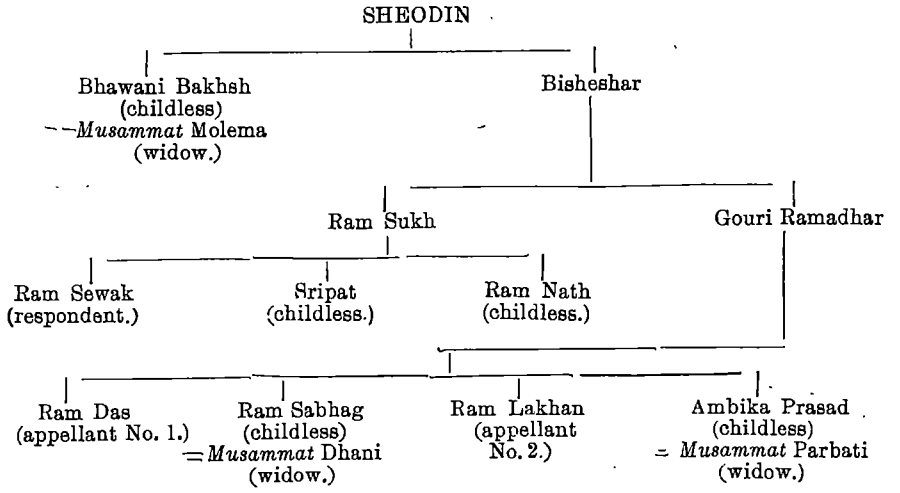
[Case-law discussed.]

S. C. A. against the decree of the Subordinate Judge, Fyzabad, dated February 10, 1933, confirming that of the Munsif, Fyzabad, dated January 23, 1932.

Mr. *S. N. Roy*, for the Appellants.

Mr. *Mahabir Prasad*, for the Respondent.

Judgment.—These two appeals were filed by Ram Das and Ram Lakhan against Ram Sewak, respondent, in two cross-suits that were instituted by the parties against each other in respect of property left by *Musammat* Molema. The following pedigree will show the relationship existing between the parties—



The admitted facts are that Bhawani Bakhsh, husband of *Musammat* Molema, died about forty years ago. It has been found by the Courts below that he died in a state of jointness with his brother and nephews and this finding is not challenged in the appeals. It is also an admitted fact that out of the family property, 19 *bighas* 10 *biswas* of land in village Dasauli was made over to *Musammat* Molema in 1899 in lieu of her maintenance by Ram Adhar, father of the appellants and Ram Sewak, respondent. It is also not disputed that *Musammat* Molema made the following purchases—

(1) 1 *bigha* 7 *biswas* of land in village Dasauli in 1901.

(2) 5 *bighas* 12 *biswas* of land in village Usru in 1902, and

(3) 3 *bighas* 11 *biswas* in village Usru by pre-emption jointly with Ram Nath, brother of the respondent.

It will thus be seen that *Musammat* Molema was purchaser of 9 *bighas* 3 *biswas* of land in village Usru and of 1 *bigha* 7 *biswas* in Dasauli. The former property was the subject of a suit brought by the present appellants against Ram Sewak, respondant, while the latter sued for possession of 1 *bigha* 7 *biswas* in village Dasauli.

The case for the appellants was that the properties mentioned above were purchased by *Musammat* Molema from the income arising from her husband's property. Ram Sewak on the other hand pleaded that they were purchased by her from her personal funds and were her *stridhan* property. He also set up a will of all these properties executed in his favour by *Musammat* Molema.

Both the lower Courts have upheld the case set up by Ram Sewak, respondent, and decreed his suit in respect of the Dasauli property and dismissed the appellants' suit in respect of the Usru property. Hence these appeals by Ram Das and Ram Lakhan in both the cases.

The appellants in their grounds of appeal challenged the lower Courts' finding about the alleged will of *Musammat* Molema but gave up that plea at the time of arguments. In fact, the finding being a finding of fact and based on admissible evidence could not be challenged in second appeal. The only question therefore that remains is whether the properties in question in both the cases were accretions to the property of *Musammat* Molema's husband or whether they constituted her *stridhan* property.

The learned Advocate for the appellants has relied on the following cases *Nabakishore Mandal* v. *Upendrakishore Mandal* (1), *Bharose Shukul* v. *Manbasi Koer* (2), *Srimati Charusila Dasi* v. *Srimati Mrinalini Dasi*, 64 Ind. Cas. 531 (3), *Isridat Koer* v. *Hansbutti Koerain* (4) and *Sheolochun Singh* v. *Saheb Singh* (5).

In all these cases it has been more or less held that when a Hindu widow makes purchases of property from the income of her husband's estate, the presumption is that she intended that they should be regarded as accretions to the husband's estate and not as a separate estate descendible in a different line of succession; but in the present case *Musammat* Molema was not in possession of any property of her husband as a Hindu widow. According to the case for the respondent the purchases were made by *Musammat* Molema out of funds that she received from her father, but even if it be taken for granted that they were made out of the income of the property that was put in her possession in lieu of her maintenance the purchased property would be her *stridhan* property. In the case of *Krishna Kumari Devi* v. *Rajendra Bahadur Sinha Deo* (6), it was held that if a certain property is purchased by a Hindu widow out of the savings from the income of her husband's property, it is presumed to belong to the estate but that this presumption cannot be extended to the case of property held by a Hindu female not as a Hindu widow's estate but as a life estate under a will or deed *inter vivos*. It was further held that if the property which had been obtained by a widow under a bequest from her husband is a property to which she would not be entitled as heir to her husband, the savings from the income of such property and everything purchased out of such savings would belong to herself and would constitute her *stridhan*. In the case of *Bhagbutti Devi* v. *Bholanath Thakoor* (7) in which a Hindu widow was given an estate for life, with power to appropriate the profits, it was held by their Lordships of the Judicial Committee that whatever property, real, or personal, was bought by the widow out of the proceeds of her husband's estate, belonged to her. This case was referred to later in the case of *Isridut Koer* v. *Hansbutti Koerain* (4) relied on by the learned Advocate for the appellant and their Lordships distinguished it by saying that in that case it was held

"that the widow held the husband's estate not in her capacity of widow but as taken of a life interest after a settlement."

(1) 65 Ind. Cas. 395; A I R 1922 P C 39; 20 A L J 22; (1922) M W N 95; 26 C W N 322; 35 C L J 116; 42 M L J 253; 24 Bom. L R 316; 15 L W 417; 30 M L T 234; 3 P L T 311 (P C).

(2) 143 Ind. Cas. 259; A I R 1932 All. 690; (1932) A L J 875; 54 A 1014; Ind. Rul. (1933) All. 205.

(3) 64 Ind. Cas. 531.

(4) 10 I A 150; 10 C 324; 4 Sar. 459; 13 C L R 418; 7 Ind. Jur. 557 (P C).

(5) 14 I A 63; 14 C 387; 5 Sar. 1; 11 Ind. Jur. 231 (P C).

(6) 104 Ind. Cas. 155; 6 O W N 1150; 2 Luck. 43; 13 O L J 846; A I R 1927 Oudh 210.

(7) 2 I A 256; 1 C 104; 24 W R 168; 3 Sar. P C J 528; 3 Suth. P C 186 (P C).

It is thus clear that even granting that *Musammat* Molema purchased the properties in question from the income of the property, small as it was, which was settled upon her in lieu of her maintenance the properties became her *stridhan* and she was competent to transfer them by law.

The conclusion arrived at by the Courts below in both cases was correct and I dismiss these appeals with costs.

N. *Appeal dismissed.*

MADRAS HIGH COURT

Civil Appeals Nos. 85 of 1928 and 128 of 1929

January 12, 1934

RAMESAM AND CORNISH, JJ.

SIVAGNANATHAMMAL—DEFENDANT—APPELLANT

versus

S. V. NALLAPERUMAL PILLAI—PLAINTIFF—RESPONDENT

Partnership—Partner taking partnership property to himself and crediting some price of his own fixing in favour of partnership—Other partner, if bound by such valuation—If he can compel former to take such property at proper price found by Court—Accounts—Day book—Lump sum debited after several months—If a day book—Value to be attached—Uncertain and indefinite accounts—Value of—Interest—Interest charged at end of each year after deducting counter-interest—Each party charging interest on overdrawings of the other—Compound interest, if to be allowed.

If a partner takes the partnership property and credits in favour of the partnership some price of his own fixing, *i. e*, behind the back of the other partner, the other partner is not bound by such valuation and if he questions the valuation, the Court is entitled to scrutinise it. If his price is not found to be the proper price by the Court, his taking over might be set aside, but he cannot be compelled to purchase them at the price found by the Court to be the proper price. The only result of setting aside his taking over of the property would be that his so-called one-sided purchase is simply set aside and the property remains as partnership property. *Muthiah Chetty* v. *Veerappa Chetty* (1), explained and English case-law considered. [p. 785, col. 2.]

The very object of accounts being kept, especially of day books, is the value that is to be attached to the entries made as each event happened. It is on the likelihood of such entries being made that the value of accounts depends But if an argument is advanced that though a drawing is made from the partnership account, it is not debited in the day-book at the time when it is drawn but only a lump sum is debited several months afterwards, it is not a proper day book; it ceases to be such an account book to which Courts are accustomed to attach value. [p. 789, cols. 1 & 2.]

The party who relies upon uncertain and indefinite accounts and accounts which on the face of the argument do not represent the actual transaction that took place must fail. [p. 789, col. 2.]

Where the accounts themselves showed that whenever accounts were settled at the end of each year the parties have charged interest on the overdrawings of each partner, and at the various stages of the case each side was insisting upon the payment of counter-interest on the footing that he was going to recover some amount :

Held, that in these circumstances the plaintiff was entitled to compound interest on the principal charged. [p. 790 col. 1.]

Messrs. *S. Srinivasa Iyengar* and *V. Ratnam*, for the Appellant.

Messrs. *S. Varadachariar* and *K. V. Sesha Ayyangar*, for the Respondent.

Judgment.—These two appeals are appeals against the preliminary and final decrees in Original Suit No. 53 of 1925, on the file of the Subordinate Judge's Court of Tuticorin. In both the appeals defendant No. 2 is the appellant. The suit was filed for the winding up of a partnership and for taking its accounts and for the recovery of such amount as may be found due to the plaintiff. The plaintiff estimates that the amount due to him would be approximately Rs. 22,000. It will now be convenient to state the history of the partnership whose winding up is sought. The plaintiff's father, defendant No. 2's husband and a third person originally carried on a partnership under the style of S. V. from the year 1904. The plaintiff's father died in the year 1905 and the third person retired from the business in the year 1911. So legally a new partnership consisting of the plaintiff and defendant No. 2's husband (Kailasam Pillai), began to work from the year 1911. The business of the partnership consisted of the manufacture of salt under licenses issued by the Government and under the rules of the Salt Department. In the year 1918 it was agreed that the capital of the partnership should be two *lakhs* of which the plaintiff contributed three-fourths, *i. e.*, *lakh* and fifty and Kailasam Pillai contributed the remaining one-fourth. As a matter of fact this capital was contributed from out of the profits of the prior business. The capital itself was to bear no interest but interest at 1 per cent was to be charged on the drawings by the partners and on the sum standing to their credit.

The partnership possessed 1327 salt pans in Levynjipuram extension factory bearing licenses Nos. 102 and 155. Besides these there were also another set of 11 salt pans which were purchased in auction in the name of Kailasam Pillai. There was some dispute about the ownership of these salt pans at one time in the lower Court, but now they are also admitted to be the property of the partnership. Kailasam Pillai died on June 27, 1922. At the time of his death he had made considerable overdrawings from the partnership funds. There is

no dispute about the amount of his overdrawings. [illegible] February 1922, this amount was Rs. [illegible]. There was also a sum due from h[illegible]der another account called market acc[illegible]. The account of the transactions between the firm and Kailasam Pillai has been filed as an annexure to the plaint. It appears that there was a large stock of salt belonging to the partnership remaining to be sold and this amounted to 6,83,000 maunds. In para. 11 of the plaint the plaintiff alleges that on January 28, 1923, he fixed a reasonable price for the aforesaid salt heaps and took them to his own account. He also took to his own account some of the outstandings due to the partnership and also the salt pans. He also took over the lands, houses, gardens and other immovable properties belonging to the partnership at a certain price. The plaintiff states that so far as the salt is concerned, he took it over for such price as he considered reasonable according to the then market and with reference to the superior or inferior quality of the goods. The salt consisted of several varieties and also of the stock of several years, *i. e.*, some portion of it was old and belonged to the stock of prior years.

On the footing that the defendant raised no objection to this taking over of the properties of the partnership it was found that a sum of Rs. 25,506-6-4 was still due to the plaintiff from the deceased Kailasam Pillai on January 28, 1923. Afterwards the parties got a rebate from the Government of duty, to defendant No. 2's share which amounted to Rs. 4,075. Deducting this amount, at the time of the suit a sum of Rs. 21,431-6-4 would still be due according to the plaintiff from defendant No. 2 the widow of Kailasam Pillai. Defendant No. 1 is a brother of Kailasam Pillai. At one time he claimed all the properties left by the deceased Kailasam Pillai to be joint family properties and there was litigation between him and the widow (defendant No. 2). It is said on behalf of defendant No. 2 that the plaintiff set him up and helped him in that litigation. But it is unnecessary to determine whether this is correct or not. On the ground that there was a rival claimant to the estate of Kailasam Pillai his brother was impleaded as defendant No. 1, but now that it is decided in the other litigation that defendant No. 2 is the sole heir to Kailasam Pillai, he has no further interest in the suit and he is not a party in the appeal. In para. 13 of the plaint the plaintiff alleges that besides the sum due from defendant No. 2 there are a number of other outstandings due to the partnership. These amount to about Rs. 37,600 On the plaint it was estimated that probably there would be a loss of Rs. 12,000 in respect of the outstandings and it was expected that the rest would be collected.

Defendant No. 2 pleads that the prices at which the properties of the partnership were taken over were not the proper prices. She contends that much larger sums than those at which the plaintiff took over the properties should be debited against him, and if this is done far from her owing a sum of Rs. 21,000 due by her there would be a large sum of money due to her. She therefore prayed that the suit should be dismissed with costs. It is scarcely necessary to add that the so-called settlement of January 28, 1923, was all made behind the back of defendant No. 2 and though it may ultimately turn out to be fair, defendant No. 2 is entitled to insist that it should be scrutinized. What the rights of the parties exactly are on such scrutiny will have to be further considered. On October 29, 1923, defendant No. 2 sent a registered notice through Vakil, Mr. A. Ramaswami Ayyar, claiming some documents and movables belonging to her husband. A reply was sent to this on November 12, 1923 (Ex. 11) by Mr. Venkatachala Ayyar, a Vakil, on behalf of the plaintiff. After replying to the subject-matter of the notice under reply, the letter winds up by saying:

"You are hereby informed that in respect of the dealings had by the said Kailasam Pillai when he was a partner of our client's salt firm, there is a sum of Rs. 25,506-6-4 inclusive of principal and interest up to the 15th *Thai*, 1098 (January 28, 1923) due to our client from the said person as well as subsequent interest and that he is ready to take the requisite proceedings for recovery of the said amount."

It is noticeable that this is the first information given by the plaintiff of the so-called settlement of January 28, 1923, which was effected by the plaintiff behind the back of defendant No. 2 and even this does not give any details of the settlement. In reply to Ex. 11 defendant No. 2 sent Ex. IV dated December 5, 1923, through a different Vakil, Mr. K. Ramaswami Ayyangar instead of his former Vakil. In this letter after replying to the prior correspondence it is alleged that a sum of Rs. 60,000 will be due from the plaintiff if accounts were taken of the business. So the plaintiff is called upon to give the details of the accounts, the balance sheets of the salt

business, to state what had become of the movables, immovables, stock-in-trade and outstandings and to give any other details that may be relevant. In reply to this the plaintiff sent Ex. IV-A dated January 7, 1924, through his Vakil Ganapathiappa Pillai. In this for the first time the information is given that the accounts were closed on January 28, 1923, the properties of the partnership being taken over at the then market price. It refers to the former notice, Ex. XI, and alleges that it was already mentioned in it that Kailasam Pillai consented to the plaintiff taking over of the partnership properties. This last statement is incorrect there being no such allegation in the prior notice. Then it says that it is not possible to give in a mere reply notice the details of the accounts. It was then alleged that the plaintiff never raised any objection to anybody interested in Kailasam Pillai coming and examining the accounts. The plaintiff offers to show the accounts to any person coming on behalf of defendant No. 2 within a month from the date of the notice. This notice, it may be said, gives a fair opportunity to defendant No. 2 to look into the accounts and gave also some information about the details of the settlement of January 28, 1923, though no such offer had been made previously. But this offer was not availed of by defendant No. 2. She sent nobody to examine the accounts and to raise specific questions about the validity of the entries therein. It appears that, up to the date of the suit, she merely kept quiet without utilising the offer made by the plaintiff. The present suit was filed on July 6, 1925, by the plaintiff.

Issues Nos. 3, 4 and 5 raise the questions as to what are the movable and immovable properties, the outsandings and the liabilities of the partnership. Issue No. 2 is now immaterial. Issue No. 1 arises only in the cross-appeal. Without recording any evidence on any of the issues the Subordinate Judge referred the whole matter to a Commissioner and after the receipt of the Commissioner's report he dealt with the issues. One of the points strenuously pressed before the Commissioner and afterwards before the Court was as to the price which the plaintiff should have paid for the salt pans. As to this it will be convenient first to state the legal position. *Prima facie*, the plaintiff is not bound to take the salt pans. If he takes the salt pans at a price agreed upon between the parties, then no question arises. But if he takes the salt pans, though not bound to take them, and credits in favour of the partnership some price of his own fixing, *i. e.*, behind the back of the other partner the other partner is not bound by such valuation and if he questions the valuation, the Court is entitled to scrutinise it. So far, the parties are agreed. But defendant No. 2 says that while she is entitled to repudiate the taking over by the plaintiff at a price of his own fixing, she is not bound to take back the pans and she is entitled to insist that the plaintiff should now be compelled to pay the proper price of the pans in January 1923. The plaintiff, while conceding that if his price is not found to be the proper price by the Court his taking over might be set aside, contends that he cannot be compelled to purchase them at the price found by the Court to be the proper price. The only result of setting aside his taking over of the salt pans would be that his so-called one-sided purchase is simply set aside, the pans remain as partnership property.

If the parties agree to wind up the partnership, the Court may sell the salt pans or if defendant No. 2 is willing to retain them she may take her share of them. But the third alternative suggested that the plaintiff can be compelled to take the pans at the price now found by the Court to be the proper price does not exist. To direct such a course would be according to him to compel the plaintiff to complete a contract never existed or to thrust a purchase upon him which he never agreed to take. In *Muthiah Chetty* v. *Veerappa Chetty* (1) myself and Jackson, J. held that a settlement by which one partner takes the partnership assets solely for himself on a valuation fixed by himself is not *prima facie* binding on the other partners, "and the Court is entitled to look into the matter." In that case Mr. Varadachari, who appeared for the respondent argued that the price at which the partner took over the assets was a proper price. That point was found against him and another price was found by the Court below as the proper price. The respondent in that case was willing to take the properties at the price fixed by the lower Court and Mr. Varadachari did not raise the further argument before us that he was

(1) 121 Ind. Cas. 488; A I R 1929 Mad. 627; 52 M. 509; 29 L W 636; (1929) M W. N 345; 56 M L J 776; Ind. Rul. (1930) Mad. 184.

not bound to take the properties at the price fixed by the lower Court. In that case the respondent was very anxious to retain the house in Rangoon at whatever cost and the argument that the purchase should not be thrust upon him against his will was never urged before us. In these circumstances, that case cannot be authority for the proposition now contended for by the appellant. In *Vyse* v. *Foster* (2), the articles of partnership contained a term that if any partner dies his share was to be purchased by the other partners and the value of his share was to be paid by promissory notes. It was found that the surviving partners took over the share of the deceased partner under this term, that there was no misconduct and that the omission of the formality by which promissory notes were to be executed for the price did not vitiate the purchase, and the suit by one of the children of the deceased partner asking for profits or interest on the value of the father's share was dismissed. At p. 329* Lord Cairns laid down three rules in the case of the death of a partner: (1) If there is nothing special in the contract of partnership and there is no settlement of account, the estate of the deceased partner is entitled to the benefit of a share of the profits which were made in the trade after his death; (2) if there was an option given to the surviving partners to take his share on certain terms, then those terms must be acted upon, and (3) if they are not acted upon, this partnership remains unliquidated and the estate of the deceased partner will again be entitled to a share of the profits. So far as the profits of the partnership subsequent to the death of Kailasam Pillai are concerned, there is no difficulty in laying down the rule of law as to what the rights of defendant No. 2 are. They are now expressly stated in s. 37, Partnership Act, and this section is substantially in conformity with the rule laid down by Lord Cairns. In the present case there is no term in the articles of partnership and as defendant No. 2 does not agree to the taking over by the plaintiff at the price fixed by him it may be that she is entitled to her share of the profits of the partnership acquired after the death of Kailasam Pillai and which may properly be attributed to her share of the partnership assets. But we are not now dealing with the question as to what share of the profits defendant No. 2 is entitled after Kailasam Pillai's death.

We have first to deal with the question as to the disposal of the corpus of Kailasam Pillai's share of the partnership assets. I do not think that the decision in *Vyse* v. *Foster* (2) helps us in this matter. In *Syers* v. *Syers* (3). It was held that a partnership at will in a music hall and tavern was started in June, 1869, and that it was afterwards, dissolved by a letter of August 1872. As to the intervening period the plaintiff was entitled to a share of profits, and also to a share of the assets as they stood in 1872, the date of dissolution. As to the share of the assets it was held that the Court of Chancery had power either to grant a sale of the undertaking as a going concern or to make a proposal for the purchase by the owner of the seven-eighths share of the plaintiff's one-eighth share. The decree in that case accordingly directed that a valuation should be made of the one-eighth share of the plaintiff and that an option should be given to the defendant-appellant to take it at that valuation. If he takes it at that valuation no further accounts are to be taken, but if he does not take it at the valuation fixed by the Court, the last clause of the decree provides that the music hall and tavern be sold as a going concern and that the assets be divided between the parties. This last provision to some extent supports the argument of the plaintiff. But Mr. Srinivasa Ayyangar appearing for defendant No. 2 contends that there was no taking over by the defendant in that case and, therefore, the question did not strictly arise. The decision in *Lord Provost etc. of Edinburgh* v. *Lord Advocate* (4), relates only to the profits acquired since the death of the partner, and has nothing to do with the corpus of the property in *Cassels* v. *Stewart* (5), it was found that the assignment of the interest of one partner to another was in exact conformity with the agreement in the articles of partnership and cannot be questioned by a third partner. It was also observed at p. 73* that a partner acquiring any benefit by using his posi-

(2) (1874) 7 H L C 318; 44 L J Ch. 37; 23 W R 355; 31 L T 177.

*Page of (1874) 7 H. L.—[*Ed.*]

(3) (1876) 1 A C 174; 24 W R 970; 35 L T 101.

(4) (1879) 4 A C 823.

(5) (1881) 6 A C 64; 29 W R 636.

*Page of (1881) 6 A. C.—[*Ed.*]

tion as a partner is bound to communicate it to the others and he should not separate his interest from theirs.

The principle is stated in Lindley on Partnership, Edn. 9, pp. 395 and 396, in respect of renewals of leases. The case in *Manley* v. *Sertori* (6), also relates to profits earned after the death of a partner. The case in *In re Bess*; *Bess* v. *Bess* (7), also deals with the case of renewal of a partnership lease and the duty of one partner not to acquire any special advantage over any other partner (p. 61*). The decision in *Hordern* v. *Hordern* (8), was very much relied on by Mr. Srinivasa Ayyangar. In that case the articles of partnership provided that on the death of one of the partners the survivor should pay to the executors of the deceased the full share to which they may be entitled on the taking of a general account of the partnership assets, the assets being valued by mutual agreement or by valuation in the usual way. It was held by the Privy Council that this clause was a binding contract of sale and purchase and that the valuation was only an incident in carrying out the same. Mr. Srinivasa Ayyangar contends that as the plaintiff had himself taken over the share of Kailasam Pillai his act was binding upon him and he could not go behind it and now offer to return the share. The valuation of the share is only an incident and he must now be compelled to take the share at the proper price which the Court may now find. But I do not agree with this contention and I am of opinion that this case does not help the appellant.

In that case there was a contract between the partners that the surviving partner should take over the share of the deceased partner at a proper valuation. The moment the proper valuation is arrived at by the Court, the contract of sale and purchase can be made to operate. But in the present case we have no such contract. What the plaintiff did was strictly illegal on his part and unless defendant No. 2 accepts it the only thing we can do is to set it aside. We cannot proceed further and insist upon the carrying out of a contract into which he never entered and compel him to take over the properties at a valuation to be arrived at by the Court. The decision in *Hugh Stevenson & Sons* v. *Aktiengsellischaft Fur Carton Nagen Industrie* (9), again does not help us. It was there held that the German Company were entitled to a share of the profits made after the dissolution by reason of the war by the carrying on of the business by the English Company with the aid of the German Company's share capital. In some of these cases there is no question of the valuation of the corpus because the corpus of the property consisted of merely capital and not of immovable property or any right analogous to the right in salt pans and that portion of the case presented no difficulty. But it does present some difficulty in the present case. On the whole I have come to the conclusion that so far as the salt pans themselves are concerned, while agreeing with the contention of the appellant that the value at which the plaintiff has sought to take them over is an undervalue and, therefore, does not bind her, she is not entitled to insist on the plaintiff taking her share of the partnership at the proper valuation which may now be arrived at. Defendant No 2 will now be entitled to her share of the partnership propery which she may keep and manage if she so likes. But if she does not, she may ask for a sale of the salt pans as a part of the winding up. We are not satisfied that the sale made by the Commissioner after the preliminary decree was a sale made after due advertisement.

That sale realised only Rs. 44,000 as against Rs. 69,090 at which the plaintiff took them over with the result that the lower Court found that the plaintiff was entitled to a larger sum than he prayed for in his plaint. We do not think we can allow such an anomalous result. The salt pans should be sold only after proper advertisement, *i. e.*, after giving not less than a month's notice fixing the price the plaintiff had paid as upset price. If after one or two attempts no higher offer is forthcoming, they should be regarded as sold to the plaintiff at the price he took them over and defendant No. 2 would not be entitled to obtain anything under this heading. If there is a higher offer, defendant No. 2 will get the benefit of the higher price and interest between January 1923 and the date of such sale.

Now coming to the next heading argued

(6) (1927) 1 Ch. D 157; 96 L J Ch. 65; 136 L T 238.

(7) (1903) 2 Ch. D 40.

(8) (1910) A C 465; 80 L J P C 15; 26 T L R 524; 102 L T 867.

*Page of (1903) 2 Ch. D.—[*Ed.*]

(9) (1918) A C 239; 87 L J K B 416; 118 L T 126; 34 T L R 206; 62 S J 290.

by the appellant, this relates to 6,83,600 maunds of salt left at the time of Kailasam Pillai's death. This salt consisted of two portions, the stock in Arumuganeri and the stock in Tuticorin. On the estimate of the Commissioner he found that the Tuticorin salt actually fetched a profit of Rs. 1,313-8-0. It is said that the reason for the profit was that the salt was mostly exported to Calcutta and other outside ports. But in the case of Arumuganeri salt it was sold at a loss of nearly Rs. 20,000 because there were four or five other salt merchants at the time and they had all considerable stocks of salt and it was not easy to dispose of such a large stock of six lakhs of maunds. Whatever the reasons may be after carefully considering the arguments of the learned Advocate and the report of the Commissioner, *vide* p. 361, etc., I am unable to find sufficient materials for differing from the conclusion of the lower Court. The average price at which the salt was taken by the plaintiff ranged from one anna per maund up to 4 annas 6 pies per maund. As regards the sales by the plaintiff in 1922, 1923 and 1924 the average price secured by him ranged from 6 pies per maund to 6 annas 6 pies per maund and the Commissioner finds that as a matter of fact in the re-sale of the stock by the plaintiff he sustained very heavy loss. And in cases where the average price ranges so widely as from 6 pies to nearly 7 annas, it is impossible for the Court at this distance of time to find that there is any impropriety in the act of the plaintiff. Even on the footing that the Court is entitled to scrutinise the taking over by the plaintiff at the instance of defendant No. 2, we are unable to say that the price credited by the plaintiff in favour of defendant No. 2 is improper. The matter might have been left at that stage in the Court below. But what the Court did was because defendant No. 2 would not accept the price at which the plaintiff took over the stock of salt, it proceeded to consider the amount realised by the sale of the salt by the plaintiff as if it was a sale held on account of the partnership and debited a considerable portion of the loss to defendant No. 2. We do not think this portion of the lower Court's action is justified. The moment we find that the price at which the plaintiff took over the salt is the proper price, there is an end of this item, and it is unnecessary to debit further loss to defendant No. 2 simply because she refused to recognize the price paid by the plaintiff as the proper price.

The third item argued is the item of outstandings. As already mentioned, para. 13 of the plaint refers to this item and the amount of the outstandings is mentioned as Rs. 37,000. As a matter of fact during the pendency of the suit some more outstandings were collected by the plaintiff and this nearly amounted to about Rs. 18,000. As to the remaining outstandings they were all sold in auction and the plaintiff purchased them at a valuation of Rs. 300 and defendant No. 2 questions the propriety of the sale. Though apparently this sale looks like a sale at an under-value, on a closer scrutiny, we do not think there is anything substantial in this item. Of the Rs. 37,000 outstandings the most important item is an item of Rs. 31,000 due on a mortgage and an item of Rs. 2,356 due as an unsecured debt from a firm called S. P. S. N. Brothers of Madura. The debt due from this firm alone amounts to Rs. 33,492 and the balance consists of small items due from various persons. The mortgage decree against S. P. S. N. Brothers was executed and Rs. 18,000 was all that could be realised. As to the other debts practically nothing has ever since been collected by the plaintiff. The plaintiff is even now willing that defendant No. 2 should take any share of these debts if any portion of them has since been realised or should have a declaration of her right to a share in these items. In these circumstances I think that there is really nothing in this item.

The next item which was the subject of controversy between the parties is an item of Rs. 5,251-11-0 due from defendant No. 2's husband to the plaintiff on an account called *Tanadu chitta* or private account. The books containing the private account are produced by the plaintiff and at one stage I thought that this fact was a fact supporting the plaintiff's case. But Mr. Varadachari with his usual fairness pointed out that all defendant No. 2's papers and documents were with him and they were produced by him and that no particular significance should be attached to the fact that the books are produced by the plaintiff. Leaving therefore this fact aside we have got to see what do these account books really represent. These books contain a number of debit items representing the amonnts spent by Kailasam Pillai for his private expenses,

As many of these books open with a debit, it is difficult to see whence the amounts were obtained by him to enable him to incur the expenses. After the debits amount to Rs. 3,000 or Rs. 4,000 sometimes we find a large credit from the partnership account, very often a credit large enough to wipe off the debit and leave a surplus. On the basis of such entries it is argued by Mr. Varadachari that the debits really represent drawings from the partnership funds. As each expense was incurred the amount was really drawn from the partnership account, but instead of the amount being entered in the account at the time, they were all totalled up later and a lump sum was entered as if it was drawn on that date.

Now, after the debits and credits cancelled each other for some time, the last of the debits remaining at the time of Kailasam's death were not counter-balanced by any credit item and these debits amount to Rs. 5,251. Mr. Varadachari therefore contends that they are really drawings from the partnership funds and that defendant No. 2 is bound to pay those drawings amounting to Rs. 5,251, or in other words the amount should be taken as a debit item against her. It is contended on the other hand by Mr. Srinivasa Ayyangar that though sometimes the debit items were counterbalanced by credit items large enough to wipe them out, there are other entries showing that the credit item did not always wipe off the debit item. It was sometimes a smaller item of credit than the debit. His argument is that the credit item represented a real credit when actually drawn but where there was no such entry, no such drawing from the partnership fund should be presumed. The consideration that if Kailasam did not draw the amount from somewhere he could not have incurred the expenses raises the suspicion that perhaps Mr. Varadachariar's explanation is true. But his case suffers under one disadvantage. With his explanation the account books cease to be accurate account books with the value of account books. The very object of accounts being kept especially of day books is the value that is to be attached to the entries made as each event happened. It is on the likelihood of such entries being made that the value of accounts depends. But if an argument is advanced that though a drawing is made from the partnership account it is not debited in the day book at the time when it is drawn but only a lump sum is debited several months afterwards, it is not a proper day book; it ceases to be such an account book to which Courts are accustomed to attach value. He relied upon an account (a rough note book) known as *ditta chitta*. His argument is that the balances in the day books of the firm did not represent the real cash balances on any particular day. To get the cash balance not only the final account in the day books should be taken but also of the various other account books containing debits and credits including the *tanadu chitta*, and only when all these are put together, the actual cash balance can be ascertained. One such *ditta chitta* in which the amounts in the various accounts were brought together in one place and the total was arrived at was filed. When the attention of P. W. No. 1 (the accountant) was drawn to the cash balances in the day books, he said that the cash balances could only be ascertained by looking at the *ditta chittas* : *vide* Ex. SS.

Now though one such *ditta chitta* was filed, it does not relate to the period now in question and though he was given time to produce the *ditta chitta* for the period in question the plaintiff was unable to produce it. So that even if the one *ditta chitta* which was only filed for the previous year somewhat supports the plaintiff's argument we cannot extend it to the period in question by reason of the absence of the *ditta chitta*.

The utmost that can be said in his favour is that there is a suspicion that possibly his argument is correct. There are other difficulties. These *tanadu chitta* accounts date from 1908 and if the last figure in them is taken, the result would be to debit the plaintiff with the result of all the former accounts ranging from 1908. But it is conceded that all the accounts between the plaintiff and Kailasam were settled somewhere in 1921 and the result of the older accounts need not be considered. Again the actual totals of these day books and *tanadu* accounts seem to be written by the plaintiff later in pencil before being filed and afterwards inked and the totals were not made by Kailasam himself. The truth of the matter is that the exact nature of these *tanadu* accounts is wrapped in some mystery. It is not possible for the Court to unravel it and the party who relies upon such uncertain and indefinite accounts and accounts which on the face of the argument do not represent the actual transaction that took place must fail. On

this ground I would hold that so far as this item is concerned, the appeal should be allowed and the plaintiff should lose this item.

The next item that was argued relates to interest. The plaintiff is charging interest at the end of each year after deducting also counter-interest. This in substance amounts to charging compound interest. The appellant contends that the plaintiff is not entitled to compound interest and relies on *Suleman* v. *Abdul Latiff* (10). But Mr. Varadachari replies that the accounts themselves show that whenever accounts were settled at the end of each year, the parties have charged interest on the overdrawings of each partner. At the various stages of the case each side was insisting upon the payment of counter-interest on the footing that he was going to recover some amount. Defendant No. 2 herself repeatedly filed objections before the Commissioner saying that interest ought to be charged against the plaintiff on some real or supposed items due to her. In these circumstances I must hold that the plaintiff is entitled to compound interest on the principal he has charged. But of course on our findings with reference to the *tanadu chitta* such portion of it as is attributable to Rs. 5,251-11-0 must now be excluded. Otherwise the plaintiff is entitled to the interest he claims.

Now as already stated on the accounts made up by the plaintiff there is a sum of Rs. 21,431-6-4 due to him and on the findings we have now arrived at as above, only a sum of Rs. 5,251-11-0 with its interest must be excluded out of this. Roughly there is a sum of Rs. 16,000 due to the plaintiff. I say roughly because the actual accounts may have to be taken on the basis of our findings and with reference to the further consideration to be pointed out. This sum of Rs. 16,000 would be due to the plaintiff on the footing that the taking over of the salt pans by the plaintiff for Rs. 69,000 odd stands. If defendant No. 2 is now willing to accept that purchase by the plaintiff, then the matter becomes simple and this sum of Rs. 16,000 would be due to the plaintiff. But if defendant No. 2 does not wish to accept that purchase the Rs. 69,000 has to be credited to the plaintiff and debited to the partnership and the salt pans will remain to be dealt with either by re-sale or otherwise. As already mentioned they must either be sold again unless defendant No. 2 chooses to retain them. But for the purpose of determining the question whether on a valuation defendant No. 2's share of the partnership can be valued at a particular figure so that defendant No. 2 may be entitled to interest on that figure for the subsequent years as profit or actual profits earned on the principle of s. 37, Partnership Act, we have still to consider the valuation of the salt pans in 1923. It is contended for defendant No. 2 that the valuation of Rs. 69,000 is an under-valuation. We are inclined to agree with this contention.

In dealing with this portion of the case the Subordinate Judge has not considered one important document relied on by defendant No. 2 (Ex. 5). This document relates to the sale of certain salt pans on June 14, 1922, a few days before the death of Kailasam and six months before the plaintiff's taking over. Under that document 54 pans were sold for Rs. 9,415. It is conceded by all parties that these pans are of a bigger size. They are what are called one cent pan, whereas the pans which are in question in this suit are not of that size but are only 5-8ths cent pans. This document works at Rs. 167 a pan and 5-8ths cent pans would be valued at Rs. 104. And according to Mr. Srinivasa Iyengar, even making a reduction of Rs. 20, each pan in question ought to have been sold for Rs. 84, and 1,327 pans in the suit ought to be valued at Rs. 1,12,800. But even on this footing, *i. e.*, crediting an extra Rs. 44,000 as the price of salt pans, the quarter share of Kailasam would only be Rs. 11,000 still leaving him on the debit side at the date of his death, *viz.*, June 1922. Whatever reasonable valuation we give for the salt pans and debiting the highest figure suggested by Mr. Srinivasa Ayyangar himself, we find that the debit side (Rs. 60,000) cannot be wiped out. The result of this finding would be that even crediting the full value of the pans for the purpose of valuation of defendant No. 2's share at the date of Kailasam's death, we are not able to find the actual share of Kailasam, taking the account of his liability, on the credit side. And if it is on the debit side she is not entitled to any interest on the valuation. If defendant No. 2 insists on her share of the actual profits earned from 1922 up

(10) 124 Ind. Cas. 891; A I R 1930 P C 185; 57 I A 245; 58 C 208; (1930) A L J 868; 34 C W N 737; Ind. Rul. (1930) P C 267; 32 Bom. L R 1152; 59 M L J 121; 52 C L J 10; 32 L W 184; 24 P L R 328 (P C).

to now she will be entitled to it, and Mr. Varadachariar has not objected to it.

The case will now have to go back to the Court below for taking the final valuation on the following basis: (1) Defendant No. 2 must now finally elect, forgetting all the past transactions, whether she will accept plaintiff's purchase of the salt pans at the price for which he took them over or whether she still insists upon another sale in which case they will be sold after reasonable notice with the plaintiff's price as the upset price and the sale will be taken into account only if a higher sum is realized; if not it will be regarded as if it never happened. In the case of a higher price being realized, defendant No. 2 may share in the benefit of this extra amount, but in that case she will have to pay interest on the ground of her debit being enhanced by one-fourth x Rs. 69,000 from January 1923 up to the date of such sale. But either if she accedes to the sale or if the sale results in no higher price, the old purchase by the plaintiff will stand and no further accounts need be taken on this matter; (2) defendant No. 2 is not entitled to any interest in substitution of the profits of the partnership as one of the alternatives allowed to her by law because on valuation her share of the partnership assets turns to be on the minus side. But if she insists she is entilted to a proportionate share of the profits actually earned (on the basis of the principle of s. 37, Partnership Act.)

It is sufficiently seen from the above judgment that probably a good deal of loss was suffered by the firm. That is certainly the plaintiff's case. Anyhow if defendant No. 2 wants an account to be taken of the subsequent profits she is entitled to it; subject to these two points being worked out, the further debits against defendant No. 2 will be taken as Rs. 16,179-11-4 minus any interest on Rs. 5,251 which has got to be deducted. This account should be taken by the lower Court or by the Commissioner. To this amount the result of the sale of the salt pans and the profits should be added. If defendant No. 2 does not want any further accounts to be taken, the decree of the lower Court will stand modified as a decree against defendant No. 2 for Rs. 16,179-11-4 with further interest from January 28, 1923 at 12 per cent compound interest upto the date of the lower Court's decree and 6 per cent on the aggregate amount up to date of payment. If the matter ends here the parties will give and take proportionate costs on the basis of this figure. But if further accounts are taken because defendant No. 2 wants them to be taken, the costs will be finally given when the figures are finally ascertained, but they will be on the same principle, *i. e.*, of giving and taking proportionate costs. In A. S. No. 85 of 1928 the parties will have proportionate costs here and in the lower Court on the footing that the plaintiff succeeds to the extent of Rs. 16,179-11-4. In A. S. No. 128 of 1929 the appellant will have costs on Rs. 15,000. These appeals having been set down to be spoken to this day, the Court made the following

Order.—In case defendant No. 2 elects to accept the value given by the plaintiff to the salt pans, the question whether plaintiff should be compensated to the extent of Rs. 728 as the value of 11 pans confiscated by Government on account of the alleged obstruction of defendant No. 2 will be considered and decided by the Court below and provided for in the final decree.

A/D. *Order accordingly.*

ALLAHABAD HIGH COURT

First Civil Appeal No. 495 of 1929

BENNET AND BAJPAI, JJ.

November 20, 1934

Chaudhari S. AFZAL HUSAIN AND AFTER HIS DEATH *Chaudhari Syed* IQBAL HUSAIN—PLAINTIFF—APPELLANT

versus

CHHEDI LAL AND OTHERS—DEFENDANTS —RESPONDENTS

Muhammadan Law — Wakf — Mutawalli *effecting usufructuary mortgage of* wakf *property with previous sanction of Court—Mortgage for justifying necessity —Validity of—Sanction, if can be given retrospectively—Fraudulent intent—When can be said to be made out.*

A usufructuary mortgage of *wakf* property by a *mutawalli* who is a *shia*, though made without sanction of the Court may be retrospectively confirmed by the Court. Such a mortgage made without previous leave of the Court is not void if made for a justifiable necessity. [p. 796, col. 2.]

Where it is found that by the usufructuary mortgage in question the accumulation of interest under the simple mortgage and the decrees was prevented and the transaction would therefore have been beneficial to the dedicated property and that the transaction should have received sanction, the usufructuary mortgage should be held to be valid in law. [p. 798, col. 1]

[Case-law discussed.]

It cannot be said that the mere statement in a deed of *wakf* that the property was free from all sorts of debts and liens, although it may be incorrect, indicates that there was any fraudulent intent.

Nor will the mere fact that the *mutawalli* subsequently made a number of leases for five years which he was authorized to do under the *wakfnama* would indicate any fraudulent intent. [p. 794, col. 2.]

F. C. A. from a decision of the Subordinate Judge, Allahabad, dated May 17, 1929.

Messrs. *Hyder Mehdi* and *Zafar Mehdi*, for the Appellant.

Messrs. *K. N. Katju* and *M. N. Kaul*, for the Respondents.

Judgment.—This is a first appeal brought by one *Chaudhari Saiyid* Afzal Husain, the sole plaintiff, and continued after his death by his son, *Chaudhri Saiyid* Iqbal Husain, who was defendant No. 2. The contesting respondent, defendant No. 1 is Chhedi Lal. The plaint sets out that the plaintiff, Afzal Husain, was the owner in possession of the property in the list attached to the plaint and that on January 18, 1919, he executed a *'waqf' 'alal aulad'* that is, *waqf* for his descendants of the property dividing the property into two portions. One village *Mauza* Samorai, *Mahal* Rustam Ali, and certain houses and groves were dedicated for religious and charitable purposes. The plaint does not mention further in regard to the other *waqf* property, but the deed of *waqf* printed on page 57 shows that the 26 remaining villages were created a *waqf* for the benefit of the family of the plaintiff and he was made the first *mutawalli* with defendant No. 2 to succeed him. When the family should become extinct, there was a gift over for religious and charitable purposes. The *waqf* property is referred to in the plaint as list A. Paragraph 2 of the plaint sets out that at the time of the execution of the *'waqfnama'* one of the villages dedicated, *Mauza* Ajora Buzurg, *Mahal* Afzal Husain, was hypothecated in lieu of Rs. 5,000 to one Sheo Pal *Brahman* under a mortgage-deed, dated April 15, 1916. Paragraph 3 states that in order to pay off the aforesaid amount and other amounts which were due by the plaintiff, the plaintiff desired to mortgage with possession villages given below to Chhedi Lal and that a mortgage-deed was executed in the shape of a deed called a *'supurdnama'* on March 20, 1924. It is to be noted that although the language of the plaint is rather loose, only the 26 villages dedicated to the family use formed the subject of the *'supurdnama'* which is printed on page 97. Paragraph 4 of the plaint sets out the following items and we understand the paragraph to indicate that the defendant No. 1 was to pay off these items:

	Rs.	a.	p.
Amount due to Sheo Pal under a mortgage-deed ..	5,000	0	0
'Zar-i-peshgi' on account of lease of Bisheshar Prasad ...	3,780	0	0
'Zar-i-peshgi' on account of lease of Saiyid Tanzim Husain ...	2,500	0	0
'Zar i peshgi' on account of lease of Patwari Din ...	1,800	0	0
Decree for profits held by Muhamad Hamid Ullah and Mohi Uddin ...	500	0	0
Decree for profits held by *Munshi* Abdul Subhan ..	1,132	3	6
Decree in respect of pay of Ali Sher Khan ...	500	0	0

Paragraph 5 states that the defendant No. 1 did not pay any of these items, that the plaintiff continued in possession and his servants made collections and deposited the amount at the place of the defendant and the defendant sent the amount to meet expenses. Paragraph 6 sets out that in September 1925 an account was made between the parties, according to which a sum of Rs. 8,844-1-6 was found due to defendant No. 1 and that the plaintiff to pay off this sum and other amounts executed a document in favour of defendant No. 1 for Rs. 20,000 under which the consideration was the Rs. 8,844-1-6 already mentioned as due to defendant No. 1, another sum of Rs. 827 also due to defendant No. 1, Rs. 1,132-3-6 due to other persons which was not paid, and a sum of Rs. 8,196-11 which the document stated was received in cash. In regard to this cash payment, it was pleaded that only Rs. 4,524-13 was received and received by instalments at later dates. It was, therefore, claimed that Rs. 5,804-11 were not received out of Rs. 20,000 consideration. The document in question which is a simple money bond is dated December 14, 1925, and is printed at page 121. Paragraph 7 states. "The plaintiff had assigned the amount in order to save the property from being sold by auction and when that amount was not paid off, the plaintiff took objection to the application for removal of *'lambardar'* which was made on behalf of defendant No. 1 on February 4, 1926, or thereabout. Ultimately on June 25, 1926, defendant No. 1 was declared to be entitled to make collections with certain conditions, but as he did not comply with those conditions, the plaintiff began to make collections." This is a somewhat cryptic paragraph but

apparently it states that the '*supurdnama*' was executed in order to save the property from being sold by auction and that a dispute took place in regard to possession. Paragraph 8 sets out that the defendant No. 4, a daughter of the plaintiff, brought a suit for cancellation of the '*supurdnama*' which was decreed by the learned Subordinate Judge on September 14, 1927. We may note that that decree was upheld by this Court and that an appeal is pending before their Lordships of the Privy Council. Paragraph 10 sets out that the '*supurdnama*' is invalid and null and void and as defendant No. 1 did not pay any amount thereunder, he is not entitled to remain in possession. Paragraph 11 sets out that defendant No. 1 alleged himself to be entitled to possession also of the property in list B. Paragraph 12 states defendant No. 1 has obtained a separate bond in lieu of the money which was due to him Under these circumstances, he has no right to remain in possession in lieu of any amount due to him when he has already obtained a separate bond in lieu thereof. The relief asked for was:—

(*a*) It may be declared that the document dated March 20, 1924, is utterly invalid and null and void, and that the plaintiff is in lawful possession of the property given in list (B) as a '*mutawalli*'.

(*b*) The plaintiff may be put into possession of the property entered in list (C) by dispossession of defendant No. 1.

Now it will be noted that no allegations are made in the plaint as to why the '*supurdnama*' is invalid and null and void. These defects in the plaint are remedied by arguments of Counsel for the appellant so far as it is possible. It is to be further noted that the plaint is defective in not explaining anything in regard to list (C) for which the plaintiff asks for possession. It is, however, the case of the appellant that in the 14 villages of list (C) mutation was effected for the defendant No. 1 on the '*supurdnama*' and for that reason the suit for those 14 villages is for possession. In the 12 villages in list (B) mutation was not effected and the name of the plaintiff remains. List (B) of 12 villages and list (C) of 14 villages make up the 26 villages mentioned in the '*supurdnama*'.

The written statement of defendant No. 1 was to the effect that the deed of *waqf* was fictitious and invalid and executed merely to avoid payment of dues due to creditors and to practise fraud upon present and future creditors and was not intended as a valid *waqf*, that the plaintiff had borrowed the amounts set out in para. 4 of the plaint and had represented to defendant No. 1 that the plaintiff wanted to go on a pilgrimage to Karbala Maula and that the son of the plaintiff was inexperienced, "therefore he requested the contesting defendant to manage his property, and so far as possible, to try to pay off his debts" and accordingly the '*supurdnama*' of March 20, 1924, was executed. Paragraph 24 sets out that mutation was effected for defendant No. 1 in 14 villages and that the plaintiff made collections through his servants and appropriated the entire profits for himself, that when an account was made up in 1932, the sum of Rs. 8,844-1-6 was found due to the contesting defendant by the plaintiff and the plaintiff and his son admitted this as correct and affixed their signatures on the simple money bond for Rs. 20,000 on December 14, 1925, and that disputes continued between the parties and on December 18, 1928, the plaintiff out of dishonest motives executed a lease for 5 years of a part of the property in favour of one Tanzim Husain. In para. 28 it is alleged that more than Rs. 20,000 are still due to contesting defendant. In para. 30 it is alleged that the suit by the daughter of the plaintiff was in collusion with the plaintiff. It was further urged in para. 31 that the plaintiff was bound by the documents executed by him and in para. 32 an estoppel is pleaded.

Several issues were framed, of which the following are important for the decision of the appeal:—

(1) Is the plaintiff estopped from impeaching the validity of the deed of March 20, 1924, executed by himself in favour of Chhedi Lal, defendant No. 1?

(3) If an estoppel does not bar a plea of the invalidity of the deed of March 20, 1924, was the plaintiff competent validly to execute the said deed in spite of the previous deed of January 18, 1919?

(5) What money, if any, is due to Chhedi Lal, defendant No. 1 under the deeds of March 20, 1924, and December 14, 1925? Is the plaintiff entitled to obtain possession of the disputed property without first paying the dues of Chhedi Lal, defendant No. 1?

(6) Is Chhedi Lal, defendant No. 1 estopped from disputing the valid-

ity of the deed of January 18, 1919? If not, is the said deed fictitious?

(7) Does s. 53 of the Transfer of Property Act vitiate the deed of January 18, 1919?

The learned Subordinate Judge has held on Issue No. 1 that the plaintiff is estopped from impeaching the validity of the '*spurdnama*'. On Issue No. 3 he found that the plaintiff was competent to execute the '*supurdnama*'. On Issue No. 5 he found that the plaintiff was not entitled to obtain possession of the property covered by the '*supurdnama*' without first paying defendant No. 1. On Issue No. 6 he found that Chhedi Lal was not estopped from disputing the validity of the *waqf* and that the deed of *waqf* was fictitious. On Issue No. 7 he found that the *waqfnama* was void under s. 53 of the Transfer of Property Act, as being made to defeat the mortgagees and subsequent creditors. The suit was, therefore, dismissed by the lower Court.

The plaintiff has appealed against these findings. After the decision of the lower Court, there was a decision of a Bench of this Court in the appeal against the decree in favour of the daughter of the plaintiff. That decree was upheld by a Bench of this Court and defendant No. 1 has taken the matter in appeal to their Lordships of the Privy Council. Accordingly the defendant No. 1 made a preliminary objection to this appeal being heard and contended that the hearing should be stayed under s. 10 of the Civil Procedure Code until the decision of their Lordships of the Privy Council.

That application was opposed by the appellant and a Bench or this Court has held that the appeal should be decided without being stayed under s. 10. Accordingly the appeal has been heard by us. We first of all consider the question of the validity of the deed of *waqf* as it comes first in point of time. The lower Court considered the validity of the deed of *waqf* on pp. 35 to 37 and found that "to all intents and purposes, the alleged '*waqf*' was a sham and that Afzal Husain was the real owner of the property covered by the alleged '*waqf*' at the time when the '*supurdnama*' was executed and that the plaintiff did not divest himself of the proprietary interest." One of the criticisms levelled against the *waqfnama* is that it is stated that the endowed property was free from all sorts of liens, debts and liabilities. This was not correct as at the time there were three mortgages on the *waqf* property. One of these due to Sheo Pal is set out in the plaint. There were also mortgages due to Ahamd Husain and Partab Singh. The plaintiff made various arrangements for the payment of these mortgage debts. On January 8, 1919, there was a sale-deed printed on p. 53, by Afzal Husain to Mahabir Singh. In it he provided for the payment of the mortgage of Ahmad Husain and also of a promissory note due to Ahmad Husain and also for a mortgage of February of 22, 1918, in favour of *Chaudhri* Surju Singh in which is a reference to the document in favour of Partab Singh. We do not think that the mere statement in the deed of *waqf* that the property was free from all sorts of debts and liens, although it may be incorrect, indicates that there was any fraudulent intent. We do not think that the execution of the deed of *waqf* could affect the rights of the previous mortgagees or that it was intended to affect their rights. We do not think that the mere fact that the *mutawalli* subsequently made a number of leases for five years which he was authorized to do under the *waqfnama* would indicate any fraudulent intent. The defendant No. 1 in taking his *supurdnama* took it from the plaintiff under the description of *mutawalli* and defendant No. 1 was well aware of the existence of the deed of *waqfnama*. Defendant No. 1 accepted that document and did not challenge it in any way and in a suit which was brought in 1926 by defendant No. 1 along with the plaintiff, the plaintiff was described as *mutawalli* (see page 157). It was only when disputes arose in regard to property and when a daughter of the plaintiff filed her suit in 1927 that the defendant No. 1 changed his mind in regard to the *waqfnama* and put forward a case that it was a fictitious document. We do not agree with the lower Court and we consider that it has not been shown that the *waqfnama* was a fictitious or fraudulent document and we consider that it complied with the provisions of the Mussalman Waqf Validating Act (Act VI of 1913) and that it is valid. A further objection was taken in regard to accumulation of income. It was provided in para. 4 of the *waqfnama* that after paying off Government dues and maintenance allowance and village expenses, the rest of the income should be employed in purchasing other property. In a table attached at the end of the *waqfnama*, it was stated that 20 per cent. would be available for this purpose. This estimate

was extremely optimistic as no amount has actually been available in any year for such purpose. We do not think that the provision would invalidate the *waqfnama*, nor do we think that the *waqfnama* is invalid under the provisions of s. 53 of the Transfer of Property Act. It is true that there were three mortgages in existence at the time of the execution of the *waqfnama*, there is, however, nothing to show that the *waqfnama* was intended to be a fraudulent transfer which would affect the interest of the mortgagees. In our opinion the interest of the mortgagees could not have been affected by this subsequent transaction, nor is it shown that any of the creditors at that time or the subsequent creditors would have been defrauded by the *waqfnama*. Learned Counsel for the appellant pointed out that it was necessary for the respondent to show that fraudulent intention existed on January 18, 1919, at the time of the execution of the *waqfnama*. We are of opinion that no such fraudulent intention has been shown. We, therefore, hold that the *waqfnama* was a valid document.

We now come to the question of the validity or otherwise of the *supurdnama* of March 20, 1924. As already observed the plaint does not give any ground on which the plaintiff asks that this document should be declared invalid and null and void. The plaint sets out subsequent transactions and alleges that defendant No. 1 did not make the payments which he undertook to make under this document. The mere failure of defendant No. 1 to carry out the document would not be a reason for the document to be declared null and void. In para. 12 of the plaint it was set out that defendant No. 1 obtained a separate bond, that is the simple money bond of December 14, 1925, and had no right to remain in possession. It is suggested that this obtaining of a separate bond in some way made the *supurdnama* null and void. We consider that the plaint was defective in not expressing the grounds on which the relief was based. When we come to the grounds of appeal we find the allegation in the eighth ground:

"Because the deed of *supurdnama* being not within the competence of the *mutawalli*, the Court below would have in any case passed a decree for possession subject to the payment of any sum if found due to the respondent"

and in ground No. 5:

"Because the Court below has erred in holding that the deed of December 14, 1925, was an auxiliary deed, on the other hand it wiped off the debt due to the respondent under the deed of March 20, 1924."

These two grounds give the basis on which the appeal has been argued in regard to the validity of the *supurdnama*. The questions, therefore, are:

(1) Whether the *mutawalli* was competent to execute the *supurdnama*, and

(2) Whether the *supurdnama* was terminated by the simple money bond of March 20, 1924?

We will deal with the second question first as it is a very small matter. The *supurdnama* of March 20, 1924, provides for defendant No. 1 taking possession of 26 villages and making certain payments to previous debtors of the *mutawalli* and managing the property and making payments of Rs. 1,600 every six months to the *mutawalli* and his son and making advances for the marriage of the daughters of the *mutawalli* (para. 10). These payments were to come partly from the income of the property and in para. 3 there is a provision for the rate of interest of Re. 0-8-6 per month for advances made by defendant No. 1 from his own pocket, the rate being changed to Re. 0-9-0 after five years. This interest was not to be compound. In para. 12 it was provided:

"If without the payment of the amounts due to the aforesaid persons, we, the executants, desire to take back the *waqf* villages from the *supurdgi* of the said *amin*, we shall pay to the *supurddar* whatever amounts he might have paid up to that time to the persons mentioned above, or any amount which he might have paid on our account and in respect whereof he might possess a receipt together with interest at the rate mentioned above. In such a case the *supurdar* shall reconvey the *waqf* property and shall render an account of the income and expenses."

In para. 13 it was provided:

"When the entire amount or the amounts due under the mortgage *zerpeshgi* lease money, the amounts of the *ruqqas*, payable on demand the amounts of the decreases, and also the amounts which the *supurddar* might have paid from his own pocket together with interest, etc., thereon, have been fully paid off from the profits and income of the *waqf* property, the *supurddar* will relinquish all the *waqf* villages."

It was, therefore, within the competence of the parties to terminate the possession of defendant No. 1 in accordance with either of those paragraphs. It cannot be argued with any hope of success that the bond of December 14, 1925, purported to terminate the possession in any such manner. There is no reference in that bond to the termination of possession at all. The bond merely sets out that accounts had been taken for the years 1331 and 1332 *Fasli* and a sum of money was found due and further advances were due and that the entire amount of Rs. 20,000 would be repaid in eight years with interest at Re. 0-8-6 per month till five

years and Re.0-9-0 after five years and with compound interest at yearly rests. Learned Counsel for appellant contends that this document provides the defendant No. 1 with a personal remedy and that he could sue on this document for the amount in question. That may be so but the document does not purport to terminate the interest created by the *supurdnama*. It is merely a collateral security in favour of defendant No. 1 and does not interfere with the rights under the *supurdnama* which had existed at the time by which defendant No. 1 was entitled to retain possession of the property until his debts and advances were paid. We, therefore, find that the bond of December 14, 1925, in no way affected the rights of defendant No. 1 under the *supurdnama*. Learned Counsel argued that if we held that the *supurdnama* was invalid and that defendant No. 1 was entitled to retain possession until he was paid then this document would amount to a payment. We do not consider that the execution of a collateral security does amount to a payment and in the hypothetical case assumed by Counsel his argument does not apply. We now turn to the main issue of this appeal that is, whether the *mutawalli* was competent to execute the *supurdnama*.

Learned Counsel for the respondent based his case on the competence of the *mutawalli* on certain text books of Muhammadan Law, and certain rulings. In Tyabjis Principles of Muhammadan Law, Second Edition, page 555, it is laid down in regard to Shias, para. 464 (2) :

"According to Shia Law the beneficiaries under a *waqf* may validly make a lease of the *waqf* property or otherwise transfer or alienate it for the period during which they are entitled to the benefit of the *waqf* but so that such lease or transfer or alienation does not prejudice the rights of any succeeding beneficiaries."

the plaintiff was admittedly a Shia. For the respondent the contention is that under the Shia Law a *mutawalli* is entitled to transfer the usufruct of the property although he is not entitled to transfer the ownership of the property by sale or by mortgage which might end in a decree for sale. Considerable argument was made in regard to the *supurdnama* in question and in part of the case for respondent it is argued that the *supurdnama* is something different from a usufructuary mortgage, that it was a kind of agreement by which defendant No. 1 was to manage the property during the absence of the plaintiff. We consider that the document cannot be regarded as a contract of management. The provisions in the document are that possession is to be taken from *Rabi*, 1331 *Fasli* by defendant No. 1 and that he is to pay certain sums of money and to retain possession until those sums of money are paid back to him. We consider that these conditions make the document a usufructuary mortgage within the definition of the Transfer of Property Act. The question therefore is whether a *mutawalli* who is a Shia may execute a usufructuary mortgage, and whether in such a case the transaction will be valid during the lifetime of the executants. It is to be noted that although the plaintiff is now dead his son defendant No. 2, who is appellant, was his successor as *mutawalli* according to the deed of *waqf*, and this son was also an executant of the *supurdnama* in question. The *supurdnama* begins: "We *Chaudhri Saiyid* Afzal Husain, *mutawalli* of the *waqf*, and *Chaudhri Saiyid* Iqbal Husain, subsequent *mutawalli*" execute the document. The distinction which was drawn in Tyabji between a transfer for the period during which the *mutawalli* was entitled to the benefit of the *waqf* and a transfer or alienation which would prejudice the rights of succeeding beneficiaries has not been so carefully drawn in other text books. We find in Ameer Ali's Muhammadan Law, Vol. I 3rd Edition of 1904, p. 370, a statement:—

"The *mutawalli* is not entitled under any circumstances to create any encumbrance by way of mortgage upon the *waqf* property without the sanction of the *Qazi*, nor can the beneficiaries hypothecate *waqf* property."

The distinction is not drawn between a transfer of the income and a transfer of the property. In Mulla's Principles of Muhammadan Law, 10th Edition of 1933 on p. 151 it is stated that a *mutawalli* has no power without the permission of the Court to mortgage, sell or exchange *waqf* property or any part thereof unless he is expressly empowered by the deed of *waqf* to do so. Mulla goes on to state that it has been held in Calcutta in *Nimai Chand Addya* v. *Golam Hossein* (1) that a mortgage of *waqf* property though made without the previous sanction of the Court may be retrospectively confirmed by the Court and that the mortgage without the previous leave of the Court is not void *ab initio*. In this ruling there was a full consideration of the texts of Muhammadan Law in

(1) 3 Ind. Cas. 353; 37 C 179; 11 C L J 317; 14 C W N 537.

original. The case arose where there was a *waqf* and certain costs of partition were incurred and the Collector fixed a date for sale of the estate for these costs. The *mutwalli* made a mortgage of a portion of the *waqf* estate and of his own property to raise money to avert the impending sale. The mortgage, therefore, was created under grave necessity of an urgent nature. Sanction was not given for the mortgage. On pages 191 and 192* the Court drew a distinction between those cases where the income alone is pledged and those cases where there was a sale of the property by the *mutawalli*. The Court held on p. 189*:

"It is but rational to hold that the approval of the Cadi was deemed requisite, primarily with a view to make sure that the loan was necessary, and in this view approval, antecedent or subsequent, ought to be equally effectual. Tested in the light of these principles, it is clear that in the case before us the mortgage ought to be treated as a valid charge upon the *waqf* properties."

On p. 191* it was stated:

"It is sufficient for us to observe that judicial pronouncements of the highest authority are to be found in the reports in support of the view that not the corpus but the income alone can be pledged under such circumstances."

In *Sailendranath* v. *Hade Kaza* (2), which was also a case which referred to Shias, there was a further consideration of this question, and it was held that a *mutawalli* differs from *shebait* or a *mahant* and has no power without the permission of the Court to mortgage, sell or exchange *waqf* property unless he is expressly authorised by the deed of *waqf* to do so. Reference was made with approval to *Nimai Chand Addya* v. *Golam Hossein* (1) where it was held that a mortgage made by a *mutawalli* without the previous sanction of the Court is not void if made for a justifying necessity and may be retrospectively confirmed by the Court. In *Amrit Lal Kalidas* v. *Sheik Hussein* (3), it was held in regard to a mortgage of *waqf* property that the plaintiff acquired no right under his mortgage which would extend beyond the lifetime of his mortgagors. This also supports the case for the respondent.

For the appellant reference was made to *Askari Hussain* v. *Chunni Lal* (4), where it was held that the District Judge takes the place of the *Qozi* to sanction transfers of *waqf* property. Reference was also made to *Abdur Rahim* v. *Narayan Das* (5). In the ruling we find on p. 47*:

"Their Lordships are of opinion that for an advance of money, otherwise than to satisfy the legitimate needs and purposes of the *waqf*, no part of the property held in *waqf* is chargeable either by the settlor or by the Court."

Under this dictum the question would arise whether the purpose was one which was for the legitimate needs of the *waqf*. Learned Counsel also relied on *Hamiduddin Ali Shah* v. *Court of Wards, Nanpara*, 18 Ind. Cas. 319 (6), a ruling of the Court of the Judicial Commissioner in Oudh. That ruling dealt with the case of a simple mortgage and not of a usufructuary mortgage, and it was held that such a mortgage would be invalid without previous sanction. On a review of all these rulings we are of the opinion that the distinction drawn in *Nimai Chand Addya* v. *Golam Hosein* (1) is a distinction which we should follow and that in the present case the validity of the mortgage depends on whether we consider that the usufructuary mortgage was one which should have been sanctioned by the District Judge if an application had been made to him previous to the execution of this *supurdnama*. Now the plaint sets forth the circumstances under which the *supurdnama* was executed. The plaint admits that it was executed in order to pay off the amount due to Sheopal under the mortgage deed which he held over the property which was *waqf*. That mortgage deed was a simple mortgage and it was open to Sheopal to bring a suit for sale of the property if he was not paid. In para. 4 of the plaint three *zarpeshgi* leases are set out, all of parts of the mortgaged property, which the *mutawalli* desired should be paid off. That paragraph also mentions three decrees for profits which were held by co-sharers against the *mutawalli*. It is clear that the encumbrances were on the mortgaged property and were encumbrances which it was in the interest of that property to liquidate. The transaction, therefore, was clearly one intended to preserve the *waqf* property. Under these circumstances we have no doubt that a District Judge would have acted correctly in giving sanction for the *supurdnama*.

(2) 137 Ind. Cas. 500; 59 C 586; A I R 1932 Cal. 356; 54 C L J 328, 35 C W N 193; Ind. Rul. (1932) Cal. 326.
(3) 11 B 492.
(4) 122 Ind. Cas. 674; (1930) A L J 205; A I R 1929 All. 849; Ind. Rul. (1930) All 274.

*Pages of 37 C.—[*Ed.*]

(5) 71 Ind. Cas. 646; A I R 1923 P C 44 at p. 47; 17 L W 509; 32 M L T 153; 44 M L J 624; 25 Bom. L R 670; (1923) M W N 441; 38; Cr. L J 242; 28 C W N 121; 50 C 329; 50 I A 84 (P C).
(6) 18 Ind. Cas. 319.

*Page of A I R 1923 P. C.—[*Ed.*]

Another point to be noted is that compound interest on the mortgage deed of Sheopal was accumulating. By the usufructuary mortgage in question the accumulation of interest under the simple mortgage and the decrees was prevented and the transaction would, therefore, have been beneficial to the dedicated property. We consider, therefore, that the transaction was one which should have received sanction.

For the appellant the argument is advanced that the respondent No. 1 did not actually pay off any of these previous charges. We consider, however, that, the question we have to examine is what was the state of affairs at the time when sanction would have been the subject of an application. The subsequent conduct of the parties would not have been known then to the District Judge and, therefore, could not have influenced him. Further we are of opinion from the evidence on the record that the failure of defendant No. 1 to pay the previous debts in this document is a failure which arises from the action of the plaintiff himself. In the plaint the plaintiff himself admits that he continued in possession of the property and prevented defendant No. 1 from obtaining possession or making collections. This state of affairs is shown by the accounts for 1331 and 1332 *Fasli* which formed the subject of the bond of December 14, 1925. There was a rendering of accounts by defendant No. 1 to the plaintiff as he was bound to do under the *supurdnama*, and it was admitted by the plaintiff and his son that no less than Rs. 8,444-1-6 were due to defendant No. 1 for the first two years of his tenure under the *supurdnama*. Under these circumstances it could not be expected that the *supurdnama* bound the defendant to supply further large sums from his own pocket for the purpose of paying off the previous debts. For the next two years we have accounts printed on pp. 495 and 496 for 1333 *Fasli* which show that an amount was due to defendant No. 1 for that year of Rs. 4,877-2 and on p. 497 for the year 1334 *Fasli* which show that an amount was due to defendant No. 1 for that year of Rs. 4317-2-3. These accounts were proved by defendant's witness Bhagwandas, the general agent, on p. 26 where he states:

"The papers exhibited OO are the extract, I prepared from my master's *siahas* of 1333, 1334 and 1335 *Fasli*. The extract is correct. I have on me the original *siahas* from which I prepared the extract."

We are satisfied, therefore, that the *supurdnama* has not been shown to be invalid.

We now proceed to deal with the question of estoppel of the plaintiff. The lower Court has held that the plaintiff was estopped from denying the validity of the *supurdnama*. That estoppel is claimed under the general law of estoppel in s. 115 of the Evidence Act which provides that when one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. In the *supurdnama* the recital states that the plaintiff is *mutawalli* of the *waqf* and that his son is the subsequent *mutawalli* and that they execute the *supurdnama* transferring possession to defendant No. 1 of the village in question. That document amounts to a representation that the plaintiff as *mutawalli* was competent to make that transfer. The document was acted upon and possession was transferred and sums of money were received by the plaintiff under this document. The receipt of the sums of money was admitted. It was not for a number of years afterwards that the plaintiff brought the present suit on May 11, 1928. For that period the plaintiff acquiesced in the *supurdnama*. He has now come forward and the argument advanced on his behalf is that he was not competent as *mutawalli* to execute the *supurdnama*. Clearly the case comes within the language of s. 115 of the Evidence Act. The argument of learned Counsel for appellant was that because the plaintiff was under the Muhammadan Law not competent to execute this *supurdnama*, therefore, the provisions of s. 115 of the Evidence Act would not apply to him. In our view this proposition of law is incorrect as it is enunciated and also because we consider that the plaintiff can validly execute the *supurdnama* under the provisions of the Muhammadan Law provided sanction is given, and we consider that the sanction can be retrospectively applied by this Court.

In the seventh ground of appeal it was urged that the Court below was bound to find what money was due to Chhedi Lal, defendant No. 1, at the date of the decree. This was a reference to Issue No. 5. We have referred to the bond of December 14, 1925, under which

there was an admission that for the first two years Rs. 8,444-1-6 was due on the accounts and a further sum was taken making Rs. 20,000 in all. The plaintiff in para. 6 of his plaint alleged that his admission in that bond as regards the payment of Rs. 8,196-11 in cash should not be accepted against him and that actually only Rs. 4,524-13 was received by him out of that amount and also that the sum of Rs. 1,132-6-6 was not paid to other persons. We have already referred to the accounts for 1333 and 1334 *Fasli* which shows that other large sums were due to defendant No. 1. The claim in the written statement is that not less than Rs. 20,000 was due to defendant No. 1. We do not think that there is any necessity to ascertain the exact sum which is due to defendant No. 1 as in our opinion the plaintiff has failed to show that he has any right to possession in the manner in which he asks, that is by a declaration that the *supurdnama* is null and void. The plaintiff has not sued for possession of the property on payment of whatever sum is due to defendant No. 1. If and when the plaintiff brings a suit for that purpose, in our opinion, it will then be proper for the Court to go into that question and ascertain the exact sum which is due, but the present suit is merely one for a declaration of nullity and in our opinion that question does not arise.

For these reasons we dismiss this first appeal with costs.

N. *Appeal dismissed.*

LAHORE HIGH COURT

Civil Revision Petition No. 428 of 1934
October 10, 1934
ABDUL RASHID, J.

GANGA SAHAI-BHAGMAL—PLAINTIFF—PETITIONER
versus
MOLAR—DEFENDANT—OPPOSITE PARTY

Evidence—Expert evidence—Finger-print expert—Evidence of—Value—Burden of proof—Execution of entry proved—Burden of proving want of consideration lies on executant.

The evidence of handwriting experts has often been found to be faulty but so far as finger-prints are concerned, it has never so far been found that two finger-prints can be identical in all respects Consequently the evidence of finger-print experts is entitled to much weight.

Where, by the evidence of finger-print expert the execution of an entry is proved, the burden of proving want of consideration is on the executant. *Ram Chand* v. *Chhunan Mal* (1), followed.

C. R. P. from the decree of the Small Cause Court Judge, Delhi, dated May 14, 1934.

Mr. *Shamair Chand*, for the Petitioner.

Mr. *Bhagwat Dayal*, for the Opposite Party.

Judgment.—This petition for revision arises out of a suit brought by the plaintiff for recovery of Rs. 300 from the defendant on the basis of a *bahi* account. The allegation in the plaint were that Rs. 100 were advanced to the defendant on October 18, 1929, and Rs. 35 and Rs. 215, on October 24, and that the defendant had repaid a sum of Rs. 100 on November 9. In support of his claim the plaintiff produced his *bahi*. The thumb-impresion below the item of Rs. 100 was too blurred to admit of any comparison. The item of Rs. 35 did not bear any thumb-impression. The item of Rs. 215 bore a thumb-impression which on comparison by the Phillaur Thumb-Impression Expert was found to tally with the thumb-impression of the defendant. The learned Judge of the Small Cause Court, Delhi, disbelieved the oral evidence of the plaintiff and so far as the *bahi* is concerned, remarked that expert evidence with respect to finger-prints is not conclusive evidence of the advance and that it had often been found that the opinion of these experts was faulty. On these findings the suit of the plaintiff was dismissed.

The plaintiff has preferred a petition for revision to this Court and it has been urged on his behalf that as the execution of the *bahi* entry regarding the item of Rs. 215 has been definitely established by the production of expert evidence, the trial Court had erred in dismissing the suit regarding this item. The evidence of handwriting experts has often been found to be faulty, but so far as finger-prints are concerned, it has never so far been found that two finger-prints can be identical in all respects. The evidence of the finger-print expert definitely proves that that the entry regarding Rs. 215 was thumb-marked by the defendant. In these circumstances it was for the defendant to prove that he had not received this sum. Reference may be made in this connection to *Ram Chand* v. *Chhunan Mal* (1). The questions of jurisdiction and limitation

(1) 88 Ind. Cas. 301; A I R 1925 Lah. 471; 6 Lah. 470; 2 Lah. Cas. 85; 7 Lah. L J 306; 26 P L R 369 (F B).

were also raised on behalf of the defendant. These questions were, however, not decided by the trial Court. I hold that the items of Rs. 100, and Rs. 35 have not been proved but it has been proved that the entry regarding Rs. 215 bears the thumb-impression of the defendant and that the onus shifts to the defendant to prove that this was not advanced to him.

For the reasons given above I accept this petition for revision, set aside the decree of the Judge, Small Cause Court, dated May 14, 1934, and remand the case to him for re-decision with respect to the item of Rs. 215 and the other points involved in the case in accordance with law. The parties will be given an opportunity to adduce additional evidence if they choose to do so. The costs will abide the result of the litigation.

D. *Petition accepted.*

ALLAHABAD HIGH COURT

Second Civil Appeal No. 621 of 1932
April 17, 1934

IQBAL AHMAD AND COLLISTER, JJ.

MITTHU LAL—DEFENDANT—APPELLANT

versus

Musammat CHAMELI AND ANOTHER—PLAINTIFFS—RESPONDENTS

U. P. Land Revenue Act (III of 1901), s. 4—Person acting as lambardar *and collecting rents—Presumption—Whether he can say that he was not legally appointed—Custom—Village expenses should be allowed on basis of gross rental—Hindu Law—Widow—Co-widows—Transfer by one—Transfer not challenged by other—Presumption of transfer being made with latter's consent.*

Where a person was the *de facto lambardar*, and acted as such and collected rents, he cannot afterwards say that he had not been legally appointed. Having accepted the post of *lambardar*, it must be presumed that he consented to perform the obligations which go with the post.

Village expenses should be allowed on the basis of gross rental.

Where one of two Hindu co widows executes a gift deed, the deed is voidable at the option of the other co-widow and none else has the right to challenge it during the latter's lifetime. When she has not challenged it, it must be presumed that the transfer was made with her consent.

S. C. A. from a decree of the District Judge, Aligarh, dated March 9, 1932, modifying that of the Assistant Collector, First Class, Etah, dated April 17, 1930.

Messrs. *Baleshwari Prasad* and *Binod Behari Lal*, for the Appellant.

Mr. *S. B. L. Gaur*, for the Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for profits which was filed by the plaintiffs under s. 226 of the Agra Tenancy Act in respect of the years 1332 and 1334 *Fasli*. The plaintiffs were Hub Lal and his son, Ram Rachpal. The former has since died.

One Daryao Singh died leaving two widows, *Musammat* Surja and *Musammat* Jumna, and on his death his 10 *biswas* share in the village devolved upon the said widows. On September 9, 1921, the widows jointly executed a usufructuary mortgage of 5 *biswas* in favour of Hub Lal. *Musammat* Jumna had a daughter by name *Musammat* Brindaban, who was married to Hub Lal, and plaintiff No. 2, namely Ram Rachpal, is their son. On January 9, 1922, *Musammat* Jumna executed a deed of gift in respect of 5 *biswas* (2½ *biswas* being proprietary rights and 2½ being mortgagee rights) to *Musammat* Brindaban and Ram Rachpal. It is not disputed that the rights of *Musammat* Brindaban have now devolved upon Ram Rachpal. *Musammat* Jumna died about 4 years before the institution of this suit.

The plaintiffs' case was that Hub Lal was a co-sharer of 5 *biswas* as mortgagee in possession in the years in suit and that Ram Rachpal was a co-sharer of 2 *biswas*, 10 *biswansis* in 1332 and 1333 *Fasli* and of 2 *biswas* and 7½ *biswansis* in 1334 *Fasli*.

The Court of first instance decreed the suit of the plaintiffs for Rs. 1,070-0 9. The lower Appellate Court has allowed the appeal in respect to Rs. 40 but in other respects has confirmed the decree of the trial Court.

The first plea which is taken before us is that the defendant-appellant is a *thekadar* and not a co-sharer, and that a *thekadar* cannot legally be appointed *lambardar*.

Under s. 4 of the Land Revenue Act, a *lambardar* is defined as

"a co-sharer of a *mahal* appointed under this Act to represent all or any of the co-sharers in the *mahal*".

Whatever the position of a *thekadar* may be under the Act of 1926, it cannot be denied that he was not a co-sharer under the Act of 1901. On the other hand, it is perfectly clear that the defendant in this case was the *de facto lambardar*. It is not pleaded before us that he was appointed without his consent, and it is admitted that he acted as *lambardar* in the years in suit, and that as *lambardar* he collected rents. This being so, it does not lie in his mouth to say that he had

not been legally appointed. Having accepted the post of *lambardar*, it must be presumed that he consented to perform the obligations which go with the post. In our opinion, therefore, this plea cannot prevail.

The next point taken is that *Musammat* Jumna was only competent to transfer her life interest to Ram Rachpal and *Musammat* Brindaban and it is argued that her deed of gift ceased to be operative after her death.

It is a fact that *Musammat* Jumna had only a life-interest in the property which she has thus transferred, and her deed of gift was voidable at the option of her co-widow, *Musammat* Surja. No one else had the right to challenge the transfer during the life-time of *Musammat* Surja, and since *Musammat* Surja herself has not done so, it must be presumed that the transfer was made with her consent.

The third plea taken before us is that the defendant-appellant is not liable to pay profits on the basis of gross rental.

The lower Appellate Court has found that the tenants were solvent, so much so that their rents were enhanced, and the Court points out that the defendant-appellant has failed to show that he filed any suits against the tenants or destrained their crops in order to realise the rent. No receipt books were produced before the Court to show how much was realised in the way of rent and from whom it was realised, and the defendant made no effort to have the rents entered up in the *siyaha*. In the circumstances the Courts below were justified in giving the plaintiffs a decree on the basis of gross rental.

The only point which remains is as regards village expenses.

The Court of first instance allowed village expenses at the rate of 5 per cent. on the net profits, but the lower Appellate Court has allowed village expenses at the rate of 10 per cent. We consider, however, that these should be on the basis of gross rental, and on this calculation it is conceded by Counsel that the defendant-appellant is entitled to a further set off of Rs. 90.

The result of our findings is that we allow this appeal to the extent that we reduce the amount which has been decreed by the lower Appellate Court in the amount of Rs. 90 only. This suit is, therefore, decreed for Rs. 940 with past interest at 12 per cent. and *pendente lite* and future interest at 6 per cent. The parties will pay and receive costs in proportion to success and failure.

N. *Appeal allowed.*

BOMBAY HIGH COURT

Original Civil Jurisdiction Award No. 27 of 1933

August 30, 1933

RANGNEKAR, J.

FAZALALLY JIVAJI RAJA—PETITIONER

versus

KHIMJI POONJI & Co.—OPPOSITE PARTY

Arbitration—Arbitrators to act together—Every stage of proceeding must be in presence of all—Arbitration Act (IX of 1899), ss. 6, 11—Submission, mode of—Intention of parties is sole guide—S. 11, scope of—Award by association on appeal by board of directors from awards of umpire under bye-law, held can be filed under s. 11 and is final decision—All members of board of directors not signing award—Irregularity can be rectified—Mercantile usage contrary to justice cannot be supported by Court of law.

Where there are several arbitrators, all must act together and each must act in the making of the award. Every stage of the proceedings must be in the presence of all, and every judicial act to be done by two or more must be completed in the presence of all who do it. Consequently where the composition of board of directors had changed from time to time since the appeal went before the board and the award was given by some of them only and some of those who were present at the earlier meetings were not present later and did not form part of the Board which made the award :

Held, that the award was not legal and must be set aside.

[Case-law referred to.]

The intention of the parties must be the sole guide for determining the mode of working out the submission and reaching a final decision. The law of arbitration is based upon the principle of withdrawing the dispute from the ordinary Courts and enabling the parties to substitute a domestic tribunal. Once that tribunal reaches a final decision as contemplated or agreed upon by the parties, then the Arbitration Act steps in to help the parties to enforce the said decision [p 804, col. 2.]

Section 11, Arbitration Act, in terms does not apply to an award made on appeal by the Board of directors, but if the decision of the Board which is called an award under the bye-law, which is filed under the Arbitration Act, is the final decision under the submission in accordance with the Act, then, it would be an award made by the arbitrators under the submission between the parties. [p. 805, col. 1.]

[Case-law referred to]

The award ought to be signed by all the members of the Board who joined in the making of it. But the omission to do so is a mere irregularity capable of being rectified. [p. 807, col. 2.]

However well established the usage or practice may be, if it is contrary to natural justice, it cannot be upheld in a Court of law. Consequently

mercantile usages, in the conduct of references, cannot be supported if they are contrary to the principles of natural justice. [p 810, col. 1.]

Messrs. *F. J. Coltman* and *M. V. Desai*, for the Petitioner.

Mr. *M. C. Setalvad*, for the Opposite Party.

Order.—The respondents are cotton brokers and members of the East India Cotton Association, Ltd. The petitioner entered into certain forward transactions with them for the sale of Broach cotton April-May delivery 1933. The petitioner is not a member of the East India Cotton Association, Ltd. In respect of the said dealings the respondents claimed from the petitioner a sum of Rs. 1,35,141. The petitioner denied his liability to pay the said sum, and a dispute arose between the parties. The contracts were subject to the bye-laws of the East India Cotton Association, Ltd., and under bye-law No. 38 the dispute was referred to the arbitration of two of the members of the East India Cotton Association, Ltd. Before the arbitrators evidence was led on behalf of the parties, but no record was kept by the arbitrators of the proceedings before them. The arbitrators differed, whereupon the dispute was referred to Mr. Boyagist of Messrs. Langley & Co., as an umpire. Evidence was led before the umpire also, and he put certain questions to the arbitrators. No record, however, was kept by the umpire of the proceedings before him. On November 22, 1932, the umpire made his award in favour of the petitioner. The respondents, thereupon, filed an appeal against the said award to the board of directors of the Association under by-law No. 39, to which the petitioner submitted a rejoinder.

The appeal was first heard on February 21, 1933, at which meeting certain members of the board of directors were present. The parties appeared by Counsel, and the arguments of the Counsel for the respondents were partly heard on that day. The hearing of the appeal was then adjourned to March 6, 1933. It did not reach a hearing on that day, and was further adjourned to March 15, 1933. At the hearing of the appeal on March 15, some of the directors, who were present at the hearing of February 21, were not present, and some other directors, who were not present at the hearing of February 21, were present. At this hearing Counsel for the respondents finished his arguments, and Counsel for the petitioner commenced his; but as the same were not finished on that day, further hearing was adjourned to March 17, 1933. At the hearing on March 17, 1933, some of the directors who were present at one or both of the previous hearings were not present, and some directors who were not present at the earlier meetings or either of them were present. The petitioner applied for an adjournment of the hearing of the appeal, but his application was refused. Thereupon, the petitioner withdrew from the appeal, and the directors who were present at the said meeting made an award in favour of the respondents, and set aside the award of the umpire. By this award the board of directors awarded a total sum of Rs. 1,35,141 to the respondents against the petitioner with interest.

This award was filed in this Court on March 23, 1933, and notice thereof was given by the Secretary of the East India Cotton Association, Ltd., to the petitioner on the following day. On March 24, the respondents applied for execution of the said award, and in execution got the petitioner's property attached under a warrant of attachment. It is under these circumstances that the petitioner has filed the present petition, and he contends that the award cannot be filed under s. 15, Arbitration Act, and, secondly, that it is illegal, void and of no effect. His contentions briefly are: (1) That the award of the board of directors in appeal from the award made by the umpire is not within the Arbitration Act and cannot be filed, as it is not the award either by the arbitrators or the umpire, and he prays that it should be taken off the file: and (2) the award is illegal on the ground that it was made by persons some of whom were not present at the earlier hearings, and some who were present at the earlier hearings had not joined in the making of the award, and that the arbitrators did not act together in the making of the award, and the award is against the principles of natural justice. At the hearing one more ground was taken on behalf of the petitioner in support of his first contention, and that is that the award is not signed by all the members of the board of directors who made the award, but only by the chairman of the board.

Exhibit A is a statement giving the names of the directors present at the various meetings. The statement is admitted to be correct on behalf of the respondents. The statement shows (1) that the

three directors who were present at the first meeting of February 21, were not present at the second meeting of March 15, (2) two of the directors who were present at the second meeting of March 15, were not present at the first meeting of February 21, (3) one member present at the first meeting of February 21, was not present at the second meeting of March 15, but was present at the final meeting of March 17, (4) two members present at the second meeting of March 15, were not present at the final meeting of March 17, (5) two members who were present at the first meeting of February 21, were not present at the final meeting of March 17, and (6) six members who were present at the first meeting of February 21, were also present at the second as well as the final meeting of March 15 and 17, respectively.

The respondents deny that the award is not within the Indian Arbitration Act, and they contend that the proceedings before the board of directors in the matter of the said appeal and the award are in accordance with the articles of association and the by-laws of the Association and are valid and binding on the petitioner. They further state that ever since the inception of the Association, appeals in respect of awards under the by-laws have been heard and disposed of at meetings of the board of directors convened from time to time and at such meetings the directors present have not been the same and have been different, and this fact was well known to the petitioner. They further say that the petitioner acquiesced in the proceedings although he knew that some of the directors present at each of the said three meetings were different; and assuming there was an irregularity, such irregularity was waived by or on behalf of the petitioner. As regards the second contention they say that it is the practice of the board of directors of the East India Cotton Association, Ltd., when appeals are being heard against awards, to circulate beforehand all papers relating to the appeal to all the members of the board of directors, and also when the hearing of the appeal is stayed over several hearings, to circulate from time to time to all the members of the board of directors the proceedings which take place at each of the said meetings. They further say that by reason of this practice though all the members of the board of directors may not happen to be present at all the meetings, they are kept well informed as to the proceedings which take place at each of the meetings of the board of directors in respect of all appeals heard by them. They say that having regard to the constitution of the Association and the bye-laws made by them, the award made by the board is valid and binding.

It may be stated that the evidence of the Secretary of the Association shows that the contention of the respondents as regards the practice followed by the board of directors is well founded, but as no record of the evidence taken by the arbitrators or by the umpire was kept, all that was circulated was the correspondence between the parties, the contracts and the award of the umpire, as well as the minutes of the meetings of the board of directors.

The first question is, whether the decision of the board is an award capable of being filed in Court under s. 11, Arbitration Act. There is no dispute in this case that the contracts between the parties were subject to the rules and bye-laws of the East India Cotton Association, Ltd. The material bye-law is bye-law No. 38 which, *inter alia*, provides that all disputes arising out of or in relation to contracts, whether forward or ready, and whether between members or between a member and a non-member, made subject to these bye-laws, shall be referred to the arbitration of two disinterested persons, one to be chosen by each party. It further provides that the arbitrators shall have power to appoint an umpire, and shall do so if and when they differ as to their award. The explanation to the bye-law says that the award shall be deemed to have been made on the date when the arbitrators have first recorded their decision in writing. Then there is a proviso for the appointment of an umpire and for the time within which the umpire has to make his award. Sub-clause E provides that the award of any two arbitrators or their umpire shall be final and binding on both parties, subject to a right of appeal to the board within ten days from the date of publication of the award. The bye-law further says that if either pary to the dispute refuses to abide by and perform the decision of the arbitrators or the umpire or their board, as the case may be, the award shall be filed in the High Court, and such party shall pay the costs between attorney and client in connection with the filing and enforcement of the award, unless the Court shall otherwise direct. It is argued that this last provision for filing the award in the High Court contemplates that the

award made by the board has also to be filed in the High Court. That, no doubt, seems to be so, but the question as to what award can be filed in this Court must turn on the provisions of the Indian Arbitration Act. Bye-law No. 39 says (omitting unnecessary words) that an appeal shall lie to the board.

Section 2, Arbitration Act, says that the Act applies only in cases where, if the subject-matter submitted to the arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a presidency town. Section 4 (*b*) defines a 'submission' as meaning a writtten agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. It will be seen from this definition that it makes no attempt to lay down how the arbitration is to be worked out and what should be the number of arbitrators. Subject to the provisions of s. 6, the Act leaves it open to the parties to settle the lines on which the arbitration is to be carried out. Section 6 is in the following terms:

"A submission, unless a different intention is expressed therein, shall be deemed to include the provisions set forth in Sch. 1, in so far as they are applicable to the reference under submission."

It is clear from this section that the intention of the parties is to be the sole guide for determining the mode of working out the submission and reaching a final decision. The law of arbitration is based upon the principle of withdrawing the dispute from the ordinary Courts and enabling the parties to substitute a domestic tribunal. Once that tribunal reaches a final decision as contemplated or agreed upon by the parties, then the Arbitration Act steps in to help the parties to enforce the said decision. Section 19, Arbitration Act, enables the parties to apply to the Court for a stay of the suit brought by his opponent in defiance of an existing submission to refer disputes to arbitation. Now there is no doubt, having regard to the terms of the contract between the parties which, as I have said, are subject to the bye-laws of the association, that, if either party had instituted a suit in this Court for determining the disputes which arose between them, the other party would have successfully maintained an application for stay of the suit under the provisions of s. 19. If this is correct, then it is difficult to see why there is a submission between the parties within the meaning of s. 19, Arbitration Act, and not a submission between the parties within the meaning of other sections of the Act. The term "submission" is construed very broadly. A contract which provides that a dispute arising in relation thereto should be tried by a foreign Court is considered a submission of any dispute arising between the parties to the arbitration of such foreign Court. In *Haji Abdulla* v. *Stamp* (1) a policy of marine insurance provided:

".....All disputes must be referred to England for settlement, and no legal proceedings shall be taken to enforce any claim except in England, where the underwriters are alone domiciled and carry on business."

The plaintiffs who had a claim under the policy filed a suit to enforce it against the defendants underwriters in the High Court of Bombay. The defendants took out a chamber summons under the Arbitration Act for an order staying the proceedings in the suit. It was held that the above clause in the policy of insurance amounted to a submission to arbitration, and that therefore, the suit should be stayed pending the result of such arbitration. In *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society* (2) a policy of life insurance was effected by a foreigner with an English insurance company, which had a branch office at Budapest. The policy, which was in the French language, provided that the premiums and insurance moneys should be payable at Budapest, and contained a condition, of which the English translation was as follows:

"For all disputes which may arise out of the contract of insurance, all the parties interested expressly agree to submit to the jurisdiction of Courts of Budapest having jurisdiction in such matters."

It was held that the above-mentioned condition constituted a submission within the meaning of s. 4 (English) Arbitration Act, 1889. It is unnecessary to multiply authorities, but I may as well refer to *Krichner & Co.* v. *Gruban* (3) which also is to the same effect. The scheme about arbitration in the bye-laws of the Association seems to be complete. There is, first, a provision for an award by the arbitrators. In the event of the arbitrators not agreeing, there is a provision for a reference to an umpire, and the decision of the umpire is final subject to an appeal to the board. The bye-laws

(1) 80 Ind. Cas 523; A I R 1924 Bom. 381; 2 Bom. L R 224.

(2) (1903) 1 K B 249; 72 L J K B 211; 19 T L R 155; 51 W R 402; 88 L T 6.

(3) (1909) 1 Ch. 413; 78 L J Ch. 117; 99 L 932.

themselves show that what is contemplated is the decision of either the arbitrators or the umpire or the board, and it is this decision which the bye-laws expressly call an award which is to be filed in this Court. This is clear from the wording of para. 2, sub-cl. F of bye-law No. 38. It is argued that s. 11 of the Act in terms contemplates an award made only by arbitrators or an umpire, and excludes an award made by the board of directors in appeal from the award of the umpire.

Undoubtedly, the section in terms does not apply to the award made on appeal by the board of directors, but if the decision of the board which is called an award under the bye-law, which is filed under the Arbitration Act, is the final decision under the submission in accordance with the Act, then, in my opinion, it would be an award made by the arbitrators under ' the submission between the parties. There is no definition of the term "arbitrators" or "umpire," or even of "arbitration." There is no doubt that these terms are used in a very wide sense.

What is contemplated is that there should be a submission within the meaning of s. 4 of the Act, and a final decision under that submission arrived at by the domestic tribunal in the manner agreed upon between the parties. So long as the tribunal is agreed upon and so long as the method of reaching a final decision is agreed upon in accordance with the submission between the parties, I see no difficulty in holding that the final decision of the domestic tribunal agreed upon under the submission would be the award which could be filed under the Act. It is clear law in England that a reference can be made to a fluctuating body or to a committee of a trade association who appoint certain of their members to act. As an authority for the proposition I may refer to *In re Keighley*; *Maxsted & Co.* v. *Durant & Co.* (4), in which the form of the contract and the submission is similar to the present case. The contract in that case contained a clause that all disputes arising out of it should from time to time be referred to two arbitrators who should have power to call in a third, the award of any two of them will be binding and conclusive, with a proviso that in case either party should be dissatisfied with the award, he might appeal to the appeal committee of the London Corn Trade Association, subject to the rules of that association. By those rules the appeal committee consisted of twenty-five members, who in each case brought before it had to elect five members from their body, who heard the appeal, and who had to confirm the award appealed against, unless four out of the five concurred in reversing or varying it; the award of the appeal committee was then signed by the chairman of the body that heard the appeal, and was to be final and conclusive of the matter in dispute.

The rules further provided that in case of death, illness, etc., of any of the five members, the appeal committee shall from time to time elect a new member or members in his or their place. In that case it was argued on behalf of the appellants that there were no arbitrators or umpire within the meaning of s. 10, Arbitration Act (52 & 53 Vic. C. 49), of 1889, and that it was a scheme of arbitration not provided for by the Act. The respondents were not called upon, and the argument was completely disregarded, and the correct position was put by Lord Esher, M. R. in this way (p. 407*):

"I am of opinion, that the appeal must be dismissed. The parties are related by a contract of purchase and sale, which is the only contract between them. A dispute arose with reference to that contract, the question at issue being whether the purchasers were bound to accept a quantity of wheat when tendered to them. In the contract the parties had agreed, in case a dispute should arise, to refer it to the arbitration of certain persons (who were, I suppose, members of the corn trade) as arbitrators and under certain conditions; if no objection was taken by either party to the award, it was of course to be final; but if either party wished to take the matter to an umpire, or by way of appeal, as the parties call it, then the umpire was to be the appeal committee of the London Corn Trade Association. The case accordingly went to arbitration, and one of the parties, being dissatisfied with the award, wished the case to go before the umpire. Now, the parties had not only agreed that the committee should be the umpire, but they had agreed that it should act according to the rules of the London Corn Trade Association, which were well known; and when the committee which consisted of 25 persons, came to be umpire, they, acting under their rules exercised their duty by appointing out of their own body a committee of five to act as umpire in the dispute. And it may be noticed here that, by the rules, if one of five members of the committee died before the matter was finally determined, another member of the body of 25 might be appointed in his place."

The submission in *Produce Brokers Co.*

(4) (1893) 1 Q B 405; 62 L J Q B 105; 7 Asp. M C 268; 41 W R 437; 68 L T 61.

*Page of (1893) 1 Q. B.—[*Ed.*]

Ltd. v. *Olymplia Oil and Cake Co , Ltd.* (5) is exactly similar to the submission and the contract between the parties in the present case, and in these terms (p. 315*) :

"13. All disputes from time to time arising out of this contract including any question of law appearing in the proceedings . . . shall be referred to arbitration according to the rules endorsed on this contract . . ."

It was never suggested in that case that such a contract and submission were outside the scope of the Arbitration Act of 1889. The question in the case was, whether the arbitrators had jurisdiction to determine the existence of a custom, and Earl Loreburn observed that in his opinion the appeal arbitral committee had jurisdiction finally to find as they did in regard to the custom of the trade, and dealing with this point Lord Sumner observed as follows (p. 332*) :

"Arbitration clauses, substantially the same as that before your Lordships, are characteristic of all these forms of contract. The system has been devised by mercantile men to suit their needs and they have found it highly beneficial ; they have been naturally anxious to establish trade control over the transactions of the trade as completly as possible. A construction which would have conferred on the appeal committee a true arbitral function as to the interpretation and performance of the printed contract, and a provisional and appealable function over so important a matter as the customs of the trade itself, would have been equally anomalous and inconvenient.

Further, I think, the transaction in question is eminently one with which the established arbitral tribunal is fitted to deal in its entirety."

Mr. Coltman argues that the English decisions are no guide on the point as there is a difference between the English Arbitration Act of 1899 and our Indian Arbitration Act of 1899. Under s. 12 of the English Act, an award can only be filed in Court with leave obtained from the Court ; under our Act no such leave is necessary, and the award can be filed without leave, and on being filed, is capable of being executed summarily as a decree of the Court. He further argues that the Indian Arbitration Act does not provide for every kind of eventuality, and relies upon a judgment of this Court in *Gopalji Kuverji* v. *Morarji Jeram* (6). He concedes that the award made by the board would be a good award, but he contends that it can only be enforced by a suit, not summarily under the Indian Arbitration Act. Apar from special circumstances, there is no reason for supposing that if an award is made by what is called in the cases to which I have referred as an 'appeal committee,' on an 'appeal arbitral committee,' leave would be refused in England. The real question is whether there is a submission between the parties within the meaning of the Act followed by arbitration in the manner agreed upon resulting in a final decision. If so, that final decision is an award, and I do not see why it cannot be filed in Court even under the Arbitration Act. In *In re Kighley, Maxsted & Co.* v. *Durant & Co.* (4) the decision of the appeal committee is described by Lord Esher, M. R., as the decision of the umpire and the proceedings before the appeal committee as umpirage, although in that case the award of the arbitrators was unanimous.

On this point in India there has been no reported decision in any authorized reports, but exactly the same point arose in *Heeralal & Co.* v. *Joakim & Co.* (7). In that case, according to the contract between the parties, a dispute was referred, firstly, to arbitrators then to an umpire, and then to a committee of appeal from him; and the Court held that the award made by the committee of appeal fell within the terms of the Indian Arbitration Act. It is pointed out in that decision that such forms of contract are used in certain trades and the awards made under similar submissions were treated as good and valid awards within the meaning of the Indian Arbitration Act. Reference was made to *Chandanmull* v. *Donald Campbell & Co.* (8) and to *Surajmull Askaran* v. *Chandmull Moolchand* (9) and although the precise question which arises in this case was not raised, such a submission was also before their Lordships of the Privy Council in *E. D. Sassoon & Co.* v. *Ramdutt Ramkissen Das* (10). After the arguments of Counsel in this case were finished and I reserved my judgment, Mr. Setalvad appeared before me and stated that the point involved in this case had come up for decision before our Court. I thereupon directed that the matter should be men-

(5) (1916) 1 A C 314; 85 L J K B 160; 60 S J 74; 32 T L R 115; 114 L T 94.

(6) 50 Ind. Cas 411; A I R 1919 Bom. 24; 43 B 809; 21 Bom L R 308.

*Pages of (1916) 1 A. C.—[*Ed.*]

(7) 103 Ind. Cas. 648; A I R 1927 Cal. 647: 55 C 180; 31 C W N 730.

(8) 54 Ind. Cas. 289*n*; 23 C W N 707*n*.

(9) 103 Ind. Cas. 631; A I R 1927 Cal. 601; 31 C W N 686.

(10) 70 Ind. Cas. 777; A I R 1922 P C 374; 49 I A 366; 50 C 1; 37 C L J 336; 44 M L J 755; 27 C W N 660; (1923) M W N 372; 18 L W 537 (P C).

tioned to me again on notice to the other side, and this was done. Mr. Setalvad produced a copy of the decision of Kanga, J., in *Sukhdev Ramdeo* v. *Dharamsey Jetha & Co.*, O. C. J. Appeal No. 50 of 1922 decided on October 2, 1922, by Shah, Ag. C. J. and Crump, J., and the decision of the Appeal Court confirming the same. The submission in that case included a term to the effect that the award of the arbitrators or their umpire shall be final and binding subject to a right of appeal to the Cotton Contracts Board. The contract was subject to the rules and regulations of that board. Kanga, J., dealt with the point in this way:

"That contention is that the proceedings which culminated in the award did not fall within the Arbitration Act, and that the Arbitration Act does not contemplate any appeal from the unanimous decision of two arbitrators, and therefore their petition, which is under the Arbitration Act, should be dismissed on the ground that there is no submission and award, and that the case falls outside the scope of the Arbitration Act. I must say that this argument came upon me as a great surprise, for I am aware of numerous awards of the Cotton Contracts Board which have been entertained by this Court as falling within the Arbitration Act. On carefully examining the argument, it seems to me that there is nothing in it. Section 4, Arbitration Act, defines a submission as follows: 'Submission means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein on not.'

Now there is no doubt that the parties may instead of resorting to ordinary Courts of law, have a domestic forum: see s. 8, Contract Act.

Therefore if under s. 4, Arbitration Act, the letter constitutes a submission, and if according to the terms of that submission the award is made, it cannot be contended that the submission and the award fall outside the scope of the Arbitration Act."

The learned Judge referred to *In re Keighley, Maxsted & Co.* v. *Durant & Co.*, (4) in support of the view which he took. In appeal, Shah, Ag. C. J., observed as follows:

"In the appeal before us the only point urged is that the submission by the parties to arbitration under r. 51, Cotton Contracts Board, constituted under the Bombay Act, 1919, is not valid. It is conceded that the award by the arbitrators may be valid but it is contended that the interference by the Board on appeal is not contemplated by the Arbitration Act, and that the award made by the Board on appeal from the decision of the arbitrators is outside the scope of the Act. It is however clear from s. 6, Arbitration Act, that it is open to the parties to express their intention at the time of submission to carry out the arbitration on such lines as the parties are willing to agree to. In the present case assuming, without deciding, that the nature of the original contract between the parties as to which the dispute had arisen, was outside the class of contracts referred to in s. 2 (*a*) Act I of 1919, it was open to the parties to agree to an arbitration to be carried out on the lines stated in r. 51 framed under that Act.

Apart from any decision, I see no difficulty in holding that an award made on the agreement of the parties in that manner is within the scope of the Act. It is as much an award in respect of which the parties can seek relief under the Arbitration Act as an ordinary award made by arbitrators as contemplated by that Act from which there is no appeal to any Board as in the present case. This point is covered by the decision of the Court of appeal in *In re Keighley Maxsted & Co.* v. *Durant & Co.* (4), which has been referred to in the judgment of the lower Court. It is a decision under the English Statute of 1889, corresponding to the Arbitration Act and the point that has been argued by Mr. Desai on behalf of the appellants here was raised in that case and disallowed."

It is argued by Mr. Coltman that the observations of Shah, Ag. C. J., are *obiter dicta*. I am not prepared to agree, but, assuming that they are, it seems to me to be clear that although the precise question raised now as to whether an award by the board of directors could be filed under s. 11 of the Act or not was not specifically raised in that case, the Appeal Court found that it was within the Indian Arbitration Act, and that decision is binding on me. The bye-laws in this case are statutory. It is not contended that the Act or the bye-laws are *ultra vires*, and obviously, they are not, in view of s. 80-A, Government of India Act. The bye-laws being valid and the contract being subject to the bye-laws the scheme of the arbitration provided by the by-laws is binding on the parties, and the final decision of the domestic tribunal agreed upon would be an award, and, in my opinion, could be filed under s. 11 of the Act.

The second ground on which it is argued that the award should be taken off the file is that the award is not signed by all the members of the board who made it. In this case the award is only signed by the chairman. It is argued that the decision of the board can be signed by the chairman only as any other resolution passed by the board of directors. There is no bye-law as to how the decisions of the board or the resolutions made by them are to be signed. In similar cases in England there is a distinct provision as to how such awards should be signed: see *In re Keighley, Maxsted & Co.* v. *Durant & Co.*(4). Section 11, Indian Arbitration Act, states that when the arbitrators or the umpires have made an award, they shall sign it, and that being so, in my opinion, the award ought to have been signed by all the members of the board who joined in the making of it. But the omission to do so is a mere irregularity as pointed out by Russell on Arbitration and Award, Edn. 12, p. 431, and is capable of being

rectified. If necessary, I would have remitted the award for being signed in accordance with s. 11 of the Act; but, in view of the conclusion to which I have come, I do not think it necessary to do so. This brings me to the last and perhaps the most important point in the case. From the facts I have set out above, it is clear that the composition of the board has changed from time to time since the appeal went on before the board, and when the decision was given, clearly some of those who heard the arguments at the earlier meetings were not present and did not form part of the board which made the award. The question, then, is, whether the award or the decision of the board under such circumstances is legal and can be accepted.

Section 14, Indian Arbitration Act, provides that where an arbitrator or umpire has misconducted himself or an arbitration or an award has been improperly procured, the Court may set aside the award. Mr. Setalvad argues that a reference may be made to a fluctuating body, and relies on *Parish of Rathven* v. *Parish of Elgin* (11). He further says that under the bye-laws the Board means the Board of Directors acting through at least the quorum of their members at the meetings called and duly constituted. There is no bye-law which fixes the quorum. But the learned Counsel relies on Art. 61 of the articles of association, according to which six directors shall be a quorum for the transaction of the business of the Board. As to his first contention undoubtedly that case is an authority for the proposition that a reference can be made to arbitration to a fluctuating body. But to make a reference to such a body is one thing and how that body is to act and in what manner and what members are to act as arbitrators is another thing, and that question was expressly left open by Cairn, and his observations are as follows (p. 538*):

"I apprehend that in this country there is nothing whatever which would prevent persons who are minded to refer to arbitration from referring to the arbitration of an incorporated society, consisting of a number of members or to the members of an incorporated society. How the arbitration so made should be worked out—by what numbers it should be decided—whether at a public meeting or in what way—is quite a different question which may be kept distinct from the question of whether such persons can be selected as arbiters."

On this point I may refer to Russell's observations in his book on Arbitration and Award, Edn. 12, at p. 36, which are as follows:

"A reference may be to a body or class of persons who may vary from time to time and the reference will be treated as being to the members of the body or class at time when the dispute comes up for decision."

As pointed out above in *In re Keighley, Maxsted & Co.* v. *Durant & Co.* (4), one of the rules of the London Corn Trade Association was to the effect that out of the twenty-five members who formed the appeal committee, five members had to be elected members to hear the appeal. There is no such bye-law under the bye-laws of the East India Cotton Association, Ltd. *Prima facie* the parties were entitled to a decision of the board. The board is the tribunal agreed upon. There is no provision for delegating the functions of the board to a particular number of directors. It is true that the board is defined to mean: "the Board of Directors of the East India Cotton Association, Ltd., acting through at least a quorum of their number at a meeting of that Board duly called and constituted."

But there is no bye-law which fixes the quorum. It is true that the articles of association provide for six directors acting as quorum. The articles of association, however, are not binding on the petitioner according to the decision of the Appeal Court in *Radhakison Gopikison* v. *Balmukund Ramchandra* (12), as the petitioner admittedly is not a member of the East India Cotton Association, Ltd. But assuming that the petitioner knew that six directors formed a quorum does that mean that different members can sit at the meetings of the board at different times to hear the appeal and give their decision on it? I think not. In my opinion, it would be a mockery of justice to say that *A*, *B* and *C* can partly hear an appeal for one day, *C*, *D* and *E*, partly on the following day, and *G*, *D* and *H* at the third meeting and the latter make their award. And this is the length which logically speaking, the respondents have to go to justify their contention. It must be remembered that the board under the submission is a tribunal although it is a domestic or private tribunal and it has to act as far as possible judicially. Assuming that the board under the bye-laws can act through a quorum once the particular directors forming the quorum become fixed, I do not think that in the matter of the determination of an appeal a change in the personnel of the quorum is contemplated

(11) (1875) 2 Scotch App. 535.

*Page of (1875) 2 Scotch—[*Ed.*]

(12) 128 Ind. Cas. 614; A I R 1931 Bom. 41; 55 B 332; 32 Bom. L R 1319.

at any rate in the absence of a specific bye-law to that effect. Once you have a meeting of the board through its quorum to consider the appeal, the board is crystallized as a judicial body for the purposes of appeal.

If there is one proposition which is firmly established by authorities more than any other in regard to arbitration, it is this that where there are several arbitrators all must act together and each must act in the making of the award and this is not denied. Indeed Mr. Setalvad concedes it. Every stage of the proceedings must be in the presence of all, and every judicial act to be done by two or more must be completed in the presence of all who do it. In *Margan* v. *Boult* (13), the facts were that the umpire and one of the arbitrators in the absence of the other arrived at a decision, though they informed him of it and afforded him an opportunity of objecting thereto before finally and formally making their award. The Court consisting of Cockburn, C. J., Crompton and Blackburn, JJ., observed as follows:

".....it would be dangerous to allow an award to stand under such circumstances. It was not a mere communication of the decision which was sufficient for it was not easy to eradicate an impression once produced and allowed to sink in the mind. There ought to have been a meeting of all three, for the purpose of mutual discussion of the matter, before arriving at any decision. It was essential to the right exercise of the judicial function by several persons, that there should be this joint consideration and discussion of the matter, before any of them arrived at a decision upon it. In this case the arbitrator of the applicant ought to have been allowed an opportunity of hearing what was urged by the other, and of making any answer to it, and urging any arguments in support of the opposite view before the umpire had formed an opinion upon the question. It would be a most dangerous precedent to allow an award to stand which had virtually been arrived at and resolved on by the umpire on the *ex parte* statements of one of the arbitrators, in the absence of the other. On that ground, therefore the award must be set aside. . . ."

In *In re Plews & Middleton* (14) Lord Denman, C. J., observed that an award is procured by unfair means if it is arrived at by a departure from natural justice in ascertaining the facts. In that case, ascertaining the facts by one arbitrator apart from the other and by an examination of an interested witness was held to be a departure, not merely from an established course of procedure, but from natural justice. Coleridge, J. observed (p. 852*)

"To uphold this award would be to authorize a proceeding contrary to the first principles of justice. The arbitrators here carried on examinations apart from each other, and from the parties to the reference; whereas it ought to have been conducted by the arbitrators and umpire jointly, in presence of the parties."

The observations of Lord Denman, C. J., are also to the same effect. In that case what happened was that by arrangement between themselves the joint arbitrators questioned a witness separately and in the absence of the parties. Each then stated the result of his inquiry to the other, and the reports agreeing, they made their award. The Court set aside the award on a motion as procured by undue means, the course pursued being inconsistent with natural justice. In *Lord* v. *Lord* (15), Coleridge, J., observed (p. 406†)

"It is now clearly established that every judicial act, to be done by two or more, must be completed in the presence of all who did it; for those who are to be affected by it have a right to the united judgment of all up to the very last moment."

In *In re Beck & Jackson* (16) it was held that upon a reference to three arbitrators, or any two of them, an award made by two, in the absence of and without finally consulting the third cannot be supported. In that case Cresswell, J. approved of the rules stated by Russell on Arbitration and Award in these words (p. 700‡)

"I find the rule thus stated in Russell on Arbitration, p. 209,—speaking of the duty of joint arbitrators,—'As they must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow-judges, so that by conference they shall mutually assist each other in arriving together at a just decision: *In re Plews & Middleton* (14), *Little* v. *Newton* (17), *Stalworth* v *Inns* (18).

I may also refer to three Indian decisions which were cited by Mr. Coltman. They are also to the same effect: *Nand Ram* v. *Fakir Chand* (19), *Thammiraju* v. *Bapiraju* (20), *Ma Sin* v. *Ma Pu* (21).

(13) (1863) 11 W R 265; 7 L T 671.
(14) (1845) 6 Q B 845; 14 L J Q B 139; 66 R R 572.
(15) (1855) 5 El. & Bl 404; 26 L J Q B 34; 3 W R 553; 1 Jur. (N S) 893; 103 R R 525.
(16) (1857) 1 C B (N S) 695; 107 R R 861.
(17) (1841) 9 D P C 437; 2 Scott (N S) 509; 2 Man & G 351; 5 Jur. 246: 10 L J C P 88: 58 R R 436.
(18) (1844) 13 M & W 466; 14 L J Ex. 81; 2 Dowl. & L 428; 9 Jur. 285; 67 R R 680.
(19) 7 A 523; A W N 1885, 139.
(20) 12 M 113.
(21) 121 Ind. Cas. 801; A I R 1930 Rang. 136; 7 R 715; Ind. Rul. (1930) Rang. 129.

*Page of (1845) 6 Q B.—[*Ed.*]
†Page of (1855) 5 El. & Bl.—[*Ed.*]
‡Page of (1857) 1 C. B. (N. S.)—[*Ed.*]

Mr. Setalwad relies on the decision in *In re Keighley, Maxsted & Co.* v. *Durant & Co.* (4) and that part of the judgment which directed that the award should be remitted for further consideration of the appeal committee although one of the members had by that time been dead. It is true that in that case the award was remitted. It must however be remembered that in that case there was a distinct rule which was a part of the contract and submission by which such a contingency was provided for, and, under that rule, the vacancy could be supplied. But that does not mean that the appeal committee would change its personnel from time to time. It only means that you have a different body to re-hear the whole appeal and finally to dispose of it. Under the rules of the Association, the tribunal was definite and a fixed body. In this case, however, there is no similar rule, and, therefore in my opinion, this decision is not of much help to Mr. Setalvad. I think, it would be desirable if the East India Cotton Association, Ltd., framed a similar or suitable rule to provide for such a contingency.

It is said that hundreds of appeals have been heard in this way by the board of directors, and the respondents rely upon the practice. But, in my opinion, the procedure followed, at any rate in the absence of specific rules, is irregular and contrary to natural justice, and, however well established the usage or practice may be, if it is contrary to natural justice, it cannot be upheld in a Court of Law. It is clear law that mercantile usages in the conduct of references cannot be supported if contrary to the principles of natural justice, and this is clear from the decisions to which I have referred. In *In re Brook and Delcomyn* (22), it was held that although mercantile arbitrators are not bound by the strict rules of evidence, yet they cannot be permitted to transgress that fundamental principle of justice which declares that no man shall be condemned, either civilly or criminally, without being afforded an opportunity of hearing the evidence adduced against him, and offering his defence. At p. 414* Erle, C. J., observed :

"I have always a great desire to give effect to mercantile customs, and to the awards of mercantile arbitrators, unless they infringe upon principles of wider importance."

Then it is said that the petitioner acquiesced in the proceedings although he knew that the personnel was changing, and, therefore the irregularity, if any, is waived by him. In the first place, I am not at all satisfied that the petitioner, who is not a member of the Association and is not shown to have been acquainted with the directors, would be in a position to make out that one or two people who were present at the first meeting were not present at the next, or that one or two other people at the next were not present at the earlier meeting. But, apart from that, however, on the last day he asked for an adjournment. It does not appear why the adjournment was required. The adjournment was refused and then he withdrew. That being so, and having regard to the facts of the case, in my opinion, the respondents have failed in establishing a case for waiver set up by them. Apart from this, I am doubtful that where the proceedings were conducted in the manner in which they have been in this case, it is merely an irregularity which can be waived by a party. The time for objecting really arose on March 17. On that day the petitioner asked for an adjournment. That being refused, he withdrew. It is difficult to see how the question of waiver can arise in these circumstances. In support of his contention, Mr. Setalvad relies on *Moseley* v. *Simpson* (23). But in that case the proceedings were commenced *de novo*, and there was an agreement not to impugn the award on any ground.

Lastly, it is submitted that as six directors were present throughout at all the meetings, the award made by the board being the award of the quorum of the board of directors is a good award. As I have pointed out, there is no bye-law which fixes the quorum binding on the petitioner. Under the bye-laws he is entitled to the benefit of a decision of all the directors acting through a quorum which was not fixed. Mr. Setalvad relies on *Beck* v. *Sargent* (24), and contends that if the award made is that of the arbitrators and a stranger joins in it, the award is still good. In that case, however, the award was made by all the arbitrators and the joining of a stranger was held not to affect the validity of it. In this case there is nothing to show that the persons who were not present at the earlier meetings did not influence the decision, and, in any event, they cannot be said to be strangers, as they were

(22) (1864) 16 C B (N S) 403; 10 Jur. (N S) 704; 10 L T (N S) 378; 139 R R 517.

*Page of (1864) 16 C. B. (S. N.)—[*Ed.*]

(23) (1873) 16 Eq. 226; 42 L J Ch. 739; 21 W R 694; 28 L T 727.

(24) (1812) 4 Taunt 232.

also the members of the board. They were arbitrators just as much as the other six, and some who were present at the earlier meetings were not present at subsequent meetings. It is difficut therefore to see how it can be said that the award made in this case is the award of the six members who were present throughout, and not the award of all the members who were present at the final meeting. There is nothing to show that even these six directors agreed upon the award or whether the award is unanimous.

I must, therefore, accept the second contention, and set aside the award. The petition must, therefore, be made absolute with costs. Security discharged. Taxed costs as on the original side long cause scale.

D. *Award set aside.*

CALCUTTA HIGH COURT

March 5, 1934

BUCKLAND, ACTG. C. J.

In the matter of DEWANGUNJ BANK & INDUSTRY, LTD.

Companies Act (VII of 1913), s. 153—Depositor becoming decree holder against company—Company subsequently embarking on scheme—Such depositor, if bound by it—Remedy of decree-holders

A depositor ceases to be a depositor when he obtains a decree against the company and becomes a decree-holder against it. When after passing of such decrees the company embarks upon a scheme and a meeting is called and notice is sent to all depositors, the decree-holder creditors, are not bound to attend the meeting and any scheme framed at such a meeting is not binding on them. The meeting, though sanctioned by the Court, has no right by a mere definition to include the decree-holders within the scope of depositors, any more than a company has the right by definition to include its general trade creditors Where the meeting includes the decree-holders as depositors and the Court sanctions it *per incuriam* or because the circumstances are not sufficiently explained to the Judge, the decree-holders can get the scheme modified by the Court, by having such portion of the scheme which affects them expunged from the scheme. *Raghubar Dayal* v. *Bank of Upper India, Ltd.* (1), distinguished.

Mr. *Page*, for the Applicants.

Mr. *Sushil Sen*, for the Bank.

Order.—This is an application on behalf of two persons who have obtained decrees against the Dewangunj Bank & Industry, Ltd., for an order modifying a scheme sanctioned by this Court under s. 153, Companies Act, by an order made on July 17, 1933.

The circumstances were that the present petitioners were depositors in the company and on January 3, 1933, they obtained a decree against the company for Rs. 2,561 being the amount of their claim. They thereupon, as it has been submitted and in my judgment rightly, ceased to be depositors and became decree-holders against the company. The decree provided for payment by instalments extending over six years. The decree has been recognised by the Bank, a payment having been made on April 13, 1933. Subsequently thereto the company embarked upon a scheme to which the sanction of the Court would be required under s. 153, Companies Act, and the usual orders were made, firstly, that of May 23, by Panckridge, J., directing a meeting of the depositors of the company for the purpose of considering the scheme and on a subsequent date the meeting was held. The petitioners had notice of the meeting but did not attend as they had already obtained decrees. The scheme of arrangement between the depositors and the company provided, broadly speaking, that depositors should not be entitled to demand payment of their deposits but would be paid over a period extending, to 15 years. The scheme was duly adopted but with a very important modification which provided as follows:

"Those who have instituted suits and obtained decrees in respect of his or her deposits including costs, if any, shall also be deemed as creditors and the scheme shall be binding on them as well."

The object of this modification was transparently clear, to include among depositors the petitioners who had already obtained decree. Sanction of this Court was in due course given to the scheme with that modification, but there is nothing to show that the attention of the learned Judge who gave the sanction was ever drawn to this modification or to its effect, nor does it appear that the petitioners had any opportunity of appearing on that application. Application is now made to have the words which were added to cl. 2 of the scheme expunged. The effect of the order sought would be to maintain the sanction given by the order of July 17, 1933, to the scheme but without such modification.

It is contended on behalf of the company that the agreement was binding upon the petitioners in spite of the fact that they had obtained decree, and in support of this contention I have been referred to *Raghubar Dayal* v. *Bank of Upper India*

Ltd. (1). Their Lordships of the Privy Council in that case laid down a rule which has no applicability whatever to the circumstances of this case. It was there decided that a depositor who had obtained a decree between the time when the agreement to a scheme was arrived at general meeting and the time when the Court gave its sanction to the scheme was bound by the scheme on the ground that the agreement became binding from the date when it was arrived at subject to the subsequent sanction of the Court. Here the position is entirely different. The decree had been obtained long before there was any question of a scheme or the meeting or the sanction of the Court being obtained to the scheme, and the authority cited is of no assistance to the company in support of the contention that the applicants are bound by the agreement to the scheme at the meeting on July 2, 1933.

A further point is taken whether I have jurisdicion to entertain this appliction and make the order. It is suggested that the proper course to be followed is for the decree-holder to execute their decrees, which I am told would be at Rungpur, when they could contend before the local Court that they were not bound by the scheme. Not only would it be embarrassing to throw the burden of deciding the point upon the local Subordinate Court but I see no reason for justice being done in this matter by an extremely roundabout method. At the time when the notice of the scheme of the proposed meeting was given the petitioners had ceased to be depositors. They were fully justified in not attending the meeting. The meeting, I conceive, though sanctioned by the Court, had no right by a mere definition to include the petitioners within the scope of depositors, any more than a company would have the right by definition to include its general trade creditors, and in my opinion the petitioners are not bound by the scheme. The scheme having been sanctioned by the Court doubtless *per in curiam* or because the circumstances were not sufficiently explained to the learned Judge, the applicants' only remedy in my judgment is to come to this Court to have the scheme modified.

(1) 50 Ind. Cas. 429; A I R 1919 P C 9; 46 I A 135; 41 A 566; 36 M L J 526; 17 A L J 533; 23 C W N 697; 21 Bom. L R 481; 22 O C 106; (1919) M W N 500; 1 U P L R (P C) 51; 30 C L J 214; 26 M L T 178; 10 L W 374; 6 O L J 423; 13 Bur. L T 31 (P.C).

There will be an order in the alternative form set out in the summons, expunging from the scheme the words "those who have instituted suits and obtained decrees in respect of his or her deposits including costs, if any, shall also be deemed as creditors and the scheme shall be binding on them as well."

Costs of this application will be paid by the company. Certified for Counsel.

D. *Application allowed.*

CALCUTTA HIGH COURT

Civil Appeals Nos. 283 to 285 of 1932

August 27, 1934

NASIM ALI, J.

SRISH CHANDRA PAL CHOUDHURY—DEFENDANT—APPELLANT

versus

RAJANI KANTA BISWAS AND OTHERS—RESPONDENTS

Bengal Tenancy Act (VIII of 1885), ss. 180-A, cl. (15), 115 (c)—No dispute about status of tenant or enhancibility of rent or area—Held, dispute was only about amount of rent and no second appeal lay—In settling fair rent, Court can consider rate payable if portion of holding is kept fallow under panchan *system.*

Where in a case there is no dispute about the status of the tenants or about the enhancibility or otherwise of the rent and also as regards the area for which the rent is to be assessed, the decision is only about the amount of rent settled and no second appeal lies. *Badri Narayan* v. *Abdul Madal* (1), relied on.

In settling the amount of fair rent, the Court is entitled to take into consideration the rate which is payable by tenants, if a portion of their holding is kept fallow under the *panchan* system.

C. A. from appellate decree of the Special Judge, Nadia, dated July, 7, 1931.

Messrs. *A. N. Bose* and *Hemanta Kumar Bose*, for the Appellants.

Mr. *Ramendra Mohan Majumdar*, for the Respondents.

Judgment.—These three appeals arise out of three applications under s. 180-A, Bengal Tenancy Act, by the tenants for determination of uniform annual money rent in respect of lands held by them under the *utbandi* system. The defence of the defendant landlord was that the applications were not maintainable in their present form and that the prayers of the tenants were not sustainable under the law. The landlord also alleged that the lands were very much improved by the excavation of a *khal* for flow of excess water at his cost. The learned Assistant Settlement Officer, after consideration of all the materials which were placed before him by the parties, held that the rate of Re. 1-2-0 per *bigha* would be the fair rent

for the lands in respect of which no *kabuliyats* were executed by the tenants and Rs. 2 would be the fair rent per *bigha* for the lands in respect of which *kabuliyats* were executed by the tenants.

Appeals were then taken by the tenants to the Special Judge. The learned Special Judge came to the conclusion that the nature and extent of improvements alleged to have been effected by the landlord by the opening of the *khal* could not be determined with any degree of precision. He was also of opinion that the fair and equitable rent should be determined irrespective of the question of any contract between the parties. He also held that the average of the amount that was actually paid as rent for the lands for the previous six years could not be determined as the papers filed by the landlord were not reliable.

The learned Judge then considered whether he could take into consideration any of the elements which are mentioned in the proviso to cl. 9 of s. 180-A, Bengal Tenancy Act. The learned Judge, after examining the materials on the record was of opinion that cls. (*a*), (*b*) and (*c*) were not sufficiently attracted in these cases. He was, however, of opinion, that in fairness to the landlord the question of improvement should be taken into consideration and in fairness to the tenant the element of *panchan* should be considered in determining the fair rent. After taking these two factors mainly into consideration, the learned Judge varied the rate fixed by the Assistant Settlement Officer by fixing Re. 1-6-6 per *bigha* for *kabuliyat* lands and Re. 1 for the non-*kabulirat* lands. Hence the present appeal by the landlord. A preliminary objection was taken to the competency of these appeals by the learned Advocate for the respondents on the ground that in view of the provisions of s. 180-A, cl. 15, Second Appeals to this Court are not maintainable inasmuch as the Special Judge has only settled fair rent in these cases. In other words the contention is that the dispute in these cases being only about the amount of rent second appeal was barred under s. 180-A, cl. 15 read with s. 115 (*c*), Bengal Tenancy Act. From what has been stated above it is clear that in these cases there was no dispute about the status of the tenants or about the enhancibility or otherwise of the rent. There was no dispute also as regards the area for which the rent was to be assessed. Consequently I am of opinion, that the decision of these cases is only a decision about the amount of rent settled. See the unreported case in *Badri Narayan* v. *Abdul Madal* (1) decided by this Court on March 12, 1934. The preliminary objection must, therefore, prevail. The appeals are accordingly dismissed.

Mr. Bose appearing on behalf of the landlord, however, prayed that these appeals might be treated as applications for revision in these cases. It was contended by Mr Bose that the learned Judge has no jurisdiction under the law to take into consideration the *panchan* system in settling the amount of rent in view of the provisions of s. 180-A, Bengal Tenancy Act. I am unable to accept this view of the matter. In setting the amount of fair rent, the Court is entitled to take into consideration the rate which is payable by these tenants, if a portion of their holding is kept fallow under the *panchan* system. It is argued by Mr. Bose that unless the area of the *panchan* land in each particular year be known, it would be inequitable to take *panchan* rate into consideration in settling the fair rent, inasmuch as the quantity of *panchan* land in the holding of each tenant might vary from year to year. I am unable to accept this contention and to hold that without a correct determination of the area of *panchan* land in each particular year, it would not be fair to the landlord to take the general rate for *panchan* land into consideration in fixing the annual rate of rent. I am, therefore, not inclined in view of the facts of these cases to interfere as I am not satisfied that there has been a failure of justice in these cases. The prayer for taking these appeals as applications for revision cannot, therefore, be entertained.

D. *Order accordingly.*

(1) 154 Ind. Cas. 466; A I R 1935 Cal. 97.

NAGPUR JUDICIAL COMMISSIONER'S COURT

Second Civil Appeal No. 51 of 1932

January 25, 1935

GRILLE, J. C.

ABDUL RAHIMAN—PLAINTIFF—APPELLANT

versus

ABDUL WAHAB—DEFENDANT—RESPONDENT

C. P. Tenancy Act (I of 1920), Sch. II, Art. 1—Whether applies to a claim for joint possession in holding.

Article 1, Sch. II, C. P. Tenancy Act, relating to possession or dispossession of or from a holding does not include a question of a claim for joint possession or resistance of such a claim in that holding. *Amarchand-Radhalal* v. *Ramjiwan* (2), referred to.

A person who is in joint possession cannot be said to have been dispossessed or excluded from possession of the holding by his co-tenant since his right of possession extends over the entire holding. Consequently, Art. 1, Sch II of the C. P. Tenancy Act has no application to such a case and the ordinary rules of the Limitation Act must apply. *Ganesh Prasad* v. *Bhawani Pershad* (1), dissented from.

Special enactments which derogate from the ordinary law must be strictly construed.

S. C. A. against the decree of the District Judge, Nagpur, in Civil Appeal No. 26 of 1931, dated September 26, 1931, arising out of Civil Suit No. 105 of 1926, dated April 21, 1931, in the Court of the First Sub-Judge, Second Class, Nagpur.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *R. N. Padhye*, for the Respondent.

Judgment.—The parties to the suit out of which this appeal arises are Muhammadans, the plaintiff being the paternal uncle of the defendant. The plaintiff sued for a declaration that he was the sole absolute occupancy tenant of certain fields and the sole *malik makbuza* of another field and prayed that an entry made by the Superintendent of Land Records declaring that his nephew was joint tenant and proprietor with him should be corrected. The defendant in the first place pleaded that a suit for mere declaration did not lie and that a suit for possession would have to be brought and the appropriate court-fees paid. On a preliminary issue on this fiscal question it was held that the plaintiff would have to add a prayer for possession on the ground that he was out of actual possession at the time of the filing of the suit. The prayer was accordingly added. The defendant resisted the claim of the plaintiff and maintained that he was entitled to joint possession under Muhammadan Law and also pleaded that he had been in exclusive possession of the fields in suit since the year 1916 (the suit was instituted in the year 1929) and that the plaintiff's claim was, therefore, time-barred. The trial Court found that the facts alleged by the defendant which would entitle him to joint possession in law were disproved, namely that his grandfather had devised the property by a will equally between his two sons and that the defendant was in any case entitled to 6 annas share of the property as the heir of his grandmother. The Court also found that the defendant had been managing the cultivation on behalf of the plaintiff, his uncle as there was nothing to show that he ever put forward his own claim to the fields adversely to the plaintiff and that his possession was never adverse. The plaintiff's claim was accordingly decreed in full. In an appeal by the defendant the decision on the facts giving rise to the defendant's inheritance under the Muhammadan Law was upheld, but the Court found on the evidence that the defendant had been in possession for five or six years before the suit as a co-tenant of the tenancy fields, that so far his possession must be regarded as adverse to the plaintiff's exclusive interest in the property and that as his joint possession had continued for more than two years, the plaintiff's claim for absolute possession of the tenancy fields must be considered barred by virtue of Art. 1 of the Second Schedule of the Central Provinces Tenancy Act. The decree of the trial Court was accordingly modified by allowing joint possession of the tenancy fields, although the decision in regard to the *malik makbuza* field was upheld as adverse possession had not been proved to have extended beyond 12 years from the death of the plaintiff's father and the defendant's grand-father who was the full owner. It may here be mentioned that this person, Kondumiya, died in the year 1922. A second appeal against this finding is now preferred by the plaintiff.

It is not disputed that the title both to the *malik makbuza* field and to the occupancy fields lies with the plaintiff-appellant, and the only question for determination is whether the ordinary principles of limitation apply or the particular article enacted in the Second Schedule of the Central Provinces Tenancy Act; in other words whether defendant's adverse possession must continue for two years or for 12 years in order to perfect his title. It may be noted that the claim that the Schedule of the Tenancy Act applied, which was successfully urged by the defendant in first appeal, was not taken into the trial Court at all, and the defendant relied on the assumption that his title to the fields was based on adverse possession since the year 1916, which he pleaded. This assertion was entirely untenable since Kodumiya did not die until 1922 and it was not disputed that he was in entire possession and enjoyment of the property until his death. Indeed the mainstay of the defendants' case was that the property was bequeathed in equal shares by Kodumiya just before his death. The trial Court considered that the plaint-

iff had never been out of possession at all, but the lower Appellate Court found that the evidence adduced was in no way incompatible with the defendant's claim that he was in joint possession at the time of the institution of the suit and held that he had been so since the year 1923-24. Had it not been for the existence of the special provision in the Tenancy Act in respect of limitation of the period within which a dispossessed tenant might make a claim for his tenancy, the appeal would have been dismissed in its entirety, as the lower Appellate Court confirmed the finding that the title both to the *malik makbuza* field and the absolute occupancy fields lay with the plaintiff and that the plaintiff failed only in respect of the latter as his claim was time barred.

The decision of the learned District Judge on the question of limitation is incorrect and I am of opinion that Art. 1 of the Second Schedule of the Central Provinces Tenancy Act has no application to the case. That article which fixes the period of limitation at two years runs :

" For possession of a holding by a person claiming to be a tenant from which he has been dispossessed or excluded from possession by any person."

The defendant-respondent relies on a decision of this Court by Mohiuddin, A.J.C., in *Ganesh Prasad* v. *Bhawani Pershad* (1), where it was held that a right to joint possession, being a lesser right than that of exclusive possession, is included in the special provision of limitation relating to the exclusive right and, therefore, the limitation prescribed by Art. 1 of Sch. II of the Tenancy Act will apply alike to claims for exclusive joint possession. With all respect I am unable to follow that decision. The plaintiff had been held all along and is admitted to be at least in joint possession of the fields. A person who is in joint possession cannot be said to have been dispossessed or excluded from possession of the holding by his co-tenant since his right of possession extends over the entire holding. It is not contended that the holding has even been divided, and the question of exclusion from a part of the holding does not, therefore, arise. Special enactments which derogate from the ordinary law must be strictly construed, and I am unable to hold that an article relating to possession or dispossession of or from a holding can include a question of a claim for joint possession or resistance of such a claim in that holding. As held by Kinkhede, A.J.C., in *Amarchand Radhelal* v. *Ramjiwan* (2), to hold that to interpret the words "possession" and "person" in such a manner as if they comprise within their scope a claim for joint possession and include a dispossession or exclusion from possession by a co-owner or co-tenant will be tantamount to holding that exclusive possession held by one co-tenant must necessarily be presumed to be adverse so as to give the other tenant who is excluded an immediate right to sue the person in possession for ejectment, which the learned Additional Judicial Commissioner held was opposed to all principles of law relating to joint property. It follows, therefore, that since Art. 1 of Sch. II of the Tenancy Act is not applicable to the circumstances of the present case, the ordinary rules regarding limitation for the plaintiff's suit must apply. The title is admittedly with the plaintiff and no attempt has been made, or indeed could be made, to support the defendant's original contention that he has been in exclusive possession of the property for 12 years. He was not even in joint possession for that time.

There is no need to go into the question whether, from the facts found, adverse possession should have been presumed or no. The judgment of the lower Appellate Court is set aside and the decree of the trial Court is restored. The defendant will pay the plaintiff's costs throughout.

D.

(1) 108 Ind. Cas. 785; A I R 1928 Nag. 178.

(2) 111 Ind. Cas. 76; A I R 1928 Nag. 96; 10 N L J 174.

CALCUTTA HIGH COURT

Civil Appeal No. 53 of 1930

August 22, 1934

MITTER AND EDGLEY, JJ.

TULSI BIBI—PLAINTIFF—APPELLANT

versus

FARRAK BIBI AND OTHERS—RESPONDENTS

Court-fees—Question of—Depends on allegations in plaint—One co-sharer filing suit for partition alleging that he is in joint possession with defendant—Court-fees, payable—Partition — Several persons entitled to succeed to property—Property belonging to them jointly—Possession of one is constructive possession on behalf of all—Co-sharers.

The question as to what the proper court-fees ought to be levied on the plaint depends on the allegations which are contained in the plaint.

Where the plaintiff files a suit for partition of his share and alleges that he is in joint possession with the defendant co-sharer, the suit is a suit for partition and *ad valorem* court-fee need not be paid; but if the Court finds that evidence establishes that he is

altogether out of possession, it can ask for *ad valorem* court-fees.

Where several persons become entitled on the death of the last owner to succeed to the estate of the last owner, the properties belong jointly to all of them and possession of one co-sharer is really a constructive possession on behalf of all. *Bidhata Rai* v. *Ram Charitar Rai* (1), relied on.

C. A. against the decree of the Sub-Judge, First Additional Court, 24 Parganas, dated November 27, 1929.

Mr. *Shyamadas Bhattacharji*, for the Appellant.

Messrs. *Nagendra Nath Dutt*, *Satyendra Chandra Sen*, *Subodh Chandra Dutt* and *Surjya Kumar Aich*, for the Respondents.

Mitter, J.—This is an appeal from the decree of the Subordinate Judge of 24 Parganas, dated November 27, 1929, by which he dismissed the plaintiff's suit on her failing to put in *ad volorem* court-fees for her share within a fortnight of the date of the judgment. The suit was one for partition and was instituted by Tulsi Bibi who is the appellant before us. It is stated in the plaint that one Golam Jalani Khan, a Peshawari Muhammadan, who was a wealthy land-holder and a brick manufacturer of Topsia in the District of 24-Parganas and was governed by the Kakezai custom of inheritance prevailing in his clan died on or about 23rd day of March 1927 leaving considerable movable and immovable properties, that upon the death of the said Golam Jalani Khan the plaintiff, now appellant, and the defendants Furokh Bibi and Najibunnessa Bibi jointly and absolutely inherited the estate left by the said Golam Jalani Khan by virtue of such special custom of inheritance prevailing in the Kakezai clan by which he was governed. She further states that the plaintiffs and the said defendants obtained joint possession of the said estate and the management thereof was entrusted in the hands of Furrokh Bibi she being the senior member of the family who from time to time paid various sums of moneys to the plaintiff and the other defendant Najibunnessa Bibi. In para. 7 she recites that the defendant Najibunnessa Bibi, in collusion with the defendant Furokh Bibi, secretly and without the knowledge of the plaintiff instituted a suit for partition being title Suit No. 107 of 1927, against the said Furokh Bibi ignoring her rights altogether. It is stated in para. 13 that Furokh Bibi is all along and still is in management of the said estate and has failed and neglected to render to the plaintiffs a true and faithful account in respect of the income thereof though repeatedly called upon by the plaintiff to do so. On these allegations she prayed for partition by metes and bounds of the estate of Golam Jalani Khan and allotment of plaintiff's one-third share to her to be enjoyed by her in severalty and absolutely. There were other reliefs which were asked for including relief for an injunction restraining the defendant from dealing with the income of the joint estate or any part thereof and from proceeding with the partition by virtue of the fraudulent compromise in title Suit No. 107 of 1927. The two preliminary issues that were tried by the Subordinate Judge were to this effect, namely (1)

"Has the necessary court-fee been paid?"

and (2)

"Is the plaintiff entitled to get any relief without a prayer for recovery of possession and without setting aside the document dated April 25, 1927, alleged to have been executed between the plaintiff and defendant No. 1 as mentioned in the plaint?"

The Subordinate Judge also stated in his judgment the respective contentions of the plaintiff and defendants. The plaintiff contended that the court-fee payable was the one payable in a suit for partition, namely a sum of Rs. 15, whereas the defendants contend that as it appears that she was out of possession, the suit cannot proceed unless *ad valorem* court-fees are paid. After recording the objections of the parties the learned Subordinate Judge said this:

In my opinion the arguments advanced on the defendant's side are quite cogent and reasonable and I am of opinion that the plaintiff must pay *ad valorem* court-fees for her alleged share and that there ought to be a prayer that the alleged instrument is void in law."

Against this decision the present appeal has been brought by the plaintiff and it is contended on her behalf that the Subordinate Judge has gone wrong on the question of court-fees. The question as to what the proper court fees ought to be on the plaint depends on the allegations which are contained in the plaint, and the plaintiff states clearly in para. 3 that immediately after the death of Golam Jalani Khan when succession opened out she being the wife of Golam Jalani Khan became entitled to 1-3rd of the properties and she was in joint possession of the said estate. Reliance was placed on behalf of defendants in the Court below on an affidavit which was filed by the plaintiff's *karpardaz*,

when the *karpardaz* is alleged to have stated that the plaintiff was out of possession of the properties which form the subject-matter of partition. The affidavit is printed at p. 15 of the paper book and the relevant paragraph is para. No. 16. That paragraph runs as follows:

"That in spite of repeated requests the said Furrokh Bibi is preventing your petitioner from entering into possession of the said brick field and of other properties and from sharing the management of same."

There is no allegation here that she was not in possession of any portion of the joint property including the dwelling house. We do not think that on the materials before the Court the Subordinate Judge was right in treating the suit as one when the plaintiff has admitted that she was out of possession of the joint property. In a case where several persons become entitled on the death of the last owner, to succeed to the estate of the last owner the properties belong jointly to all of them and possession of one co-sharer is really a constructive possession on behalf of all. This is a principle which has been accepted and firmly established. Reference may be made in this connection to the decision in *Bidhata Rai* v. *Ram Charitar Rai* (1) where Mookerjee, J., pointed out that the plaintiff is entitled to maintain a suit for partition if his possession to some part of the joint property is admitted or established, but if it is established that he is not in possession at all of any portion of the joint property, or that there has been a complete ouster, he must sue for recovery of possession and partition and pay *ad valorem* court-fees upon a plaint appropriately framed for the purpose. It is pointed in that case that in order to maintain a suit for partition the plaintiff must be in actual or constructive possession of the properties, and whether he has such possession or not, is to be determined in view of the principle that the possession of one of the co-owners, is *prima facie* the possession of all the co-owners, and his possession must be presumed to be in conformity with right and title as co-owner. Having regard to this accepted and well known principle we are of opinion that this suit is really a suit for partition on the materials as were before the Court. Consequently on the court-fee of Rs. 15 which were paid on the plaint the plaintiff is entitled to maintain the suit.

(1) 6 C L J 651; 12 C W N 37.

The result is that the decree of the Subordinate Judge dismissing the suit is set aside and the case is sent back to him for the determination of the other issues. It will be open to the subordinate Judge, after the evidence has been gone into, if he finds that evidence establishes that she is altogether out of possession, to ask for *ad valorem* court-fees. The plaintiff-appellent is entitled to get her costs in this appeal. These costs are to be realised from defendants Nos. 1 and 2. The hearing-fee is assessed at five gold *mohurs*.

Edgley, J.—I agree.

D. *Order accordingly.*

CALCUTTA HIGH COURT

First Civil Appeal No. 182 of 1934

August 28, 1934

COSTELLO, J.

RASH BEHARI SANYAL—APPELLANT

versus

GOSTO BEHARI GOSWAMI—RESPONDENT

Calcutta Improvement Act (V of 1911), s. 77 (1) (b)—Property sold by widow acquired compulsorily—Claim to compensation by reversioners and purchaser—President of Tribunal deciding under s. 77 (1) (b)—Appeal, whether appeal against order relating to compensation—Court Fees Act (VII of 1870), ss. 8, 7 (iv) (c).

Where a property which had been sold by a widow was compulsorily acquired and the reversioners and the purchaser claimed to take compensation of money and the President of Calcutta Improvement Tribunal decided under s 77 (1) (*b*) of the Calcutta Improvement Act:

Held, that the appeal from his order was not an appeal against an order relating to compensation and s. 8, Court Fees Act, was not applicable. The claimants were really asking for a declaration and some consequential relief, namely that the money should be invested instead of being handed over to the purchaser and the case fell under ss. 8, 7 (*iv*) (*c*), Court Fees Act.

Messrs. *Satindra Nath Mukherjee* and *Satischandra Munshi*, for the Appellant.

Mr. *Bijan Kumar Mukherjee*, for the Crown.

Order.—This matter arises in connection with an appeal sought to be filed by one Rash Behari Sanyal under s. 3 (1), Calcutta Improvement (Appeals) Act, 1911, from a decision of the President of the Calcutta Improvement Tribunal sitting alone by virtue of provisions of s. 77 (1) (*b*), Bengal Act V of 1911. Of the parties to the appeal the appellant and the second and third respondents had been the claimants before the President of the Calcutta Improvement Tribunal in a case in which

the question at issue was whether or not a sale which had been made by a lady Bhuban Mohini Debi of certain immovable property in Calcutta, had been made by her for legal necessity and so passed an absolute right in the property to the purchaser who was Gosto Behari Goswami, the first respondent to the appeal. The property which is the subject-matter of the proceedings had been acquired by the Calcutta Improvement Trust compulsorily and a sum of Rs. 6,339-6-0 had been awarded to Gosto Behari Goswami as the owner of the property at the time when it was acquired, as compensation. The Sanyals claimed in the proceedings before the President of the Tribunal that they were the reversioners of Bhuban Mohini's husband, and therefore entitled to the property in question, or to the proceeds of the sale of it after the death of Bhuban Mohini. Whether they were so entitled or not of course depended upon the question whether the sale made by Bhuban Mohini was made for legal necessity and whether it was of such a nature as to confer on the purchaser an absolute interest or merely an interest for the duration of life of Bhuban Mohini.

The claimants in the proceedings before the President of the Calcutta Improvement Tribunal, asked for a declaration that they were in law the reversioners, and consequently that the amount of the compensation money ought not to be handed over to Gosto Behari Goswami, but should be invested by the President of the Calcutta Improvement Tribunal under the provisions of s. 32, Land Acquisition Act, 1894. When the appeal was lodged a difference arose between the officer whose duty it is to see that the proper Court-fee was paid, and the Advocate for the appellant upon the question of what the amount of that fee ought to be. The matter was then put before the Registrar of the Court in his capacity as Taxing Officer, and he was of opinion that it was of such general importance that he ought to refer it for the decision of the Chief Justice under the provisions of s. 5, Court Fees Act, 1870. Under the provisions of this section it was open to the Chief Justice to decide a matter of this kind himself or to appoint another Judge of the Court in that behalf. It is in that way that the matter comes before me for final decision.

The officer concerned with the question of court-fees who is referred to in Letter of Reference by the Registrar as the Stamp Reporter, seems to have taken the view that the question of the amount of the fee to be paid on the filing of this appeal was affected by the terms of s. 8, Court Fees Act. That section provides that the amount of the fee payable under the Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant. I may say at once that, in my opinion, this is not a case of an appeal against an order relating to compensation under any Act. The appeal is really against the decision of the President of the Calcutta Improvement Tribunal whereby he held that the sale by Bhuban Mohini was made for legal necessity, and therefore Gosto Behari Goswami had acquired an absolute interest in the property and so was entitled to retain for his own use the whole of the compensation money which had been awarded, and the Sanyals had no interest whatever in that money. Accordingly the President had declined to invest the money under the provisions of s. 32 and was prepared to hand it over in its entirety to Gosto Behari Goswami. If it were held that the sale by Bhuban Mohini had only resulted in a transfer of a Hindu widow's interest, the position would seem to be that the money ought to be invested so that the purchaser of the property would enjoy the interest accruing thereon, for the period of life of Bhuban Mohini, and after that the principal sum would revert to the Sanyals. It is quite clear, in my opinion that the dispute between the Sanyals and Gosto Behari Goswami cannot in any sense be properly said to be concerned with the amount of compensation payable by reason of the compulsory acquisition of the property owned by Bhuban Mohini. The Sanyals in the proceedings before the President of the Improvement Tribunal were really asking for a declaration and some consequential relief, namely that the money should be invested instead of being handed over to Goswami. In that view of the matter this would seem to be one of that unsatisfactory class of cases, which fall within the provisions of s. 7, sub-s. (*iv*) (c) where the amount of fee payable is more or less left to the discretion of the plaintiff himself, in that the section provides that in suits brought to obtain a declaratory

decree or order, where consequential relief is prayed, "the plaintiff shall state the amount at which he values the relief sought." This provision has recently been discussed by a Full Bench of this Court in *Narayanganj Central Co-operative Sale and Supply Society, Ltd.* v. *Maulvi Mafizuddin Ahmed* (1).

Dr. Mukherjee who appears on behalf of the Crown in the matter now before me, was disposed to agree that it would not be easy to contend that in the present circumstances the matter is other than one within the ambit of the provisions of s. 7 (*iv*) (*c*) to which I have referred. But on the other hand the learned Advocate appearing for the appellant has conceded that the matter is one which may well be treated as falling within the provisions of Sch. II, Art. 17 (*iii*), Court Fees Act, which provides that a memorandum of appeal in connection with a suit to obtain a declaratory decree when no consequential relief is prayed, must bear a definite fee of Rs. 20. One has only to put the provisions of s. 7 (*iv*) (*c*) and those of Sch. II, Art. 17 (*iii*) in juxtaposition to show how unsatisfactory and anomalous some of the provisions of the Court Fees Act are. I pointed out in the judgment which I gave in the Full Bench case already referred to, that it seems desirable that the legislature should put the provisions of this Act into a more satisfactory shape. If the property acquired by the Improvement Trust had not been sold by Bhuban Mohini, it is obvious that the only question which could have been agitated by the Sanyals was the question whether or not they were in fact the reversioners.

Upon the exact phraseology of s. 7 (*iv*) (*c*) and that of Sch. II, Art. 17, (*iii*) respectively, I should be disposed to hold that this is a case where subject to the qualifications mentioned in the Full Bench case, the Sanyals as claimants and now as appellants could have assigned an arbitrary value to the proceedings. That is a highly unsatisfactory state of affairs for the reasons I gave in my judgment in the Full Bench case. In the present instance, however, having regard to the very reasonable and proper attitude taken on behalf of the appellant, I think the answer to the Reference should be that the court-fee to be paid on the memorandum of appeal is the sum of Rs. 20 as provided for in Sch. II, Art. 17 (*iii*), Court Fees Act, both sides having agreed that Sch II, Art. 17 (*vi*). will not apply. The appellants have already paid a fee of Rs. 15. The deficit of Rs. 5 must be put in within a week.

D. *Reference answered.*

(1) 149 Ind. Cas. 3; A I R 1934 Cal. 448; 6 R C 536; 59 C L J 233; 38 C W N 589; 61 C 796.

LAHORE HIGH COURT

First Civil Appeal No. 263 of 1929

May 19, 1934

BRIDE AND DIN MOHAMMAD, JJ.

SECRETARY OF STATE—DEFENDANT—APPELLANT

versus

AKBAR SHAH—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), O. VII, r. 6—Limitation Act (IX of 1908), s. 19—Plea of limitation resting on certain acknowledgment taken for first time at time of argument—Whether can be allowed—Evidence—Admission—Previous statement by party, when can be legal evidence.

When a plaintiff deliberately takes up a definite position as to when the cause of action arose, he cannot be allowed to shift his ground later on, when he finds that position untenable. Thus the plaintiff cannot be allowed to take up a new plea of limitation resting on certain acknowledgment at the stage of arguments, when he finds his original position untenable. To adopt such a course is unfair, as the defendant has no notice either of the plea or of the statements in certain documents on which reliance is sought to be placed and he cannot, therefore, be reasonably expected to meet the plea. *Pancham* v. *Ansar Hussain* (2), relied on. [p. 822, col. 2.]

A previous statement made by a party cannot be made legal evidence in the case and used against him as an admission by merely filing an attested copy of that statement, without putting it to the party concerned. *Muharram Ali* v. *Barkat Ali* (6) referred to.

F. C. A. from a decree of the Senior Sub-Judge, Rawalpindi, dated October 30, 1928.

Messrs. *Des Raj Sawhney* and *M. A. Majid*, for the Appellant.

Messrs. *Dev Raj Sawhney* and *Lakshmi Narayana Pandit*, for the Respondent.

Bhide, J.—The plaintiff in this case is one Haji Akbar, Shaha contractor, who undertook to construct certain blocks of buildings at Cliffden and Willow Bank in Murree for the Army Department. The contract was entered into on May 27, 1920, and a part of the work was carried out by August 1920, but in that month, the plaintiff (according to his allegations in the plaint) had to postpone the work owing to his religious engagements and leave Murree. In his absence the military authorities got the rest of the work carried out by another contractor without giving him due notice. The plaintiff had been paid Rs. 40,485-11-0, for blocks Nos. 2 to 7

and 12 at Cliffden before he left and he was satisfied with this payment, but as the Army Department refused to pay him for the rest of the work, he instituted the present suit against the Secretary of State for India in Council on July 29, 1925, for recovery of the following amounts:

(*a*) Rs. 23,000 on account of the construction of Blocks Nos. 1, 8, 10 and 11 at Cliffden and Blocks Nos. 3 and 4 at Willow Bank; (*b*) Rs. 7,000 price of the materials left on the spot which were utilised by the contractor who succeeded the plaintiff with the consent of the Military Authorities; (*c*) Rs. 3,000 on account of extra water charges incurred by the plaintiff owing to scarcity of water; (*d*) Rs. 1,585-8-3 due to plaintiff as shown in ledger account of the plaintiff, kept by the Military Authorities and (*e*) Rs. 6,780 on account of security deposit:

Total: Rs. 46,365-8-3.

The defendant pleaded that the plaintiff joined the Hijrat movement and abandoned the work on August 8, 1920, without notice. The plaintiff was sent a telegram that unless he returned to the work by August 15, his contract would be cancelled, final measurements would be taken and other arrangements made to carry out the work. The plaintiff, however, failed to appear and in fact communicated that owing to the Hijrat movement and his religious views he could not complete the work. The work was accordingly given to another contractor and completed by him. When final measurements were taken it was discovered that the work done by the plaintiff on Blocks Nos. 2 to 7 and 12 was worth Rs. 17,633-13-0 only while he had been paid Rs. 40,485-11-0 and that he had been overpaid to the extent of Rs. 22,851. The defendant admitted that the following amounts were due to the plaintiff, but claimed to have adjusted them against this over-payment:

"(*a*) Rs. 13,398-10-0 for blocks Nos. 1, 8, 10 and 11 at Cliffden and Nos. 3 and 4 at Willow Bank (the plaint recited that this sum was due for blocks Nos. 1, 4, 8, 10 and 11 at Cliffden and block No. 3 at Willow Bank, but it was admitted before us that this was a mistake and that block No. 4 referred to in connection with this item was at Willow Bank and not at Cliffden). (*b*) Rs. 1,585-8-3 due on the ledger account (*c*) Rs. 540 on account of extra water charges incurred by the plaintiff. (*d*) Rs. 6,780 security deposit.

As regards the materials alleged to have been left on the spot, it was pleaded the plaintiff had been given credit for the same in the final bills. The defendant alleged that a sum of Rs. 825-7-1 was due from the plaintiff after giving him credit for the above amounts as against the over-payment and further claimed damages to the extent of Rs. 18,521 on account of loss sustained by him owing to breach of the contract by the plaintiff. Lastly it was also pleaded that the cause of action, if any, arose in August 1920, and the present suit instituted in July 1925 was barred by time. A number of issues were framed by the Court and after a protracted trial the plaintiff was awarded a decree for Rs. 18,681-6-0 consisting of the following items:

"(*a*) Rs. 8,155-15-0 on account of blocks Nos 8, 10 and 11 at Cliffden and 4 at Willow Bank. (*b*) Rs. 1,585-8-0 on the ledger account. (*c*) Rs. 1,619-13-0 on account of materials left by the plaintiff on the site, (*d*) Rs. 510 on account of extra water charges. (*e*) Rs. 6,780 on account of security deposit."

The counter-claim of the defendant was dismissed. From this decision defendant has appealed and the plaintiff has filed cross-objections with respect to certain items disallowed by the trial Court. It may be stated at the outset that the defendant's claim to damages is not being pressed in appeal and that the learned Counsel for the plaintiff also conceded in respect of the cross-objections that there was no evidence on the record to sustain his claim in respect of the materials and water charges for any sum in excess of the amounts allowed by the trial Court. The amounts due in respect of the ledger account and the security deposit are not in dispute. As regards the amount due in respect of blocks Nos. 1, 8, 10 and 11 at Cliffden and Nos. 3 and 4 at Willow Bank for which the plaintiff originally claimed Rs. 28,000, the plaintiff has now limited his demand to the sum which was admitted by the defendant to have been due for these blocks, *viz.*, Rs. 13,398-10-0, and has only claimed in the cross-objections the difference between this amount and the amount allowed by the trial Court for the same. It will appear from the above that the two main points on which the decision of this appeal and the cross-objections will depend are:

"(*a*) Whether there had been an overpayment of Rs 22,851-14-0 in respect of blocks Nos. 2 to 7 and 12 as alleged by the defendant. (*b*) Whether the plaintiff's suit was barred with respect to all or any of the items claimed".

As to the first point, the defendant relies on the final measurements taken by the defendant's officers when the plaintiff abandoned the work and failed to appear in response to the telegram sent to him. According to the defendant these measurements are binding on the plaintiff. There is no doubt that according to these final measurements there was an overpayment of Rs. 22,851-14-0, but on behalf of the plaintiff, it is contended that these final

measurements are wholly unreliable and that he is not bound by them as none of the clauses relied on by the defendant are applicable to the circumstances of the case. In order to determine this question it is first necessary to see who broke the contract and which of the clauses of the contract are applicable. According to the plaintiff he had merely postponed the work for a few days owing to his religious engagements and it was the defendant who broke the contract by giving the work to another contractor in his absence. This contention I have no hesitation in rejecting. (His Lordship went through the evidence and proceeded). It is significant that the present suit was not instituted till five years later and that the plaintiff has not ventured to claim any damages for the alleged breach of contract on the part of the defendant. He has contended himself with claiming only the price of the work actually done by him and of the materials left on the spot.

It seems to me perfectly clear from the above facts that it was the plaintiff who broke the contract by abandoning the work and in the circumstances the defendant was of course fully justified in putting an end to the contract and giving it over to another contractor (*vide* s. 39, Contract Act). According to the defendant, cl. (3) of the contract was applicable and action having been taken under sub-cl. (*c*) thereof the plaintiff was not entitled to recover any amount in excess of what was certified by the Assistant Commanding Royal Engineer to be due to him. But the opening words of cl. (3) show that it is applicable only when the "contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit" under any clause or clauses of the contracts (*vide* Ex. P-18 at pp. 90-104 of the Printed Record). We have therefore to turn to the other clauses of the cantract to see whether this condition is fulfilled. The learned Counsel for the defendant was unable to point out any clause in the contract applicable to the circumstances of the case under which the contractor had rendered himself liable to pay compensation amounting to the whole of his security. Strange as it may appear, there is no distinct clause in the contract providing for the consequences of abandonment of work; but we must take the contract as it stands. The learned Counsel for the defendant-appellant referred to cls. 2 and 6, but neither of these clauses appears to be applicable. Clause (2) deals with delay in execution of the work, while cl. (6) refers to the action to be taken on the completion of the work. Reference was also made to the final portion of the plaintiff's own tender, but this only says that the contractor shall abide by the conditions of the contract and forfeit his security in default thereof. What cl. (3) requires is that the contractor should have rendered himself liable to compensation amounting to the whole of his security under some clause or clauses of the contract before action is taken under any of the sub-clauses thereof. I am unable to see that this condition can be said to have been fulfilled in this case. The amount due to the plaintiff must therefore be determined on the evidence on the record and the final measurements taken by the defendant's officers or the amount certified by them as due to the plaintiff cannot be held to conclude the matter. (After discussion of the evidence his Lordship concluded). I would accordingly hold that, the evidence on the record does not establish the alleged overpayment of Rs. 22,851 in respect of blocks Nos. 2 to 7 and 12.

The second point for decision is that of limitation. I have found above that it was the plaintiff who broke the contract when he abandoned the work on August 6, 1920. His cause of action for the price of the work done by him and for the price of the materials alleged to have been wrongfully appropriated by the defendant therefore arose on that date. So far as the work is concerned, Art. 56, Limitation Act, would seem to apply, while the claim for the price of the materials would appear to be governed by Art. 48. In either case the period of limitation would be three years and the present suit instituted in July 1925, would *prima facie* be barred. The plaintiff alleged that it was the defendant who broke the contract. Even on this basis, Art. 115 would apply and the period of limitation would again be three years. The plaintiff alleged in the plaint that the cause of action arose in September 1922 when the construction of work was completed. But the work was completed not by him, but by another contractor and no attempt was made before us by the learned Counsel for the plaintiff to maintain the position taken up in the plaint.

It was, however, contended that although the cause of action arose in August 1920, and the period of limitation was only three

years, it was kept alive by subsequent "acknowledgments" on the part of the defendant but no such plea appears to have been taken or put in issue. The defendant had distinctly pleaded in para. 13 of the written statement of January 25, 1926, that the cause of action, if any, arose in August 1920, and the suit was barred. But the plaintiff in his replication merely denied the correctness of this defence. He did not plead that even if the cause of action arose in August 1920, it was kept alive by any subsequent acknowledgments falling within the purview of s. 19, Limitation Act. The plaintiff did not produce any such acknowledgments even in the course of evidence and it was only at the last stage in the course of arguments before the learned Judge of the trial Court that an attempt was made to rely on statements appearing in certain documents produced by the defendant as acknowledgments for the purpose of saving limitation. Now, the defendant had no notice at all that plaintiff was going to rely on any statements in these documents for this purpose and the Counsel for the defendant rightly objected to such a plea, which depends on questions of fact, being entertained at the last stage during the course of arguments. The learned Judge, however, has entertained this plea on the ground that the defendant had also raised certain pleas at a last stage. But this was hardly any ground for entertaining new plea involving questions of fact for the first time in the arguments. The proper course in my opinion would have been to reject such pleas on either side.

Order VII, r. 6, Civil Procedure Code, requires that when a suit is instituted after the expiration of the period of the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed. In the present case, plaintiff's suit was based on an alleged breach of contract on behalf of the defendant and it is conceded before me that the period of limitation for such a suit is three years according to Art. 115, Limitation Act: see *Muhammad Ghasita* v. *Siraj-ud-din* (1). The suit having been instituted more than three years after the cause of action arose in August 1920, was *prima facie* barred by time. It was, therefore, incumbent on the plaintiff to state in the plaint even on the facts as alleged by him how the suit was within time, but he failed to do so. He no doubt stated that the cause of action arose when the work was completed in September 1922, but that position was wholly untenable and in my opinion, that statement could not have been made in "good faith". I do not think a plaintiff can be allowed to evade the clear provisions of O. VII, r. 6, Civil Procedure Code, by making an incorrect statement of this kind. Moreover, the defendant had pleaded in reply that the cause of action arose in August 1920, but the plaintiff merely contended himself with denying the correctness of the defendant's plea. This can only be interpreted to mean that he stuck to his position that the cause of action arose when the work was completed in September, 1922, but that he had no other defence if it arose in August 1920, as alleged by the defendant. In *Pancham* v. *Ansar Hussain* (2), it was held by their Lordships of the Privy Council that when a plaintiff deliberately takes up a definite position as to when the cause of action arose, he cannot be allowed to shift his ground later on, when he finds that position untenable. In my opinion the facts of the present case are analogous and the plaintiff could not be allowed to take up a new plea at the stage of arguments when he found his original position untenable. To adopt such a course would be obviously unfair as the defendant had no notice either of the plea or of the statements in certain documents on which reliance was sought to be placed and he could not, therefore, be reasonably expected to meet the plea.

On the above findings the plaintiff's plea as regards the alleged acknowldgment must be ruled out altogether. I may, however, add that even if the plea were entertainable, none of the documents relied on before the trial Court appears to me to contain any such acknowledgment as would bring the suit within time under s. 19, Limitation Act. The documents so relied on are mentioned in Question B in the judgment of the learned Senior Subordinate Judge (*vide* p. 65 of the printed record) and these are Exs. P-10, P-11, P-12, P-13, P-14, P-16 and Ex. D. W. No. 3/1. Exhibits P-10, P-12, P-13, P-14 and P-16 do not contain any acknowledgment but on the contrary require the plaintiff to pay

(1) 66 Ind. Cas. 490; A I R 1922 Lah. 198; 2 Lah 376.

(2) 39 Ind. Cas. 650; A I R 1926 P C 85; 53 I A 187; 48 A 457; 24 A L J 736; (1926) M W N 520; 24 L W 241; 31 C W N 324 (P C).

certain amounts claimed by the defendant. Exhibit P-11 and D. W. No. 3-1 also do not appear to contain any definite "ackowledgment" of a subsisting liability in respect of the plaintiff's present claim. These were, moreover, written after the expiry of three years since the cause of action arose in August 1920, and could, therefore, be of no avail as acknowledgments under s. 19, Limitation Act. The learned Counsel for the plaintiff advanced a feeble argument in the end that limitation was saved by s. 13, Limitation Act, as the Secretary of State for India in Council against whom the suit is instituted resides out of British India. As to this it need only be pointed out that the suit is not against the Secretary of State or the Members of his Council in their personal capacities but according to s. 79, Civil Procedure Code every suit against the Government has to be instituted in this form. There is no force in this contention.

It would appear from the above that the plaintiff's claim for work done as well as materials must be held to be time-barred. There is, however, one item claimed by the plaintiff, *viz.*, the security deposit of Rs. 6,780, to which a different period of limitation applies, *viz.*, that laid down in Art. 145. According to this article the period of limitation in respect of this item would be 30 years. It was conceded before us that the suit with respect to this item is within time, but it was urged that the defendant was entitled to forfeit the security and had done so. This was not, however, the plea taken up by the defendant. The defendant had merely pleaded that the security deposit was duly deducted from the overpayment of Rs. 22,851. But as it has been found above that the alleged overpayment is not proved, plaintiff must be held to be entitled to a refund of this item. I would accordingly accept this appeal in part and reduce the amount decreed in favour of the plaintiff to Rs. 6,780 only. The cross-objections fail and are hereby dismissed. As regards costs neither side seems to have taken the trouble to put forward its case properly and elucidate all the necessary facts. I would therefore leave the parties to bear their costs throughout.

Din Mohammad, J.—I concur in the judgment recorded and the decree passed by my learned brother Bhide, J. Order VII, r. 6, Civil Procedure Code, explicitly provides that where the suit is instituted after the expiration of the period prescribed by the Law of Limitation, the plaint shall show the ground upon which exemption from such law is claimed. This rule was interpreted as long ago as 1914 by a Division Bench of the Chief Court, Punjab, in *Gobinda Mal* v. *Santa* (3), in which the facts were very similar to the facts of the present case. Shah Din, J, who delivered the judgment with the concurrence of Beadon, J., discussed the previous authorities on the point and decided that under O. VII, r. 6, the plaintiffs were bound to show in the plaint the grounds upon which exemption from the Law of Limitation was claimed and as there was no mention in the plaint of the alleged acknowledgment of liability by the defendants, the plaintiffs could not be allowed to rely on it. This judgment was followed by a Division Bench of the High Court Lahore in *Uttam Chand* v. *Thakar Devi* (4), Scott-Smith, J., who delivered the judgment with the concurrence of Campbell, J., observed that having regard to the provisions of O. VII, r. 6, Civil Procedure Code, the plaintiff could not be allowed to set up a ground of exemption for the first time in appeal. It would not be fair to the defendant to allow the plaintiff an opportunity of proving that there had been an acknowledgment as now alleged. The learned Counsel for the respondents relied on *Parmeshri Das* v. *Fakiria* (5), which lays down that if the plaintiff mentions one ground of exemption in the plaint, he is not debarred by the provisions of O. VII, r. 6, from taking another and an inconsistent ground to get over the bar of limitation and could consequently rely upon the acknowledgment made in the pleas of the previous case. Scott-Smith, J. was one of the Judges who decided this Letters Patent Appeal and as has been pointed out above, he was also a member of the Bench that decided *Uttam Chand* v. *Thakar Devi* (4). He himself distinguished the case of *Parmeshri Das* v. *Fakiria* (5), on the ground that while there a ground of exemption was mentioned in the plaint, in *Uttam Chand* v. *Thakar Devi* (4), no ground of exemption from the Law of Limitation at all was claimed in the plaint. The learned Judges observed that it was clear to them that the plaintiff never intended to set up any

(3) 26 Ind. Cas. 441; A I R 1914 Lah. 337; 83 P R 1914; 232 P L R 1915.

(4) 69 Ind. Cas. 419; A I R 1922 Lah. 39; 3 Lah. 233; 4 Lah. L J 190.

(5) 60 Ind. Cas. 772; A I R 1922 Lah. 230; 2 Lah. 13; 3 Lah. L J 22.

acknowledgment as entiting him to an exemption from that law. In this case also as would appear from the plaint neither any exemption was specifically pleaded nor does it appear that the suit as framed contemplated any exemption from the law of limitation. The case therefore is on all fours with *Uttam Chand* v. *Thakar Devi* (4), and the plaintiff cannot be allowed to take advantage of any acknowledgment whatsoever.

My learned brother has however for his satisfaction scrutinised all those documents which were intended to be relied on by the plaintiff for the purpose of s. 19, Limitation Act, and I entirely agree with him in his finding that in none of those documents any such words have been used which would amount to an acknowledgment of a subsisting liability within the meaning of s. 19. Most of the statements relied on are mere official communications between the Military Authorities *inter se* and are nothing more than expressions of opinions which were held by one officer and dissented from by another. Moreover, it has not even been established that the persons responsible for those opinions were in any way authorized to burden the Secretary of State with their so-called admissions. A party cannot be permitted to take his opponent by surprise and in these circumstances I am definitely of opinion that no such statements could be availed of at the final stage of the case without the plaintiff ever having intended to use them as acknowledgements of without any opportunity having been given to the defendants to explain what they really conveyed. It is a well settled law that no such grounds of objection can be allowed to be entertained at the fag end of a case as cannot be decided upon the record before the Court.

Even in the case of the parties' admissions, a Bench of this Court laid down in *Muharram Ali* v. *Barkat Ali* (6), that a previous statement made by a party cannot be made legal evidence in the case and used against him as an admission by merely filing an attested copy of that statement, without putting it to the party concerned. In the case before us, although the defendant examined Sub-Contractors Lys and Mr. Richards, not one question was put to either of them to explain what these words signified which he had employed in his official correspondence. It is quite possible that in every case they were in a position to offer a satisfactory explanation or to wash away the apparent effect of the so-called admissions attributed to them. I agree therefore that the plaintiff is only entitled to the refund of his security, and to no more. As regards costs also, I agree that the parties should bear there own costs.

D. *Order accordingly.*

(6) 125 Ind. Cas. 886; A I R 1930 Lah. 695; 12 Lah. 285; Ind. Rul. (1930) Lah. 662.

ALLAHABAD HIGH COURT

Second Civil Appeal No. 121 of 1933
February 28, 1935
NIAMAT-ULLAH, J.

BABOO SINGH—PLAINTIFF—APPELLANT
versus
RAM MANOHAR AND OTHERS—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 142—Applicability — Adverse possession — Dispossession of plaintiff—Considerations for deciding the question—Property not capable of enjoyment in possession of one co-sharer—Conduct of vendees from other co-sharers—Co-sharers—Sale by some co-sharers—Co-sharer in possession, if can be presumed to know contents of deed—Possession of one—Whether should be considered to be constructive possession of others—Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Finding of fact arrived at in complete disregard of legal questions involved — Whether can be interfered with in second appeal.

Where property in dispute consists of lands actually cultivated or of house capable of actual occupation and the plaintiff sues for possession of such property on the allegation that he was dispossessed by the defendant, Art. 142 is undoubtedly applicable and the plaintiff must show that his dispossession occurred within twelve years before the institution of the suit. But where the property is of such a nature that it is not capable of actual physical possession or where the property, though capable of physical possession, is in the occupation of one through whom the plaintiff can be in constructive possession, different considerations apply. In considering the question whether the plaintiff was dispossessed within twelve years or whether his possession discontinued within twelve years, the nature of the property and the position of those actually occupying it, if it is capable of actual occupation, must be taken into consideration.

A co-sharer cannot be presumed to know the contents of a registered document, executed by persons who impliedly denied his title by executing the document.

Held, that where the property (a tank) and its appurtenances are not capable of enjoyment and there is no suggestion that the defendants so conducted themselves in relation to the tank purchased by them as to amount to the plaintiff's dispossession, the plaintiff's possession must be taken to have continued till the defendants' possession became adverse as regards continuity and extent.

In the case of co-sharers possession of any one of them must be considered to be constructive possession of all unless the person in actual possession ousted his co-sharers in denial of their rights.

Where the finding of the lower Appellate Court is so worded as to amount to a finding of fact but it

has been arrived at in complete disregard of the legal propositions involved in the consideration of the question; the finding is vitiated by errors of law and can be interfered with in second appeal.

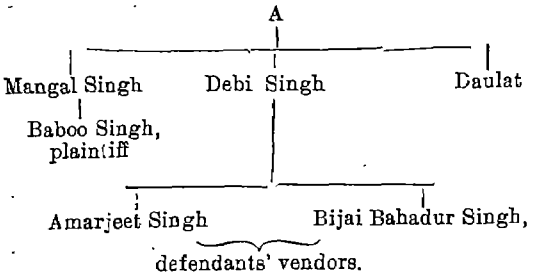
S. C. A. from the decision of the Second Additional Sub-Judge of Allahabad, dated October 18, 1932.

Messrs. *Damodar Das*, *Hyder Mehdi* and *Zafar Mehdi*, for the Appellant.

Mr. *Shiva Prasad Sinha*, for the Respondents.

Judgment.—This appeal has arisen from a suit brought by the appellant for a declaration of his right to half of the tank in dispute and in the alternative for possession. Both the Courts below dismissed the suit as barred by limitation.

The plaintiff is one Baboo Singh. The defendants are vendees from Amarjeet Singh and Bijai Bahadur Singh under a sale-deed, dated April 27, 1917. The relationship between the plaintiff Baboo Singh and the defendants' vendors will appear from the following pedigree:—



It has been found by both the Courts below that the tank in dispute (No. 708 old and 851 new) was purchased at an auction by Daulat, who acted in that transaction on behalf of himself and his two brothers. Daulat died issueless and his interest devolved upon his two brothers either by survivorship or by inheritance, a point which is not material, as in either case after the death of Daulat Singh the plaintiff's father and the father of the defendants' vendors were co-sharers. Plaintiff succeeded to the interest of his father, while the defendants' vendors succeeded to the interest of their father. On these facts there can be no doubt that the plaintiff and the defendant's vendors were co-sharers. There was controversy in the lower Court as to whether Baboo Singh, was in actual enjoyment of the tank or whether Amarjeet Singh and Bijai Bahadur Singh alone were in possession. All of them being co-sharers, possession of any one of them must be considered to be constructive possession of all unless the person in actual possession ousted his co-sharers in denial of their rights. There is no suggestion either in the pleadings or evidence that before the sale-deed, dated April 27, 1917, Baboo Singh's right was denied by the defendants' vendors or that Baboo Singh was in any manner ousted from the constructive possession which he must be deemed to have had. On the question of limitation there is another important point which both the lower Courts have overlooked and which, in my opinion, has a very important bearing on that point. The property in dispute is a tank with a belt of *parti* land round about it. It is not suggested in evidence, nor is there any finding in the judgments of the lower Courts, that the tank and the belt of land surrounding it were capable of actual enjoyment. The tank does not appear to be one of those hollow lands which can be cultivated in particular seasons of the years or that it yields any crop of any kind, such as *singhara*. There is also no suggestion that it yielded any fish which could be the source of income to the owners of the tank. The sale-deed obtained by the defendants describes the property conveyed thereby as a tank measuring 4 *bighas* 17 *biswas* with three *babool* trees standing on its *bhita*. I have mentioned these facts in detail to show that the rightful owner cannot be considered to be out of possession only because he is not able to establish by evidence definite acts of possession. In such cases possession must follow title.

First of all the lower Courts addressed themselves to the question whether Arts. 142 or 144 applies. They held that having regard to the allegations contained in the plaint Art. 142 is the proper Article to apply. Having arrived at that conclusion, they addressed themselves to the further question as to whether the plaintiff established his possession within limitation, that is to say, whether the plaintiff had proved such acts of possession as could be considered to save limitation. As already stated, in this connection they completely ignored the fact that the property is not one in respect of which the plaintiff, or for the matter of that the defendants' vendors, could have exercised any definite acts of possession. They also overlooked the fact that Baboo Singh and the vendors of the defendants being co-sharers, possession of one co-sharer is constructive possession of all. This is not the first case which has recently come to my notice in which Sub-

ordinate Courts have viewed Art. 142, Limitation Act, in such a manner as to make it almost impossible for a plaintiff to establish his possession within limitation in cases in which the plaintiff may well be considered to be in constructive possession through others or his possession must follow his title having regard to the nature of the property. Where property in dispute consists of lands actually cultivated or of house capable of actual occupation and the plaintiff sues for possession of such property on the allegation that he was dispossessed by the defendant, Art. 142 is undoubtedly applicable and the plaintiff must show that his dispossession occurred within twelve years before the institution of the suit. In such a case it may be necessary for him to adduce evidence showing when his own possession ceased and that of the defendant or of any other trespasser began. But where the property is of such a nature that it is not capable of actual physical possession or where the property, though capable of physical possession, is in the occupation of one through whom the plaintiff can be in constructive possession, different considerations obviously apply. A man may be in possession of his property without actually occupying it. In considering, therefore, the question whether the plaintiff was dispossessed within twelve years or whether his possession discontinued within twelve years the nature of the property and the position of those actually occupying it, if it is capable of actual occupation, must be taken into consideration. As already stated, in the present case the plaintiff must be deemed to have been in constructive possession of the tank in dispute, even assuming the vendors of the defendants, who were his co-sharers, were alone in possession and the tank was capable of actual possession. The plaintiff's title was never denied expressly or by necessary implication till April 27, 1917, when the defendants obtained a sale-deed from the plaintiff's co-sharers. The sale-deed is a registered document, but the plaintiff cannot be considered to have obtained knowledge of its contents only because it was registered. A subsequent transferee or any other person having occasion to deal with any property may be fixed with notice of a prior registered instrument because he is put to inquiry and is expected to inspect the Registration Office; but a co-sharer cannot be presumed to know the contents of a registered document, executed by persons who impliedly denied his title by executing the document. It is obviously impossible to expect that every owner of property must periodically inspect the Registration Office to find if any other person has dealt with his property adversely. At the same time if the vendee takes possession of the vended property in a manner which is calculated to give clear notice, to the person whose title is affected by the sale, that his right is denied and he is excluded, the vendee's possession will be adverse. Applying this rule to the present case, if the defendants took possession of the tank and the belt of land around it in a manner amounting to a denial of the plaintiff's right and exclusion of his possession as it was before the sale, the plaintiff's constructive possession terminated, and if the suit was brought more than twelve years after the date of such dispossession or discontinuance of possession, the suit would be undoubtedly barred. There is no suggestion in the judgments of the lower Courts that the defendants so conducted themselves in relation to the tank purchased by them as to amount to the plaintiff's dispossession. As already mentioned, the tank and its appurtenance were not capable of enjoyment. The plaintiff's possession must be taken to have continued till the defendants' possession became adverse as regards continuity and extent.

The plaintiff's case is that in 1928, there was a dispute between the parties about the cutting of *babool* trees, and the defendants then set up their exclusive right and possession which necessitated the present declaratory suit. To be on the safe side the plaintiff claimed possession in the alternative. I do not consider that these allegations attract the application of Art. 142, Indian Limitation Act. If the question were of importance, I would apply Art. 141 to a case of this kind. But as in my opinion it makes no difference, having regard to the circumstances of the case, whether Art. 142 or Art. 144 be applied, I have approached the case as if Art. 142 is applicable. If the plaintiff's allegation is true, his dispossession occurred in 1928. If it is not true, and it is not suggested by the defendants that there was any occasion before 1928 when the parties could come in conflict, plaintiff's possession must be inferred from his title which was unaffected by anything taking place before or after the sale-deed of 1917. The property being what it is, his possession followed title. In all these circumstances, I am clearly of opinion that the lower Courts have arrived

at an incorrect finding in holding that the plaintiff failed to establish his possession within limitation.

The learned Advocate for the appellant strongly pressed upon me the view that the finding of the lower Appellate Court is one of fact and is conclusive in second appeal. It is true that the conclusion is so worded as to amount to a finding of fact but it has been arrived at in complete disregard of the legal propositions which are involved in the consideration of the question and which I have indicated above. In my opinion the finding is vitiated by errors of law and it is open to me to interfere with it in second appeal. This is, of course, on the assumption that Art. 142, is applicable. If Art. 144 be applied the finding which does not affirm defendants' adverse possession is beside the mark.

One of the pleas put forward by the defendant-respondents was that the plaintiff is not entitled to possession except on payment of compensation for improvements made by them. This plea was embodied in the third issue framed by the trial Court which found that the defendants spent Rs. 288, in re-digging the tank. That Court did not, however, express any opinion as to whether the defendants are entitled to half of that amount from the plaintiff. The lower Appellate Court disposed of the case on the question of limitation without entering into any other question arising in the case. It is unnecessary to make any further enquiry on this point as Mr. Panna Lal, the learned Advocate for the appellant, expresses his client's readiness to contribute half of the sum spent by the defendants.

The result is that I declare the plaintiff's suit to be in time and pass a decree for joint possession in respect of half of the tank. As the defendants' claim to compensation has been conceded, I direct that parties should pay their own costs in all the Courts. The defendants shall be entitled to recover Rs. 144 by execution of decree.

N. B.—Leave to appeal under the Letters Patent is granted.

N. *Decree passed.*

PATNA HIGH COURT

Appeal from Appellate Decree No. 383 of 1931

March 8, 1935

MOHAMMAD NOOR AND VARMA, JJ.

MAHINDRA OJHA—DEFENDANT —APPELLANT

versus

SITARAM OJHA—PLAINTIFF—RESPONDENT

Hindu Law—Joint family—Mitakshara—*Undivided member, if can transfer his share—Alienation—Statement that transferor has a specific share—Whether constitutes separation—Partition.*

A member of a joint Mitakshara family cannot make a transfer of his undivided share in the ancestral estate for his own benefit.

Although from statements of separation in the deed of transfer itself an inference of fact may be drawn that there was a partition, yet simply a statement in the deed that the transferor has a specific share will not constitute separation as a matter of law.

It cannot be said that if an undivided member of a family transfers his share by will or *inter vivos*, the transfer is valid simply because he specifies the share. *Jumma Ram* v *Mansab Rai* (1), explained and dissented from, *Amar Dayal Singh* v. *Har Pershad Sahu* (2) and *Balgobind Das* v. *Narain Lal* (3), referred to.

A. from a decision of the Additional Subordinate Judge, Shahabad, dated September 19, 1930, affirming that of the Munsif, Second Court Buxar, dated July 31, 1928.

Mr. *D. N. Varma*, for the Appellant.

Mr. *B. P. Sinha*, for the Respondent.

Mohammad Noor, J.—The suit out of which this second appeal arises was instituted by the plaintiff-respondent for a declaration that a deed of gift said to have been executed by his uncle Radha Prasad Ojha in favour of the defendant is not genuine and (is) null and void. It was alleged by the plaintiff that he and his deceased uncle Radha Prasad Ojha were members of a joint Hindu family and therefore even if the deed in question was genuine, the donor was not competent to make a gift of his undivided share in favour of the defendant. The defence was that the deed was genuine and that the uncle and the nephew had separated in *Kartik* 1334 (corresponding to 1926). In support of separation the defendant produced a certain document which has been marked as Ex. G in the suit. The trial Court at first refused to take this document into evidence, and on other evidence adduced before it decreed the suit. The defendant appealed, and the learned Subordinate Judge remanded the case with an order that the document in question be taken into evidence for the limited purpose of proving partition, but

not for the purpose of proving what particular properties were allotted to each co-sharer. This was done and as I have said the document was marked as Ex. G in the case, but the learned Munsif again decreed the suit holding that the deed of gift was suspicious and that it was not properly attested as the witnesses to the deed did not speak of its having been executed in their presence. He further held that there was no partition between the plaintiff and his uncle and that Ex. G was not genuine.

There was again an appeal by the defendant. It was argued mainly on the basis whether or not there was a partition between the plaintiff and his uncle. The learned Subordinate Judge held that they were joint and that Ex. G, which purports to be evidence of partition, was not genuine. He, therefore, dismissed the appeal. The defendant has preferred this second appeal.

Two points have been raised before us. One is that the learned Subordinate Judge having found that the signature of the plaintiff on Ex. G was genuine was not justified in holding that the deed itself was not genuine. I do not find any such finding in the judgment of the learned Subordinate Judge. What happened was this. The learned Munsif gave as one of the reasons for holding Ex. G to be not genuine that it was signed in *Kaithi* characters while the plaintiff used to sign his name in *Devanagari*. The learned Subordinate Judge, while he gave some reasons against the genuineness of Ex. G, found that the plaintiff used to sign both in *Devanagari* and *Kaithi Hindi* and said that though he did not agree with the reasons given by the learned Munsif he nevertheless held the document to be not genuine. This is a finding of fact and is conclusive in second appeal. As this was the only point argued before the learned Subordinate Judge, the appeal is fit to be dismissed on the ground that it is concluded by the finding of fact.

Mr. Varma has, however, urged a point which does not seem to have been raised either before the trial Court or before the learned Subordinate Judge. He contends that assuming that there was no partition, as alleged, in *Kartik* 1334, which was sought to be proved by Ex. G, nevertheless as the uncle of the plaintiff in the deed of gift specified his share in the joint family property as half and stated that he was separate from his nephew, this statement itself constitutes separation and therefore the deed is valid. He has drawn our attention to the fact that the question of attestation mentioned by the trial Court does not arise now since the definition of attestation in the Transfer of Property Act has been amended and the amendment has a retrospective effect. If we could accept this contention of the learned Advocate it would have been necessary for us to remand this case, because there is no finding of fact by the learned Subordinate Judge about the genuineness of the deed of gift. The learned Munsif, as I have said, has only said that the deed was suspicious. A clear finding of fact about its genuineness would have been necessary. It is not, however, necessary to adopt this course. In my opinion, the point of law which is urged by Mr. Varma has no foundation. He has relied upon a decision of the Lahore High Court in *Jumma Ram* v. *Munsab Rai* (1). There the question was whether a certain bequest in a will was valid. The question depended upon the fact whether the testator was joint with his nephews or separate from them. The District Judge relied upon a document showing that the parties had separated. The High Court pointed out that the deed relied upon by the District Judge was subsequent to the will, but their Lordships said:—

"Nevertheless, there is the fact that the shares are specified also in the will, the testator's share being mentioned therein as one-third, and we think that this would suffice to constitute a separation in law, an unequivocal declaration by a member of the co-parcenary body of his intention to be divided in status being sufficient to effect a severance without an agreement by all the co-parceners being required".

The terms of the will are not given in the report. If their Lordships intended to lay down that if an undivided member of a family transfers his share by will or *inter vivos*, the transfer is valid simply because he specifies the share, then with all respect I cannot agree. This will practically be nullifying a series of decisions which have held that an undivided member of a joint Mitakshara family cannot make a transfer of his share. We can, however, conceive of cases in which from statements of separation in the deed of transfer itself an inference of fact may be drawn that there was a partition, but simply a statement in the deed that the transferor has a specific share will in my opinion not constitute separation as a matter of law. In *Amar*

(1) 67 Ind. Cas. 812; A I R 1922 Lah. 473.

Dayal Singh v. *Har Pershad Sahu* (2) it was held that an intention to separate from the rest of the joint family cannot be inferred from the fact that the member of the family executing a mortgage purported to hypothecate only his own share out of the whole property. In the case of *Balgobind Das* v. *Narain Lal* (3) it was held that it is the settled law of the Mitakshara, as administered in Bengal and the North-West Provinces, that a Hindu cannot, without the consent of his co-parceners, sell or mortgage his undivided share in the ancestral estate for his own benefit. In that case there was a conflict between a mortgage of half share executed by the son and a sale of a portion of that share in execution of a decree against him. It was held that the son's co parcenary interest passed to the purchaser at the auction and that the only remedy of the mortgagee was to attach and sell any unsold portion of the mortgaged-property in execution of a money decree against the mortgagor. It will be seen in this case that the Court sale was held to be valid but not the private mortgage executed by the son. The law is exactly the same in the case of a gift or will.

I see no merit in this appeal and I would dismiss it with costs.

Varma, J.—I agree.

N. *Appeal dismissed.*

(2) 58 Ind. Cas. 72; 5 P L J 605; 1 P L T 511.

(3) 20 I A 116; 15 A 339; 6 Sar. 313; 17 Ind. Jur. 425 (P C).

ALLAHABAD HIGH COURT

Second Civil Appeal No. 20 of 1933

February 26, 1935

NIAMAT-ULLAH, J.

QUTUBUDDIN—DEFENDANT—APPELLANT

versus

MANGALA DUBEY—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 53—Scope of—Gift—Compromise and decree affirming validity of gift deed—Compromise, if can be deemed collusive—'Collusive', significance of—Co-sharers—Transfer by one of land held in severalty—Other co-sharers, if can have transfer set aside and take joint possession with transferor.

Under s. 53, Transfer of Property Act, a deed, unless it was meant by the executant thereof to be fictitious, is only voidable at the option of the creditors; and if it is not avoided by the latter, it is a perfectly valid instrument as between the parties to it.

If the plaintiff and the defendant in an action compromise, and the compromise is given effect to in the decree, it cannot be considered to be collusive, unless it is a fraud on the rights of third persons. The word "collusive" is not a term of art and generally implies an understanding between two persons in fraud of the rights of third persons. As between the parties to a transaction no question of collusion can arise only because they acted in concert—a characteristic which is common to all agreements. A party to it or any one claiming under him is estopped by the compromise and the decree affirming the validity of a deed of gift executed by him. Nor is a third party entitled to raise any question in respect of the binding character of the deed of gift.

One of several co-sharers in an undivided *mahal* cannot transfer to a stranger, lands held by him in severalty and if he does so, the other co-sharers are entitled to have the alienation set aside, to eject the transferees and to take joint possession with the transferors *Jamna* v. *Jhalli* (1) and *Mohamad Sher Khan* v. *Bharat Indu* (2), referred to.

S. C. A. from the decision of the Subordinate Judge of Azamgarh, dated December 7, 1932.

Mr. *Mukhtar Ahmad*, for the Appellant.

Mr. *Kanhaiya Lal Misra*, for the Respondents.

Judgment.—This is a plaintiff's appeal and arises from a suit for possession of two plots: Nos. 394-1 and 494, by ejectment of defendant No. 1, who claims it under a mortgage deed executed by defendant No. 2. The plaintiff and defendant No. 2 are recorded co-sharers of a '*khata*' in which the plots in suit lie. The trial Court decreed the plaintiff's suit so far that joint possession was allowed to the extent of 11/12. The lower Appellate Court dismissed the plaintiff's suit.

The '*khata*' in which the plots in suit are situated originally belonged to one Makhdum Bakhsh. In 1906 he executed a deed of gift in respect of the entire *khata* in favour of his daughter's sons, Abdur Rauf and Muhammad Hanif. Makhdum Bakhsh subsequently died, leaving a daughter, Wasiha Bibi, and her two sons, the donees, Qutubuddin is the son of Zaibun Nisa, daughter of Wasiha Bibi. Mutation of names was effected in favour of the donees, Abdur Rauf and Muhammad Hanif. The latter died, apparently unmarried, and his share devolved partly on his mother and partly on his brother and sister. The sister also died, leaving the plaintiff and her mother Wasiha Bibi as her heirs. Wasiha Bibi thus obtained a fractional share in the '*khata*' from her deceased son and daughter, though she got nothing on the death of her own father, Makhdum Bakhsh, who had gifted away the entire share to her sons. Abdur Rauf made a gift of his share to the plaintiff. Wasiha Bibi executed a deed of mortgage

with possession to defendant No. 1 Mangala Dubey, in respect of plots Nos. 394-1, and 494. Thereupon the plaintiff instituted the suit which has given rise to this appeal for exclusive possession of the plots in dispute impugning the deed of mortgage and the right of the mortgagee to remain in possession of the plots which formed part of the undivided property of the plaintiff and Wasiha Bibi, from whom defendant No. 1 admittedly derives title. The suit was contested by defendant No. 1, who pleaded that the deed of gift, under which the plaintiff claims title and which was executed by Abdur Rauf, was fictitious and fraudulent and conferred no title on the plaintiff. The plaintiff had also impugned the mortgage relied on by defendant No. 1 on the ground that Wasiha Bibi did not intelligently execute it in favour of defendant No. 1, nor did she receive any consideration in respect thereof.

Both the lower Courts have concurrently found that the mortgage deed in favour of defendant No. 1 is perfectly valid. This finding must be accepted, and defendant No. 1 should be treated as a mortgagee with possession from *Musammat* Wasiha Bibi. The lower Appellate Court upheld the defence as regards the validity of the deed of gift in favour of the plaintiff. It is somewhat difficult to ascertain the exact finding of that Court on this part of the case. It is alleged on behalf of the respondent that the finding amounts to a declaration that the deed of gift was void. I shall advert to this question presently.

It is no longer in dispute that Abdur Rauf executed a deed of gift in favour of the plaintiff in 1918, and had it registered. Mutation of names was effected in his favour in respect of the share of Abdur Rauf in the '*khata*' we are concerned with. Abdur Rauf subsequently instituted a suit for cancellation of the deed of gift, alleging that the deed was fictitious and was not given effect to. The suit was compromised and a decree dismissing the suit in terms of the compromise was passed on April 26, 1920. The decree clearly states that the deed of gift be declared to be valid and the plaintiff's suit be dismissed. This was the effect of the compromise, which however provided that certain house and *sir* and *khudkasht* lands would remain in possession of Abdur Rauf. After sometime Abdur Rauf appears to have instituted another suit again impugning the deed of gift as before. He also impugned the compromise and the decree passed in the earlier suit. As regards the compromise, he said that it was collusive. Excepting the plaint, no other document relating to that suit has been filed by any of the parties. It is conceded on both sides that the suit was eventually dismissed. It is not suggested that Abdur Rauf was not in possession of the share to which the deed of gift related. In the face of this history it is surprising that the lower Appellate Court upheld the defence that the deed of gift is not valid and confers no title on the plaintiff. The learned Subordinate Judge, who heard the appeal, refers to some evidence showing that Abdur Rauf was indebted to certain persons and that he dealt with one or two plots as if he were the owner after the deed of gift. The suggestion that Abdur Rauf was indebted was based on some oral evidence and the admission of the plaintiff that Abdur Rauf was indebted to one Kanhaiya Lal, who was paid off by the donee (the plaintiff) after the deed of gift. The learned Subordinate Judge also referred to the allegation of Abdur Rauf himself in his plaint in the suit brought for cancellation of the deed of gift. On these facts the learned Subordinate Judge held that the deed of gift had been executed to defraud the creditors and was, therefore, void. He failed to take note of the fact that no creditor ever challenged the deed of gift. He is apparently of opinion that a deed of gift executed to defeat the creditors is necessarily void. This is not a correct proposition. Under s. 53, Transfer of Property Act, a deed, unless it was meant by the executant thereof to be fictitious, is only voidable at the option of the creditors; and if it is not avoided by the latter, it is a perfectly valid instrument as between the parties to it. That the deed of gift in question was not fictitious is abundantly proved by the fact that mutation of names was effected and that the donee (the plaintiff) has been in possession of the gifted share and his right is questioned only as regards the two plots which are now in dispute. The decree, though based on the compromise, is, in my opinion, conclusive as regards the validity of the deed of gift. Abdur Rauf or any one claiming under him, is bound by the decree which affirmed the validity of the deed of gift. The learned Subordinate Judge has brushed it aside with the remark that it was "collusive". He did not pause to consider what a collusive transaction means. If the plaintiff and the defendant in an action compromise, and the compro-

mise is given effect to in the decree, it cannot be considered to be collusive, unless it is a fraud on the rights of third persons. The word "collusive" is not a term of art and generally implies an understanding between two persons in fraud of the rights of third persons. As between the parties to a transaction no question of collusion can arise only because they acted in concert—a characteristic which is common to all agreements. It is not suggested that the object of the compromise between the parties to this suit was to prejudice the right of any one else. As already stated, Abdur Rauf, or any one claiming under him, is estopped by the compromise and the decree from questioning the validity of the deed of gift. Much less is a third person like defendant No. 1 entitled to raise any question in respect of the binding character of the deed of gift. For these reasons, I set aside the finding of the lower Appellate Court so far as it relates to the validity of the gift relied on by the plaintiff-appellant.

The learned Advocate for the appellant has referred to *Jamna* v. *Jhalli* (1) and *Mohamad Sher Khan* v. *Bharat Indu* (2) and contended that one of several co-sharers in an undivided *mahal* cannot transfer to a stranger lands held by him in severalty and that if he does so, the other co-sharers are entitled to have the alienation set aside, to eject the transferees and to take joint possession with the transferors. One of these cases is the decision of a Division Bench, and I am bound by it. The lower Courts have found as regards one of the plots in dispute that it was in exclusive possession of Wasiha Bibi. If she had not executed the mortgage deed relied on by defendant No. 1, the plaintiff would not have been entitled to joint possession with her; but as ruled in the cases already referred to, he becomes entitled to joint possession after ejecting the transferee. Acting on this view, the Court of first instance decreed joint possession to the plaintiff, declaring his share to be 11/12. It did not, however, pass any decree for ejectment of defendant No. 1, the transferee. The latter appealed to the lower Appellate Court; but the plaintiff did not file any cross-objection, nor did he prefer a separate appeal of his own. The lower Appellate Court dismissed the suit, holding that the plaintiff had no right under the gift set up by him, but went on to observe that if the deed of gift had been found by it to be valid, it would have decreed joint possession to the plaintiff. According to the calculation of shares made by that Court, the plaintiff's share comes to 121/144, and not 11/12, as assumed by the trial Court. It is clear that the plaintiff acquiesced in the form of the decree passed by the trial Court and did not insist on the ejectment of defendant No. 1. None of the grounds taken in the memorandum of appeal in this Court is directed against the ejectment of defendant No. 1. In this state of things, I do not think that a decree for ejectment of defendant No. 1 need be passed. In the view of the case I have taken, the decree of the trial Court should be restored, declaring the plaintiff's right to be 121/144, as found by the lower Appellate Court. The order of the trial Court decreeing mesne profits is also restored.

The result is that the appeal is allowed with costs. The decree of the lower Appellate Court is set aside and that of the Court of first instance is restored with this modification that the plaintiff's share shall be considered to be 121/144 and not 11/12.

Leave to appeal under the Letters Patent is refused.

N. *Appeal allowed.*

(1) 55 Ind. Cas. 94; 18 A L J 129.
(2) 106 Ind. Cas. 656; 25 A L J 983; A I R 1928 All. 59.

PATNA HIGH COURT

Civil Appeal No. 144 of 1933
July 25, 1934

MOHAMMAD NOOR AND LUBY, JJ.

BANARSI PRASAD CHAUDHURY—JUDGMENT-DEBTOR—APPELLANT

versus

KIRTYANAND SINGH BAHADUR AND OTHERS—DECREE-HOLDERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 48—Application for execution—When should be treated as continuation of previous application—Previous application not proceeded with—Bar removed—Fresh application, if one to revive proceedings which had to be stopped.

An application for execution must be treated as a continuation of the previous application where the previous application could not be proceeded with on account of a bar having been placed by the allowance of the claim; and once the bar was removed that execution can proceed and the fresh application is nothing more than an application to revive the proceeding which had to be stopped. *Rudra Narain Guria* v. *Pachu Maity* (2), applied.

C. A. from the original order of the Sub-Judge, Monghyr, dated June 2, 1933.

Mr. *Janak Kishore*, for the Appellant.

Messrs. *D. L. Nandkeolyar* and *Raghunath Jha*, for the Respondents.

Mohammad Noor, J.—This appeal is by the judgment-debtor and is directed against an order of a Subordinate Judge of Monghyr, holding that the execution case instituted before him was not barred under s. 48 of the Civil Procedure Code. The decree under execution was passed by the Subordinate Judge of Bhagalpur on July 1, 1918, and in about April 1928, it was brought on transfer to Monghyr where an application for execution was made on April 10, 1928. Certain properties seem to have been attached in execution of the decree but a claim to the property preferred on behalf of an idol was allowed on December 25, 1929, and apparently the execution could not proceed further. The decree-holder had to institute a suit under O. XXI, r. 63, for a declaration that the property which he sought to attach and sell was in fact the property of the judgment-debtor and liable to be sold for satisfaction of the decree. The suit was decreed on September 20, 1932; and a week later, on September 28, 1932, the present petition for execution was filed. The objection raised was that the application was barred under s. 48 of the Civil Procedure Code. The learned Subordinate Judge has held that as the decree-holder was prevented from executing the decree on account of the fraud of the judgment-debtor committed within 12 years of the date of the decree, the execution was not barred. The fraud consisted in falsely setting up a claimant and thereby forcing the decree-holder to fight out a civil suit. The judgment-debtor has preferred this appeal.

In order to appreciate the argument of the learned Advocate who has appeared on behalf of the appellant, it is necessary to mention a few more facts. It seems that after the decree-holder was prevented from proceeding to sell the property on account of the claim having been allowed, he sought execution of the decree by the arrest of the judgment debtor and an application to this effect was made on June 18, 1930. Somehow or other this application was dismissed on September 30, 1931, but this Court ordered on March 22, 1933, the execution to be revived and in fact that application is still pending. It has been kept in abeyance till the present application for execution, which is the subject-matter of the appeal is disposed of.

The learned Advocate contended that s. 48, of the Civil Procedure Code had no application, firstly, because the decree-holder was not prevented from execution as in fact he proceeded to execute his decree by the arrest of the judgment-debtor; and secondly, because the institution of a suit by itself did not constitute fraud. As to the first contention, as the learned Subordinate Judge has pointed out, it is open to a decree-holder to have his decree executed in any manner provided by law. If the decree-holder now finds that on account of the suit having been decided in his favour, he can pursue a certain property with some amount of certainty that the decree will be realised, he cannot be forced to pursue his application for the arrest of the judgment-debtor. He may, if he likes, do so if he fails to realize the decree by the sale of the property. As to his second contention that the institution of a suit does not constitute fraud, the learned Advocate has relied upon the case of 1912, *Raghunath Prasad* v. *Kashi Prasad* (1). There the institution of certain kinds of suits was on the facts of that case, held not to constitute fraud. One of them was a suit by a person claiming title to the property on the foot of a mortgage, which suit ultimately was unsuccessful. It is obvious that if the claim of a third person is disallowed, the decree-holder is not prevented from executing the decree and cannot, therefore, plead this as a ground for exclusion from the operation of s. 48. In this case now before us the claim was allowed, and the decree-holder was forced to bring a suit. Another kind of suit mentioned in the head note as not constituting fraud was a suit instituted under s. 283 of the Civil Procedure Code of 1882 by the decree-holder who purchased a house in execution of his decree after the objection of the purchaser of the same property from the judgment-debtor had been allowed and which suit was afterwards successful. The head-note is somewhat misleading. It appears from the body of the judgment that the claim of the third person was preferred and allowed after the decree-holder had purchased a property in execution of his decree, and then the decree-holder had to bring the suit for declaration of his title which was successful. It is obvious that the suit could not have been under s. 283 of the old Code, but under s. 332 (now O. XXI, r. 103), as the claim and the suit were after the sale. It

(1) 13 Ind. Cas. 88; 15 C L J 678.

is obvious that the institution of such a suit could not have prevented the execution of the decree. I do not see any reason why the present case should not come within s. 48 of the Civil Procedure Code. In my opinion, therefore, none of the contentions of the appellant is tenable.

Apart from the applicability of s. 48 of the Civil Procedure Code, this application for execution can safely be treated as a continuation of the application in which the property could not be sold on account of the claim having been allowed. This was exactly what was held in the case of *Rudra Narain Guria* v. *Pachu Maity* (2). No doubt the question before the Calcutta High Court was not one under s. 48 of the Civil Procedure Code but under the Limitation Act. But the principle is exactly the same. There also a claim was allowed, and the decree-holder had to institute a suit for a declaration of his right to execute his decree against the property. After the suit was decreed, the decree-holder filed a fresh application for execution. Their Lordships held that that application must be treated as a continuation of the previous application because the previous application could not be proceeded with on account of a bar having been placed by the allowance of the claim: and once the bar was removed that execution could proceed and the fresh application was nothing more than an application to revive the proceeding which had to be stopped. Taking any view of the case, namely, whether we apply to it the exceptions mentioned in s. 48 of the Civil Procedure Code or treat the present application as a continuation of the previous application, the execution must proceed. The proceedings are not barred by limitation.

I would dismiss this appeal with costs.

Luby, J.—I agree.

N. *Appeal dismissed.*

(2) 23 C 437.

CALCUTTA HIGH COURT

Civil Appeal No. 3167 of 1931

August 23, 1934

MITTER, J.

JOGESH CHANDRA ROY—DEFENDANT—APPELLANT

versus

Srimati SACHCHHANDA AND OTHERS—RESPONDENTS

Easement—Prescription—Right of way—Mere discontinuance of user is not an interruption or abeyance of enjoyment even though such cessation occurs while right is being acquired.

In order that a prescriptive right may be successfully claimed, the pathway must be enjoyed peaceably and openly as an easement without interruption for more than 20 years. The term interruption refers to an adverse obstruction and not a mere discontinuance of user. A person may be said to be in enjoyment of a right of way during a period of time, though he does not use the way every moment. Cessation of user is not an invariable indication of the abeyance of enjoyment of a right, that is, it is not inconsistent with the continuance of the enjoyment of the right.

[Indian and English case-law referred to.]

Cessation of user for a time while the right is being acquired does not stand on a different basis from cessation when the right has already been acquired by 20 years' enjoyment. *Sturges* v. *Bridgman* (5), explained.

C. A. from appellate decree of the Sub-Judge, Second Additional Court, Chittagong, dated August 15, 1931.

Messrs. *S. C. Basak* and *Nripendra Chandra Das*, for the Appellant.

Messrs. *Narendra Kumar Das* and *Rohinibinod Rakshit*, for the Respondents.

Judgment.—This appeal is on behalf of the defendant. It arises out of a suit instituted by the plaintiffs for declaration of their right of way from their homestead over the bank of the defendant's tank to a public highway farther south and for a permanent injunction restraining the defendant from putting obstructions. The plaintiffs alleged that they had acquired the right of way by prescription and alternatively they say that the way is a way of necessity. Although the lower Appellate Court has given a decree to the plaintiffs also on the footing that the way is a way of necessity, that part of the judgment is not sought to be supported before me. The plaintiffs and defendant hold under different landlords and the plaintiffs' homestead and the bank of the defendant's tank had never been held under a common title. The only question, therefore, in this appeal is whether the findings arrived at support the claim based on prescription.

The defendant took the defence that the plaintiffs' homestead had been abandoned for about 24 years, and that there had not been any user for a long period. They accordingly contended that the plaintiffs' claim based on prescription cannot be supported. The first Court found that the plaintiffs did not occupy their homestead for six or seven years, holding that there could not be any possible claim based on prescription. The lower Appellate Court did not agree with this finding. The

material findings arrived at by the lower Appellate Court, are the following : (*i*) the pathway had been used for more than 50 years: (*ii*) that the homestead of plaintiffs had never been abandoned, (*iii*) that it was not a fact that the plaintiffs ceased to live in their homestead for six or siven years (*iv*) that since the death of plaintiff No. 1's son (which occurred in 1900) the plaintiff had been living sometimes in her daughter's house and sometimes in her own homestead.

The appellant relies on the last finding and says that the continuity in the enjoyment has been broken and the plaintiff's claim based on prescription must be negatived. The findings of the Subordinate Judge make it clear that 20 years' enjoyment had been completed before the plaintiff's son died when the plaintiff began sometimes to live with her daughter and sometimes in her own hut. In order that a prescriptive right may be successfuly claimed the pathway must be enjoyed peaceably and openly as an easement without interruption for more than 20 years. The term interruption refers to an adverse obstruction not a mere discontinuance of user: *Carr* v. *Foster* (1), *Hollins* v. *Verney* (2), *Smith* v. *Baxter* (3). A person may be said to be in enjoyment of a right of way during a period of time though he does not use the way every moment. Cessation of user is not an invariable indication of the abeyance of enjoyment of a right, that is, it is not inconsistent with the continuance of the enjoyment of the right: see *Gopal Chandra* v. *Bankim Behary* (4). I would accordingly hold that the learned Subordinate Judge is right in holding that the plaintiffs have a right of way over the bank of the defendant's tank which right has been acquired by prescription.

The appellant has argued before me that cessation of user for a time while the right is being acquired stands on a different basis than when the right had already been acquired by 20 years' enjoyment and in support of this proposition the case of *Sturges* v. *Bridgman* (5), has been cited before me. That case is no authority for the proposition contended for. It only re-affirms the principle laid down in the well-known case of *Charles Dalton* v. *Henry Angus & Co.* (6), that an enjoyment physically incapable of interruption would not confer any right of easement by prescription. Besides, as I have pointed out, plaintiff No. 1 began to live in her daughter's house, off and on, only after the enjoyment had been completed for more than 20 years.

Another point has been raised that the learned Subordinate Judge has proceeded upon a misconstruction of Ex. B. That is a deposition of plaintiff No. 3 in a criminal case. I am not satisfied that the said document has been misconstrued but assuming it has been, that does not raise any question of law for it is only a piece of documentary evidence. For these reasons I dismiss the appeal with costs.

D. *Appeal dismissed.*

(1) (1868) 3 Q B 581; 2 G & D 753; 11 L J Q B 264; 6 Jur. 837.

(2) (1885) 13 Q B D 704; 53 L J Q B 420; 48 J P 580; 33 W R 5.

(3) (1900) 2 Ch. 138; 69 L J Ch. 437; 48 W R 458; 82 L T 650.

(4) 51 Ind. Cas. 372; A I R 1919 Cal. 357; 29 C L J 421; 26 C W N 121.

(5) (1880) 11 Ch. D 852; 48 L J Ch. 785; 28 W R 200; 41 L T 219.

(6) (1881) 6 A C 740; 50 L J Q B 689; 30 W R 191; 44 J P 132; 44 L T 844.

PATNA HIGH COURT

Civil Appeal No. 1439 of 1930

October 9, 1934

MOHAMMAD NOOR AND LUBY, JJ.

Sri SATYANARAIN SAMI AND ANOTHER —APPELLANTS

versus

JAMUNA BAI AND ANOTHER— RESPONDENTS

Occupancy holding— Lessee of non-transferable occupancy holding purchasing it during term of lease but before amendment of Bengal Tenancy Act in 1907—Dedication to idol—Validity of—Bengal Tenancy Act (VIII of 1885)—Amendment of 1907, if retrospective—Transfer of non-transferable occupancy holding—Whether void or voidable.

The amendment of the Bengal Tenancy Act in 1907 does not affect a right which has already become vested prior to the amendment which has no retrospective effect. Where, therefore, the lessee of a non-transferable occupancy holding has purchased it during the continuance of the lease but before 1907 and has dedicated it to an idol, the dedication is perfectly valid. *Harrington* v. *Dwarka Prasad* (1) relied on *Raghubar Mahto* v. *H Manners* (3) not followed *Chandra Churdeo* v. *Laldhari Prasad Singh* (2), referred to.

A transfer of a non-transferable occupancy holding is not void but voidable.

C. A. from appellate decree of the District Judge, Muzaffarpur, dated July 31, 1930.

Messrs. *S. M. Mullick*, *L. K. Jha* and *P Jha*, for the Appellants.

Messrs. *B. N. Mitter* and *N. N. Roy*, for the Respondents.

Mohammad Noor, J.—The suit out of which this second appeal arises was instituted by the plaintiff-respondents under O. XXI, r. 63, Civil Procedure Code, for a declaration that about 12 *bighas* of land situated in village Khrhat Golapur is liable to be sold in execution of their decree against defendants Nos. 3 and 2 and that the claim of defendant No. 1, an idol, was wrongly allowed. The suit was dismissed by the trial Court but has been decreed by the Court of Appeal below. Defendant No. 1 has preferred this second appeal.

The facts are these: The defendants Nos. 2 and 3 obtained a temporary lease of the village from the plaintiffs and in 1906 during its continuance acquired by purchase the occupancy right of the land which is the subject-matter of the present litigation. Later, in 1909, they dedicated this land in favour of the idol, defendant No. 1. Their lease expired in the year 1320 (corresponding to 1913). By that time their financial conditions became bad and they defaulted in payment of the rent. The plaintiffs obtained a decree for rent, and in execution of it sought to sell the land as the property of defendants Nos. 2 and 3. A claim was preferred on behalf of defendant No. 1 on the basis of the dedication made in the year 1909, which was allowed. Hence the present suit. The learned Subordinate Judge found the dedication valid and *bona fide*.

The learned District Judge has decreed the suit relying mainly upon the fact that just about a year before the expiry of the *thika* lease, defendant No. 3 executed on his own behalf a *kabuliyat* in respect of the land in suit in favour of the plaintiff, Ex. 3, in which it is stated that the purchase of the occupancy rights in 1906 was invalid as there was no custom of transferability of the holding in the village, and therefore he (defendant No. 3) was taking the settlement from the proprietors. The *kabuliyat* does not purport to be on behalf of the idol.

It has been contended before us that if by the purchase of the year 1906 the property was legally vested in defendants Nos. 2 and 3 and thereafter defendants Nos. 2 and 3 legally dedicated it in favour of defendant No. 1 in 1909, the execution of the *kabuliyat* by the defendant No. 3 who was the *shebait* of the idol would not take away the vested interest of the idol and the *kabuliyat* executed by defendant No. 3 must be taken to have been executed for the benefit of the idol.

This leads us to the consideration of whether the purchase by defendants Nos. 2 and 3 of occupancy right of the land and its later dedication was valid, as the holding was non-transferable, without the consent of the landlord. It was contended by the appellant before us as well as before the learned District Judge that in spite of the fact that the land was a non-transferable occupancy holding, the transfer to the defendants Nos. 2 and 3 was valid as it was a transfer to persons who were entitled to give consent and recognise that transfer. The case of *Harrington* v. *Dwarka Prasad* (1) was relied upon before the learned District Judge. He seems to have accepted this contention so far as the transfer was in favour of defendants Nos. 2 and 3 as it was prior to the year 1907, when the Bengal Tenancy Act was amended by enacting that an *ijardar* or a lessee was not entitled to acquire occupancy right even by purchase during the continuance of the lease. He, however, seems to be of opinion that as the dedication in 1909 was after the amendment of the Act in 1907 it was not valid. Here the learned District Judge is clearly in error. If by virtue of the purchase in the year 1906 the occupancy right became vested in defendants Nos. 2 and 3 as has been held in *Harrington* v. *Dwarka Prasad* (1) above referred to, they were entitled to deal with it in any way they liked. The amendment of the Act in 1907 did not affect a right which had already become vested in them prior to the amendment which has no retrospective effect. Therefore when in 1909 they dedicated the land to the idol, the dedication was perfectly valid. Assuming that the land dedicated was a non-transferable occupancy holding, defendants Nos. 2 and 3 as transferors did consent to it by the dedication itself as they in 1906 consented to and recognised the transfer to themselves. It was held in *Harrington* v. *Dwarka Prasad* (1) that a *thikadar* during the period of the lease stood in the place of the landlord for that period and was the landlord of the *raiyat*, and as such, could give consent to the transfer of a non-transferable occupancy right and could consent to a transfer to himself. We must, therefore, hold that in taking a transfer to himself in 1906 he consented to it and in making the transfer by himself in 1909 he again gave consent to it. Perhaps the learned District Judge did not consider

(1) 55 Ind. Cas. 59; A I R 1920 Pat. 577; (1920) Pat. 11; 7 P L T 533.

that in the year 1909 when the dedication was made, defendants Nos. 2 and 3 were still the lessees of the village, and as such, they could recognise that transfer. The principle has also been laid down by their Lordships of the Judicial Committee in *Chandra Churdeo* v. *Laldhari Prasad Singh* (2).

Mr. H. N. Mitter who appears on behalf of the respondents has relied upon *Raghubar Mahto* v. *H. Manners*, 11 Ind. Cas. 389 (3) for the proposition that even before 1907 a lessee could not during the term of his lease acquire occupancy right by purchase. We are unable to follow it in view of the clear decision of this Court in *Harrington* v. *Dwarka Prasad* (1). The case relied upon by Mr. Mitter seems to have been dissented from in this Court in *J. P. Morgan* v. *Ramjee Ram* (4), where their Lordships observed:

"We must hold that prior to the Act of 1907 the acquisition by *thikadar* of an occupancy right by purchase was not barred by s. 22 (3)."

We must follow the two Division Bench decisions of this Court and hold that defendants Nos. 2 and 3 acquired a valid right in the lands in question by purchase in the year 1906 and validly transferred it to the idol in the year 1909. Once we hold that the property was validly transferred to the idol and vested in it, the *kabuliyat*, Ex. 3, executed by defendant No. 3 in favour of the plaintiffs will be of no avail, and we must construe it as having been executed by the *shebait* for the benefit of the idol. The view taken by the learned Subordinate Judge was correct. Apart from the validity of the transfer, I am of opinion that the quesion cannot be raised by the plaintiff in the present suit. A transfer of a non-transferable occupancy holding is not void but voidable. The suit to avoid it had become barred when the present suit was instituted nor is the suit framed on that basis.

I would allow this appeal with costs reverse the decree of the learned District Judge and restore that of the learned Subordinate Judge. The plaintiffs will pay the costs of defendant No. 1 of the lower Appellate Court also.

Luby, J.—I agree.

N. *Appeal allowed.*

(2) 139 Ind. Cas. 550; A I R 1932 P C 264; Ind. Rul. (1932) P C 295; 63 M L J 731; (1932) M W N 1174; 16 R D 535; 56 C L J 360; 37 C W N 98; 14 P L T 57 (P C).

(3) 11 Ind. Cas. 389.

(4) 56 Ind. Cas. 366; A I R 1920 Pat. 97; 5 P L J 302; (1920) Pat. 168; 1 P L T 310.

LAHORE HIGH COURT

Second Civil Appeal No. 1589 of 1933

January 15, 1935

ADDISON AND DIN MOHAMMAD, JJ.

HARGOBIND AND OTHERS—DEFENDANTS—APPELLANTS

versus

GURDAS MAL—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS

Punjab Tenancy Act (XVI of 1887), ss. 59, 60—Widow surrendering her share in occupancy right to landlord two years before her death—Assignee of co-tenant, being stranger to family, if can assail the surrender.

Under s 59, sub-s. (5) read with s. 60 of the Punjab Tenancy Act, a surrender, even if assailable can be attacked by the landlords alone and by none else and where the surrender by a widow has taken place in favour of the landlords themselves, it is perfectly valid and unimpeachable. By s. 59, sub-s. (1), cl. (c), on the termination of the widow's interest under s. 59, sub-s. (1) cl. (*b*) it is only the male collateral relatives of the widow's deceased husband who are entitled to succeed to the occupancy rights and an assignee from a co-tenant being a stranger to the family and not falling under that category has no right of succession and consequently no right of attack. Even if it be conceded that the assignee is entitled to inherit the rights by virtue of the rule of survivorship among joint tenants, there is nothing left to be inherited at the time when the widow died, she having already surrendered her interest two years before.

[Case-law referred to]

S. C. A. from the decree of the District Judge, Jullundur, dated May 8, 1933, modifying that of the Subordinate Judge, Third Class, Jullundur, dated October 10, 1932.

Mr. *Achhru Ram*, for the Appellants.

Mr. *Jagan Nath Agarwala*, for the Respondent.

Din Mohammad, J.—Kanshi Ram, *Musammat* Dhan Devi and Gobind Ram possessed occupancy rights in 19 *kanals* 11 *marlas* of land situate in Banga. They held the land in the following shares:—

Kanshi Ram—1-6th.

Musammat Dhan Devi—1-3rd.

Govind Ram—½.

Kanshi Ram was adjudicated an insolvent in 1919 and his share on being sold by the Official Receiver was purchased by Gurdas Mal-Gobind Ram died in 1920 and his share went to the landlords in 1928 after a hard contest in the Courts between all the parties concerned including Gurdas Mal. In the same year *Musammat* Dhan Devi surrendered her rights in favour of the landlords and two years after she died. On July 5, 1930, the present suit was instituted by Gurdas Mal for possssion of 5-6ths share of the land mentioned above alleging that being a joint tenant he was entitled to succeed to the land left by his

co-tenants, Gobind Ram and *Musammat* Dhan Devi. The landlords resisted this suit on various grounds and contended *inter alia* that so far as Gobind Ram's share was concerned, the plaintiff being a party to the former litigation that was started on Gobind Ram's death was debarred from reagitating the matter in the present suit and as regards *Musammat* Dhan Devi's share, the surrender in their favour was valid and the plaintiff had no *locus standi* to challenge it. The Subordinate Judge decreed the suit but on appeal the District Judge while reversing the decision of the trial Court in respect of Govind Ram's share maintained it as regards *Musammat* Dhan Devi's share. It is against this decision that the landlords have appealed.

Counsel for the appellants contends that under s. 59, sub-s. (3) read with s. 60 of the Tenancy Act, the surrender even if assailable could be attacked by the landlords alone and by none else and that as the surrender in this case had taken place in favour of the landlords themselves, it was perfectly valid and unimpeachable. He further maintains that by s. 59, sub-s. (1), cl. (*c*), on the termination of the widow's interest under s. 59, sub-s. 1, cl. (*b*), it is only the male collateral relatives of the widow's deceased husband who are entitled to succeed to the occupancy rights and that an assignee from a co-tenant being a stranger to the family and not falling under that category has no right of succession and consequently no right of attack. He finally urges that even if it be conceded that the plaintiff was entitled to inherit the rights by virtue of the rule of survivorship among joint tenants, there was nothing left to be inherited at the time when the widow died.

We have given due consideration to these arguments and have come to the conclusion that this appeal should succeed. The law is quite clear on the point that a widow's transfer in contravention of the provisions contained in s. 59, is not void but merely voidable, and that too, at the instance of the landlords only (s. 60 of the Tenancy Act). Even, therefore, if the principle enunciated in *Kanshi Ram* v. *Chet Kuer* (1), that a widow's surrender amounts to an alienation, be applicable here the plaintiff has no right to challenge the surrender in this case, *Rugha* v. *Mughli* (2), relied on by the respondent also does not advance his case any further. It does not lay down any law which is not already contained in the section itself and where it uses the words 'next claimant' it does so merely in reference to s. 59, sub-s. (1), cl. (*c*) and not in any general sense so as to include even a person other than the 'male collateral relative of the deceased tenant.' Similarly nothing that is laid down in *Moti Lal* v. *Kartar Singh* (3), militates against the view we have taken in this case. The surrender being complete two years before the widow's death, there was nothing left, as urged by Counsel for the appellants, which could have gone to the plaintiff and *Moti Lal* v. *Kartar Singh* (3), applies only where the deceased tenant has a share in the holding which is to pass on his death. The law as to the right of challenging the widow's alienations in these circumstances has been laid down correctly in *Thando* v. *Hasham Ali* (4), and we are in entire agreement with that decision.

We hold, therefore, that the plaintiff had no *locus standi* to attack the surrender of her rights by *Musammat* Dhan Devi in favour of the landlords and accept this appeal. The suit is thus dismissed *in toto*. The parties will bear their own costs in the lower Appellate Court but the appellants will get their costs both here and in the trial Court.

D. *Appeal dismissed.*

(1) 111 Ind. Cas. 203; 10 Lah. 237; 29 P L R 581; A I R 1928 Lah. 932.

(2) 19 Ind. Cas. 855; 2 P R 1914; 138 P W R 1913; 236 P L R 1913.

(3) 127 Ind. Cas, 1; 11 Lah. 427; A I R 1930 Lah. 515; 31 P L R 644; Ind. Rul. (1930) Lah. 801 (F B).

(4) 130 Ind. Cas. 517; A I R 1930 Lah. 942; Ind. Rul. (1931) Lah. 309.

LAHORE HIGH COURT

Civil Revision Petition No. 352 of 1934

February 1, 1935

RANGI LAL, J.

NANAK CHAND—DEFENDANT—PETITIONER

versus

HAZARI MAL AND OTHERS—PLAINTIFFS AND ANOTHER—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. IX, r. 13, s. 115—Held, decree was indivisible and could not be dismissed against one and allowed to proceed against the other—Revision.

Held, that the decree against father and son was one and indivisible and it could not be allowed to stand against father alone, and where such a result comes from the lower Court's decision, the High Court can interfere in revision. *Bhura Mal* v. *Har Kishen Das* (1) and *Mahomed Hamidullah* v. *Tohurennissa Bibi* (1), relied on.

C. R. P. of the order of the District Judge, Delhi, dated January 24, 1934

affirming that of the Subordinate Judge, Second Class, Delhi, dated February 20, 1933.

Mr. *Kishan Dayal*, for the Petitioner.

Mr. *Shamair Chand*, for the Respondents.

Judgment.—A suit was brought against Nanak Chand and Kastur Chand, who are father and son, on the basis of a trust deed said to have been executed by them. An *ex parte* decree was passed against both of them on July 20, 1932. The father applied to have the decree set aside on August 3, 1932, and the son applied separately on August 4, 1932. The trial Court dismissed both the applications on February 20, 1933. The learned District Judge accepted the appeal of the son and set aside the decree against him but he dismissed the appeal of the father. A petition for revision against the order dismissing the appeal of the father has been filed to this Court.

It has been urged that the learned District Judge has failed to consider the proviso to O. IX, r. 13, of the Civil Procedure Code, which lays down that where the decree is of such a nature that it cannot be set aside as against one defendant only it may be set aside as against all or any of the other defendants also. The question for consideration is whether the decree is or is not of such a nature that it cannot be set aside as against one defendant only. It has been urged before me that the validity of the trust deed relied on by the plaintiffs is not admitted and if the decree against the father stands and the suit is allowed to proceed against the son, it may result in two inconsistent decrees. The decree is one and indivisible, and complications may arise if it is allowed to stand against the father and not against the son. *Bhura Mal* v. *Har Kishen Das* (1) and *Mahomed Hamidullah* v. *Tohurennissa Bibi* (2), support the position taken up by the petitioner. This Court can interfere in revision because a clear provision of law seems to have been ignored by the learned District Judge.

I accept the petition and set saide the *ex parte* decree against the father also. No order as to costs.

D. *Petition accepted.*

(1) 24 A 383; A W N 1902, 76.
(2) 25 C 155.

MADRAS HIGH COURT

Civil Appeal No. 374 of 1928
February 14, 1934
SUNDARAM CHETTY AND PANDRANG RAO, JJ.

K. GNANADESIKAM PILLAI AND OTHERS —DEFENDANTS—APPELLANTS
versus
ANTONY BENATHU BOOPALARAYAR —PLAINTIFF—RESPONDENT

Lease—Construction—Property usufructuarily mortgaged—Same property leased to mortgagor—Collateral security clause in lease deed—Suit for rent after more than 12 years—Held, mortgagor was holding over as tenant and rent could be recovered for three years prior to suit—Transfer of Property Act (IV of 1882), s. 116—Stamp Act (II of 1899), s. 6—Deed both lease and mortgage—Stamp duty payable.

The defendant created usufructuary mortgage of his property in favour of the plaintiff on January 18, 1911. The mortgagee-plaintiff instead of actually taking possession of property, granted a lease of the same property to the defendant on January 19, 1911, on a fixed annual rent, payable up to the time of the redemption of the "*othi*" which was for two years according to the mortgage agreement. The lease deed contained a collateral agreement by way of mortgage under which the property was offered for security for payment of rent due under the lease. Certain amount, towards the rent due under the lease was paid by the mortgagor in 1916, and accepted by the mortgagee. After a period of 12 years, the present suit was brought by the mortgagee for recovery of the sum alleged to be due under the lease deed;

Held, that the usufructuary mortgage deed and the lease deed were parts of the same transaction, and the lease was for a period of two years only and the continuance of possession after the expiration of this period of two years, by the mortgagor must be taken to be that of a tenant holding over on the original terms of the lease.

Held, also that the collateral security clause in the lease-deed not being any part of the terms which constituted the transaction of the lease, the clause could not be carried over after the determination of the lease, *i. e.*, two years.

Held, further that the plaintiff could recover the rent due for three years prior to suit only.

Where a deed is to be taken both as a lease and as a mortgage, it must bear a stamp leviable in the case of a mortgage, which requires a higher stamp duty.

A. against the decree of the Sub-Judge, Tuticorin, dated February 27, 1928.

Messrs. *K. Bajah Ayyar*, *V. Ramaswami Ayyar* and *V. Seshadri*, for the Appellants.

Mr. *A. Swaminatha Ayyar*, for the Respondent.

Sundaram Chetty, J.—This appeal arises out of a suit filed by the plaintiff for the recovery of a sum of Rs. 8,981-14-8 alleged to be due under a registered lease-deed, dated January 19, 1911, and executed by defendant No. 1, under which there was an agreement to pay an annual rent of Rs. 368-8-0. Properties comprised in the lease-deed were mortgaged by defendant No. 1 with

possession to the plaintiff under a mortgage-deed dated January 18, 1911, for Rs. 2,500. The mortgage-deed and the lease-deed have been filed as Exs. A and E, respectively. The suit is for the recovery of the arrears of rent due under the aforesaid lease-deed and the charge created under Ex. E is also sought to be enforced. According to the contention of defendant No. 1 the usufructuary mortgage was for a term of two years and the lease granted by the mortgagee was also for the same period of two years, and that at the end of that term, he surrendered possession to the plaintiff, as he did not pay either the arrears of rent or the mortgage amount. His case is that the plaintiff himself was in actual enjoyment of the properties since then. There is also the plea of limitation. One of the questions for consideration is whether the lease in question evidenced by Ex. E must be deemed to have been granted for a term of years only or for an indefinite term. On this point, we have to construe the terms of Exs. A and E. It is clear that the usufructuary mortgage deed and the lease deed are parts of the same transaction. Ex. A recites in clear terms that the other right is to be for a period of two years, on the expiry of which term defendant No. 1 should redeem the mortgage by paying a sum of Rs. 2,500. Instead of actually taking possession of the mortgaged properties, the plaintiff granted a lease of the same to the mortgagor under Ex. E. In this lease deed, the rent fixed for each year is Rs. 368-8-0 which defendant No. 1 as lessee had to pay up to the time of redeeming the *othi*

He agreed to pay rent every year by 19th, January. Then there is the collateral agreement by way of mortgage, under which the properties mentioned in the schedule were offered as security for the payment of rent due under the lease deed. Ex. E is virtually a combination of a lease and a mortgage. It is true that, in the lease deed, there is no specific mention of the term of the lease, but we have to read both these documents together in order to understand the true intention of the parties. When the parties chose to fix a period of two years for the enjoyment of the properties by the mortgagee and for the redemption of the mortgage by the mortgagor, it is not unlikely that the lease was also intended to be for the same period as that of the mortgage. It seems to us that the term in the lease deed, that the rent is payable up to the time of the redemption of the *othi* should be understood as the time contemplated or fixed for redemption in the mortgage deed itself. Some argument was based upon the circumstance that the lease deed bears a stamp of Rs. 4. It is urged that if the lease is for a term of two years only, a stamp of Rs. 2 would be sufficient, but if it is a lease for an indefinite term, then a stamp for Rs. 4 would be necessary as per cls. 3 and 4 of Art. 35, Stamp Act. In this view, the learned Subordinate Judge treates the lease evidenced by Ex. E as one for an indefinite term. But we think that that is not the necessary inference to be drawn from the fact that the lease deed bears stamp of Rs. 4 as we have already said that Ex. E is a combination of a lease and a mortgage.

If the lease is for 2 years, the total rent payable would be between Rs. 700 and 800. If for the payment of this sum a collateral security of immovable property is also given, the document has to be viewed as a simple mortgage. When it is to be taken both as a lease and as a mortgage, it must bear the stamp which is leviable in the case of a mortgage, which requires a higher stamp duty. It is possible that a stamp of Rs. 4 was used as the document evidenced a simple mortgage also as stated above. Furthermore, even if there is some ambiguity as to the period of the lease really intended by the parties in the recitals in Ex. E, the evidence given by the plaintiff himself leaves no room to doubt what the real intention of the parties was. Even in his chief examination, he admits that 2 years' term was inserted to fit in with the period of the *othi*. And in his cross-examination, he would say that defendant No. 1 asked for the lease to last for the term of the *othi*, and that the talk was for 2 years from the beginning. He denies that there was any agreement for one year's lease.

On the other hand, he says that defendant No. 1 himself insisted on the lease being for 2 years. In the face of these admissions, the present contention raised on behalf of the plaintiff that the lease was intended for an indefinite term so as to last till the actual repayment of the mortgage amount cannot be accepted as correct. If the lease evidenced by Ex. E was for a fixed term of two years only, that lease must be deemed to have determined on the expiration of that period. If the lessee (defendant No. 1) continued to be in

possession of the properties even after the determination of the lease by efflux of time in what capacity was he in possession like that? Either he must have been a tenant holding over or a trespasser. Under s. 116, Transfer of Property Act, if a lessee remains in possession after the determination of the lease and the lessor accepts rent from the lessee or otherwise assents to his continuance in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year in the case of the lease of immovable property for agricultural or manufacturing purposes. According to the case of the plaintiff, there was a payment of Rs. 1,000 by defendant No. 1 in 1916 towards the rent due under the lease. If this is true, we can hold that the lessor assented to the lessee continuing the possession even after the determination of the lease. It is alleged in the plaint that the plaintiff granted receipt to defendant No. 1 at the time of this payment. Even in the notice issued to defendant No. 1 (Ex. F-1), reference was made to this payment but no reply was sent by defendant No. 1 to that notice. Even in a suit subsequently filed by the plaintiff for the recovery of a sum of money due on another simple mortgage-deed executed by defendant No. 1, reservation of his right to sue for arrears of rent due under the lease was made.

If the main plea of defendant No. 1 that he surrendered possession at the end of the two years' term is not believed, then there is nothing improbable in the plaintiff's story that in 1916 a sum of Rs. 1,000 was paid to him towards rent. We shall deal with the question of the alleged surrender presently. The plaintiff has sworn to the truth of the alleged payment in his evidence and this fact is not even denied by defendant No. 1 in the witness-box. The learned Subordinate Judge has believed the evidence of the plaintiff and we see no reason to disagree with his finding. If so, defendant No. 1's continuance of possession after the expiration of the original term of two years must be taken to be that of a tenant holding over. Coming now to the question, whether, as a matter of fact, defendant No. 1 did surrender possession at the end of two years, there is only oral evidence on both sides. (After discussing the evidence the judgment concluded.) We therefore do not think fit to disturb the finding of the lower Court that the defendant No. 1 had been in possession of the properties in question even after the expiration of the original term of two years. Now, a further question arises whether the plaintiff is entitled to recover arrears of rent for the whole period as claimed in the plaint. This claim is for more than 12 years before the date of the suit. The claim would not be barred by limitation, if the mortgage or charge created under Ex. E enures for the benefit of the whole of the claim, and if the payment of Rs. 1,000 towards prinicipal and interest mentioned in the lease deed is also true. As we have already stated, defendant No. 1 must be deemed to be a tenant holding over, subsequent to the expiration of two years from the date of Ex. E. If so, a tenancy from year to year is created by operation of law. In the absence of an agreement to the contrary, we can take it that the same terms of the lease for the fixed period of two years also hold good for the fresh tenancy from year to year. It is argued on behalf of the respondent, that the charge created under Ex. E for payment of rent should also hold good for the entire amount of rent due as arrears, since the creation of the fresh tenancy from year to year.

This involves a consideration of the question what really are the terms of the lease as such, and what are outside the scope of the lease transaction and are simply collatteral to it. As we read the document, Ex. E, we find that it evidences a grant of lease of immovable property, whereby an annual rent is fixed and such rent is also to carry interest. The other part of the document evidences a mortgage created by defendant No. 1 as security for the payment of rent due under the lease deed. The decision of a Division Bench of this Court reported in *Kutti Amma* v. *Madhava Menon* (1), seems to be a direct authority against the contention put forward on behalf of the respondent. In that case, there was a *Verumpattam* lease for one year executed by the mortgagor to the mortgagee which, after fixing the amount of rent, provided for payment of interest in case of default in the payment of rent on the due date, and it was a registered instrument. As regards the clause whereby the charge was created, the learned Judges were of opinion, that the clause was not a term of the lease, as a lease, which could be deemed to be imported into the terms on which the lessee was allowed to hold over. In this view, they held that the claim for arrears of rent

(1) 11 M L J 186.

beyond the three years before the date of the suit was barred by limitation. In the present case, all that we can say is, that the mortgage created under Ex. E can only be enforced for the recovery of rent due for the term of two years. After the determination of that lease, when the tenancy from year to year was created, it is not possible to carry over this collateral security which is certainly no part of the lease transaction, so as to enable the plaintiff to claim the arrears of rent for the whole of the subsequent period, as if that mortgage was also created for the rent due subsequent to the transformation of the tenancy into one from year to year.

The test is not whether the particular clause in Ex. E is or is not repugnant to the terms of the lease. On the other hand, the true test is whether this clause can really be deemed to be any part of the terms which constituted the transaction of the lease itself. In a recent decision reported in *Dasarathi Kumar* v. *Sarat Chandra* (2), it was held that a stipulation in the original lease that at the expiration of the term, the the lessee should give up possession without notice, could not be imported into the new tenancy created by holding over and the acceptance of rent. The principle of that decision is in consonance with the view we have expressed. If the mortgage created under Ex. E is of no avail to the plaintiff for the recovery of rent due subsequent to the expiration of the term of two years, he can only recover the rent due for three years prior to date of suit according to ordinary law. The plaintiff is, therefore, entitled only to the arrears of rent at the rate of Rs. 368-8-0 per annum for three years before date of suit, together with the interest 12 per cent. per annum on the amount of each year's rent from the date when it falls due, *i. e.*, from January 19, 1924, January 19, 1925, and January 19, 1926, up to date of suit. In modification of the decree of the lower Court, a decree will be passed in plaintiff's favour for the aforesaid amount, *viz.*, Rs. 1,312-12-6 together with interest at 6 per cent. from the date of suit till realization, recoverable from out of the family properties in the hands of defendants Nos. 2 to 4. In the peculiar circumstances of this case, we think fit to direct the parties to bear their own costs throughout.

A.-D. *Decree modified.*

(2) 149 Ind. Cas. 722; A I R 1934 Cal. 135; 37 C W N 971; 6 R C 630.

LAHORE HIGH COURT

Letter Patent Appeal No. 15 of 1934

January 8, 1935

DALIP SINGH AND BHIDE, JJ.

WARAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat FATIMA AND OTHERS—DEFENDANTS—RESPONDENTS

Custom (Punjab)—Succession—Arains of Chunian Tahsil, Lahore District—Sister of last male-holder whether a preferential heir to collaterals of third degree.

Among *Arains* of Chunian Tahsil, Lahore District, the sister of the last male-holder is a preferential heir to collaterals of the third degree.

L. P. A. against the judgment of Mr. Justice Jai Lal, dated November 20, 1933, passed in C. A. No. 909 of 1932, reversing that of the Additional District Judge, Lahore, dated April 9, 1232, which reversed that of the Subordinate Judge, Fourth Class, Chunian, dated April 23, 1931.

Dr. *Nand Lal*, for the Appellants.

Messrs. *Nazir Ahmad* and *Muhammad Husain*, for the Respondents.

Dalip Singh, J.—The only question arising in the case is whether among *Arains* of Chuninan Tahsil, Lahore District, the sister of the last male holder is a preferential heir to collaterals of the 3rd degree. The trial Court in my opinion rightly placed the onus on the sister in the first instance, but pointed out quite correctly again that the onus was light in view of the exception stated in the *riwaj-i-am* to the general answer to question No. 61. The exception is no doubt confined in terms to villages in the proximity of Lahore, but in view of the fact that custom is ordinarily tribal and not local and the previous judicial decisions in *Zainab* v. *Amir* (1) and *Jhandi* v. *Chiragh Din* (2), which appear to have considered cases throughout the Lahore District and the instances given in the Schedule, and the particular instance relating to self-acquired property in this village itself, the onus was in my opinion light and has been sufficiently rebutted. In any event the learned Counsel for the appellant has entirely failed to show that the judgment of the learned Judge sitting in Single Bench is wrong. I would, therefore, dismiss the appeal with costs.

Bhide, J.—I agree.

D. *Appeal dismissed.*

(1) 174 P R 1889.

(2) 112 Ind. Cas. 840; 10 Lah. 422; A I R 1928 Lah. 870.

LAHORE HIGH COURT

Second Civil Appeal No. 1879 of 1933
March 11, 1935
ABDUL RASHID, J.

Sayed MUHAMMAD HUSSAIN AND OTHERS —PLAINTIFFS—APPELLANTS
versus
DIN MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS

*Custom (Punjab)—Water rights—Batala—*Ars*—Held, that the custom whereby defendants could use* ars *of old well for carrying water of new well to fields, existed.*

Held, that the defendants had established the existence of a local custom in Batala whereby they could use the *ars* (water channels) of the old well for carrying the water of the new well to their fields on specified days.

S.C. A. from the decree of the District Judge, Gurdaspur, dated August 8, 1933, modifying that of the Subordinate Judge, Fourth Class, Gurdaspur, dated March 14, 1933.

Mr. *R. L. Anand I*, for the Appellants.

Mr. *Muhammad Munir*, for the Respondents.

Judgment.—This appeal arises out of an action brought by the plaintiffs-appellants for a permanent injunction to the effect that the water of the new well constructed by defendant No. 1 in *Khasra* No. 446 should not be allowed to pass through the *ars* (water channels) of the old well. It was alleged in the plaint that there was a well in *Khasra* No. 430 which was jointly owned by the parties, that defendant No. 1 had a right to take the the water of this well for irrigating his fields on certain specified days through *ars* (water channels) which pass through some of the fields of the plaintiffs. The defendant had constructed another well and had begun taking the water of the new well through the old water channels, and that the plaintiffs were entitled to restrain him from using the old water channels for carrying the water of the new well to his fields. The defendants pleaded *inter alia* that there was a local custom in Batala whereby they were entitled to use the *ars* of the old well for carrying the water of the new well to their fields provided they used the *ars* for the water of the new well only on specified days according to the old turns. Both the lower Courts held that the defendants had established the existence of a custom whereby they could use the *ars* of the old well for carrying the water of the new well to their fields on specified days The learned District Judge, however, granted a certificate to the plaintiffs on the question of custom, and the plaintiffs have preferred the present second appeal to this Court.

The learned Counsel for the appellants has taken me through the evidence in the case and has contended that the evidence adduced by the respondents does not establish the custom on which they rely. The defendants' witnesses have quoted eleven instances wherein persons who have constructed new wells have used the water channels of the old wells for irrigating their fields from the new wells. Two of the witnesses produced by the defendants are Municipal Commissioners and nine others are proprietors in Batala. Several of them have sunk new wells and have used the old *ars* for irrigating their fields from the new wells.

In none of these instances did any of the co-sharers object to the old *ars* being used for carrying the water of the new wells. This evidence, in my opinion, conclusively establishes the custom relied upon by the defendants.

The evidence in rebuttal is of the flimsiest character. The plaintiffs have produced two witnesses, who merely state that *ars* of the old well cannot be used by a co-sharer for carrying the water of the new well. They have not given any instances. This evidence is far too vague and inconclusive to rebut the evidence produced on behalf of the defendants.

For the reasons given above I hold that the learned District Judge has decided the case correctly and I, therefore, dismiss this appeal with costs.

The cross-objections preferred by respondent No. 1 on the question of costs are also dismissed with costs.

D. *Appeal dismissed.*

CALCUTTA HIGH COURT

Civil Appeal No. 212 of 1930
August 16, 1934
MITTER AND EDGLEY, JJ.

RATI LAL NANJI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
UTTAM LAL SARCAR AND ANOTHER—DEFENDANTS—RESPONDENTS

Partnership—Representation by one, whether binds the other—Civil Procedure Code (Act V of 1908), O. XXI, r. 49—Money decree against one partner—Sale of partnership property—Whether operative against the other.

Any representation by one of the partners will not bind the other partner.

Order XXI, r. 49, Civil Procedure Code, is an im-

perative provision of the statute and renders the sale of partnership property in execution of the decree in a money suit against one partner, invalid and inoperative as against the other partners.

A. against the decree of the Sub-Judge, Asansol, dated July 23, 1930.

Messrs. *A. K. Roy*, *Susil Chandra Sen* and *Amarendra Nath Bose*, for the Appellants.

Messrs. *Sarat Chandra Bose* and *Gopendra Nath Das*, for the Respondents.

Mitter, J.—This is an appeal by the plaintiffs from a decree of the Subordinate Judge of Asansol, dated July 23, 1930, by which their suit claiming several reliefs was dismissed. The reliefs claimed in the plaint are: (1) that certain coal lands mentioned in Sch. (1) to the plaint be declared to be the joint and partnership properties of plaintiff No. 1 and defendant No. 2 constituting the firm of Khengarji Amrital & Co., (plaintiff No. 2): (2) that a decree in Money Suit No. 207 and the subsequent proceedings thereof are not binding on the plaintiffs or either of them; (3) that the sale in execution of the said decree is void or even if it be held to be valid is not binding on plaintiff No. 1 and his share has not been affected thereby, and (4) that it be declared that plaintiff No. 1 has a right to redeem the schedule properties and the decree for redemption may be passed after taking an account of what would be due to the principal defendant.

The case stated in the plaint is that the principal defendant Uttamlal Sarkar and his co-sharers are the joint owners of *Mauza* Jote Dhamo and that the one-half share of the said undivided *mauza* belongs to the said defendant and the remaining half share to his co-sharers; that in the said *mauza* there is a plot of land measuring 527 *bighas* the under-ground coal mining rights thereof was demised to one Mr. James Kirkwood by two leases one of which was executed by the principal defendants on January 28, 1920, in respect of his undivided half share and the other by his co-sharers Hem Chandra Sarkar and others on the same date and at the same time in respect of the remaining eight annas: that on April 17, 1920, Mr. Kirkwood demised on certain terms his rights in the said plot of 527 *bighas* acquired under the two leases to the *proforma* defendant for the firm of Khengarji Amritlal & Co., the partners whereof were the *proforma* defendants Amritlal Ojha and the late Nanji Khengarji, the father of plaintiff No. 1 that on June 20, 1921, Mr. Kirkwood conveyed to the firm of Khengarji Amritlal & Co., the right which he had under the two leases, *viz.*, his right to receive royalty from the said firm under the sub-lease of April 17, 1920; that the said firm became the tenant under the principal defendant and his co sharers in respect of the premises demised by the leases of January 28, 1920, that plaintiff's father had 7 annas share in the colliery that plaintiff No. 1's father died on March 3, 1928, that on the death of his father the plaintiff became entitled to his entire share in the partnership business regarding the Jote Dhamo Colliery; that some time in August 1928, plaintiff No. 1 came to know that the colliery has been sold in execution of a decree obtained by defendant No. 1 for the royalty of the said colliery that as a result of his inquiries it transpired that defendant No. 1 had instituted a suit (Miscellaneous No. 207 of 1924) against defendant No. 2 for certain amount due to him in respect of royalty of the colliery and had obtained a charge decree on April 21, 1926, which was eventually confirmed by the High Court on January 18, 1928, that defendant No. 1 proceeded to sell some of the properties covered by the said charge decree and that he himself had purchased the same at a grossly inadequate price of Rs. 700, the real price being Rs. 1,25,000; that in the said suit neither plaintiff's father nor the plaintiff was made a party that the plaintiff believes that defendant No. 1 followed an illegal and irregular procedure in bringing about the sale, that the properties being partnership properties could not be sold by defendant No. 1 in execution of a decree against defendant No. 2 alone and the partnership properties have not in fact been sold. On this state of pleadings the plaintiffs asked for the reliefs which have already been stated. There were several defences to the suit but it is only necessary to mention those defences which bear on the points raised by the present appeal. They are: (1) that defendant No. 2 was the sole owner and proprietor of the firm of Khengarji Amritlal & Co. (2) that the defendant No. 1 executed the decree in Suit No. 207 of 1924 quite legally and purchased the properties at a fair price (3) that the plaintiff allowed himself to be represented by defendant No. 2 in all transactions regarding the disputed colliery with the lessors and is bound by the decree in Money Suit No. 207 of 1924, on the principle of estoppel, acquiescence and

waiver. On these pleadings several issues were framed.

Issue No. 2 is to the following effect: Is plaintiff No. 1, a partner in the firm of Khengarji Amritalal & Co. (plaintiff No. 2) The finding of the Subordinate Judge on this issue is in favour of the plaintiff-appellant. He has held that Nanji Khengarji who was a partner in the firm of Nanji is the father of plaintiff No. 1. The finding of the Subordinate Judge on this part of the case has been challenged by the respondent by way of cross-objection and we have heard the respondent on this point but nothing that we have heard from the respondent induces us to take a view different from that of the Subordinate Judge on this point. It is true that no deed of partnership was produced in this case, besides it appears that the conveyance (Ex. 4) executed by Amritlal Ojha in favour of the firm shows that Amritlal Ojha was not the sole partner, for in that document Amritlal describes himself as a member of the firm of Khengarji Amritlal & Co. This document is dated January 22, 1921 (see p. 17, part 2). The subsequent conveyance by Mr. Kirkwood, dated June 20, 1921, is in favour of the firm Khengarji Amritalal & Co. see Ex. 5, p. 20, part 2. It also appears that in Ex. 9 series a published report of the Government of the list of coal mines worked under the Indian Mines Act, Nanji father of plaintiff No, 1, is also shown as the partner of the firm and these reports extend from 1920 to 1927 see pp. 9, 10 and 25, part 2. We have no doubt on this documentary evidence that the plaintiff's father was the partner of the firm. The respondent in support of his cross-objection has seriously commented on the fact that Amritalal Ojha has not gone into the witness box and that his agent Maniklal who was present in Court has not also been examined and that when material evidence is withheld, an inference unfavourable to the party withholding the evidence should be drawn. Chunilal, however, has been examined on behalf of the plaintiff and he proves that Nanji was the proprietor of the colliery and that he was appointed by Nanji some ten years before he was deposing to look after the work of the colliery. We are therefore of opinion that the Subordinate Judge has rightly decided the issue in favour of the plaintiff. This disposes of the cross-objection.

Issues No. 3 and 4 raise the question as to whether Amritlal represented the firm in Money Suit No. 207 of 1924, and whether the decree obtained by defendant No. 1 for royalty of the colliery in Money Suit No. 207 and the sale in execution thereof are binding on the plaintiffs. It is to be noticed in this connection that plaintiff No. 1 is the son of one of the partners and plaintiff No. 2 is the firm of Khengarji Amritalal & Co. The Subordinate Judge has held on the evidence of Uttam Lal Sarkar, defendant No. 1 alone, that Amritalal represented plaintiff's firm and the plaintiffs are bound by the decree against defendant No. 1 and the sale thereunder. This finding of the Subordinate Judge has been challenged by the learned Advocate-General who appears for the plaintiffs-appellants. After reading the evidence of Uttamal we do not think that any case of presentation has been made out.

On the other hand the receipts which Uttamlal gave to Khegarji Amritlal & Co., would go to show that Uttamlal was treating the company as the tenant. These receipts extend over the period of four years commencing from July 29, 1924, and ending with November 28, 1927; (see Ex. 7 series) pp. 38 to 41, part 2. Some of the receipts cover a period subsequent to the institution of the suit of 1924, and they make it clear that the tenant was the firm. After issuing the receipts, defendant No. 1 who was plaintiff in Suit No. 207 might have added the firm as party to the suit if he wanted to make the decree in the suit binding on the firm. The evidence of defendant No. 1 is that Amritalal told him that he had acquired Kirkwood's interest in the firm but any representation by one of the partners will not bind the other partner, Nanji. If defendant No. 1 had only cared to look into the conveyance by Kirkwood, he would have at once discovered that the transferee was the firm, one member of which was Amritalal. This conveyance at p. 21, part 2, refers to the *pottah* of April 17, 1920, granted by Kirkwood in favour of Amritalal where Amritlal is described as a member of the firm. The receipts and these documents show conclusively that the doctrine of representation cannot be availed of by defendant No. 1. For the above reasons the conclusion of the Subordinate Judge that Amritalal represented the firm cannot be supported. It follows from this that the sale is not binding either on plaintiff No. 1 and cannot affect his interest nor is the sale bind-

ing on the firm, *i. e.*, plaintiff No. 2. The share of plaintiff No. 1 in the partnership seems to be five and half annas, and the sale so far as he is concerned, does not bind him.

The next question for consideration is what is the effect of the sale so far as the firm plaintiff No. 2 is concerned. Order XXI, r. 49, Civil Procedure Code, provides that save as otherwise provided by that rule property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners of the firm as such. This is an imperative provision of the statute and renders the sale in execution of the decree in Money Suit No. 207 of 1924, invalid and imperative as against the plaintiffs or either of them. It appears from the application for execution dated March 16, 1928, pp. 47 to 50, part 2, that the decree-holder prayed for realization of the decretal amount including costs and interest by auction sale of the colliery in question, that in the said execution case the property was sold and was purchased by the decree-holder for Rs. 700 only see Ex. 2, p. 63, part 2. The sale as we have held is inoperative but there is an alternative prayer in the plaint that it be declared that the first plaintiff has the right to redeem the schedule properties and a decree for redemption be passed after taking an account of what will be due to defendant No. 1. Having regard to the fact that Amritalal Ojha represented to defendant No. 1 that he was sole partner of the firm, it will be just to grant the plaintiff the alternative relief claimed by him and we accordingly set aside the decree of the Subordinate Judge dismissing the plaintiff's suit and direct that plaintiff No. 1 be allowed to redeem the properties which have been sold and that a decree for redemption be passed after taking an account of what will be due to defendant No. 1 in accordance with the provisions of O. XXXIV, r. 7, Civil Procedure Code, read with r. 15. Considering all the circumstances of the case, we are of opinion that each party should bear its own costs throughout.

Edgley, J.—I agree.

D. *Decree set aside.*

LAHORE HIGH COURT

Civil Revision Petition No. 590 of 1933

April 9, 1934

ABDUL RASHID, JJ.

SOHAN SINGH AND OTHERS—PLAINTIFFS—PETITIONERS

versus

MOOL SINGH AND OTHERS—DEFENDANTS—OPPOSITE PARTIES

Decree—Ex parte *decree—Appeal from—Adjudication regarding rights and liabilities of the person against whom* ex parte *decree is passed—Jurisdiction of trial Court to set aside* ex parte *decree.*

Where the Appellate Court has adjudicated regarding the rights and liabilities of the person against whom an *ex parte* decree has been passed, the *ex parte* decree against such person cannot be set aside by the trial Court, but where there has been no adjudication regarding the rights and liabilities of such person in the Appellate Court, the trial Court is entitled to entertain an application for the setting aside of the *ex parte* decree against him. The fact that a person has been impleaded as a *pro forma* respondent in the appeal does not in any way affect the jurisdiction of the trial Court so far as the setting aside of the *ex parte* decree against such person is concerned.

[Case-law referred to.]

C. R. P. from an order of the Junior Sub-Judge, Sheikhupura, dated May 11, 1933.

Mr. *A. R. Khosla*, for the Petitioners.

Mr. *J. G. Sethi*, for the Opposite Parties.

Judgment.—The facts bearing on the question of law involved in this petition for revision may be shortly stated. On March 21, 1931, Sohan Singh and three others instituted a suit for recovery of Rs. 1,134-4-0, on the basis of two promissory notes against Hira Singh and his son Mul Singh. On May 20, Sardar Kirpal Singh, Subordinate Judge, passed an *ex parte* decree for Rs. 1,075, against Mul Singh, defendant No. 2, and dismissed the suit against Hira Singh. Mul Singh applied to have the *ex parte* decree set aside, and his application was accepted and the *ex parte* decree was set aside on October 10. No notice was issued to Hira Singh defendant of the application presented by Mul Singh for the setting aside of the *ex parte* decree.

After the *ex parte* decree against Mul Singh had been set aside, the suit, seems to have proceeded against both Hira Singh and Mul Singh. On March 4, 1932, the Subordinate Judge dismissed the claim of the plaintiffs against Mul Singh, but granted them a decree for Rs. 1,134-4-0 and costs against Hira Singh. This decree against Hira Singh was *ex parte*. On April 2, 1932, Hira Singh applied for the setting aside of the *ex parte* decree passed against him on March 4, on the ground that after the

dismissal of the suit against him on May 20, 1931, he had never been served with a notice and that the suit had been wrongly restored as against him also. This application was accepted by the Subordinate Judge on May 11, 1933, and against this order the plaintiffs have preferred the present petition for revision. When the suit of the plaintiffs was dismissed against Mul Singh on March 4, 1932, they preferred an appeal to the learned District Judge, praying that they may be awarded a decree against Mul Singh also, and that the Subordinate Judge had erred in giving them a decree against Hira Singh only. In that appeal they made Hira Singh a *pro forma* respondent, but no relief was claimed against him as their suit against him had been decreed by the trial Court. This appeal was dismissed by the District Judge.

It was contended on behalf of the petitioner that the learned Subordinate Judge had no jurisdiction to set aside the *ex parte* decree passed against Hira Singh respondent as that decree had merged in the decree of the Appellate Court, and that it was only the Appellate Court which could set aside such a decree. It was urged that the learned Subordinate Judge had placed reliance on a ruling of the Madras High Court reported as *Subramania Iyer* v. *Varadarajulu Naidu* (1), but that this ruling did not lay down sound law and was opposed to the view taken by the other High Courts. Reference was made in this connection to p. 547 of Mulla's Civil Procedure Code, Edition 9, where it is remarked that:

"the High Courts of Calcutta, Allahabad and the Chief Court of Oudh have held that where an appeal is preferred from an *ex parte* decree, and the decree is confirmed or otherwise disposed of in appeal under O. XLI, r. 32, the Court which passed the *ex parte* decree has no longer any power to entertain an application to set it aside even if the application was made before the appeal was filed. This is because the decree of the lower Court is merged in that of the Appellate Court."

The learned Counsel also relied on *Hedlot Khasia* v. *KaRan Khasiani* (2) and *Abdul Khalef Molla* v. *Bama Charan Chetterji* (3), and contended that as Hira Singh was a respondent in the appeal preferred by the plaintiffs, he could not present an application to the original Court for the setting aside of the *ex parte* decree. It was, however, conceded that if Hira Singh had not been made a respondent in the appeal, the *ex parte* decree against him could have been set aside by the trial Court.

On behalf of the respondent reliance was placed on *Kalimuddin Ahmad* v. *Esahakuddin* (4) and *Raghunandan Chaube* v. *Bhuwal Tiwari* (5). It is unnecessary to deal with all these rulings in detail. The principle underlying the rulings seems to be that where the Appellate Court had adjudicated regarding the rights and liabilities of the person against whom an *ex parte* decree has been passed, the *ex parte* decree against such person cannot be set aside by the trial Court, but that where there has been no adjudication regarding the rights and liabilities of such person in the Appellate Court, the trial Court is entitled to entertain an application for the setting aside of *ex parte* decree against him. The fact that a person has been impleaded as a *pro forma* respondent in the appeal does not in any way affect the jurisdiction of the trial Court so far as the setting aside of the *ex parte* decree against such person is concerned: *vide Brij Lal Singh* v. *Mahadeo Prasad* 12 Ind. Cas. 669 (6). For the reasons given above I am of opinion that the Subordinate Judge had the jurisdiction to deal with the application of Hira Singh for the setting aside of the *ex parte* decree.

The learned Counsel for the petitioners raised several contentions dealing with the merits of the case. I am reluctant to deal with these points as any remarks made by me may prejudice the fair trial of the case in the lower Courts. Moreover, the only question that can be raised in revision must be one connected with the illegal or irregular exercise of jurisdiction by the trial Court. I therefore dismiss this petition for revision. Parties shall bear their own costs in this Court.

D. *Petition dismissed.*

(1) 103 Ind. Cas. 146; 26 L W 19; 53 M L J 110; A I R 1927 Mad. 722.

(2) 13 Ind. Cas. 377; 15 C L J 241.

(3) 140 Ind. Cas. 586; 36 C W N 747; A I R 1932 Cal. 773; Ind. Rul. (1933) Cal. 7.

(4) 83 Ind. Cas. 220; 51 C 715; 39 C L J 399; 28 C W N 795; A I R 1924 Cal. 830.

(5) 140 Ind. Cas. 178; 54 A 423; A I R 1932 All. 340; (1932) A L J 257; Ind. Rul. (1932) All. 605.

(6) 12 Ind. Cas. 669; 17 C W N 133; 15 C L J 432.

LAHORE HIGH COURT

Letters Patent Appeal No. 37 of 1934

January 31, 1935

ADDISON AND DIN MOHAMMAD, JJ.

ATMA RAM—DEFENDANT—APPELLANT

versus

MUKHI RAM AND OTHERS—PLAINTIFFS FIRM GULAB RAI GUJJAR MAL, AND OTHERS—DEFENDANTS—RESPONDENTS

Succession—Debts—Priority—Personal debts of deceased take priority to all claims against heirs who are in possession of property.

When an heir succeeds to the property of the deceased, he takes it subject to the charge of his debts. In other words, that portion of the property does not devolve in fact on the heirs, which is required to satisfy the debts of the deceased and it stands apart, as it were, for the creditors of the deceased. That being so, the personal debts of the deceased being a first charge on the property left by him, takes priority over all claims against the heirs who were then in possession of the property. *Bhola Nath* v. *Maqbul-un-nissa* (1) and *Hajee Abdullah Sahib* v. *Alanji Abdul Latif Sahib* (3), relied on.

L. P. A. against the order of Mr. Justice Abdul Rashid, dated February 27, 1934, in Civil Appeal No. 705 of 1933, reported as 150 Ind. Cas. 964 reversing that of the District Judge, Hoshiarpur, dated January 6, 1933, who reversed that of the Subordinate Judge, Second Class, Hoshiarpur, dated June 6, 1932.

Mr. *Fakir Chand*, for the Appellant.

Messrs. *Achhru Ram* and *Hem Raj Mahajan*, for the Respondents.

Din Mohammad, J.—The facts bearing upon the question of law involved in this Letters Patant Appeal are as follows:—

The firm Gulab Rai-Gujjar Mal instituted a suit for recovery of Rs. 26,000 against Salig Ram and his grandsons. On June 11, 1921, the parties filed a compromise discharging Salig Ram and holding his grandsons alone liable for the amount found due. Salig Ram died some time in 1924. On June 2, 1924, Salig Ram's creditors, Mukhi Ram and others, brought a suit for recovery of their debt due from Salig Ram personally. This suit was instituted against Salig Ram's grandsons as his legal representatives or heirs. A decree was made in this suit in favour of Mukhi Ram and others. In the course of the execution proceedings taken by the firm Gulab Rai-Gujjar Mal against Salig Ram's grandsons, a house belonging to Salig Ram attached and sold. Mukhi Ram and others claimed priority for their claim in the sale proceeds of this house, on the ground that the property being personal of Salig Ram, his debt due to them must be satisfied first. This claim was resisted by the firm Gulab Rai-Gujjar Mal, on the ground that as the property was now in the hands of the grandsons, it should be deemed to be their property for all purposes and hence liable for the firm's decree against them. Mukhi Ram and others' claim was disallowed. They then instituted the present suit on the same allegations, which was decreed by the Subordinate Judge but dismissed by the District Judge on appeal. An appeal was preferred to this Court against the order of the District Judge and Abdul Rashid, J. before whom the appeal was heard, reversed his judgment and ordered that the deceased's property should first be applied to the satisfaction of the decree against the estate of the deceased, and that the firm be required to refund the amount received by it by the sale of the house. The firm appeals.

We have no hesitation in affirming the decision of the learned Judge of this Court. The law applied by him is well established, being based on sound principles of English Law. A similar question came before a Division Bench of the Allahabad High Court in *Bhola Nath* v. *Maqbulunnisa* (1), and the learned Judges there following *Kinderley* v. *Jervis* (2), held that the personal debts of the deceased being a first charge on the property left by him, took priority over all claims against the heirs who were then in possession of the property. In *Haji Abdullah Sahib* v. *Alanji Abdul Latif Sahib* 57 Ind. Cas. 854 (3), the Allahabad judgment was cited and approved. At page 857 Wallis, C. J. who delivered the judgment remarked as follows:—

"I consider the father's creditors have a prior claim to the money as it belonged to the father and could be taken by the sons only subject to their rights to have their debts paid from it."

As remarked above, we are in respectful agreement with this view. When an heir succeeds to the property of the deceased, he takes it subject to the charge of his debts. In other words, that portion of the property does not devolve in fact on the heirs, which is required to satisfy the

(1) 26 A 28; A W N 1903, 184.

(2) (1856) 22 Beav 1; 25 L J Ch. 538; 2 Jur. (N S) 602; 4 W R 579; 111 R R 238.

(3) 57 Ind. Cas. 854; 28 M L T 34; 12 L W 70; 39 M L J 91.

*Page of 57 Ind. Cas.—[*Ed.*]

debts of the deceased and it stands apart, as it were, for the creditors of the deceased. That being so, the creditors' prior claim cannot be resisted in law, the heirs being entitled only to the residue left after the satisfaction of the personal debts of the deceased.

The question of refund presents no difficulty. This suit was instituted at a time when the assets had not yet been realised by the firm, and if in the meantime they have done so, they must refund the amount wrongfully received by them.

We, therefore, uphold the judgment of the learned Judge and dismiss this appeal with costs throughout.

D. *Appeal dismissed.*

CALCUTTA HIGH COURT

Civil Suit No. 2186 of 1931
March 20, 1934
BUCKLAND, AG. C. J.

PROTIVA SUNDARI DEBI - PLAINTIFF
versus
SARADA CHARAN GOHO AND OTHERS —DEFENDANTS

Mortgage—Property not mortgaged included in sale proclamation and sold—Mortgagor not rectifying sale proclamation—If disentitled from recovering property—Suit to set aside such sale—Held, it may be treated as an application under s. 47, Civil Procedure Code (Act V of 1908), made on day the plaint was presented—Receiver—No attempt made to interfere with his right to property in his care—Receiver, if a necessary party—Civil Procedure Code (V of 1908), s. 47.

Where property which is not included in mortgage is included in the sale proclamation and sold the mortgagor is not disentitled from recovering the same, merely because he abstains from rectifying the sale proclamation. Something more is necessary to enable the mortgagee to entitle him to bring to sale in execution of his mortgage decree such property. *Willmott* v. *Barker* (1), referred to.

The Receiver of the property of a party to litigation, is not a necessary party if no attempt is made thereby to interfere with the right of the Receiver to the property entrusted to his care, where the subject-matter of suit is not in the possession of the Receiver. *Jotindra Nath* v. *Sarfaraj Mia* (2), distinguished.

A suit was instituted to set aside a Court sale in respect of property not included in the mortgage:

Held, that the suit might be treated as an application under s. 47, Civil Procedure Code, made on the day on which the plaint was presented.

Messrs. *W. W. K. Page* and *A. K. Roy* (*Jr.*), for the Plaintiff.

The Advocate-General and *N. Chatterjee*, for the Defendants

Judgment.—The plaintiff in this case asks for a declaration that the sale held by the Registrar of this Court on September 25, 1931, in Suit No. 1120 of 1927 is not binding. The facts are not in dispute. The plaintiff's husband and one Himangshu Sekhar Gupta were the joint owners of a moiety of a printing press known as the 'Gupta Press' situate at No. 221, Cornwallis Street, and the copy-right in a publication known as the 'Gupta Press Panjika' as well as other publications.

"The owner of the other moiety was the defendant Sushila Bala Debi. In the year 1918 Sushila Bala Debi brought a suit against the plaintiff's husband for partition and accounts, and on June 28, 1918, Mr. Nripendra Nath Bose was appointed Receiver. The terms on which he was appointed are set out in para. 3 of the plaint, and he was appointed to take possession of the 'Gupta Press' with its goodwill, leasehold rights, machinery, stock-in-trade, printing machineries, copyright and materials of and in the Gupta Press Panjika or Year Book, corrugated iron roof room on the first floor of premises No. 221, Cornwallis Street, to be sold as a going concern by the Receiver, and the copyright in other publications, with liberty to the parties to bid and set off half the amount of the bid less Rs. 4,000.

On December 20, 1923, the Receiver was directed to print the publication known as the 'Gupta Press Panjika' for the year 1924-25 and to raise Rs. 5,000 at 12 per cent on the security of the Gupta Press concern for, I presume, the purposes of financing the publication, which he did by a mortgage dated August 8, 1924, whereby he borrowed Rs. 5,000 from the defendant Sarada Charan Goho on the security of what I may very shortly state was the press and its goodwill. The defendant Goho brought a suit in this Court on his mortgage and obtained a final decree which directed the mortgaged properties to be sold, and it is alleged that at the sale in execution of the decree not only was the mortgaged property sold but other property not included in the mortgage was also sold. So far as the plaintiff charges that that was done fraudulently, such charge has now been withdrawn and the case has been limited to the claim to have the sale set aside so far as it affects property which was sold and which was not the subject of the mortgage and, therefore, should not

have been sold. What was mortgaged was

"all beneficial interest and goodwill in the said business carried on under the name and style of Gupta Press at 221, Cornwallis Street, Calcutta, and secondly, all and singular the several chattles and things belonging to the said Gupta Press concern and specifically described in the schedule hereto."

Turning to the schedule, one finds there five items which are sufficiently specific not to admit of much error. There is no mention of any publication or of the 'Gupta Press Panjika' to which I understand a certain value is attached. To the plaint is attached a schedule in two parts, the first part of which admittedly includes the property covered by the mortgage, and the second part of which includes items admittedly not within the schedule to the mortgage but which, it is argued on behalf of the defendant are within the general words in cl. 1 of the deed which I have quoted, and, if not comprised therein, admittedly are not within the security. Various other defences, more or less technical, have been taken and they are comprised in the following issues:

1. Is the Receiver a necessary party to this? 2. Did defendant in execution of his decree cause to be sold property not covered by the mortgage in his favour? 3. Is the plaintiff entitled to restrain the defendant from publishing 'Gupta Press Panjika' or other publications mentioned in para. 2, Sch. A? 4. Are s. 47 and O. XXI, r. 78, bars to the maintainability of his suit? 5. Was sale proclamation and notice settled on notice to the plaintiff? If so, what is the effect thereof? 6. To what relief, if any, is the plaintiff entitled? On issue No. 5 no argument has been addressed to me by the learned Advocate-General, though he exhibited the affidavit of service of notice to the parties to the mortgage suit to settle the sale proclamation and the minutes of the Registrar when he settled the sale proclamation. But Mr. Page on behalf of the plaintiff has referred me to the observations of Fry, J., in *Willmott* v. *Barker* (1) (at p. 104*), upon which he relies for the purpose of showing that there was no acquiescence on the part of the plaintiff. As I have said, the learned Advocate-General, though he submitted the issue and put in the relative documents, did not argue the point, and no question of estoppel being raised, it does not appear to me that the plaintiff is necessarily bound if the notification of sale actually and in fact included property which is not the subject of the security. It would, I conceive, require something considerably more than mere abstention on the part of the plaintiff to enable the defendant to say that he was entitled to bring to sale in execution of his mortgage decree property which belonged to the mortgagor though it was not subject to his mortgage.

Taking the other issues in order, it has been argued on the authority of *Jotindra Nath* v. *Sarfaraj Mia* 6 Ind. Cas. 214 (2) that the Receiver was a necessary party to this suit. But that was a case in which the property, the subject-matter of the suit, was actually at the time in the possession of the Receiver. That is not the case here, and the learned Judges observed:

"It is obvious that the Receiver of the property of a party to litigation, is not a necessary party if no attempt is made thereby to interfere with the right of the Receiver to the property entrusted to his care."

There is no question in this suit of interfering with the right of the Receiver. The defendant Goho has no interest in the rights of the Receiver. The Receiver was the representative of the parties in the suit in which he was appointed. It may be that, if this suit should succeed, the property recovered should be handed back to the Receiver, but that is not a matter in which the defendant Goho is interested. In my judgment this is not a case in which the Receiver is a necessary party. I will pass over Issue No. 2 because that involves a question of construction to which I shall presently return. Issue No. 3 is only a question of relief. With reference to issue No. 4 Mr. Page on behalf of the plaintiff has conceded that this suit is not maintainable and that he cannot resist the arguments advanced, but he has invited me on the authority of *Biru Mahala* v. *Shyamabhurn* (3), which is one of the authorities cited on behalf of the defendant to adopt the course then followed by the learned Judges and to treat this suit as though it were an application under s. 47, Civil Procedure Code. As in that case, the suit has been instituted in the Court which has jurisdiction to execute the decree and by which the order for sale was made and under whose direction the sale was held,

(1) (1880) 15 Ch. D 96; 28 W R 911; 43 L T 195.

*Page of (1880) 15 Ch. D.—[*Ed*].

(2) 6 Ind. Cas. 214.

(3) 22 C 483.

This, as pointed out there, is merely a defect in form, and I see no reason why the same course should not now be adopted: and if it is adopted, the only logical course is to treat the suit from the beginning as though it were an application made on the day on which the plaint was presented. In that case no question of limitation will arise. This is admitted. A question of limitation would only arise if the suit were treated as though it were an application under s. 47 made now or on some date subsequent to that on which the plaint was presented, but I see no reason for that and I direct that this suit shall be treated as an application under s. 47, Civil Procedure Code made on the day on which the plaint was presented.

The only question which remains to be decided is whether what was sold is covered by the mortgage. What was sold was the beneficial interest in the business. That means the legal interest in the business. That does not carry anything specific. Then there was sold the goodwill in the business. Now goodwill is something intangible and immaterial which must have some relation to something else. It was the goodwill of the business, but it is not specified as the goodwill in any publication or anything of that nature. So far as any question of anything other than a chattel is concerned, that disposes of the matter. The second part of the clause specifically restricts the security to the chattles and things belonging to the Gupta Press concern which are described in the schedule. Admittedly nothing in Sch. 2 to the plaint is to be found in the schedule to the mortgage deed. Nothing in Sch. 2 to the plaint, in my view, is comprised within the first part of the clause which I am now considering. That being so, it follows that that which is to be found in Sch. 2 to the plaint is not within the security and, therefore, was sold by the defendant in execution of his mortgage decree though it was property not covered by the mortgage in his favour. In these circumstances the plaintiff is entitled to relief. The defendant will restore to the Receiver appointed in Suit No. 674 of 1918 the properties specified in Sch. 2 to the plaint. The plaintiff will be entitled to her costs as though this were an application made under s. 47, Civil Procedure Code. As regards any costs which have been incurred and which would not have been incurred if an application had been filed in the first instance, both sides will bear their own costs.

D. *Order accordingly.*

LAHORE HIGH COURT

Second Civil Appeal No. 296 of 1933
June 27, 1934
YOUNG, C. J. AND RANGI LAL, J.
MIHAN SINGH—PLAINTIFF—APPELLANT
versus
SHIV DITT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS

Custom (Punjab)—Reversionary right—Sale of—Whether ipso facto *becomes sale of land*

The sale of a reversionary right *ipso facto* does not become a sale of the land which falls to the reversioner when succession opens out. *Alabaksh* v. *Gulam* (1), *Padmur* v. *Achha* (2) and *Narayan Singh* v. *Lharam Singh* (5), followed, *Buta Singh* v. *Jhandu* (3), dissented from.

S. C. A. from the decreee of the District Judge, Ludhiana dated November 2, 1932.

Order of Reference.

Dalip Singh, J.—The pedigree table of the parties is given in the judgment of the learned District Judge. The plaintiff Mihan Singh, sues for the entire estate left by Ran Singh on the ground that Ran Singh left a widow *Musammat* Jai Kaur who is now married to Mihan Singh, plaintiff, and has thereby forfeited her rights. The other reversioner Sadda is dead and hence Mihan Singh is entitled to his share. The suit was originally brought as a declaratory suit on January 13, 1926, but as the Revenue Authorities partitioned this property between Mihan Singh and certain people, who claimed as alienees from Sadda, the plaint was amended into a suit for possession. The plaintiff's case was that Sadda could not transfer his reversionary rights and that the sale which was made in 1909, was void as *Musammat* Jai Kaur was alive at the time. He also impeaches the sale for want of consideration and necessity. The plaintiff stated that Sadda had died in December 1924. The defendants denied this. After *Musammat* Jai Kaur's remarriage which took place on April 13, 1917, mutation had taken place on September 25, 1920, when the parties to the present litigation were shown as jointly owning the property. Up till 1920, *Musammat* Jai Kaur continued in possession though she had re-married in April 1917. The learned District Judge in appeal dismissed the plaintiff's suit holding that it was barred by limi-

tation on the ground that in *Alabaksh* v. *Gulam* (1), *Padmur* v. *Achha* (2), and *Buta Singh* v. *Jhandu* (3), it was held that:

"where a reversioner purports to sell his reversionary rights in an estate during the lifetime of the widow of the last owner, the transaction amounts to no more than a mere agreement to sell which takes effect immediately on the death of the widow, so that the date of alienation is not the date of the sale by the reversioner but the date of the death of the widow on which the transfer takes effect."

He held therefore on the authority of these rulings that in the Punjab the sale of reversionary rights is not void. It can be enforced when the estate falls into possession. He held therefore that the alienation of reversionary rights by Sadda in 1903, became an alienation of property on the remarriage of *Musammat* Jai Kaur in 1917. The plaintiff's suit for a declaration was therefore barred under Art. II, Punjab Act, I of 1920, and the suit for possession was similarly barred. He made a casual reference that the suit was also barred by the rule of *res judicata*, but the learned Counsel for the respondents very properly did not rely on this because I do not think the learned District Judge intended to give a decision on the point, he having previously stated expressly that he was deciding the appeal on the question of limitation alone.

The question involved in this appeal raises a point of some difficulty. It may be correct that in the Punjab where the Transfer of Property Act is not in force, an agreement to sell reversionary rights is not void as an agreement and can be enforced when the succession opens out, but it is a different proposition to hold that when a person has sold his reversionary rights then *ipso facto* when the succession opens out the sale of the reversionary rights becomes the sale of the land which falls to the reversioner on that date. It was held by the Privy Council in *Hamath Kuar* v. *Indra Bahadur* (4), that sale of reversionary rights could not be effected by deed of sale for the right was not capable of being so transferred. It has been held that a reversionary right is a *spes successionis* and therefore the sale of such rights does not need registration. To my mind it appears to be a totally different question as to whether such an agreement can be enforced when succession opens out against the vendor or his representatives. I find however that in *Buta Singh* v. *Jhandu* (3), where the suit was to set aside the sale on the ground of lack of consideration and necessity, it was held that the date of limitation was the date of the widow's death. This would certainly support the position of the learned District Judge. Similarly in *Naranjan Singh* v. *Dharm Singh* (5), another Division Bench approved of this ruling and allowed a declaratory suit to proceed. On the other hand in *Padmur* v. *Achha* (2), the learned Judge held that a suit for specific performance lay to enforce the agreement. I find it difficult to reconcile these rulings. If the sale of reversionary rights *ipso facto* became a sale of land on the succession opening out the suit should be one for possession and not a suit for specific performance of an agreement to sell. I also find it difficult to reconcile the remarks in *Buta Singh* v. *Jhandu* (3), with the Privy Council decisions. A suit by a reversioner to set aside a sale of reversionary rights would not lie, for custom only empowers the reversioner to bring a suit to set aside the alienation of ancestral land and the sale of reversionary rights is not a sale of ancestral land according to the Privy Council, and therefore until steps are taken to enforce the alienation, it would remain merely an agreement to sell and there would be no question of any suit by a reversioner to have the sale of reversionary rights set aside. Such a suit obviously could not be brought in the present case in 1909, when the sale itself took place and I am unable to see that the death or re-marriage of the widow should somehow or other give the reversioner power to bring a suit to have the sale set aside. In view, however, of the Division Bench authorities I consider that this case should be referred to a Division Bench for a decision on the question of limitation.

Mr. *Nand Lal*, for the Appellant.

Mr. *Mohammad Shah Nawaz*, for the Respondents.

Judgment.—The only question for decision in this case is whether the sale of a reversionary right *ipso facto* becomes a sale of the land which falls to the reversioner when succession opens out. It has

(1) 13 P R 1899.

(2) 89 Ind. Cas. 792; A I R 1926 Lah. 39; 1 Lah. Cas. 286.

(3) 61 Ind. Cas 375; A I R 1921 Lah. 133; 3 U P L R (L) 49; 3 Lah. L J 211.

(4) 71 Ind. Cas. 629; A I R 1922 P C 403; 50 I A 69; 45 A 179; 9 O L J 652; 44 M L J 489; 37 C L J 346; 27 C W N 949; 1 P L W 383; 26 O C 223; 33 M L T 216 (P C)

(5) 129 Ind. Cas. 29; A I R 1930 Lah. 928; Ind. Rul. (1931) Lah. 109; 31 P L R 909.

been held in *Padmur* v. *Achha* (2), that a sale of a reversionary right does not effect a transfer of property but merely gives rise to a right which the Court will enforce when the inheritance falls into possession. The same view was taken by a Division Bench of the Chief Court in *Alabaksh* v. *Gulam* (1), and by a Division Bench of this Court in *Naranjan Singh* v. *Dharm Singh* (5). The learned Judge in Chambers, who has referred this case to a Division Bench, found that he could not reconcile the authorities mentioned above with the ruling in *Buta Singh* v. *Jhandu* (3). In that case it was held that the date of the alienation was not the date of the sale of his reversionary right by the reversioner, but the date of the death of the widow on which the transfer takes effect. This decision was based on *Alabaksh* v. *Gulam* (1), but in that case all, that was held was that the vendee of a reversionary right can enforce the agreement when succession opens out. Anyhow the balance of authority is against the view taken in *Buta Singh* v. *Jhandu* (3). It cannot by any means be said that in this case there was a sale of ancestral property on the date on which the widow remarried. Act I of 1920, has therefore no application to the case. This being so, the ordinary period of limitation, *i. e.*, 12 years would apply to the case. The nature of the suit is that of an ordinary title suit against a trespasser. We are, therefore, of opinion that the suit was not barred by time. The decree of the learned District Judge is therefore set aside and the case is remanded for decision on the merits. Appellant's costs to be paid by the respondents both in this Court and the Court below.

N. *Case remanded.*

LAHORE HIGH COURT

Civil Miscellaneous Petition No. 12 of 1930

May 18, 1934

TEK CHAND AND MONROE, JJ.

In the matter of BOMBAY HOUSE., LTD.,

Civil Procedure Code (Act V of 1908), ss. 35, 141—Creditor's application for liquidation of company not bona fide—Costs—Company.

Where it is clear that the action of the petitioning creditor in making the application for the winding up and in insisting upon further proceedings in liquidation is not *bona fide*, the entire costs of the liquidation should be paid by him. In the absence of a clear provision in the Companies Act dealing with a case of this kind, the matter is governed by s 35, Civil Procedure Code. Under that section the High Court can pass proper orders in this behalf.

Referring Order.

Tek Chand, J.—This is an application by Mr. N. D. Kapur, Official Liquidator of the Bombay House, Ltd. (in Liquidation), praying that: (1) a reasonable amount be fixed as his remuneration and (2) orders be passed as to who is to pay him the cost of the liquidation and the amount of his remuneration. The relevant facts are that on November 25, 1930, the Bharat Insurance Co., Ltd. (hereinafter called the "petitioning creditor") presented an application in this Court for the compulsory winding up of the Bombay House, Ltd., (hereinafter called the "Company") alleging that a certain sum of money was due to it by the Company on decrees obtained from the Civil Courts at Lahore, and that the Company was unable to pay its debts. The application was duly advertised and there being no opposition was granted by the Court on March 13, 1931. On the same day it was ordered under s. 164, that all subsequent proceedings in the liquidation, including the appointment of an Official Liquidator, be taken in the Court of the District Judge at Lahore. The District Judge, at the suggestion of the petitioning creditor, appointed Mr. N. D. Kapur as the Official Liquidator by his order, dated November 6, 1931.

On March 7, 1932, the Liquidator reported the Company was a private Company, which had not done any business since 1928, that it had no Office nor any assets, that no trace could be found of three out of the four directors, that after much effort he had been able to get in touch with the managing director, who had stated that he had no records or account books with him and that there was no assets of any kind available. The liquidator submitted, that in these circumstances, no useful purpose would be served by continuing the liquidation proceedings, and prayed that the Company be dissolved. He also submitted a list of the out-of-pocket expenses which he had incurred in issuing advertisements, etc., and prayed that the petitioning creditor be ordered to pay him the amount. Along with this petition, he attached a letter from S. N. Ahmad, the managing director of the Company, stating that the Company had closed its business in October 1928, and that in his

absence the petitioning creditor had attached the entire property of the Company including its records, account books and other documents, and sold its assets, and by this act it had ruined the Company. It was also stated that the debts due by the third parties to the Company had become time-barred.

The petitioning creditor opposed the Official Liquidator's application, for dissolution of the Company and prayed that the Official Liquidator be ordered to proceed with the work of liquidation in co-operation with the petitioning creditor," and that he be directed to arrange for the public examination of the directors of the Company, which was likely to disclose the true state of the affairs of the Company and lead to the discovery of the frauds which were alleged to have been committed by the directors. It was denied that the petitioning creditor had attached the books of account or the stock-in-trade of the Company. On hearing these objections, the District Judge passed an order under s. 195 for the public examination of the managing director and also ordered that the other directors be summoned. After much difficulty, the liquidator was able to secure the attendance of the managing director. A considerable time was taken upon in disposing of his objections, after which he was examined before the District Judge. In the course of these proceedings the petitioning creditor pressed for the prosecution of the managing director. On June 23, 1933, the learned District Judge held, that there was:

"absolutely no *prima facie* case against the Managing Director on any grounds under which his prosecution could be lodged."

He found as a fact that in execution of a decree obtained by the petitioning creditor against the Company for recovery of arrears of rent and ejectment, the entire goods in the premises of the Company, together with a number of books of account and papers, had been removed. He had ordered the Official Liquidator to make enquiries as to what had become of these account-books, but in spite of his best efforts they could not be traced in the *malkhana* or elsewhere, and the learned Judge came to the conclusion that they had been either misplaced or lost. The conduct of these proceedings against the managing director naturally required money and no funds or other assets had come into the hands of the Liquidator. Accordingly, on May 6, 1932, he made an application to the District Judge stating that he had already spent about Rs. 100 from his pockets, that the public examination of the directors was likely to cost about Rs. 200 more and that other expenses of the liquidation might cost a further sum of Rs. 200. He therefore asked for permission to raise a loan of Rs. 500 to cover these expenses. On May 10, 1932, the District Judge passed an order under s. 179 (*g*) granting permission to the Official Liquidator to raise a loan of Rs. 300 on the security of the assets of the Company. No loan, however, appears to have been raised as the Company had no assets whatever.

On August 24, 1933, the Official Liquidator presented another application before the District Judge, stating that for 19 months he had worked as a Liquidator and spent money out of his own pocket for carrying on the proceedings at the instance of the petitioning creditor and in issuing the necessary advertisements, processes, etc. He accordingly prayed that arrangements be made for payment of the amount to him, and that a reasonable sum be fixed as his remuneration for the work done. The District Judge has forwarded the application to this Court for necessary orders. Notice of the application was duly served on the petitioning creditor and I have heard Counsel on their behalf.

It is contended on behalf of the liquidator that the petitioning creditor (Bharat Insurance Co.) be made to pay him the cost of the liquidation and his remuneration. He urges that the liquidation proceedings were started at the instance of the petitioning creditor, who being the sole creditor, of the Company had already attached and sold all the available assets of the Company and caused their account books to be removed. Their sole object in making the application for winding up appears to have been to use the machinery of the liquidation Court for putting pressure on the managing director and the other directors of the Company with a view to make them pay the decretal amount from their personal funds. The liquidator also urges that the petitioning creditor was all along fully aware that the Company had ceased to do any work, and that it had no assets of any kind, and that shortly after his appointment when he represented to the Court that no useful purpose would be served by proceeding with the liquidation and applied

that the Company be dissolved, the petitioning creditor opposed the application and insisted that the public examination of the managing director be conducted and his co-directors prosecuted. The Liquidator therefore prays that the petitioning creditor, who is responsible for all these proceedings, be ordered to bear his entire expenses.

Counsel for the Bharat Insurance Company while expressing his inability to deny the correctness of the facts as stated above, points out that there is no provision in the Indian Companies Act under which his client could be ordered to pay the expenses incurred by the liquidator and his remuneration. The point is not covered by authority and is, I think, of sufficient importance to be decided by a larger Bench. I accordingly refer the case to a Division Bench and direct that a very early date be fixed, of which notice be given to the Official Liquidator and Counsel for the Bharat Insurance Company.

Mr. *Durga Das Jain* for the Bharat Insurance Co., Ltd., for the Respondent.

Order.—The facts are set out at length in the referring order dated May 11, 1934, and it is not necessary to repeat them here. After hearing Counsel for the petitioning creditor, we are of the opinion that the petition for the winding up of the Company was not made in good faith by the petitioning creditor (Bharat Insurance Company). The Bharat Insurance Company was the sole creditor of the Bombay House, Ltd., and it appears that in execution of its decrees it had already attached and sold all the available assets of the Company and had caused the account books of the Company to be removed from its office. The facts on the record leave no doubt in our minds that the sole object of the petitioning creditor in applying for the winding up was to put pressure on the managing director and the other directors of Company to pay the decretal amount from their personal funds. Very soon after his appointment the Official Liquidator brought it to the notice of the Court that the Company had stopped business three years before, that it had no assets of any kind, that the whereabouts of the directors were not known and that no useful purpose would be served by proceeding with the liquidation. He accordingly suggested that the only proper course to adopt was to dissolve the Company forthwith. The petitioning creditor however opposed this prayer and moved the Court that the Liquidator be directed to trace the managing director and other directors and have them publicly examined. It was suggested that such examination would lead to the discovery of frauds which had been committed by them and for which they should be prosecuted. Accordingly the learned District Judge directed the Liquidator to trace the directors and arrange for the public examination of the managing director. After much effort, the liquidator was able to secure the attendance of the managing director and he was publicly examined. After examining him the learned District Judge held that there was:

"absolutely no *prima facie* case against the Managing Director on any grounds under which his prosecution could be lodged."

He also found that long before the application for winding up of the Company had been made, the petitioning creditor had got the entire goods in the premises of the Company seized and sold in execution and the account books removed. It is clear from what has been stated above that the action of the petitioning creditor in making the application for the winding up and in insisting upon further proceedings in liquidation was not *bona fide*, and we do not see why in the peculiar circumstances of the case the entire cost of the liquidation be not paid by them. As already stated, the Company has not got any assets and there is no reason why the Official Liquidator, who was appointed at the instance of the petitioning creditor and conducted the entire proceedings at their request should suffer personally. In the absence of a clear provision in the Companies Act dealing with a case of this kind, the matter is governed by s. 35, Civil Procedure Code. Under that section, read with s. 141 of the Code, we have ample authority to pass proper orders in this behalf. Under s. 35, costs are in the discretion of the Court, and the Court has fully power to determine by whom, or out of what property, and to what extent, such costs are to be paid and to give all necessary direction for the purpose aforesaid.

In our opinion this is a fit case in which the petitioning creditor (the Bharat Insurance Company) should pay to the Official Liquidator his out-of-pocket expenses in the liquidation proceedings together with a reasonable amount as his remuneration, which we fix at Rs. 150. The Official Liquidator will submit a detailed account of his out-of-pocket expenses to the learned District Judge who, after having it properly checked, will issue a payment order

against the Bharat Insurance Company for the amount found due plus Rs. 150 as the Liquidator's remuneration. There will be no order as to costs of this hearing.

N. *Order accordingly.*

PRIVY COUNCIL

Appeal from the Supreme Court of the Straits Settlements (Settlement of Singapore).

December 3, 1934

LORD ATKIN, LORD ALNESS AND SIR SIDNEY ROWLATT.

C. KASIVISVANATHAN CHETTIAR —APPELLANT

versus

S. V. S. CHOKALINGAM CHETTIAR—RESPONDENT

Straits Settlement Ordinance No. 56 (Limitation), ss. 9, 3—Verbal assignment by attorney to himself of property known to be his principal's — Property vests in him in trust for principal—Purpose of trust must be found in object for which he was appointed, —Held, that the purpose for which property vested in attorney as attorney of administrator, was specific.

Where a verbal assignment was made by the appellant, as attorney of the administrator, to himself, of property known to be his principal's :

Held, that he was in a fiduciary capacity and the only result of the proceeding was that the property became vested in him in trust for the administrator.

Held, also that the appellant dealt with the property in a fiduciary capacity antecedent to such dealing and the purpose for which it became vested in him must be found in the purpose for which that capacity was conferred upon him. *Soar* v. *Ashwell* (1), referred to.

Held, further that the purpose for which the property became vested in the appellant was specific. If he was regarded in the light of a trustee for the administrator, the purpose was specific. But even if it was to administer the estate and account for the residues to the next of kin, the purpose was also specific. *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh* (2), explained. *Lam Kin Sang* v. *Cheang Kok Sang* (3), relied on.

Messrs. *A. B. Vaisey*, *K. C. Cecil*, and *W. Turner*, for the Appellant.

Sir *Gerald Hurst*, *K. C.* and Mr. *C. D. Myles*, for the Respondent.

Sir Sidney Rowlatt.—This is an appeal from the judgment of the Court of Appeal of the Supreme Court of the Straits Settlements (Settlement of Singapore), dated September 14, 1931, setting aside the judgment of Mills, J., delivered on October 25, 1930, and giving judgment in favour of the respondent.

The suit was begun by writ issued on March 9, 1925, by S. Muthuraman Chettiar, suing as the administrator *de bonis non* of one S. V. S. Supramaniam Chetty deceased (herein called "the Intestate"). The respondent was substituted as plaintiff, suing in the same capacity, by an order dated September 26, 1928.

As originally framed the suit was against E Kong Guan. The appellant was added as a further defendant by an order dated September 7, 1925. The claim against the appellant with which alone this appeal is concerned, was to make him accountable for certain shares in a rubber estate called Leong Watt Hin Rubber Estate (afterwards converted into 1,250 shares in Leong Watt Hin Estate, Ltd.) and the primary question was whether such shares, which passed into the hands of the appellant under the circumstances to be hereinafter examined, were the private property of the intestate or the property of a firm in which he was a partner, his share therein having been subsequently acquired by the respondent. On this issue there were concurrent findings of fact in favour of the respondent which their Lordships intimated at the hearing that they would not disturb and the main question left is whether the claim was barred by limitation. It is so barred unless the property in question became vested in the respondent in trust for a specific purpose within the meaning of s. 9 of Ordinance No. 56 (Limitations) of the Ordinances of the Straits Settlements.

For some time prior to 1912 the intestate had been the managing partner in a firm of money lenders carrying on business at Malacca under the style or "*vilasam*" of P. M. S. He also carried on a private business on his own account under the *vilasam* of S. V. S. His interest in P. M. S. was in the form of a one-half share in a Hindu undivided family which owned a quarter share in P. M. S. The family *vilasam* was V. E. S.

Before 1912 the intestate had become interested with Guan, the first defendant, in the rubber estate already mentioned, which it is convenient to call, (as was done in the argument), "L. W. H."

In the early part of 1912, as the result of transactions which it is unnecessary to relate in detail, the position was as follows: The land was in Guan's name, but belonged to Guan and two other Chinese associated with him for the purpose of this venture. Guan's interest in it was to the amount of 13/20, afterwards changed to 13/22, the other two holdings, after the alteration, 6/22 and 3/22 respectively. The intestate, as sub-

partner with Guan, was entitled to 5 of his 13 parts or shares. About August, 1912, the intestate, being in bad health, left Malacca for India, where he died on December 9, of that year, leaving a widow and son, Shanmugan, and two daughters. On May 2, 1913, the widow gave a power of attorney to one Kadappa to apply for letters of administration in the Straits Settlements and these were granted to him on August 1, 1913. Kadappa was at this time managing P. M. S. as a paid agent.

According to the evidence of Guan, Kadappa came to Malacca about May, 1913, and discussed with him the intestate's affairs, including the L. W. H. shares. In his examination-in-chief, Guan did not say whether this was before or after the grant of letters of administration. In his cross-examination, he said it was before. In his re-examination he said Kadappa told him later that he had taken out the grant. The substance of the conversation according to Guan's evidence was that Kadappa told him to wait for the arrival of the intestate's son (Shanmugan). In cross-examination he said "Kadappa told me to hand the shares over to Shanmugan and the manager of P. M. S." In re-examination he gave Kadappa's words as being "Then" (referring to Shanmugan's arrival) "we can settle." It was suggested in the argument before their Lordships on behalf of the appellant, on the strength of this evidence, that Kadappa had, by these words spoken to Guan, administered this asset and that was the end of the matter. Their Lordships are unable to take this view. Apart from the doubt as to the date of the conversation, it does not appear to their Lordships that what took place amounted to a final dealing with the asset from the administrator's point of view.

In 1913, the appellant who was already a partner in P. M. S., went to India and acquired the share of the intestate's family in that firm. He was now the predominant partner and in 1914 returned to Malacca and took over the management. On April 5, 1914, Kadappa gave a power of attorney to the appellant to act in the administration of the intestate's estate and as his attorney and in his name to perform a numerous class of acts, being those necessarily called for in an administration. The power gave the appellant power to appoint a substitute. Kadappa left Malacca for India in 1914 and died there in 1917. It was held at the trial of the present suit that this power-of-attorney was invalid. No argument founded on such a contention was seriously pressed on the hearing of this appeal and in view of the appellant's actions, the question is an academic one.

In 1915, Shanmugan came to Malacca. It appears that according to the Hindu Law applicable to the estate of the intestate Shanmugan or the son was beneficially entitled to the whole, subject to maintenance of the widow and daughter till marriage. In the colony, however, the estate vested in the administrator, who alone could deal with it. This being the state of affairs, the appellant and Shanmugan on July 16, 1915, made an agreement evidenced by receipts exchanged between them, that they should divide the intestate's 5 shares in L. W. H. equally, each taking $2\frac{1}{2}$ shares. The appellant was—to quote the language of both receipts which is in this respect the same—"to take all actions to obtain agreement, etc.," and he was to account to Shanmugan for his half. At the time of making this agreement, the appellant must have known that these shares belonged to the intestate's estate which he was administering.

Following on this arrangement of July 16, 1915, a meeting took place between Guan, the appellant, Shanmugan and one P. V. Palaniappa Chetty, when the three latter concurred in requesting Guan, firstly, to hand over to Shanmugan the scrip of certain shares which had belonged to the intestate, but with which this appeal is not concerned, and secondly, as regards the 5 shares in the L. W. H. property, that they should be transferred to P. M. S., Kasi, that is, to the appellant under the *vilasam* of the partnership P. M. S. From that time, Guan said that he considered the owner of these 5 shares to be P. M. S.

In 1915, the property L. W. H. began to yield profits and there was a distribution among the partners in October of that year. The proportion attributable to the 5 shares of the intestate was paid to the appellant as P. M. S. Kasi, who also received all subsequent profits and, when the property was transferred to a company, all the dividends on the shares representing the intestate's interest.

On June 5, 1916, the appellant purported to exercise the power of substitution expressed to be conferred upon him by the power-of-attorney given to him by Kadappa and appointed one Muthiah Chettiar as

his substitute for the purpose of the administration of the estate of the intestate.

There was evidence that, notwithstanding this substitution, and even after the death of Kadappa which occurred on November 24, 1917, terminating beyond all question the power-of-attorney given by him, the appellant acted as Kadappa's attorney and made an application to the Court in that character in connection with the sale of some land. In the view of their Lordships, however, a termination of the appellant's agency under power-of-attorney whether in 1916, by the substitution of Muthiah or in 1917 by the death of Kadappa, does not affect the situation, inasmuch as the appellant had already, namely, at the interview with Guan and Shanmugan in 1915, been recognized by Guan as the person to whom he was to account for the intestate's interest in the L. W. H. property. In pursuance of that arrangement (so Guan deposed), Guan subsequently, namely, by an indenture of July 5, 1916, formally transferred that interest to the appellant.

At the end of 1917, a few days before the death of Kadappa, the L. W. H. property was transferred to a Company, called the Leong Watt Hin Estate Co., Ltd., and the appellant received, by direction of Guan, 1,250 shares in that Company as representing the intestate's interest.

Although by the agreement entered into with Shanmugan in July, 1915, the appellant had agreed to hold one half of the 5 shares for the account of Shanmugan, he did not account to him for any part of the profits he received. Early in 1924, Shanmugan came from India to Malacca and asked the appellant for the money due to him on the $2\frac{1}{2}$ shares. The appellant told him that his partners in P. M. S. claimed all the 5 shares as belonging to that firm and he suggested that Shanmugan should sue the partners. In the end, Shanmugan accepted from the appellant $18,000 and released his claim. This according to the appellant's evidence was a private transaction of his own with which his partners in P. M. S. were not concerned.

On November 1, 1924, the intestate's widow gave a power-of-attorney to one Muthuraman Chettiar to apply for letters of administration to the estate of the intestate and on December 20, these were granted to him *de bonis non*.

On March 9, 1925, Muthuraman commenced the present suit against Guan as sole defendant, the appellant being added as second defendant by order dated September 7, 1925. Later in the proceedings the widow having died, the respondent took out letters of administration *de bonis non* as attorney of the daughters and was substituted as plaintiff.

By the statement of claim delivered on February 10, 1926, the plaintiff claimed as against the appellant a transfer of the 1,250 shares in the L. W. H., Ltd., an account of the dividends received and damages. There was no allegation of fraud. The appellant, by his defence delivered on June 20, 1926, pleaded limitation and by supplemental defence delivered on October 11, 1926, pleaded *inter alia*, that the right to the 5 shares in the original L. W. H. venture now represented by 1,250 shares in L. W. H., Limited, had been the property of P. M. S. and further, that any question regarding them had been settled by the agreement of July 16, 1915. On October 12, 1926, he served a third party action on Shanmugan, claiming to be indemnified by him against the plaintiff's claim by virtue of the arrangement in 1918 by which the appellant had bought out Shanmugan for $18,000.

In 1927, Shanmugan commenced an action in India against the appellant, claiming the 1,250 shares in L. W. H. Ltd., and alleging that the agreements of 1915 and 1924 were obtained from him by misrepresentation and fraud. He raised the same contention in his pleading, delivered on February 6, 1929, as third party in the present action. The suit in India is still pending. The Judge's notes at the trial of the present suit contain a statement that it had "been stopped pending this present case," but whether it has been formally stayed does not appear.

The suit was tried before Mills, J. in September and October, 1930. No oral evidence was called for the plaintiff, the present respondent. For the defendants oral evidence was given by, among others, Guan and the appellant. At the close of the case of the second defendant (the present appellant) his Counsel admitted that he could make no case for indemnity against the third party Shanmugan and the Judge ruled there and then that the third party claim be dismissed. Shanmugan was never called to substantiate his charges of fraud. Nor had his Counsel put those charges to the appellant on cross-examination.

On October 25, 1930, Mills, J. delivered

a written judgment in which he found that the 5 shares in the L. W. H. venture were the private property of the intestate. As regards the responsibility of the appellant for the L. W. H. shares, he dealt with the matter as follows:—He held that the power of attorney from Kadappa to the appellant was void, as not authorised by the power of attorney given by the widow to the former and that the appellant, though accountable for the shares, was so only as an alienee without value given. He held, therefore, that the suit against him was barred by limitation not having been brought within six years from July 15, 1915. He was of opinion that the appellant, in dealing with the shares on that date, was not acting as a trustee nor was he in the position of a person receiving trust property and dealing with it in a manner inconsistent with trusts which he was cognizant, because he did not receive the trust property as such, but throughout the negotiations which culminated in the arrangement of July 16, 1915, acted solely in his capacity as partner and manager of the firm P. M. S. and supported the claims of the firm in opposition to the claims of the deceased man's estate. The learned Judge said that he confined himself to findings absolutely necessary for the determination of the issue in order that the parties to the Indian litigation might not be embarrassed by comments or *dicta*.

The respondent appealed to the Court of Appeal and the appellant cross-appealed against the dismissal of his third party claim against Shanmugan. This cross-appeal was, however, abandoned by Counsel and Shanmugan was released from the proceedings in the course of the arguments. Shanmugan is not a party to the present appeal.

The learned Judges in the Court of Appeal concurred with the finding of the trial Judge that the interest in the L. W. H. venture was the private property of the intestate, but held that the appellant, in dealing with that interest, had acted as a trustee by virtue of the power of attorney given to him by Kadappa and that he was not protected by limitation.

The learned Judges further expressed the opinion that the appellant had been guilty of fraud at every stage of his transactions with the family of the intestate. The order of the Court directed an account of all moneys received by the appellant or his agents in respect of the L. W. H. shares and an account from November 20, 1917, of all moneys received or which ought to have been received by the appellant or his agents in respect of the 1,250 shares in the L. W. H. Company and an enquiry to ascertain what had been the highest value, which a share in the L. W. H. Company had reached prior to the date of the judgment. The Court further directed that in taking the account, the appellant should be debited with punitive interest at the rate of 6 per cent. per annum. It was further, by consent of the third party, declared that the appellant was entitled to set off to the extent of Shanmugan's interest, the $18,000 paid to the third party under the arrangement of January 7, 1924, against what should be found due from him. Further consideration was adjourned with liberty to apply.

Upon the question of limiation, their Lordships agree with the conclusion arrived at by the Court of Appeal.

The point turns upon s. 9 of Straits Settlements Ordinance No. 56 (Limitations) which is as follows:—

"Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose or against his legal personal representative or assigns, not being assigns for valuable consideration, for the purpose of following in his or her hands such property, shall be barred by any length of time."

The cardinal fact in the case is that the appellant in dealing with this asset of the intestate's estate acted in the character of attorney to the administrator. The arrangement between the appellant and Shanmugan on July 16, 1916, was entered into to deal with the question whether the interest in the L. W. H. venture had been the intestate's private property, as Shanmugan was alleging or not. To any settlement of that question the legal personal representative of the intestate was a necessary party. Shanmugan could not bind the estate and unless it was to be bound by the participation in the transaction of the appellant in the character of attorney for the administrator, that transaction would not furnish a title enabling the appellant to obtain from Guan, as he did, first an assignment of the intestate's interest in L. W. H. and afterwards the shares in the limited company.

What took place, therefore, was a verbal assignment by the appellant, as attorney of the administrator, to himself, of property known to be his principal's. He was in a

fiduciary capacity and the only result of the proceeding was that the property became vested in him in trust for the administrator. This is not a case in which a stranger has possessed himself of trust property under circumstances which make him bound by the trust and in which it is then necessary to inquire into his exact position with reference to the section under discussion or to the English doctrine of express trusts. The appellant here dealt with the property in a fiduciary capacity antecedent to such dealing and the purpose for which it became vested in him must be found in the purpose for which that capacity was conferred upon him. The position is the same as if the administrator himself had vested the property in the appellant for the purposes of the administration instead of the appellant vesting it in himself by virtue of his powers as attorney. In the course of the arguments, their Lordships were necessarily referred to the decision of the Court of Appeal in England in *Soar* v. *Ashwell* (1). Whatever limits may have to be observed in the application to the construction of this section in the Limitations Ordinance of the Straits Settlements of the English decisions as to express trusts, the reasoning of the Master of the Rolls and Bowen, L. J., in that case afford ample support for the particular step in the present argument which consists in referring the possession of the appellant to his antecedent fiduciary capacity.

It remains to consider whether the purpose for which the property became vested in the appellant was specific. If he is regarded in the light of a trustee for the administrator, the answer is obviously in the affirmative. But even if it was to administer the estate and account for the residue to the next of kin, the purpose was also specific. It was suggested in the argument on behalf of the appellant that the judgment of this Board delivered by Lord Buckmaster in *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh* (2), was an authority for the broad proposition that distribution under an intestacy is never a specific purpose. Their Lordships are not of that opinion. They concur in the explanation of that judgment given in *Lam Kin Sang* v. *Cheang Kok Sang* (3), namely, that it only deals with the case where a specific trust has been declared on its face exhausting the fund, but, that trust being void in law, the fund has to be dealt with as upon an intestacy in contradiction of the purpose named.

There remain certain subordinate questions. It is unfortunate that to bring Shanmugan into the suit, recourse was had to the misconceived procedure of a third party notice. The position was that if as between the appellant and Shanmugan the arrangements of July 16, 1915, and January 7, 1924, stand, the appellant has an equitable defence to the extent of the sum to which Shanmugan will be beneficially entitled out of the money for which the appellant is accountable. If, on the other hand, those arrangements are avoided for fraud, there is an equitable defence only to the extent of the $ 18,000 which Shanmugan received under the latter arrangement. This latter result has been, in fact, achieved by the order of the Court made by consent of the parties though not relevant to the pleadings. It seems, however, to their Lordships that the issue of fraud on which it depends, has never been regularly tried. It was only introduced by the pleading delivered by the third party and he was discharged from the action without being called upon to support his allegations, on the ground that the third party procedure was inapplicable. The issue is, however, relevantly raised in the action now pending in India, and, under the circumstances the proper order in the present suit is that execution (except for costs and the amount of any expenses properly incurred by the plaintiff and his predecessor as administrators *de bonis non*), be stayed until the suit in India has been determined. The widow being dead and the daughters now apparently married, it appears *prima facie* that Shanmugan is the only person interested. The order must provide that the stay will become perpetual failing due prosecution of the litigation in India and there must be liberty to apply.

With regard to the enquiry directed by the order of the Court of Appeal to ascertain the highest value reached by a share in the L. W. H, Ltd., it appears from the written judgments delivered, that it was left to be determined upon further consideration before a single Judge whether the respondent could elect to take the value of the shares instead of the shares themselves and how that value was to be

(1) (1893) 2 Q B 390; 42 W R 165; 69 L T 585.
(2) 102 Ind. Cas. 832; (1922) 1 A C 120; A I R 1922 P C 212; 49 I A 37; 25 Bom. L R 121; 30 M L T 160; 26 C W N 495 (P C).
(3) (1929) S S L R 62.

estimated. Their Lordships understand this question has been determined on further consideration and on appeal by the Court of Appeal. These orders are not before their Lordships in this appeal.

Their Lordships will duly advise His Majesty that the appeal be dismissed subject to a variation of the order of the Court of Appeal by the introduction of a stay of execution as already described.

There will be no order as to the costs of the appeal.

D. *Appeal dismissed.*

Solicitors for the Appellant.—Messrs. *Lowe & Co.*

Solicitors for the Respondent.—Messrs. *Peacock & Goddard.*

LAHORE HIGH COURT

First Civil Appeal No. 444 of 1930
March 1, 1935

ADDISON AND DIN MOHAMMAD, JJ.

BAHADUR CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat RAMON BAI AND OTHERS—DEFENDANTS—RESPONDENTS

Custom (Punjab)—Succession—Aroras of Khanewal, District Multan—Whether governed by Hindu Law—Alienation by widow—Cognates, whether can challenge—Hindu Law—Alienation—Widow.

Held, that an *Arora* of Khanewal in the District of Multan is not governed in the matter of succession by Hindu Law but by Customary Law and the cognates of the propositus have no *locus standi* to challenge the alienation made by the widow.

F. C. A. from the decree of the Senior Subordinate Judge, Multan, dated November 2, 1929.

Mr. *S. N. Bali*, Mr. *Dev Raj Sawhny*, Mr. *Charanjiv Lal* for Mr. *Fakir Chand*, for the Appellants.

Messrs. *R. C. Manchanda* and *S. C. Manchanda*, for the Respondents.

Din Mohammad, J.—The dispute in this case relates to the property of Gela Ram who was an *Arora* of Khanewal in the District of Multan. The pedigree-table is printed at pp. 44 to 49 of the paper book and will explain the relationship of the parties to the suit, out of which this appeal has arisen.

On Gela Ram's death his widow *Musammat* Ramon Bai and his mother *Musammat* Vishan Devi succeeded him in equal shares. On November 20, 1916, *Musammat* Ramon Bai made an oral gift of a part of the property held by her in favour of her deceased husband's relative Sohna Ram and on January 9, 1928, she settled the remaining property on him by a registered deed. Thereupon the plaintiffs who are cognates of Gela Ram instituted the present suit for a declaration that both the alienations mentioned above should not affect their rights after the death or remarriage of *Musammat* Ramon Bai. Three of the cognates did not join them and were impleaded as defendants in the suit. The plaintiffs based their claim on Hindu Law while both *Musammat* Ramon Bai and Sohna Ram resisted it mainly on the ground of custom according to which the plaintiff had no *locus standi* to control *Musammat* Ramon Bai's alienations. The Senior Subordinate Judge held that the plaintiffs were heirs of Gela Ram, and as such competent to sue, that in matters of succession and alienation parties followed custom, that the widows succeeded as absolute owners, that the gift made in 1916 could not be challenged owing to the efflux of time and that both the gifts were valid, having been made for services rendered. As a result of these findings, he dismissed the suit. The plaintiffs have appealed.

In our opinion, the most crucial point in this case is whether the parties follow Hindu Law or custom. If it is found that they are governed by Hindu Law, there can be no question but that the plaintiffs who are *Bandhus* will be entitled to succeed to Gela Ram's property and will thus be competent to control the alienations of his widow who held only a limited estate. If, on the other hand, the family is governed by custom, the plaintiffs being cognates will have no *locus standi* to challenge the alienations in suit.

The onus of proving that the family of Gela Ram was governed by Hindu Law was placed on the plaintiffs and from a perusal of the evidence led by them, it is evident that they have hopelessly failed in discharging it. They had examined only three witnesses in the case, namely, *Musammat* Ramon Bai defendant No. 1, Shada Ram, defendant No. 4, and his brother Raju Ram, defendant No. 5. All of them have unequivocally stated that they do not follow Hindu Law but custom. In addition to this the evidence adduced by the contesting defendants themselves fully supports their allegation that they are governed by custom. It is further proved that *Musammat* Vishan Devi had alienated her property without any objection on the part of the plaintiffs.

Besides, there is ample testimony to support the defendants' assertion in the various records of the Customary Law of the Multan District, which have been compiled from time to time, the latest being Emerson's Customary Law of 1923-24.

Answer to Question No. 35 runs as follows :—

"*Aroras, Khatris* and *Brahmins* of the Multan town, except *Pushkarna Brahmins*, follow Hindu Law. All other Hindu and Muhammadan tribes admit that succession in the first place goes to the sons * * and failing them to the widows for lives and in the latter's absence, to unmarried daughters until marriage and failing them to the collaterals within four degrees * * *. In the absence of the collaterals within four degrees, daughters and failing them, daughters' sons and in default of daughters' sons sisters and their sons succeed * * *. Among Hindus, however, daughters seldom exclude collaterals within four degrees The rural Hindus of Multan *Tehsil* say that a widow is entitled to maintenance only. The Hindus of Shujaabad and Kabirwala say that failing widows unmarried daughters are entitled to succeed until marriage."

In answer to Question No. 53, it is stated by the rural Hindus of the Multan *Tehsil* that mother and widow get maintenance only. Here also it is stated that *Aroras, Khatris* and *Brahmins* of Multan except the *Pushkarna Brahmins* of Multan town, follow Hindu Law. It may be mentioned here that Counsel for the appellants laid great stress on this part of the answer and contended that the word "Multan" here meant the whole of the District of Multan and not the town of Multan only. But reading this answer with the answer to Question No. 35 quoted above, it is evident that the reference is to Multan and not to the whole District of Multan.

In answer to Question No. 57, the Hindus of Lodhran and Kabirwala *Tehsil* stated that the mother would inherit if a proprietor died leaving no widow but a mother and a daughter. It may be mentioned here that what was known as Kabirwala *Tehsil* before is the same as Khanewal *Tehsil* now.

In answer to Question No. 59, whether daughters took a share when there were no sons, all Hindu tribes said that in the absence of sons and of widows, unmarried daughters were entitled to maintenance until marriage.

In answer to Question No. 70, all tribes stated that the property would go to sisters and failing them to their sons and in their absence to the original owners of the same *got* when a man died leaving no male lineal relations, no mother, no widows, no daughters and no daughters' sons.

In answer to Question No. 82, the reply was that the property would devolve on owners of the same *got* in the first instance and failing them it would become *shamilat patti* and if there were no *pattis*, would become *shamilat deh* if a man died intestate leaving no relations. Reading this answer with the answer to Question No. 70 it appears that the word "relations" here is confined only to those relations who are enumerated there, and does not include cognates.

It follows from the above, that cognates do not appear at all in the chain of succession provided for in the Customary Law relating to this District and are, therefore, ineligible to succeed under any circumstances. The inevitable result is that the plaintiffs have no *locus standi* to challenge the alienations in dispute.

We, therefore, affirm the decision of the Court below and dismiss this appeal with costs.

D. *Appeal dismissed.*

LAHORE HIGH COURT

Second Civil Appeal No. 1377 of 1932

January 6, 1934

HILTON, J.

Musammat AISHAN BIBI AND OTHERS—DEFENDANTS-APPELLANTS

versus

ALLAH DITTA AND OTHERS—PLAINTIFFS—RESPONDENTS

Custom (Punjab) — Succession — Non-ancestral property — Reversioners — Sandhu Jats — *District Lahore — Gift to daughters, by widow — Reversioners, collaterals of fourth degree, if exclude daughters*—Wajib-ul-arz *of* 1855—*Ancestral property* —Riwaj-i-am *of* 1868—*Gift by* Sandhu Jat *widow— Self-acquired immovable property of husband—Gift, if valid—Clear statement of custom—Burden of proof on him who disputes—Practice—Original version of Customary Law in vernacular and English version of the same—Which to be preferred.*

Among *Sandhu Jats* of Lahore District, daughters are excluded in respect of non-ancestral property by reversioners as the fourth degree collaterals.

Land under the *wajib-ul-arz* of 1885 refers only to ancestral land. *Rahmat Ali Khan* v. *Sadiq-ul nissa* (1), followed.

According to *riwaj-i-am* of 1868, Lahore, even self-acquired immovable property of husband cannot be gifted by the widow.

The burden is on him, who disputes the clear statement of special custom in Customary Law (Punjab), to prove the contrary. *Beg* v. *Allah Ditta* (2), relied on.

If there is any difference in the original vernacular and the English version of the Customary Law, the English version should be preferred on the ground that it is the final draft.

S. C. A. from the decree of the District Judge, Lyallpur, dated June 27, 1932.

Mr. *Nazir Ahmad*, for the Appellants.

Mr. *Niamat Rai*, for the Respondents.

Judgment.—On September 5, 1930, *Musammat* Aishan, widow of Buta, a sonless proprietor, gifted 110 *kanals* 7 *marlas* of land to her daughters, Sardar Bibi and Mehraj Bibi. The reversioners of Buta in the fourth degree have sued to challenge the gift. The parties are *sandhu Jats* of Kot Begum, now in the Sheikhupura, but originally in the Lahore District.

The trial Judge dismissed the suit but the plaintiffs have obtained a decree from the lower Appellate Court and this Second Appeal on a certificate is preferred by the defendants.

Both the Courts below held that the land is non-ancestral *qua* the plaintiffs but while the trial Judge decided that the parties being bound by general agricultural custom, a gift by the mother to her daughters of the acquired property of her husband was permissible as an acceleration of succession; the learned District Judge on the other hand has found that the *riwaj-i-am* evidences a special custom among *Sandhus* of Kot Begum disallowing such a gift and that the initial onus is thereby thrown upon the defendants to prove its validity. He held that their evidence is insufficient for this purpose. Thus the questions that now arise for determination are, whether the *riwaj-i-am* clearly evidences such a custom; if so, should an initial presumption in its favour not be made, and if it should be made, has it been rebutted.

The first document to be considered in this connection is the *wajib-ul-arz* of the 1855 Settlement (P-9) which sets forth that if a sonless proprietor gifts any land to his daughter during his life-time, she becomes its owner; otherwise the nearest reversioner inherits and the daughter is disinherited. In the present case there was no gift during Buta's life-time and the entry, therefore, favours the plaintiff reversioners. However, I think that as the passage makes no distinction between ancestral and acquired land, it should be taken as referring only to ancestral land, as laid down in *Rahmat Ali Khan* v. *Sadiq-ul-nissa* (1)and other authorities. This entry, may, therefore, be excluded from considerations in determining the point at issue.

Next there is the *riwaj-i-am* of 1868 (P-10) which mentions that a *Sandhu Jat* widow can gift the movable property of her husband, whether ancestral or self-acquired, but not the immovable property. This document thus favours the reversioners and in my opinion, seems to mean that even self-acquired immovable property cannot be gifted by the widow. By itself, however, it would not perhaps be conclusive. The Customary Law of the Lahore District by R. C. Bolster compiled in 1916 is, however, clearly and definitely in favour of the special custom set by the reversioners. Question No. 56 deals with the nature of a widow's interests and the answer is that a widow can alienate only for necessity the land of her husband whether ancestral or self-acquired. In the present suit, however, the question at issue is not so much the widow's power to alienate for necessity but the right of the daughters to succeed in presence of the collaterals and their consequent claim to receive non-ancestral land by way of a gift in acceleration of succession. I pass, therefore, to Questions Nos. 61 and 62 which deal with this matter. The answers to these two questions assert very distinctly that, among *Jats*, daughters are excluded by male lineal descendants through males, however distant, and that no distinction in this connection exists between ancestral and acquired property of the father not even between the immovable and movable property. The following note below Answer No. 61 may be quoted at length:

"The feeling in favour of the custom excluding daughters is so strict that it gives even members of the village community a prior right of succession, while in the case of the agnatic line becoming extinct, escheat to Government is recognized. But modern feeling combined with the growth of personal as against communal ideas of ownership tends to let daughters inherit to the exclusion of agnates five and in some cases more generations distant."

In the present case the plaintiffs are collaterals of the fourth degree and the above quoted remarks are, therefore, very strongly in their favour: A criticism has been made on behalf of the appellant-defendants that the English version of the Customary Law differs in material respects from the Urdu version from which it is stated in the introduction to have been compiled. Even if there were a difference I think that the English version should be preferred on the ground that it is the final draft. The alleged differences, however, are unimportant and do not affect the main principle.

There being thus a very clear statement in the Customary Law of the special cus-

(1) 138 Ind. Cas. 280; A I R 1932 Lah. 353; 33 P L R 117; Ind. Rul. (1932) Lah. 468; 13 Lah. 404.

tom contended for by the reversioners there is no reason why the initial onus should not be placed upon the defendants to disprove it, a proposition for which there is ample authority in *Beg* v. *Allah Ditta* (2). It has been argued before me that reliance was not placed by the plaintiffs upon the foregoing passages in Bolster's Customary Law of Lahore District until the first appeal was heard by the learned District Judge, and that there was, therefore, a shifting of the onus in the lower Appellate Court, which, it is maintained, has prejudiced the defendants. I find, however, that even in the trial Court the plaintiffs contended for a special custom, and moreover, the third issue framed in that Court did actually cast the onus on the defendants of establishing that plaintiffs are bound by the gift. That being the case I do not agree that the defendants have been prejudiced by the course of the arguments in the lower Appellate Court. An initial presumption in favour of the special custom excluding daughters having thus been set up, it remains to consider whether there is an evidence to rebut that presumption and disprove the special custom. Although the present suit relates to non-ancestral land, instances of the succession to ancestral land among *Sandhus Jats* by daughters, if any, might be relevant, on the ground that if daughters could succeed to ancestral land they could surely inherit non-ancestral land also. Instances, however, of exclusion of collaterals more remote than the fifth degree would not rebut the presumption in favour of the special custom, having regard to the remarks contained in the Note to Answer No. 61 (set forth *in extenso* above) and to the fact that plaintiffs are of the fourth degree. No such instances have been cited of *Sandhu Jats* of Lahore nor does the oral evidence appear to refer to any clear instances of that nature. I must accordingly accept as correct the conclusion of the learned District Judge that the plaintiffs as fourth degree collaterals exclude the daughters in respect of non-ancestral property. The appeal of the defendants, therefore, fails and is dismissed with costs.

D. *Appeal dismissed.*

(2) 38 Ind. Cas. 354; A I R 1916 P C 129; 44 I A 89; 44 C 719; 45 P R 1917; 12 P W R 1917; 21 M L T 310; 32 M L J 615; 19 Bom. L R 388; 15 A L J 525; 21 C W N 842; 26 C L J 175 (P C).

NAGPUR JUDICIAL COMMISSIONER'S COURT

Civil Revision No. 61 of 1934

July 13, 1934

GRILLE, A. J. C.

LOKMAN—PLAINTIFF—APPLICANT

versus

HALKU—DEFENDANT—NON-APPLICANT

Criminal Procedure Code (Act V of 1898), ss. 195 (3), 476—Order by Small Cause Court Judge, Saugor, under s. 476—Appeal from, whether lies to Additional District Judge, Saugor, or to District Judge, Jubbulpore.

The Additional District Judge sitting at Saugor determines all matters arising from the Saugor Revenue District and there is no limitation either by general or special orders of the Local Government or by any particular order of the District Judge, which debars the Additional District Judge from hearing an appeal under s. 476, Criminal Procedure Code, which comes before him in the ordinary course of the distribution of the business. Consequently an appeal from an order of the Court of Small Causes, Saugor, under s. 476, Criminal Procedure Code, lies to Additional District Judge, Saugor, and not to the District Judge, Jubbulpore.

Application for revision of the order of the Additional District Judge, Saugor, dated December 7, 1933, in Miscellaneous Appeal No. 9 of 1933, arising out of Miscellaneous Judicial Case No. 122 of 1932, dated February 10, 1933, of the Court of the Judge, Small Cause Court (Second Sub-Judge, First Class) Saugor.

Messrs. *K. K. Tiwari* and *J. Sen*, for the Applicant.

Messrs. *A. V. Khare* and *W. B. Pendharkar*, for the non-Applicant.

Mr. *V. Bose*, for the Crown.

Order.—The applicant Lokman applies in revision against the order of the Additional District Judge, Saugor, filing a complaint against him in respect of offences said to have been committed in the conduct of a civil suit. An application under s. 476 of the Code of Criminal Procedure was originally made by the non-applicant in the Court of Small Cause, Saugor, in which Court the offence complained of is said to have taken place. That Court declined to make a complaint, but that decision was reversed in an appeal made to the Additional District Judge.

It is contended in revision that in entertaining and allowing the appeal the Additional District Judge acted without jurisdiction and that the only Court competent to hear the appeal was the Court of the District Judge, Jubbulpore.

It is settled law that, in respect of offences committed in Courts of Small Causes and orders passed in respect of complaints made or refusal to make complaints under s. 476, of the Criminal Procedure Code, by

such Court, an appeal lies not to the High Court but to the Court of the District Judge to which Court, within the meaning of s. 195, sub-s. (3) of the Code of Criminal Procedure, the Court of Small Causes is held to be subordinate: *Chidda Lal* v. *Bhajan Lal* (1) and *In re Ram Prasad Malla* (2). The only point for determination then is whether an appeal from the order of the Court of Small Causes, Saugor, should lie to Additional District Judge, Saugor, or to the District Judge, Jubbulpore.

It is contended that the words:

"To the principal Court having Ordinary Original Civil Jurisdiction within the local limits of whose jurisdiction such Civil Court is situate".

In sub-s. (3) of s. 195 of the Code of Criminal Procedure can have reference only to the District Court situated at Jubbulpore. The Court of Small Causes at Saugor is situated in the Civil District of Jubbulpore which comprises the Revenue Districts of Mandla, Jubbulpore and Saugor. In this Civil District the Courts having Original Civil Jurisdiction are those of Subordinate Judges of the Second Class, Subordinate Judge of the First Class and the District Court. The principal Court then having Ordinary Original Civil Jurisdiction is the District Court. The argument that the principal Court having Ordinary Original Civil Jurisdiction in this area is the Court of the District Judge situated at Jubbulpore and that the Court of the Additional District Judge sitting at Saugor is inferior to it and, therefore, incompetent to entertain the appeal is apparently based on the fact that the latter Court is popularly described as the Court of the Additional District Judge, Saugor. The appeal certainly lies to the District Court, and the Judge of the District Court sits at Jubbulpore. The jurisdiction of the Additional District Judge sitting at Saugor is that of the District Court under the provisions of s. 26, sub-ss. (1) of the Central Provinces Courts Act. The Local Government is empowered to appoint one or more Additional Judges to any District Court and such Additional Judge exercises the jurisdiction of the Court to which he was appointed and exercises the powers of the Judge of the District Court. The correct appellation of the Judge who decided this appeal is Additional Judge to the Court of the District Judge, Jubbulpore, sitting at Saugor, and the appointment of the Judge is gazetted in those terms. The appeal, therefore, was made in the principal Court having Ordinary Additional Jurisdiction in the Jubbulpore District, and the Additional Judge had jurisdiction to hear the appeal. His jurisdiction is subject only to any general or special orders of the Local Government as to the class or value of suits and appeal which he may decide, and no general or special order which would bar his jurisdiction in respect of this particular class of appeal exists. Neither has any other restriction in respect of the distribution of the Court business in the control of the Judge of the District Court been brought to my notice. The ordinary procedure is that the Additional District Judge sitting at Saugor determines all matters arising from the Saugor Revenue District and there has been no limitation either by general or special orders of the Local Government or by any particular order of the District Judge, which debars the Additional District Judge from hearing this appeal which came before him in the ordinary course of the distribution of the business.

On the merits of the case it is sufficient for me to say that I am in agreement with the conclusion of the learned Additional District Judge. A *prima facie* case warranting a complaint has been made out.

The application in revision accordingly fails and is dismissed with costs. Pleaders' fee Rs. 30.

D. *Application dismissed.*

(1) 42 Ind. Cas. 167; A I R 1917 All. 405; 39 A 657; 15 A L J 721; 18 Cr. L J 935 (F B).

(2) 4 Ind. Cas 6; 37 C 13; 10 Cr. L J 454; 13 C W N 1038; 10 Cr. L J 454.

MADRAS HIGH COURT

Appeal against Appellate Order No. 25 of 1930

October 5, 1934

BEASLEY, C. J. AND KING, J.

SADANALA GANGARAJU—APPELLANT

versus

INDRAGANTI SUBBAYYA (DIED) AND OTHERS—RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 182 (5), Expl. I—Application for execution against surety more than three years after decree—Limitation—Principal judgment-debtor and surety, whether joint-debtors—Applicability of Expl. I.

A surety for the satisfaction of a decree is neither a joint judgment-debtor nor a person against whom a decree has been passed severally with any portion of its subject-matter distinguished as payable or deliverable by him within the meaning of Expl. I to cl. (5) of Art. 182 of the Limitation Act. An application for execution against a surety is not therefore governed by Expl. I but by the simple unqualified words of Art. 182, cl. (5).

Though a surety is technically liable from the date of the decree, in equity his liability arises only upon the failure of the judgment-debtor to satisfy the decree and the decree-holder who is proceeding against the principal debtor is not bound to file a formal and otherwise futile petition against the surety before the period of three years expires in order to keep alive the decree against the surety *Narayan Ganpatbhai Agsal* v. *Timmaya* (1), *Mohamed Cassim* v. *Jamila Bee Bee* (2,) *Raja Ragunandan Prasad Singh* v *Raja Kartyanad Singh Bahadur* (3) and *Honda Ram* v. *Firm Seth Kunwar Bhan Sukh Nand* (6); not followed. *Mohamad Hafiz* v. *Mohamad Ibrahim* (4) and *Badar-ud-Din* v. *Mohamad Hafiz* (5), followed.

Appeal against the appellate order of the Court of the Subordinate Judge of Rajahmundry, dated April 22, 1929, and made in Appeal No. 32 of 1929 (A. S. No. 122 of 1928, District Court, East Godavari) preferred against the Order of the Court of the District Munsif of Ramachandrapur in S. A. No. 522 of 1928 in O. S. 283 of 1916 on the file of the Additional District Munsif's Court, Rajahmundry.

Judgment.—The appellant in this appeal is the decree-holder in O. S. No. 283 of 1916 on the file of the Additional District Munsif of Rajahmundry. The respondent is a surety for the satisfaction of the decree by the judgment-debtor. The decree in question was confirmed in appeal on February 23, 1922. In 1922 and again in 1924 execution was taken out by the appellant against the legal representatives of the judgment-debtor. Some of the assets of the judgment-debtor were sold and the decree was satisfied in part. In April 1927 and again in October 1927 execution was taken out against the surety. When his property was about to be sold in March 1928, the surety (respondent) raised the objection that execution as against him was barred, and this objection was upheld both by the executing Court and on appeal by the Sub-Judge of Rajahmundry. Hence the second appeal by the decree-holder to this Court.

The Article of the Limitation Act which governs this case is 182, cl. 5. This allows three years' time from the date of the final order passed on the last preceding application for execution made in accordance with law. That date is admittedly October 4, 1924 and, therefore, if cl. 5 alone is looked to, both the execution applications of 1927 are in time. But cl. 5 is subject to Explanation I the second part of which runs as follows:—

"Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application if made against any one or more of them or against his or their representatives shall take effect against them all."

We have been referred to a number of decisions which deal with similar facts to those in the present case and with the application of this explanation to the case of a surety, but they are by no means uniform. The earliest is *Narayan Ganpatbhai Agsal* v. *Timmaya* (1), where it is laid down that a principal judgment-debtor and a surety are not joint judgment-debtors and, therefore, an execution petition taken out for the first time against a surety more than three years from the date of the decree is not saved from the bar of limitation by the fact that previous execution petitions had been taken out against the principal judgment-debtor. This ruling has been followed by the High Courts of Rangoon *Mohamad Cassim* v. *Jamila Be Bee* (2), and Patna *Raja Ragunandan Prasad Singh* v. *Raja Kartyanand Singh Bahadur* (3). The Allahabad High Court, however, has taken a different view in *Mohamad Hafiz* v. *Mohamad Ibrahim* (4), and *Badr-ud-din* v. *Mohamad Hafiz* (5), holding that a surety is neither a joint judgment-debtor nor a person against whom a decree has been passed severally with any portion of its subject-matter distinguished as payable or deliverable by him. Explanation I, therefore, does not apply to a case like this at all, and it must be governed only by the simple unqualified words of cl. 5 itself. The Lahore High Court also dissents from the view held in Bombay, Rangoon and Patna but for a different reason. It is held in *Honda Ram* v. *Firm Seth Kanwar Bhan Sukh Nand* 67 Ind. Cas. 301 (6), that a surety and a principal judgment-debtor are joint debtors as each is liable for the whole amount of the decree. In Madras there is no reported case dealing with this point though we have been referred to a decision of a Bench

(1) 31 B 50; 8 Bom. L R 807.

(2) 111 Ind. Cas. 479; 6 R 334; A I R 1928 Rang. 282.

(3) 120 Ind. Cas. 309; 8 Pat. 310; A I R 1929 Pat. 595; Ind. Rul. (1930) Pat. 21; 11 P L T 220.

(4) 58 Ind. Cas. 791; 43 A 152; 18 A L J 988; 2 U P L R (A) 376.

(5) 77 Ind. Cas. 129; 44 A 743; 20 A L J 726; A I R 1922 All 481.

(6) 67 Ind. Cas. 301; 4 U P L R (L) 70; A I R 1922 Lah. 457; 38 P W R 1922; 74 P L R 1922.

of two Judges in C. M. S. A. No. 62 of 1913 which follows *Narayan Ganpatbhai Agsal* v. *Timmaya* (1), without any discussion of any possible alternative view.

In this conflict of authorities we are of opinion that the method of approach adopted by the Allahabad High Court is the right one. None of the rulings cited from Bombay, Rangoon or Patna lays it down positively that the case of a judgment-debtor and his surety falls within Explanation I. They all assume without any discussion that as the judgment debtor and his surety are not joint judgment-debtors, an execution petition against the former will not avail to save limitation as against the latter. We agree with the Allahabad view that Expl. I does not contemplate a case of this kind at all and, therefore, that cl. 5 itself is the only provision by which this question of limitation must be determined. And this view, we think, is very clearly in accordance with natural justice and the real meaning of suretyship. When a surety guarantees the payment of a decree debt what is ordinarily contemplated is that the decree-holder will proceed first (as he has done here) against the principal judgment-debtor and if he fails to realise his decree in full from him, he will then proceed against the surety for the balance. The surety may no doubt be technically liable from the date of the decree but in equity his liability arises only upon the failure of the principal judgment debtor to satisfy the decree, and in practice it will be only on the happening of that contingency that the decree-holder will think of proceeding against him. In these circumstances it seems to us unreasonable to hold that a decree-holder who may often find that proceedings against the principal judgment-debtor occupy him for more than three years, must file a formal and otherwise futile petition against the surety before the period of three years expires, in order to keep alive against him a remedy which he has not yet thought of using.

For these reasons we hold that the order and judgment of the Courts below are wrong and must be set aside. The appeal is allowed with costs throughout, and the Execution Petition (No. 522 of 1928) ordered to be restored to file and be disposed of according to law.

L. A. *Appeal allowed.*

PATNA HIGH COURT

Jury Reference No. 2 of 1935
March 5, 1935
DHAVLE AND ROWLAND, JJ.
RAMJANAM TEWARI AND OTHERS —ACCUSED
versus
EMPEROR OPPOSITE PARTY

Criminal Procedure Code (Act V of 1908), ss. 307, 298, 194, 196-A (2)—Sessions Court accepting jury's verdict on one charge and disagreeing with jury on another charge—Reference to High Court under s. 307—Competency of — Penal Code (Act XLV of 1860), ss 498, 120-B—Absence of complaint as required by s. 199—Charge under s. 498 added—Question, if charge was proper—Whether one of law—Charge under s. 498 without complaint — Jurisdiction to frame—Trial, validity of—Conspiracy—Object to commit cognizable offence punishable with rigorous imprisonment for over two years—Sanction, if necessary.

It is not open to a Court of Session to accept the verdict of the jury on one charge and disagree with the jury on another charge and refer the matter to the High Court under s. 307 of the Code of Criminal Procedure. *Emperor* v. *Hazari Lal* (1), relied on.

Where a case was committed to the Sessions Court under ss. 366, 420 and 120-B of the Penal Code, but though there had been no complaint by any person competent under s. 199, Criminal Procedure Code, to make one, the Court added a charge under s. 498 Penal Code and the charges under ss. 366 and 498 being tried by jury, a verdict of guilty under s 498 was brought against some of the accused:

Held, that whether the charge under s. 498 of the Penal Code was or was not proper was a question of law; and under s. 298 of the Code of Criminal Procedure, it was the Judge's plain duty to decide that question himself instead of leaving it to the jury and that if the Judge was not really satisfied that the additional charge was not proper, there was no reason whatsoever why he should have treated it as question of fact and left it for the jury to deal with.

Held, also that the charge under s. 498 was framed and tried without any jurisdiction at all, having regard to the terms of s. 199 of the Code of Criminal Procedure, and that all the proceedings that followed upon that charge were equally without jurisdiction.

Where the object of the conspiracy is to commit cognizable offences punishable with rigorous imprisonment for more than two years, under s. 196-A (2), Criminal Procedure Code, no sanction is necessary for a charge under s. 120-B, Penal Code.

J. R. made by the Additional Sessions Judge of Shahabad in his Letter No. 129, dated January 17, 1935.

Dhavle, J.—This is a reference under s. 307 of the Code of Criminal Procedure made by the Additional Sessions Judge of Shahabad in a case which was committed to the Court of Session under ss. 366, 420 and 120-B of the Indian Penal Code. It appears that on the assurance of the Assistant Public Prosecutor that there was authority for adding a charge under s. 498 of the Indian Penal Code,

the learned Judge framed an additional charge under this section, even though there had been no complaint up to that stage by any person competent under s. 199 of the Code of Criminal Procedure to make one. The charges under ss. 366 and 498 were tried by jury, and the jury brought in an unanimous verdict of guilty under s. 498 against four of the accused persons and of not guilty under that section against the other accused persons, and of not guilty under s. 366, in respect of all the accused persons. The learned Judge told the jury that the Assistant Public Prosecutor had not been able to satisfy him that s. 199 of the Code of Criminal Procedure did not prevent the Court from taking cognizance of an offence under s. 498 of the Indian Penal Code, and he left it to them to consider whether the charge under s. 498 of the Indian Penal Code was proper. The verdict of the jury shows that they considered that the charge was "proper" (to use the language of the learned Judge), and as this was not his view he has made this reference under s. 307 of the Code of Criminal Procedure.

On the face of it the reference is incompetent. Section 307 is clear enough, and has been interpreted in several cases, including *Emperor* v. *Hazari Lal* (1) which was decided in this Court not long ago and which points out how it is not open to a Court of Session to accept the verdict of the jury on one charge and disagree with the jury on another charge and refer the matter to the High Court under s. 307 of the Code of Criminal Procedure. The learned Judge has apparently accepted the verdict of the jury in respect of these four persons on the charge under s. 366, for he has limited his reference to the charge under s. 498 and says that the verdict on it is, "contrary to law." Limiting the reference in this manner is, however, not the only error that the learned Additional Sessions Judge has fallen into. Whether the charge under s. 498 of the Indian Penal Code was or was not "proper" as the Judge called it, was a question of law; and under s. 298 of the Code of Criminal Procedure it was his plain duty to decide that question himself instead of leaving it to the jury. Why he should not have called upon the Assistant Public Prosecutor to produce his authorities then and there and looked into them before proceeding with the trial instead of acting on his assurance and framing the charge, does not appear any more than why he should finally have left to the jury what it was for himself to decide. If the learned Additional Sessions Judge was not really satisfied that the additional charge was not "proper", there was no reason whatsoever why he should have treated it as question of fact and left it for the jury to deal with. But the rejection of the reference as incompetent is not the only order that we are called upon in the circumstances of this case to make. We think we ought to point it out to the Court below that the charge under s. 498 was clearly framed and tried without any jurisdiction at all, having regard to the terms of s. 199 of the Code of Criminal Procedure, and that all the proceedings that have followed upon that charge are equally without jurisdiction. It is in fact impossible to do anything with that charge in the absence of a complaint under s. 199, so far as the trial referred to us is concerned.

It appears from the record that the learned Judge has also fallen into another error. The charge under s. 120-B of the Indian Penal Code was dropped on the ground that no sanction was obtained. But the object of the conspiracy was to commit cognizable offences punishable with rigorous imprisonment for more than two years, and it should have been obvious to the Assistant Public Prosecutor and the Additional Sessions Judge, from a mere perusal s. 196-A (2) of the Code of Criminal Procedure, that in such a case no "sanction" was necessary.

Rowland, J.—I agree.

N. *Order accordingly.*

(1) 137 Ind. Cas. 190; 11 Pat. 395; 13 P L T 93; A I R 1932 Pat. 156; (1932) Cr. Cas. 273; Ind. Rul (1932) Pat. 148; 33 Cr. L J 505.

CALCUTTA HIGH COURT

Civil Appeal Suit No. 2399 of 1930

January 10, 1934

ROY, J.

NILADRI NATH MUKHERJEE AND OTHERS—PLAINTIFFS

versus

MADAN THEATRES LTD., AND ANOTHER—DEFENDANTS

Copyright—Copyright Act 1911 (1 & 2, *Geo. V, Ch.* 46), *ss.* 1, 2—*Existence of copyright not denied—Representation and performance of the works—Whether constitute infringement of copyright—Printing of books, if necessary to infringe copyright before Copyright Act* 1911 (1 & 2 *Geo. V, Ch.* 46.)

Where the existence of copyright in certain books is not denied, then the representation and performance of the works of the author by the defendants amounts to an infringement of copyright under ss. 1 and 2, Copyright Act of 1911.

Obiter.—In order to infringe the plaintiff's copyright in books, it is not essential that the defendant should print the books even before the Copyright Act of 1911.

Messrs. *S. B. Singha* and *S. N. Rudra*, for the Plaintiffs.

Messrs. *K. P. Khaitan*, *Agarwalla*, *S. C. Roy* and *U. C. Laha*, for the Defendants.

Judgment.—This is another suit by the three grandsons of *Rai Bahadur* Bankim Chandra Chatterjee who were the plaintiffs in Suit No. 2400 of 1930, *Niladri Nath Mukherjee* v. *Satish Chandra Mukherjee* (1), for the recovery of damages for infringement of copyright. The facts are not in dispute. Counsel for the plaintiffs handed in to me a chronological list of events which was admitted by Counsel for the defendants and which I have directed should be kept on the file. The issues submitted in this suit were practically the same as in suit No. 2400 of 1930 and were the following:

(1) Have the plaintiffs any interest in the copyright in any of the books mentioned in the plaint? (2) Has the defendant company infringed the plaintiffs' copyright as alleged in para. 5 of the plaint? (3) Is the suit barred by limitation? (4). What reliefs, if any, are the plaintiffs entitled to? (5). Is the suit maintainable having regard to the fact that the plaintiffs do not claim any right or declaration of title to property?

By my judgment in the last suit I have held that the plaintiffs are entitled to the copyright claimed along with defendant No. 2, and I decided the issues as to maintainability of the suit and limitation in favour of the plaintiffs. Counsel for defendant No. 1 in this suit intimated to me at the outset that so far as those issues were concerned, he would not advance further arguments as he had been following the arguments in the last case. Issues Nos. (1), (3) and (5) are decided in favour of the plaintiffs.

Counsel for defendant No. 1 Madan Theatres, Limited, has, however, argued that though the plaintiffs might be entitled to to copyright in the books there had been no infringement of copyright. The infringement complained of in this case as has been alleged in para. 5 of the plaint is that the defendant Madan Theatres, Limited had represented and performed or caused or permitted to be represented and performed the works mentioned in the plaint or parts thereof at places of dramatic and public entertainment in Calcutta. In its written statement the defendant company admitted what had been alleged in para. 5 of the plaint but denied that the representation or performance was unauthorised or wrongful. They never disputed that copyright existed in the works mentioned in the plaint but only contended that the plaintiffs had no interest in the copyright. Counsel for the defendant company however sought to argue in Court that the rights of the parties were governed by the old Copyright Act XX of 1847) and that the plaintiffs' copyright in the books could only be infringed if the defendant printed the books.

There is no substance in this argument but I do not think it is necessary to discuss the matter at all as in my view it is not open to the defendant company to raise this point on the present pleadings. The existence of the copyright in the books not having been denied, it follows that what the defendant company had done amounted to an infringement of copyright under ss. (1) and (2), Copyright Act of 1911 (1 and 2 Geo. V. c. 46). Reference may be made in this connection to the case of *Sitanath Basak* v. *Mohini Mohan Singh* (2), which was cited by learned Counsel for the plaintiffs. Issue No. 2 is therefore answered in the affirmative. With regard to Issue No. (4) I do not think the plaintiffs are entitled to any relief against defendant No. 2 and the suit should be dismissed against him.

As against defendant No. 1, there will be a decree for an injunction and for discovery as claimed in prayers (*b*) and (*c*) of the plaint. There will be a reference as to damages and an enquiry will directed to ascertain the profits made by defendant No. 1 by the infringements complained of and the plaintiffs will be entitled to 3-4ths share of such profits. The reference would be to such officer as the Registrar may appoint. The plaintiffs will be entitled to the costs of this suit against defendant No. 1. There will be no order for costs with regard to defendant No. 2.

N. *Decree accordingly.*

(1) 152 Ind. Cas. 835; A I R 1934 Cal. 668; 38 C W N 604; 7 R C 320.

(2) 81 Ind. Cas. 754; A I R 1924 Cal. 595; 39 C L J 134.

PATNA HIGH COURT

Civil Revision No. 524 of 1934
February 11, 1935
DHAVLE, J.
Rani BHUNESHWARI KUER
—PETITIONER
versus
Musammat DEVKI KUER AND ANOTHER—
OPPOSITE PARTY

Bengal Cess Act (IX of 1880), ss 56, 52, 54, 47—Cesses, if become payable only after publication of notices under ss. 52 and 54—Absence of special contract—Tenant, if liable to pay anything except under s. 56—S. 47, if applies to rent-free tenures.

Under s. 56, Bengal Cess Act, cesses only become payable after publication of the notices required by ss. 52 and 54; and this would contradict s. 62 if the latter section were construed to mean that such cesses can be realised before publication of the notices. *Rash Behari Mukerjee* v. *Pitambari Choudhrani* (1), followed.

In the absence of a special contract nothing is lawfully payable by the tenant defendant except under s. 56 which requires as an indispensable preliminary that notices should be served under ss. 52 and 54 of the Cess Act.

The addition of s 64-A to the Act makes it clear that s. 47 has no application to rent-free tenures. *Pitambar Chowdhury* v. *Rahmat Ali* (2), referred to.

C. R. against an order of the Munsif, Second Court, Gaya, dated July 30, 1934.

Mr. *S. N. Ray*, for the Petitioner.

Messrs. *B. P. Jamuar*, *Rajini Kant Sinha* and *M. M. Prasad*, for the Opposite Party.

Judgment.—In this case Mr. Jamuar who appears for the opposite party urges at the outset that there is no room for interference in revision as there is no question of jurisdiction involved. Mr. S. N. Ray who appears for the petitioner has endeavoured to meet this by saying that the lower Court has completely overlooked s. 62 of the Cess Act and has wrongly refused to exercise a jurisdiction vested in it by law.

The suit was for recovery of cess, and the defence was that notices under ss. 52 and 54 of the Act were necessary but had not been given. There was no dispute that the property in respect of which the cess was claimed is a rent-free *Jagir*. The operation of s. 62 in such cases was considered in 1888 in *Rash Behari Mukerjee* v. *Pitambari Choudhrani* (1), where Beverley, J. with whom Norris, J. concurred pointed out that under s. 56 cesses only become payable after publication of the notices required by ss. 52 and 54; and that this would contradict s. 62 if the latter section were construed to mean that such cesses can be realised before publication of the notices. Mr. Ray points out that the plaint was amended to cover a claim not for double the cess as provided in s. 58, but for the ordinary cess only. But under s. 56 even this amount only becomes payable after publication of the notices "and not otherwise" Mr. Ray urges that that would not prevent realization of cess at the old rate, but the case does not seem to have been conducted on that footing below, and I see that the only witness examined for the plaintiff, a law-clerk, cannot even say in which year the cess claimed was assessed, nor does there appear to be anything in the record to show what the old cess, if any, was. It thus seems perfectly clear that in the first place there is no error of jurisdiction committed by the lower Court, and secondly that the view taken by the lower Court is supported by good authority. Mr. Ray has proceeded to argue that the petitioner's claim should have been allowed under ss. 69 and 70 of the Contract Act. The answer to this is that no special contract being even alleged, nothing was lawfully payable by the tenant defendant except under s. 56 which requires as an indispensable preliminary that notices should be served under ss. 52 and 54 of the Cess Act. Reference was made to s. 47 of the Act, but the addition of s. 64-A to the Act makes it clear that s. 47 has no application to rent-free tenures, as was pointed out in *Pitamber Choudhury* v. *Rahmat Ali* (2). There is no merit in the application either, quite apart from the fact that the preliminary objection raised by Mr. Jamuar is perfectly sound.

The application is dismissed. Hearing fee, three gold *mohurs*.

Application dismissed.

(1) 15 C 237.

(2) 65 Ind. Cas. 138; 1 Pat. 218; 3 P L T 282; (1922) Pat. 167; A I R 1922 Pat. 301.

LAHORE HIGH COURT

Second Civil Appeal No. 295 of 1934
July 11, 1934
BECKETT, J.
RODA MAL—PLAINTIFF—APPELLANT
versus
NIGHAHIA AND OTHERS—DEFENDANTS—
RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Tort-feasors—Death of one—Non-impleading of legal representatives—Suit, if abates as against the other.

Where one of two tort-feasors dies and his legal representatives are not brought on record, the suit or appeal does not abate as against the other.

S. C A. from the decree of the Senior Sub-Judge, Hoshiarpur, dated November 10, 1933.

Mr. *Fakir Chand*, for the Appellant.

Mr. *H. J. Rustomji*, for the Respondents.

Judgment.—The plaintiff purchased a strip of land in the hills. The defendants, or some of them, came upon the land and cut down certain trees. The plaintiff then sued them to recover the cost of the timber which they had removed. The defendants raised the defence that they had received permission from the *lambardar*, Nabi Bakhsh; and it was decided that Nabi Bakhsh should be added as a party. Nabi Bakhsh died during the course of the suit and his legal representatives were not brought upon the record within time. The lower Court has held that the suit cannot proceed without them and has dismissed the plaintiff's claim.

The plaintiff has appealed on the obvious ground that the death of one tort-feasor cannot affect the case against another, this contention seems to be correct. It appears from the record that Nabi Bakhsh appeared in Court and stated that he has given permission to the defendants to cut down the trees because they stood on *shamilat* land which did not belong to the plaintiff. The finding of the lower Court on the question of title is in favour of the plaintiff and the learned Senior Subordinate Judge says that this question was not pressed in arguments before him. If the defendants entered upon the plaintiffs' land under permission given by the *lambardar* by mistake, it is difficult to see how the plaintiff's right to claim compensation could be affected by the inclusion or exclusion of Nabi Bakhsh from the list of defendants. It is true that he was held to be a necessary party in a previous decision of this Court but the order in question merely means that his inclusion was necessary if a final adjudication was to be obtained on the question of title, which had been raised in the suit and not that he would still be a necessary party if it was found that the denial of the plaintiff's title by the defendants was entirely unfounded. It is possible that the defendants may still have a good defence in reply to the plaintiff's case, but the suit cannot be dismissed merely because Nabi Bakhsh or his legal representatives no longer appear on the record.

For these reasons I set aside the decision of the lower Court, which is based upon a preliminary point, and remand the suit for determination on the merits. Stamp fee will be refunded and the plaintiff will receive his costs in this Court from the defendants. Other costs will be costs in the suit.

N. *Case remanded.*

PATNA HIGH COURT

Civil Appeal No. 286 of 1931

September 3, 1934

AGARWALA AND SAUNDERS, JJ.

BABAN MISRA AND OTHERS—DEFENDANTS —APPELLANTS

versus

BISHWANATH PANDE AND OTHERS—PLAINTIFFS—RESPONDENTS

Equity—When to be invoked—Considerations—Transfer of Property Act (IV of 1882), s 92—Widow—Purchaser from widow discharging mortgage debt—Reversioner, if entitled to possession only on payment of mortgage debt paid—No allegation of bad faith on part of purchaser—Good faith, if to be proved.

If equity is to be invoked it should be only in favour of persons shown to have acted disinterestedly and in good faith with no intention of securing any unfair advantage for themselves.

Where a purchaser from the widow holding a life-estate discharges a mortgage debt out of the consideration for the mortgage and on the death of the widow, the reversioner sues for possession of the property, credit should be given to the mortgage amount paid by the purchaser. In such case, if the plaintiff reversioner does not impute bad faith on the part of the purchaser, the latter is not bound to allege or prove good faith. *Chinna Alagumperumal* v. *Vinayagathammal* (3), distinguished, *Mohammed Shumshool Hooda* v. *Shewukram* (1), and *Jagdeo Sahu* v. *Mahabir Prasad* (2), referred to.

C. A. from the appellate decree of the District Judge, Muzaffarpur, dated December 3, 1930.

Messrs. *S. M. Mullick*, *B. C. De* and *R. Jha*, for the Appellants.

Messrs. *Parmeshwar Dayal* and *S. N. Banerji*, for the Respondents.

Saunders, J.—This appeal is by the defendants in a suit brought by the reversionary heirs of one Pokhai Pande for possession of land sold by his sister-in-law *Musammat* Tetri while she held the estate in lieu of maintenance after the death of his widow.

The sale of approximately six and a half *bighas* of land was effected by means of two documents executed in 1922 in favour of defendant No. 1, who is her nephew. A portion of the land covered by one of these sale deeds, 1 *bigha* 4 *kathas* 3 *dhurs*, had

been given in usufructuary mortgage to another person by Pokhai Pande in 1911, the sum secured by the mortgage being Rs. 899. This sum and a sum also for redemption of another mortgage which had been executed by *Musammat* Tetri herself were left with defendant No. 1, who in 1924 sold the 1 *bigha* 4 *kathas* 3 *dhurs* to defendants Nos. 2 and 3 for Rs. 1,203 without having redeemed either of the mortgages. Defendants Nos. 2 and 3 redeemed the usufructuary mortgage and obtained possession of the land which they had bought from defendant No. 1. Separate written statements were put in by defendant No. 1 and by defendants Nos. 2 and 3 and in both the written statements the plaintiffs claim to be the reversioners of Pokhai Pande was denied and it was pleaded that the sales by *Musammat* Tetri had been for necessity.

The trial Court decreed the suit and an appeal against the decree was dismissed by the District Judge of Muzaffarpur. This second appeal is by the three defendants, but it is pressed only on behalf of defendants Nos. 2 and 3. Mr. Mullick appearing for the appellants did not question the findings of the lower Courts as to the plaintiffs' right as reversioners or as to the invalidity of the alienations by *Musammat* Tetri, but he contended that defendants Nos. 2 and 3 are entitled to a refund of the Rs. 899 which they paid to the usufructuary mortgagee. He relied on the decisions of two cases, *Mohamed Shumsool Hooda* v. *Shewukram* (1) and *Jagdeo Sahu* v. *Mahabir Prasad* (2). In the former case a mortgage subsisting upon an estate at the time of a sale by a widow with only life interest in the estate was afterwards redeemed by the purchaser and the Judicial Committee of the Privy Council held that it was equitable that when the plaintiff claims the estate, credit should be given to the purchaser for the payment of the mortgage which otherwise the plaintiff himself would have had to meet. In the other case the reversioners of a deceased mortgagor instituted a suit for possession against the person who had purchased the mortgaged property and had deposited the mortgage debt and the view was taken by this High Court that although, as in the present case, s. 92, Transfer of Property Act, did not apply because the section was enacted after the sale, yet the transferee was entitled to the equitable relief claimed by him and that credit should be given to him for the payment of the mortgage debt.

Mr. Parmeshwar Dayal appearing for the respondents attempted to distinguish those cases from this case for the reason that in the former, the payments had been made in good faith whereas defendants Nos. 2 and 3 failed to satisfy the Courts below that they were honest purchasers of the property. He contended also that it is not open to these defendants to claim equitable relief on this ground as they did not do so in their written statement and did not cause any issue to be framed for adjudication of the claim, but contested the suit on same grounds as those taken by defendant No. 1, stating only as regards the sale that it was executed by defendant No. 1 in their favour for consideration and was in every way valid and binding on the estate. The plaint, however, contained no allegation that called for an assertion of good faith on their part. All that the plaintiffs stated in the plaint regarding these two defendants was that they were impleaded as defendants because they were subsequent purchasers of some of the properties and a declaration was prayed for that the first defendant had no right to sell any of the properties to them. The claim was made by these defendants during the hearing of the suit and it was rejected merely because they did not give evidence as witnesses to prove that the purchases have been made in good faith. I do not consider that it was necessary for them to do so when there was no imputation of bad faith in the plaint. In the appeal to the District Judge the plaintiffs' claim to be given possession of the property was not questioned, the appeal being argued only on the ground that the appellants were entitled to a refund of the money they had paid to the mortgagees. The learned District Judge dealt with the point at some length and rejected the claim because he found that defendant No. 1 had acquired the properties dishonestly with the intention of keeping the estate out of the hands of the reversioners; taking the correct view that if equity is to be invoked, it should be only in favour of persons shown to have acted disinterestedly and in good faith with no intention of securing any unfair ad

(1) 22 W R 409; 2 I A 7; 4 B L R 226 (P C).
(2) 153 Ind. Cas. 602; A I R 1934 Pat. 127; 13 Pat. 111; 15 P L T 13; 7 R P 3 7.

vantage for themselves. But nothing that the learned Judge has said regarding the dishonesty of the transactions can have any reference to defendants Nos. 2 and 3 on whose behalf the claim must have been intended to be made for the claim was not open to defendant No. 1 who did not redeem either of the mortgages. The confusion of their case with the case of defendant No. 1 seems to have been due to the fact that the defence taken by these defendants was virtually the same as his. Nevertheless, as I have said, there is no reason to suspect bad faith on their part. Mr. Parmeshwar Dayal has referred to the case of *Chinna Alagumperumal* v. *Vinayagathammal* (3), where a transferee of the property of a minor which he obtained from a person who was not the minor's guardian was found not to be entitled to be reimbursed the money which he had spent for the benefit of the estate. The facts however are clearly distinguishable from the facts of the present case as there was a distinct finding in that case that the transferee's conduct throughout had been dishonest. In the present case I do not see why the plaintiffs should obtain the property free of the encumbrance which they would have had to pay if the property had not been sold to defendants Nos. 2 and 3 and so derive a very substantial benefit from the transaction which they have successfully impugned. I would, therefore, dismiss the appeal so far as defendant No. 1 is concerned, and allow it partly in favour of defendants Nos. 2 and 3 by adding a declaration to the decree that the plaintiffs will not be put in possession of the 1 *bigha* 4 *kathas* and 5 *dhurs* bought by these defendants from defendant No. 1 until the plaintiffs have paid to them the sum of Rs. 899. The three defendants will be liable for three-quarters of the plaintiffs' costs in the Courts below and the parties will bear their own costs of this appeal.

Agarwala, J.—I agree.

D. *Order accordingly.*

(3) 117 Ind. Cas. 731; A I R 1929 Mad. 110; 55 M L J 861; 29 L W 6.

LAHORE HIGH COURT

First Civil Appeal No. 1295 of 1928

May 19, 1934

BHIDE AND DIN MUHAMMAD, JJ.

FEROZE KHAN—PLAINTIFF—APPELLANT

versus

UMAR HAYAT AND OTHERS—DEFENDANTS—RESPONDENTS

Custom (Punjab)—Succession—Self-acquired property—Riwaj-i-am *entry against married daughters—Onus of proof—Shifting of onus—Presumption held rebutted on evidence on behalf of daughter* -Janjúha Rajputs *of Jhelum.*

Even in the case of a *riwaj-i-am* unsupported by instances, the presumption lies in favour of its correctness and a duty is cast upon those who challenge it to rebut this presumption. Consequently, the onus is on the daughters to prove that even after their marriage they excluded the collaterals if the property was the self-acquired property of their father. But the presumption in such cases is so weak that on a mere proof of a small number of instances to the contrary it stands rebutted and the onus is then shifted on to the collaterals to prove that they exclude married daughters from the self-acquired property of their father:

Held, in a case of *Janjuha Rajputs* of Jhelum that the presumption was rebutted by evidence adduced on behalf of the daughters.

[Case-law discussed.]

F. C. A. from the decree of the Senior Sub-Judge, Lyallpur, dated February 10, 1928.

Messrs. *Nanak Chand* and *Mehar Chand Sud* for the Appellant.

Messrs. *Shamair Chand*, *Ladha Ram* and *Qabul Chand*, for the Respondents.

Din Muhammad, J.—The parties to this suit are *Janjuha Rajputs* of Jhelum. One Mirza Khan of Pindi Saidpur, *Tahsil* Pind Dadan Khan, was granted about four squares of land in the District of Lyallpur whose proprietary rights he acquired during his life-time. On his death he left him surviving a widow, *Musammat* Karam Bibi who succeeded to the usual life estate and two daughters, Irshad Begam and Mastura Begum. *Musammat* Karam Bibi died on September 24, 1916, and on her death, the whole ancestral property of Mirza Khan was inherited by his reversioners while the entire self-acquired property situated both in the District of Jhelam as well as in the District of Lyallpur was mutated in favour of her daughters. On the death of Irshad Begam, her share of the property devolved half and half on her husband and her minor daughter, *Musammat* Sardar Begam, respectively. On the death of the husband his share was mutated half and half in the names of his two sons, Ayyub Khan and Umar Hayat, and on the death of the former

his share passed on to the latter. On the death of Mastura Begam her estate went to her son Aurangzeb. The present position therefore is that Umar Hayat is in possession of one-fourth of the self-acquired property of Mirza Khan, deceased, *Musammat* Sardar Begam holds one-fourth, while the remaining half is held by Aurangzeb. Mirza Khan had three brothers, named, Nadir Ali, Nawab Khan and Sarfraz Khan, whose descendants were alive at the time when the present suit was brought by Feroze Khan, one of the two sons of Sarfraz Khan for the recovery of the possession of Mirza Khan's self-acquired lands in the District of Lyallpur to the extent of his own share. This suit was instituted on October 9, 1926, against Umar Hayat, Aurangzeb and *Musammat* Sardar Begam on the allegation, *inter alia* that according to the custom prevailing in the tribe of the parties, a daughter was excluded from the landed property of her father even if it was self-acquired. The defendants denied this custom on which an issue was framed casting the burden of proof upon the plaintiff to prove his preferential right as against the daughters of Mirza Khan. The learned Subordinate Judge, after examining in detail the oral evidence led by the parties as well as the instances cited by them, came to the conclusion that the custom relied upon by the plaintiff was not proved and consequently he dismissed his suit with costs.

The plaintiff has preferred an appeal to this Court, mainly on the ground that as the entries in the *Riwaj-i-am*, of the Jhelum District prepared by Mr. Talbot in 1900 were against the succession of married daughters both as regards ancestral and the self-acquired property, the trial Court erred in law in placing the onus on him and that even if it had been rightly placed, he has succeeded in discharging it, and is, therefore, entitled to a decree. Mr. Nanak Chand, who appeared on his behalf, has strenuously urged before us that in view of the pronouncement of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1) and the subsequent rulings of this Court based thereon and in face of the reply given by the representatives of the *Janjuna* tribe to Questions Nos. 17 and 58 of the *Riwaj-i-am*, the initial presumption lay in favour of the appellant. He contends that for the last eight or nine years, the law has been gradually laid down that even in the case of a *Riwaj-i-am* unsupported by instances, the presumption lies in favour of its correctness and a duty is cast upon those who challenge it to rebut this presumption. This is no doubt true. I have therefore no hesitation in holding that the onus should have been placed on the daughters to prove that even after their marriage they excluded the collaterals if the property was the self-acquired property of their father. The learned Counsel for the respondents has very frankly conceded this proposition of law but he contends that the presumption in such cases is so weak that on a mere proof a small number of instances to the contrary it stands rebutted and the onus is then shifted on to the collaterals to prove that they exclude the married daughters from the self-acquired property of their father. I may, however, note here that the case as originally presented by the plaintiff was that a daughter succeeds in no case (para. 7 of the plaint) and as this was evidently against the entries of the *Riwaj-i-am*, which recognises the right of an unmarried daughter to succeed to her father's estate, whatever the nature of the property, the learned Subordinate Judge appears to have placed the onus on the plaintiff. It is only because the retention of the self-acquired property after the marriage is opposed to the entries in the *Riwaj-i-am* and is being claimed by the daughters that the onus should have been placed on them.

It becomes necessary, therefore, to closely examine and scrutinise the evidence of the parties both oral and documentary to see whether sufficient material has been brought on the record one way or the other. For the plaintiff reliance is placed on the oral evidence as well as on the copies of mutations, Exs. P-3 to P-7 (*a*), in most of which, I may say at once, it has not been clearly established that the property, which was the subject-matter of the mutation, was the self-acquired property of the last male owner. Exhibit P-3 is a case from the village of the parties. Fateh Ali, a *Janjuha Rajput*, was succeeded by his daughter *Musammat* Begam Jan and the record shows that the collaterals in whose favour a mutation had been entered by the *Patwari* after the marriage of *Musammat* Begam Jan, did not agree to the step taken by him and she is still enjoying the land. The plaintiff produced this copy with the object of showing

(1) 38 Ind. Cas. 354; A I R 1916 P C 129; 44 I A 89; 44 C 749; 45 P R 1917; 12 P WR 1917; 21 M L T 310; 32 M L J 615; 19 Bom. L R 388; 15 A L J 525; 21 C W N 842; 26 C L J 175 (P C).

that daughters forfeit their inheritance on marriage. This, however, is not proved by this document.

Exhibit P-4 relates to village Sherpur. It is no doubt true that on the death of Karim Ullah Khan his property was mutated in the names of his collaterals in the presence of his daughter, *Musammat* Razia, but it is admitted by the plaintiff himself that she was only one year old at the time of her father's death and afterwards died in her infancy. Similarly as shown by Ex. P-5 on the death of *Musammat* Sultan Begam her daughter, *Musammat* Said Begam, was ignored in favour of her husband's collaterals, but the mortgagee rights, which alone constituted the self-acquired property of her father, were only valued at Rs. 75 and as she is married to a respectable gentleman of the position of Lieutenant Sahib Khan, D. W. No. 3, it appears that she did not think it worth her while to claim that infinitesimal share of her father's estate. Even if these two instances were taken at their face value, they do not help the plaintiff's case. Exhibit P-4 rather proves that in thus depriving the daughter of the self-acquired property of her father, the *Riwaj-i-am* was being ignored which by virtue of the reply to Question No. 57 conferred the estate on her until marriage at least. The rest of the documentary evidence mostly concerns *Machhis*, *Maliars*, *Jats* and *Awans* of Jhelum, but though the custom amongst all the tribes is uniform, these instances do not help the plaintiff, inasmuch as it is not clear, as has been indicated above, that the property concerned in these mutations was self-acquired of the last male owner. It would appear, therefore, from the above resume of the plaintiff's evidence that he has not been able to quote any instance in which a married daughter was ousted by the collaterals of her father in the matter of succession to his self-acquired property. According to the *Riwaj-i-am* of the district there is no distinction between ancestral or self-acquired property so far as the succession of daughters until marriage is concerned, and there can be no presumption, therefore, that the land to which the daughters had originally succeeded and of which they were deprived at the time of their marriage was only self-acquired, as was urged by the learned Counsel for the appellant when explaining the value of the instances cited by him.

As against this, the defendants have produced both oral and documentary evidence to show that the daughter has successfully asserted her claim to the self-acquired property of her father as against the collaterals in spite of the definite entry in the *Riwaj-i-am*. They have quoted instances to show that not only before the Revenue Officers but even in the Civil Courts, this claim has been recognised. Exhibits D-4, D 5, D-12, D-15, D-16, D-23 and D-24 relate to the previous course of succession to the land in suit as well as to the other self-acquired property of Mirza Khan, and in almost all these cases, the contesting reversioners remained unsuccessful in establishing their claim. Exhibit D-2 proves that *Musammat* Fazal Nur, a married daughter of Shah Alam Khan a *Janjuha Rajput* of Bajwala, succeeded to his self-acquired property in the presence of a collateral Shah Nawaz, who by mutual compromise was assigned 4 *kanals* of *banjar* land only. Exhibits D-17 D-18 and D-19 show that *Musammat* Sardar Begam, daughter of Sarfraz, *Gakhar* retained her father's estate even on her marriage, although the reversioners went up to the Court of the District Judge. Exhibit D-13 is the copy of a judgment of the Subordinate Judge at Pind Dadan Khan, upholding the claim of *Musammat* Said Begam, daughter of Nawab, *Janjuha*, as against his collaterals. Exhibit D-21 is a copy of the order of the Collector, Jhelum, upholding the right of *Musammat* Karam Nur who had succeeded to her father Nawaz, a *Rajput* of *Tahsil* Chakwal to retain her inheritance even after her marriage. It will be interesting to note that some of the instances cited by the plaintiff himself clearly refuted his contention that a daughter does not succeed to her father's estate in any case, as they clearly indicated that a daughter had originally inherited her father's estate.

From the defendant's instances, it would be evident that in almost all cases where there had been a contest between the collaterals and the daughters as regards self-acquired property of the last male owner, the claim of the daughters not only to succeed to the property but also to retain it even after their marriage has been invariably recognised. These instances in my view would be quite

sufficient to shift the onus on to the plaintiff to prove that he had a superior claim to the married daughters of Mirza Khan.

The learned Counsel for the respondents has invited our attention to several authorities of the Punjab Chief Court as well as of this Court to show that the *Riwaj-i-am* of 1900 prepared by Mr. Talbot had been declared to be inconsistent and unsatisfactory. Reference may be made among others to *Khuda Yar* v. *Fatteh* (2). In *Sultan* v. *Sharfan* (3), a Division Bench of this Court observed that the declaration in Talbot's Customary Law that a married daughter cannot inherit even the self-acquired movable property of her father verges on an absurdity. In *Nadran* v. *Mahamad Husain* (4), Addison, J., followed an earlier *Riwajiam* in preference to this *Riwaj-i-am*. In *Mahomed* v. *Jiwani* (5), Abdul Rashid, J., decided in favour of the daughters on the basis of two instances which he thought were sufficient to rebut the presumption created by the entries in the *Riwaj-i-am* under discussion. Similarly in a case from Shahpur reported in *Khan Beg* v. *Fateh Khatun* (6), it was remarked by Tek Chand and Coldstream, JJ., that where the custom recorded in the *Riwaj-i-am* is opposed to the rules generally prevailing, the presumption will be considerably weakened and where the *Riwaj-i-am* affected adversely the right of females who had no opportunity whatever of appearing before the Revenue Authorities, the presumption will be weaker still and only a few instances might be sufficient to rebut it. It may also be useful to indicate that the author himself expressed a doubt as to the correctness of some of the replies that he had recorded in his compilation. In the note appended to the reply to Question No. 57 he has remarked that the answers were somewhat doubtful as they were opposed to the general custom prevalent amongst the agricultural tribes of the province. In the preface to his book also he suggested that most of the statements made to him were those of the persons intersted in them and could not serve as a sure guide to determine the real state of affairs. He observes as follows:

"The Code may be taken to be a correct record of the Customary Law of the people as stated by them, but it does not follow that it is in all cases a correct record of the customs actually existing as the more intelligent tribesmen, who usually act as spokesmen on an occasion of this kind, sometimes allow their opinion as to what customs are expedient to override their knowledge of the customs as they are."

Moreover, it is a matter of common knowledge that the trend in these days is in favour of daughters especially in case of all Muhammadan tribes residing in the northern districts of the Punjab and people are now generally being found inclined to right the immeasurable wrong they had so far been doing to their female heirs. Daughters have been treated of late as a favoured class when opposed to the collaterals of a remote degree even in the case of ancestral property, and the learned Counsel for the respondents has invited our attention to various authorities of this Court relating to a number of districts in the province where the right of daughters to succeed to the self-acquired property of their father even in the presence of brothers and nephews has been clearly recognised. Reference may also be made in this connection to para. 23 (2) of Rattigan's Digest of Customary Law where this has been laid down as a general custom of the Province implying thereby that the exclusion of daughters from the self-acquired property of their father should be treated as exceptional case.

In view of the above, I have no hesitation in holding that the learned Subordinate Judge arrived at a right conclusion in dismissing the suit of the plaintiff, and I would dismiss this appeal with costs.

Bhide, J.—I agree that the presumption attaching to the entries in the *Riwaj-i am* has been rebutted by the evidence on the record and that this appeal must, therefore, be dismissed with costs.

N. *Appeal dismissed.*

(2) 8 P R 1906; 64 P L R 1906.
(3) 111 Ind. Cas. 846; A I R 1928 Lah. 703; 10 Lah. 249.
(4) 132 Ind. Cas. 209; A I R 1931 Lah. 450; Ind. Rul. (1931) Lah. 545.
(5) 151 Ind. Cas. 318; A I R 1934 Lah. 363; 17 R L 118; 2 P R 732; 36 P L R 267.
(6) 135 Ind. Cas. 769; A I R 1932 Lah. 157; 13 Lah. 276; 32 P L R 890; Ind. Rul. (1932) Lah. 161.

LAHORE HIGH COURT

First Civil Appeal No. 403 of 1926
July 9, 1934

TEK CHAND AND BHIDE, J.

ABDUL RAFI KHAN—PLAINTIFF—APPELLANT

versus

Pandit LAKSHMI CHAND AND OTHERS—DEFENDANTS—RESPONDENTS

Abatement—Appellant minor—Next friend parda-

nashin *lady—Respondent dying in different district – Abatement, if should be set aside – Custom (Punjab) —Alienation—Gohna Tahsil of Rohtak District—Male proprietors, powers of—Necessity—Application of money—Act of good management*

Where the appellant is a minor residing in another district and his next friend is a *pardanashin* woman and the death of the respondent takes place in a different district, there is sufficient cause to set aside the abatement.

A male proprietor in the Gohana Tahsil can alienate immovable property freely except for immoral purposes.

[Case-law discussed.]

A vendee is not expected to see to the application of the money by the vendor to the purposes mentioned in the sale-deed.

Where a proprietor sells his land in the village on seeing that his staying there is not safe and with a view to purchase land elsewhere, and he settles there, the sale is an act of good management and cannot be disturbed under any rule of law.

F. C. A. from the decree of the Senior Sub-Judge, Rohtak, dated November 23, 1925.

Messrs. *M. L. Puri* and *M. C. Sud*, for the Appellant.

Messrs. *Shamair Chand, J. L. Kapur, Qabul Chand, J. N, Agarwal* and *Nand Lal* for Mr. *Prabhu Dial*, for the Respondents.

Bhide, J.—The plaintiff Abdul Rafi Khan who is a minor son of Shamshad Ali Khan, a Rajput land owner of Gohana in the Rohtak District, brought this suit for a declaration that two sales of ancestral land effected by Shamshad Ali Khan by sale deeds, dated April 29, 1915, and July 21, 1916, for Rs. 26,000 and Rs. 28,000, respectively, in favour of *Pandit* Lakshmi Chand, defendant No. 1, should not affect his reversionary rights. It was alleged that the parties are governed by custom and that the sale being effected without any valid necessity are not binding on the plaintiff. Defendant No. 1 had transferred portions of the land sold to him to other persons and these were all impleaded as defendants.

The vendees denied that the plaintiff was a son of the vendor Shamshad Ali Khan and further raised the pleas that the suit was barred by limitation, that according to the custom prevailing in the Gohana Tahsil of the Rohtak District, the vendor could alienate ancestral land even without necessity provided the alienation was not effected for immoral purposes, and finally that the alienations were, in fact, made for valid necessity.

The trial Court found that the plaintiff was the son of the vendor and the suit was within time, but held that the parties were governed, by a custom according to which the vendor had power to alienate the land except for immoral purposes, and lastly, that the sales were effected for valid necessity. On these findings the suit was dismissed and the plaintiff has appealed.

A preliminary objection was raised that the suit had abated in part as the vendee *Pandit* Lakshmi Chand and two of the subsequent transferees, *viz.*, Chhatar and Ramji Lal had died and no applications had been made within time to bring their legal representatives on the record. As regards *Pandit* Lakshmi Chand, it appears that he died at Delhi on February 9, 1934, while the application to bring his legal representative on the record was made on May 19, 1934. The application was thus admittedly out of time by 9 days; but it was explained on behalf of the appellant that he lives usually in Hardwa Ganj in the Aligarh District, that his next friend is a *pardanashin* lady and that *Pandit* Lakshmi Chand having died in Delhi, she did not come to know of the death in time. A similar explanation was offered in respect of the delay in making applications to bring on the record the legal representatives of the other two deceased respondents. On behalf of the respondents it was alleged that these two respondents died about 3 or 4 years ago and it was, therefore, urged that such abnormal delay should not be condoned. But there is nothing on the record to show that these respondents died 3 or 4 years ago. In view of all the circumstances, we consider that sufficient cause has been shown for the delay in making the applications for impleading the legal representatives of the deceased respondents and we accordingly set aside the abatement of the appeal in respect of the three respondents.

On the merits of the appeal, the learned Counsel for the appellant contended that the finding of the learned Senior Subordinate Judge, that an alienation made by a *Rajput* proprietor of the Gohana Tahsil of the Rohtak District could not be challenged unless it was made for immoral purposes, was incorrect, that the custom governing the *Rajputs* was the same as the general custom in the province according to which alienations of this kind are not binding unless made for valid necessity, and lastly, that no necessity for the alienations in question had been established.

As regards the point of custom, the oral evidence is of little value and was not relied on by either party. The learned

Counsel for the appellant relied mainly on certain judicial decisions and the *Riwaj-i-am* of the Gohana Tahsil, which, he urged, had been misinterpreted by the trial Court. The judicial decisions relied on by him were Exs. P-8, P-11, P-13, P-9 and P-10.

The first three are of little value. Ex. P-8 is a judgment by Agha Muhammad Sultan Mirza, in which he merely follows an earlier judgment of his (Ex. P-9) in which he has dealt with the question at some length. He also relies on a judgment of Lieutenant-Colonel Knollys, dated March 29, 1920, and one of Mr. Anderson. The former appears to have been set aside by this Court in *Giani* v. *Tek Chand* (1), while the latter is not on the record. In Exs. P-11 and P-13, the point of custom was either assumed or not argued. Exhibit P-9, Agha Muhammad Sultan Mirza, Munsif First Class, has discussed the question of custom at some length. In *Ramji Lal* v. *Tej Ram* (2), a Full Bench decision of the Punjab Chief Court, it was held that the rule laid down in *Gujar* v. *Sham Das* (3) with respect to the central districts of the Punjab that there was a presumption that ancestral immovable property could not be alienated by a member of a village community without necessity, was applicable to the whole of this province. Starting with this presumption, the learned Munsif went on to point out that most of the decisions in which it was held that the proprietors of land in the Rohtak District had unrestricted powers of alienation were based on an enquiry made under the orders of Mr. Clifford, Divisional Judge, in *Har Dayal* v. *Ram Raj*, Civil Appeal No. 235 of 1896. He criticised the enquiry and expressed the opinion that it was of a superficial character and insufficient to displace the presumption as regards the existence of restrictions on the power of alienating ancestral immovable property as laid down in *Ramji Lal* v. *Tej Ram* (2). The last decision relied on (Ex. P-10) was by the District Judge, Karnal, in which he referred to the entries in the *Riwaj-i-am* of the Gohana Tahsil and held that they did not show that a male proprietor could alienate land without necessity. He distinguished the rulings reported in *Giani* v. *Tek Chand* (1) *Uggar Sain* v. *Telu* (4), and *Kala* v. *Ram Chand* (5), on the ground that these relate to the Rohtak Tahsil. I shall presently deal with the *Riwaj-i-am* of the Gohana Tahsil, the terms of which were not discussed by the learned District Judge in this ruling and which in my opinion was not correctly interpreted by him. The learned Counsel for the appellant further relied on two reported rulings: *Budal* v. *Kirpa* (6) and *Ghansham* v. *Balak Ram* (7). The latter was a case of gift by a *Brahman* in Jhajjar Tahsil and it is not in point. The former (which appears from a reference to the record to be a case from Gohana Tahsil) is, no doubt in appellant's favour; but this ruling does not discuss any previous decision or the *Riwaj-i-am*. It makes no reference also to the enquiry made under the orders of Mr. Clifford in Civil Appeal No. 235 of 1896 and it has not been followed in subsequent rulings as pointed out in *Kala* v. *Ram Chand* (5).

The respondents relied on a certain number of judicial decisions copies of which have been marked as Exs. D-50 to D-55 and D-62. Most of these judgments are based on the inquiry made under the orders of Mr. Clifford in Civil Appeal No. 235 of 1896 referred to above, the last one containing a useful resume of the more important earlier decisions. It is true that some of these judgments do not relate to the Gohana Tahsil, but the inquiry ordered by Mr. Clifford in the aforesaid appeal covered the whole of the Rohtak District and was not confined to any particular Tahsil. As a result of Mr. Clifford's decision in that appeal, which was subsequently followed in a large number of cases, a note was appended to the answer to question No. 102, in the compilation of the Customary Law of the District by Mr. Joseph in the year 1911, to the effect that a sonless proprietor in the Rohtak District can sell or mortgage his land without necessity and such alienations cannot be impugned unless made for immoral purposes. This view has now been followed in several reported decisions: see, *e. g. Sheoji* v. *Ali Khan* 20 Ind. Cas. 475 (8) and *Telu* v. *Chuni* 20 Ind. Cas. 373 (9) and was recently endorsed in a Division Bench judgment relating to the Gohana

(1) 64 Ind. Cas. 549; 4 Lah. 111; A I R 1922 Lah. 69; 11 P L R 1922.
(2) 73 P R 1895.
(3) 107 P R 1887.
(4) 71 Ind. Cas. 829; 122 P L R 1923; 4 Lah. 113; A I R 1923 Lah. 1923.
(5) 73 Ind. Cas. 988; 4 Lah. 282; 75 P L R 1923; 5 Lah. L J 404; A I R 1924 Lah. 102.
(6) 23 Ind. Cas. 211; 148 P L R 1914; 76 P R 1914; A I R 1914 Lah. 140.
(7) 36 Ind. Cas. 215; 94 P L R 1916; 181 P W R 1916; A I R 1916 Lah. 145.
(8) 20 Ind. Cas. 475; 230 P L R 1913.
(9) 20 Ind. Cas. 373; 231 P L R 1913.

Tahsil reported as *Behari* v. *Bhola* (10). The view expressed by the learned Munsif in Ex. P-9 that the inquiry made under the orders of Mr. Clifford was a superficial one and cannot be supported. In *Telu* v. *Chuni* (9), it was pointed out by Scott Smith, J., that the enquiry was a very exhaustive one. It appears from the record of that inquiry that all available mutations regarding sales and mortgages were examined and every effort was made to ascertain the custom in the District as far as practicable. It is remarkable that no instances of any attempt to challenge alienations on the ground of want of necessity prior to 1893 were forthcoming (*vide* Ex. D-58).

The decisions on which the learned Counsel for the appellant has sought to rely appears to proceed mainly on the presumption as to the existence of restrictions on the power of alienation of ancestral immovable property by a member of a village community. This rule was originally laid down in *Gujar* v. *Sham Das* (3) with reference to the central Districts of the Punjab, but was extended to the whole of the province in *Ramji Lal* v. *Tej Ram* (2). But the presumption appears to have been based in the latter ruling merely on an inference drawn from the origin and character of a village community and not on any positive evidence as to the existence of such restrictions, outside the central Districts of the Punjab. It was pointed out by Chatterjee, J., in *Hasan* v. *Jahana* (11) that the rule laid down in *Ramji Lal* v. *Tej Ram* (2) could not be accepted without some limitation and that the words "creed, tribe and locality apart" should be read into it. According to the Punjab Laws Act, the initial presumption in the case of Hindus and Muhammadans in this province is that they are governed by Hindu and Muhammadan Law, and if a custom modifying these laws is alleged, it has to be proved. As pointed out by Robertson, J., in *Daya Ram* v. *Sohel Singh* (12) a view which has been endorsed by their Lordships of the Privy Council in *Abdul Husain Khan* v. *Sona Dero* (13).

" the legislature did not show itself enamoured of custom rather than law, nor does it show any tendency to extend the 'principles' of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of Customary Law, nor any theory of custom or deductions from other customs which is to be the rule of decision but only any custom applicable to the parties concerned."

It has been pointed out in later rulings of the Punjab Chief Court, as well as of this Court, that custom is not a matter of theory but of fact, that it is not always logical and cannot be deduced by inferences *of Pala Singh* v. *Lachami* (14) and *Amin Chand* v. *Bujha* (15) and *Gurbhaj* v. *Lachhman* (16). In view of these authorities, I must say with all deference that the rule as to presumption laid down in *Ramji* v. *Tej Ram* (2), is open to question and this was sufficiently demonstrated in the case of the Rohtak District by the inquiry made under the order of Mr. Clifford in Civil Appeal No. 235 of 1896.

Coming now to the *Riwaj-i-ams*, it appears that in Tupper's Customary Law compiled in 1879, it was stated that a proprietor in the Rohtak District had unrestricted power-of-alienation and the revesioners could only exercise their right of pre-emption in the event of a sale (*vide* answers to questions Nos. 25 and 27 at page 176, Vol. 2). It appears, however, that the *Riwaj-i-ams* for the different Tahsils of the Rohtak District varied and the wide proposition as stated above does not seem to be sustainable at least in the case of the Gohana Tahsil. The relevant question and answer with respect to sales of ancestral land in the *Riwaj-i-am* of this Tahsil prepared in 1879 are in the following terms (*vide* Ex. P-4):

Question—

Under what circumstances can a proprietor sell his immovable property?

Are there any circumstances under which he cannot do so?

Answer—

Every proprietor is competent to sell or mortgage his immovable property, whether ancestral or self-acquired, for payment of revenue and fine imposed by Court and for defrayal of marriage, funeral and household expenses, and expenses of a pilgrimage to Mecca.

He is not competent to effect a sale or mortgage to follow immoral pursuits.

The phraseology used is not perhaps happy but it seems clear from the answer that the only circumstances in which a proprietor cannot sell his property are when the sale is intended for immoral purposes. The first portion of the answer mentions in

(10) 144 Ind. Cas 616; 14 Lah. 600; 34 P L R 342; A I R 1933 Lah. 339; 6 R L 4.

(11) 71 P L R 1904; 96 P L R 1904.

(12) 110 P R 1906; 31 P L R 1907.

(13) 43 Ind. Cas. 306; A I R 1917 P C 181; 45 C 450; 16 A L J 17; 4 P L W 27; 34 M L J 48; 22 C W N 353; 23 M L T 117; 27 C L J 240; 1 P L R 1918; 20 Bom. L R 528; 12 S L R 104; 45 I A 10 (P C).

(14) 32 Ind. Cas. 16; 105 P R 1915; 73 P L R 1915 Sup.; A I R 1916 Lah. 141.

(15) 32 Ind. Cas. 29; 107 P R 1915; 70 P L R 1915 Sup.; A I R 1916 Lah. 128.

(16) 88 Ind. Cas. 550; 26 P L R 217; 6 Lah. 87; A I R 1925 Lah. 341; 1 L C 492; 7 Lah. L J 133.

a general way what are considered to be necessities, but apparently without being exhaustive. The learned Counsel for the appellant urged that the concluding portion of the answer was redundant, but there seems to be no justification for holding it to be so. It was a definite answer in reply to the question as to the circumstances under which a proprietor could not alienate his immovable property and there is no justification for ignoring it. Reading the answer as a whole, it seems to me that a proprietor in the Gohana Tahsil can alienate immovable property freely except for immoral purposes. This rule is in consonance with Hindu Law, which, as is well-known, prevails to a considerable extent in the Rohtak and other districts forming part of the old Delhi territory. The correctness of the custom as stated above was affirmed by the inquiry made by Mr. Clifford and has been accepted in many subsequent decisions. It was also accepted recently in *Behari* v. *Bhola* (10).

I accordingly hold that the learned Senior Subordinate Judge was right in his conclusion that the plaintiff had no *locus standi* to challenge the sales in dispute unless they were proved to have been made for immoral purposes. The plaintiff has produced a certain amount of evidence to show that the vendor was a man of immoral character, but it is by no means convincing. The vendor was less than 20 years of age at the time of the sales and it can hardly be believed that he was addicted at that age to prostitution, drink and other vices as stated by the witnesses. Besides, most of the evidence relates, as pointed out by the learned Senior Subordinats Judge, to a later period. There is nothing to show that the consideration for the sale deed was intended for immoral purposes, and the sales cannot, therefore, be held to be invalid on this ground, according to the custom governing the parties.

In view of the above finding, it is not necessary to go into the question of necessity for the sales; but I may point out briefly that the sales appear to have been necessitated by peculiar circumstances and may reasonably be looked upon as an act of good management, even according to the custom, generally prevailing in the province. It appears that the relations between the family of the plaintiff and tenants in the village, where the land was situated had become very strained and three members of the family including the father of the vendor had been recently murdered. Security proceedings were taken under s. 107, Criminal Procedure Code, against the tenants but unfortunately these proved infructuous. As a result, the members of the family, finding their position in the village precarious, sold their lands one by one as they found it difficult to manage them or recover rent (*vide* Exs. D-1 to D-7 and D-10). It is, therefore, not surprising to find that the vendor Shamshad Ali, who was a youngster aged less than 20, had lost his parents and was living with his maternal relations in the United Provinces, found it necessary to adopt the same course. It may be noted that the sales were made with the sanction of the Deputy Commissioner under the Punjab Alienation of Land Act. The circumstances necessitating the sale were mentioned in Shamshad Ali's application to the Deputy Commissioner dated April 23, 1915 (*vide* Ex. D-13). It was also stated in the sale deeds that the vendor wanted to buy other lands. Further it is in evidence that he did actually buy some land in the United Provinces for Rs. 11,000 and also purchased mortgagee rights in other land for Rs. 24,682, shortly after the sales (*vide* Exs. D-63 and D-66). The land was bought in the name of K. Muhammad Mahfuz Ali Khan, father-in-law of the vendor and he gifted it in favour of the vendor's wife; but there is ample evidence on the record to show, as pointed out by the learned Senior Subordinate Judge, that this was merely a device to defeat the claims of possible pre-emptors. Further, there is evidence on the record to show that Shamshad Ali built a house for himself at a cost of about Rs. 8,000 or Rs. 9,000 in 1917-18. It is well-established that a vendee is not expected to see to the application of the money by the vendor to the purposes mentioned in the sale deed, but the facts stated above are sufficient to show that the vendee acted in good faith and that the money was not wasted on any immoral pursuits.

The consideration for the two sales as stated in the deeds was Rs. 26,000 and Rs. 28,000. The learned Senior Subordinate Judge has held that only Rs. 24,000 and Rs. 23,000 out of the consideration were satisfactorily proved to have been paid and the rest was probably fictitious. It was urged that the vendee cannot be held to have acted in good faith unless it was shown that the above sums represented the proper market value of the land sold. But the evidence on the record shows that Fayyaz Ali Khan, who was a co-sharer to

the extent of one-half share in the same *khata*, sold his share for Rs. 48,000 (*vide* Ex D-3). Considering this fact, there is no adequate ground to hold that the land was sold below its market price.

In view of all the facts stated above, I feel no hesitation in holding that the sales in question were fully justified in the circumstances of the case and were an act of good management. In *Jai Singh* v. *Darbara Singh* (17), a sale of ancestral land by a person governed by ordinary custom was upheld as an act of good management, when the land was bringing him little income and he found it necessary to migrate to China to make a living. The same principle would apply to the present case.

On the above findings, this appeal must fail and I would accordingly dismiss it with costs.

Tek Chand, J.—I agree.

Appeal dismissed.

D.

(17) 89 Ind. Cas. 302; 6 Lah. 137; 26 P L R 329; A I R 1925 Lah. 396.

LAHORE HIGH COURT

Second Civil Appeal No. 1317 of 1933.
April 26, 1934
ABDUL RASHID, J.

AUTAR SINGH—DEFENDANT—APPELLANT
versus
LAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS

Mortgage—Mortgage of reversionary rights—Validity of, in the Punjab—Transfer of Property Act (IV of 1882), s. 43.

A contract mortgaging a *spes successionis* in a province where the Transfer of Property Act is not in force can be enforced as an agreement to convey the estate when it falls into possession. A mortgage of the reversionary right of succession is, therefore, enforceable in the Punjab, although it does not effect a transfer of property at the time of the sale. *Annanda Mohan Roy* v. *Gour Mohan Mullick* (5) and *Naranjan Singh* v. *Dharam Singh* (6), followed.

[Case-law discussed.]

S. C. A. from the decree of the Additional District Judge, Lahore, dated June 10, 1933.

Mr. *Mehr Chand*, for the Appellant.

Mr. *Tirath Ram*, for the Respondents.

Judgment.—The facts relevant to the decision of the question of law arising in this case may be shortly stated. Autar Singh, defendant, and *Musammat* Ishar Kaur were joint owners in equal shares of two plots of land, one of which was situated in village Fatta Khoja and the other in village Sagga. All the joint land in village Fatta Khoja was in possession of Autar Singh, and the whole of the land in village Sagga was in the possession of *Musammat* Ishar Kaur. On March 19, 1928, Autar Singh defendant mortgaged 190 *kanals* of land situated in village Fatta Khoja in favour of the plaintiffs for Rs. 6,500. The mortgagees were put in possession of the land. A short time after the mortgage, *Musammat* Ishar Kaur, applied for partition of her share, and thereupon, 138 *kanals* 16 *marlas* out of the mortgaged land were granted to her, while 51 *kanals* 4 *marlas* fell to the share of the defendant. Shortly afterwards *Musammat* Ishar Kaur died, and the defendant succeeded to her rights as well, as he was her husband's nearest reversioner. The plaintiffs instituted the present suit on July 1, 1932, for a declaration to the effect that they were mortgagees with possession in respect of 190 *kanals* of land situated in Fatta Khoja by virtue of the mortgage deed, dated March 19, 1928. They also claimed an injunction restraining the defendant from dispossessing them or interfering with their possession. The plaintiffs alleged in their plaint that at the time of the execution of the mortgage deed the defendant had made a representation that the land in dispute belonged to him, and that in any case as the entire area had now fallen to the share of the defendant, he could not deny the plaintiffs' claim. The defendant pleaded, *inter alia*, that the plaintiffs were fully cognisant of the fact that he was owner of only one-half share of the land in dispute, and that the other one-half belonged to *Musammat* Ishar Kaur, and that, therefore, the plaintiffs were not entitled to the relief claimed. The trial Court held that in every sale or mortgage of immovable property there is an implied covenant that the title of the alienor is not defective in any manner, and that in accordance with the provisions of s. 43, Transfer of Property Act, the plaintiffs were entitled to maintain possession of the mortgaged property as the entire mortgaged property had fallen to the share of the defendant on the death of *Musammat* Ishar Kaur. The plaintiffs were granted a decree with costs against the defendant.

On appeal the learned District Judge confirmed the decision of the trial Court, and the defendant has now come up in Second Appeal to this Court. The learned District Judge has given the following

findings which may be quoted *in extenso*

"Autar Singh was mortgaging the entire land as his own and not mortgaging the reversionary rights he held in *Musammat* Ishar Kaur's land. He clearly stated on oath that he made himself out to be the owner of the entire land. Bur Singh, P. W. No. 2 who is an attesting witness to the mortgage deed deposed that Autar Singh expressly represented the entire land to be his own It is true that the mortgagees were perhaps not unaware of the fact that *Musammat* Ishar Kaur originally held a one half share in the land, but considering that Autar Singh was in possession of all the joint land in Fatta Khoja and *Musammat* Ishar Kaur was in possession of all the joint land in village Sagga, they (mortgagees) might well have been induced to believe that by a family arrangement Autar Singh had become the sole proprietor of the land in suit. The case is in my opinion fully covered by s. 43, Transfer of Property Act, which lays down that where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property, and professes to transfer such property, for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists."

It was argued by the learned Counsel for the appellant that the right of an heir succeeding to an estate cannot form the subject-matter of any valid contract and that if such a right is transferred, the contract is absolutely void. It was further urged that it was unnecessary to determine in such cases whether the doctrine of *spes successionis* was applicable to the Punjab in view of the fact that the Transfer of Property Act does not apply to this province, as the transfer of *spes successionis* is void under Hindu Law also. Reference was made in this connection to the following Privy Council Rulings: *Sham Sundar Lal* v. *Achhar Kunwar* (1), *Amrit Narayan Singh* v. *Gaya Singh* (2), *Annanda Mohan Roy* v. *Gour Mohan Mullick* (3), *Harnath Kunwar* v. *Indar Bahadur Singh* (4) and *Ananda Mohan Roy* v. *Gour Mohan Mullick* (5). In my opinion, no question of the transfer of a *spes succcssionis* arises in the present case. The learned District Judge has found that Autar Singh mortgaged the entire land in dispute as his own property and that he did not purport to mortgage the reversionary rights he held in *Musammat* Ishar Kaur's land. In view of this finding, the rulings relied upon by the learned Counsel for the appellant are inapplicable to the present case. Moreover, it was held in *Naranjan Singh* v. *Dharam Singh* (6) that a sale of a reversionary right of succession, though at the time of the sale it does not affect a transfer of property, gives rise to a right which the Court will enforce when the inheritance falls into possession. Such a contract is enforceable in a province where the Transfer of Property Act is not in force. *Annanda Mohan Roy* v. *Gour Mohan Mullick* (5) was considered in this ruling and it was pointed out that the observations in the Privy Council ruling were confined to cases arising in the provinces where the Transfer of Property Act was in force. It was held in Letters Patent Appeal No. 87 of 1924 by Sir Shadi Lal, C. J., and Le Rossignal, J., that a contract mortgaging a *spes successionis* in a province where the Transfer of Property Act was not in force could be enforced as an agreement to convey the estate when it fell into possession. The present suit is suit for a declaration, and the mortgagees are already in possession of the property in dispute. The facts of the case referred to above are, therefore, on all fours with the present case. Reference may also be made in this connection to *Malak Allah Bakhsh* v. *Ghulam* (7). It was maintained on behalf of the appellant that the principle underlying s. 43, Transfer of Property Act, was inapplicable to the present case as the mortgagees knew that *Musammat* Ishar Kaur was the owner of one-half of the land in village Fatta Khoja, and that, therefore, they were not misled by any erroneous representation made by the defendant-appellant. This point, however, cannot be raised in Second Appeal as the learned District Judge has found as a fact that Autar Singh mortgaged the entire land representing it to be his own property and did not reveal the fact that *Musammat* Ishar Kaur had any right in this land. The observations of the learned District Judge that the mortgagees were perhaps not unaware of the fact that

(1) 21 A 71; 25 I A 183; 2 C W N 729; 7 Sar 417 (P C).

(2) 44 Ind. Cas. 408; 45 C 590; 23 M L T 142; 22 C W N 409; 27 C L J 296; 34 M L J 298; 4 P L W 221; 16 A L J 265; (1918) M W N 306; 7 L W 581; 20 Bom. L R 546; 45 I A 35 (P C).

(3) 65 Ind. Cas. 27; 48 C 536; 25 C W N 496; 33 C L J 457.

(4) 71 Ind. Cas. 629; 45 A 179; A I R 1922 P C 403; 9 O & A L R 270; 9 O L J 652; 44 M L J 489; 37 C L J 346; 27 C W N 949; 50 I A 69; 18 L W 383; 26 C C 223; 33 M L T 216; 5 P L T 281; 2 Pat. L R 237 (P C).

(5) 74 Ind. Cas 499; 50 C 929; 21 A L J 718; 4 P L T 609; A I R 1923 P C 189; (1923) M W N 803; 45 M L J 617; 25 Bom. L R 1269; 33 M L T 365; 50 I A 239; 28 C W N 713; 40 C L J 10 (P C).

(6) 129 Ind Cas. 29; 31 P L R 909; A I R 1930 Lah. 928; Ind. Rul. (1931) Lah. 109.

(7) 13 P R 1899.

Musammat Ishar Kaur originally held a one-half share in the land do not mean that the mortgagees were aware at the time of the execution of the mortgage deed that *Musammat* Ishar Kaur had any share in the specific fields that from the subject-matter of the mortgage.

For the reasons given above I am of opinion that as the defendant did not purport to mortgage a *spes successionis* the mortgage cannot be held to be void *ab initio*, and that in any case the case is fully covered by the principles underlying s. 43, Transfer of Property Act. I, therefore, hold that the decision of the lower Court is correct and dismiss the appeal with costs.

N. *Appeal dismissed.*

CALCUTTA HIGH COURT

Civil Appeal No. 37 of 1934
May 21, 1934
COSTELLO AND LORT-WILLIAMS, JJ.
SAMARENDRANATH MITRA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
PYAREECHARAN LAHA—DEFENDANT—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 4, 11, O. IX, r. 9, s. 11—Certificated guardian appointed guardian ad litem*—Such person ceasing to be certificated guardian—Whether ceases to be guardian* ad litem, ipso facto*—Suit dismissed for want of prosecution under O. IX, r. 9—No issues tried*—Res judicata*—Words and phrases—"Cause of action"—Meaning of.*

Normally if a minor wishes to institute a suit and he has a certificated guardian then that certificated guardian is the right person to act as the next friend of the minor. If, on the other hand, a suit is brought against a minor who already has a certificated guardian then he is the person who must be appointed guardian for the suit unless the Court otherwise decides. There is no inherent disqualification in all persons other than certificated guardians to be a guardian *ad litem*. Where a person appointed guardian *ad litem* at the time when the suit was started is in fact the certificated guardian, the appointment is strictly in conformity with the provisions of sub-r. (2), O. XXXIV, Civil Procedure Code. The mere fact that he subsequently ceased to be the certificated guardian, and somebody else was appointed in his stead, does not of itself impose such an absolute and fundamental disqualification that he automatically vacates his office and becomes *functus officio*. The only way of getting rid of a guardian *ad litem* who has once been properly appointed, is under the provisions of r. 11, subject perhaps to the implications of sub-r. (1), r. 4. [p. 886, col. 2.]

The question of *res judicata* does not arise where a suit is dismissed for want of prosecution, under O. IX, r. 9, Civil Procedure Code, and the issues which are raised or might have been raised are never tried out and there is no judicial determination of any of them.

It is quite correct to define "cause of action" as meaning all the congeries of facts which it is necessary for the plaintiff to establish before he can ask the Court to grant the relief which he claims in the suit.

C. A. from original in Extraordinary Civil Suit No. 4 of 1933.

Messrs. *Sudhir Roy* and *N. Sanyal*, for the Appellants.

Messrs. *S. N. Banerjee*, *Page*, *K. Basu Roy*, Advocate General and *Sambhu Banerji* for Mr. *Kshettri*, for the Respondent.

Costello, J.—The facts, out of which this appeal arises, are set forth in the early part of the judgment of Buckland, J. In order to make it clear, however, how it came about that only certain issues were decided by the learned Judge it is necessary that I should recite some of the salient facts. In the year 1931, one Krishnakatyayanee Mitra became entitled to the estate of her grandfather, Kumarkrishna Deb, in the right of a Hindu lady. It is said that her husband, Asokenath Mitra, was a man of dissolute habits, who had dissipated the properties which he had himself inherited from his own father. The story is that Krishanakatyayanee Mitra was induced by her husband, Asokenath Mitra, to borrow various substantial sums of money and to create mortgages and other securities on the estate which she had acquired from her grandfather, in order that the personal debts of her husband might be paid off, and also to provide him with funds for what is described as his "evil propensities." It is said that the result of these operations was that Asokenath Mitra and his wife were in such financial straits that they, in conspiracy with an attorney named N. C. Mandal, and a man named Amalkanta Sarkar, who was their son-in-law, entered into various projects for the purpose of raising large sums of money for discharging the antecedent liabilities whereby their infant sons were deprived of the interest which they would eventually have acquired upon the cessation of their mother's estate.

On March 25, 1927, Amalkanta Sarkar was appointed guardian of the person and property of the present plaintiffs, the two sons of Asokenath Mitra and Krishnakatyayanee, who are minors. Amalkanta Sarkar was ostensibly appointed for the purpose of safeguarding the reversionary interest of the plaintiffs in the property. The conspiracy alleged may be described thus: The Solicitor N. C. Mandal, advised Asokenath Mitra to induce Krishnakatyayanee to surrender her interest in her

grandfather's estate to the minors, which was done, and the Solicitor arranged for a loan on the security of a mortgage of the properties. It is said that the defendants, Pyareecharan Laha and Anandacharan Laha, are relations of the Solicitor. The surrender having been made, the Solicitor then filed a petition on behalf of the then guardian of the plaintiffs, Amalkanta Sarkar, before the District Judge of the 24-Parganas, and obtained permission to raise a loan of Rs. 2,50,000 on behalf of the minors by means of mortgage of the properties. That was done on August 16, 1929. On September 22, 1929, another petition was put in before the District Judge of 24-Parganas asking for approval of the draft mortgage to be prepared in favour of the Laha defendants. On September 27, 1929, a deed of surrender and a mortgage-deed for Rs. 2,50,000 in favour of the Laha defendants was executed by Amalkanta Sarkar. Part of the allegations against the defendants is that the whole of the money was retained by the Solicitor defendant, N. C. Mandal, and that no part of it came into the hands of Amalkanta Sarkar, as guardian of the minors.

It was, subsequently, found that the surrender might not have been entirely valid in law because certain portions of the property inherited by Krishnakatyayanee Mitra had not been included in the original deed of surrender. Consequently on October 5, she executed an instrument which has been referred to as a Deed of Rectification of the Deed of Surrender. I would pause here to say that it is not material for our present purpose to discuss the question which might have arisen as to whether a surrender of this kind was properly within the contemplation of the provisions of Hindu Law. That point has not been taken. But the surrender is challenged on the ground that the whole matter was in the nature of a plot to deprive these minors of their reversionary rights in regard to the property.

On April 12, 1930, the attorney, N. C. Mandal, again made an application to the District Judge, 24-Parganas, and on that occasion asked for permission to raise a further loan of Rs. 80,000 also on the mortgage of the estate. It was, in fact, a second mortgage of the same property as that comprised in the mortgage to the Lahas. It is said that as a result of that transaction, the Solicitor defendant received for his own benefit a sum amounting to Rs. 44,000 and that Amalkanta Sarkar, the then guardian, and Asokenath Mitra, the father of the minors, also received large sums for their own purposes. The allegations made by the minors against their parents and their guardian and the attorney relate to the transactions I have just described.

After an interval of a few months—about November 12, 1930,—the Lahas instituted a suit on the mortgage to them and that was suit No. 2090 of 1930. In that suit they made Krishnakatyayanee a defendant and also Lakshmeenarayan Kshettree who was a second mortgagee, the man who had lent the Rs. 80,000. On November 22, 1930, Amalkanta Sarkar, who, as I have already said, had been appointed guardian of the person and the properties of the present plaintiffs on March 25, 1930, was appointed guardian *ad litem* of the minors in the mortgage suit and for the purposes of that suit, and that it is an important fact to be borne in mind, having regard to what transpired subsequently. On April 30, 1931, a man named Asheshnath Mitra, who is also some kind of relation of the present plaintiffs, made an application to the District Judge of the 24-Parganas at Alipore, asking for the removal of Amalkanta Sarkar from the guardianship of the minors on the allegations that he was neglecting and disregarding their interest and had in effect worked hand-in-hand with the parents of the minors and this Solicitor N. C. Mandal, to defraud the minors of their properties. On that date, an order was made appointing Asheshnath Mitra guardian provisionally. It was also directed that the eldest of the three minors (there were three at that time) who was aged about 20, should appear before the Court.

Then, on May 5, 1931, the suit with which we are concerned, was instituted by the minors, the present plaintiffs and their elder brother, through their next friend and guardian, Asheshnath Mitra. It is to be noted that at that time he was, strictly speaking, only provisionally the guardian. However, he instituted a suit, which is suit No. 936 of 1931, asking for a declaration that the four instruments I have mentioned, *viz.*, the deed of surrender, the first deed of mortgage, the deed of rectification, and the second deed of mortgage were of no effect and invalid in law and for an order setting aside those instruments. On the same day, an application was made in that suit by the minors through their

guardian. This application was made by the minors for an injunction restraining the plaintiffs in the mortgage suit, that is to say, Lahas and the Kshettrees, from proceeding with their suit, and on the application an *interim* injunction was granted. On May 7, an order was made appointing Asheshnath Mitra as guardian of the minors, subject to his furnishing security as specified and directing the removal of Amalkanta Sarkar from the guardianship which he previously held. On that date, the eldest of the three minors appeared before the Court and apparently expressed some opinion in the matter. On May 14, the matter of the application in suit No. 936 made for the purpose of staying the mortgage suit came again before the Court and on that occasion an order was made without prejudice to the rights of the parties in suit No. 936 of 1931, that the mortgage suit being No. 2090 of 1930, should be proceeded with The mortgage suit, apparently, was pursued in the usual course.

On May 14, 1931, a preliminary decree was made in the mortgage suit. The mortgage suit was in fact not defended and the usual preliminary decree was made. One of the allegations in the present suit, in effect, is that the mortgage suit was allowed to go undefended, owing to the deliberate action or rather abstention of the guardian *ad litem* Amalkanta Sarkar. What is complained of with regard to that decree is that the mortgagee ought to have made it their business to have substituted Asheshnath Mitra in place of Amalkanta Sarkar, as guardian *ad litem* of the minor defendants. On June 9, 1931, Asheshnath Mitra definitely became the guardian of the person and property of the minors having satisfied the District Judge with regard to the matter of the security which he had been directed to furnish. It is clear therefore at any rate, as from June 9, 1931, Asheshnath Mitra was in a position to take such steps as he thought fit in the interest of the minors.

On July 24, 1931, suit No. 936 of 1931 was dismissed for want of prosecution. It was said that Asheshnath Mitra had to go away to Benares owing to the illness of his mother. That is the explanation given on behalf of the plaintiffs. On the other hand, it was suggested, on behalf of the defendants in the present suit, that what really happened was that the non-appearance of Asheshnath Mitra was really consistent with, and indeed in pursuance of, the whole conspiracy. It is suggested that Asheshnath Mitra was really acting in conjunction with the parents of the minors, and with the solicitor in getting himself made a certificated guardian, in order that he might then accuse the other conspirator, Amalkanta Sarkar, of having betrayed the interests of the minors in connection with the antecedent transaction. I am bound to say, speaking for myself and looking at the matter in due perspective, that one cannot altogether be free from a suspicion that that may have been the true state of affairs. We are, however, not concerned with that aspect of the matter at the present stage.

On May 13, 1932, a final decree was made by Ameer Ali, J., in the mortgage suit (No. 2090 of 1930), and at that time, so far as the records show, Amalkanta Sarkar was still the guardian *ad litem* of the infant defendants. Against that final decree there was an appeal, but that appeal was dismissed for want of prosecution on February 2, 1933, and some three months later the eldest of the three minors, Sailendranath Mitra died. It is to be observed that the mortgagees had clothed themselves with full rights in the way of enforcing their mortgage as early as June 30, or at any rate, February 2, when the appeal of the defendants was finally dismissed. One result of that appeal against the final decree was that the mortgagors had succeeded in staving off execution under the final decree for a period of some nine months.

Nothing more was done by the mortgagors until June 29, 1933, when the mortgagees were enforcing their security by bringing the mortgaged properties to sale, and on that date a rather curious thing happened. A suit was filed in the Alipore Court asking for a declaration that the decrees obtained in the mortgage suit No. 2090 of 1930, including presumably the decision of the Court of Appeal, were void and the properties were not saleable in the execution proceedings and also for a perpetual injunction restraining the defendants, that is to say, the mortgagees, from putting the decrees which they had obtained to execution. One cannot fail to observe, in passing, that it seems somewhat strange that Asheshnath Mitra, acting for these minors, thought fit to take himself to the Court of a Munsif at Alipore, in order to challenge the decrees made by this Court. The defendants in that

"extraordinary" suit (it was extraordinary in more senses than one) took appropriate proceedings for having that suit transferred to the Original Side of this Court, and on August 1, 1933, there was an order transferring the suit on certain terms, one of which was that the defendants in the suit, the mortgagees, should provide a sum of money to enable the plaintiffs to pursue the suit in this Court.

On August 17, 1933, there was an order for amendment of the plaint which is of some importance, as some of the amendments clarified the attitude which the plaintiffs were taking up as regards the whole of the transactions entered into by their parents by the solicitors and by their former guardian. On August 30, 1933, an order was made in the suit that certain issues should be tried as preliminary issues, obviously a proper order in the circumstances, because, in one view of the matter, the determination of those issues might have put an end to the whole of the proceedings. It is in consequence of that order that the suit came before Buckland, J., and from his decision it now comes before us in appeal. The order was made by Panckridge, J., and he directed that the following issues should first be tried:

"(1) Whether the minors are properly represented in suit No. 2090 of 1930, (2) whether this suit is barred by *res judicata* and by principles analogous thereto, and (3) whether the suit is barred under O. IX, r 9, Civil Procedure Code."

With regard to the first of those issues, the learned Judge came to the conclusion that there was no such defect in the form of the proceedings in suit No: 2090 of 1930, as would operate to make either the preliminary decree or the final decree obtained in that suit, invalid. The learned Judge puts the matter in this way:

"On the first issue it is submitted that the minors are not properly represented because O. XXXII, r. 4, Civil Procedure Code, provides that where a minor has a guardian appointed by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers otherwise."

And then the learned Judge says:

"The certificated guardian of the minors was undoubtedly appointed as their guardian *ad litem* at the inception of suit No. 2090 of 1930, and there can be no question that at the time the minors were properly represented within the meaning of the section."

Mr. Roy has argued before us, on behalf of the plaintiffs-appellants, that as Asheshnath Mitra was appointed guardian of the person and property of the minor on May 5, 1931, and Amalkanta Sarkar was removed from the guardianship on that date, at the time when the mortgage suit came to trial, the minors were not properly represented in that Asheshnath Mitra had never been substituted in place of Amalkanta Sarkar. The learned Judge came to the conclusion that if a person has once been validly appointed guardian *ad litem* he remains such and properly represents the minors, or lunatics, as the case may be, unless and until he has been removed from the office of guardian *ad litem*. This point is of considerable importance. Mr. Roy was quite unable to put before us any direct authority on the point. I ventured to suggest to Mr. Roy that hitherto it has never occurred to any one seriously to argue that a guardian who has been properly appointed guardian *ad litem* *ipso facto* ceases to be guardian *ad litem* merely because some other person has got himself appointed guardian of the person and property of the minor plaintiffs, by some other Court. I have mentioned the fact that in the present instance the guardian *ad litem* was appointed by this Court in suit No 936 of 1931. The certificated guardian was appointed by the Court at Alipore and it struck me as being somewhat remarkable and that it might lead to considerable inconvenience, if orders made by some other Court were to have the effect of abrogating orders made by this Court, in a pending suit. In my opinion, that position cannot arise, however, because I take the view that once a person has been properly appointed guardian *ad litem*, he only cease to be guardian *ad litem* in one or other of the ways specified in O. XXXII, r. 11 which says in sub-r. (1).

"Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit."

Then in sub-r. (2) it is provided that:

"Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place."

In my opinion, as there are no other direct provisions in the Code in regard to this matter, it must be taken that there are only three ways by which a guardian *ad litem* can cease to function as such during the pendency of a suit: (1) by his retirement with the permission of the Court. It should be noted that under the old Code, even that was not allowed. (2) By his death, and (3) by his removal by an order of the Court itself. It is to my mind of

great significance in these proceedings that though Asheshnath Mitra got himself appointed certificated guardian by a Court at Alipore, he never came to this Court to ask for the removal of Amalkanta Sarkar from being guardian *ad litem* in suit No. 936 of 1931, even though he was making before the Alipore Court very serious allegations as to the integrity and diligence of Amalkanta Sarkar. I think I ought perhaps qualify what I have said with regard to the termination of the office of guardian *ad litem*, during the pendency of a suit, by saying that it may perhaps be that if a guardian *ad litem* became of unsound mind, he might by reason of the provisions of r. 4, sub-r. (1), thereby become so disqualified that he would cease to act as guardian for the suit.

It is to be noted that the provisions of sub-r. (1) are in general terms and they lay down that any person who is of sound mind and has attained majority may act as next friend of a minor or as guardian for the suit. I emphasize the words "may act" because it is quite arguable from that phraseology that a person who ceases to be of unsound mind, can no longer 'act' as guardian for the suit. But what we are concerned with, in the present case, are the provisions of r. 4, sub-r. (2) and they are as follows:

"Where a minor has a guardian appointed or declared by a competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be."

Now the effect of that rule is that normally if a minor wishes to institute a suit and he has a certificated guardian, then that certificated guardian is the right person to act as the next friend of the minor. If on the other hand, a suit is brought against a minor who already has a certificated guardian then he is the person who must be appointed guardian for the suit unless the Court otherwise decides. That last proviso, to my mind, indicates that there is no inherent disqualification in all persons other than certificated guardian to be a guardian *ad litem*. In the present proceedings, at its inception, the suit was undoubtedly properly constituted because the person appointed guardian *ad litem* at the time when the suit was started, was in fact the certificated guardian. Therefore the appointment was strictly in conformity with the provisions of sub-r. (2). It seems to me that the mere fact that he subsequently ceased to be the certificated guardian, and somebody else was appointed in his stead, does not of itself impose such an absolute and fundamental disqualification that he automatically vacated his office and became *functus officio*. In my opinion, the only way of getting rid of a guardian *ad litem* who has once been properly appointed, is under the provisions of r. 11, subject perhaps to the implications of sub-r. (1), Rule 4, which I have mentioned. In that view of the matter, it follows that the decision of the learned Judge on issue No. 1 was correct. Buckland, J, then says:

"It is further argued that the interests of Amalkanta Sarkar were adverse to those of the minors. As to that I express no opinion. This involves questions of fact, and questions of fact are not being considered at this period. The learned Advocate-General objects that the plaintiffs are not entitled to take such point on their pleadings. As to that again, I express no opinion, and I leave it for determination by the learned Judge to whom may fall the duty of determining this case upon the facts should such occasion arise."

Now, that passage means this: The learned Judge held, and in my opinion rightly, that the question whether or not Amalkanta Sarkar had done his duty as a guardian *ad litem*, in the mortgage-suit, was not a matter which was before the Court at that time, because it was not really comprehended within any of the issues which had been ordered to be tried as preliminary to the trial of the actual suit itself. The learned Judge was therefore right in saying that the question was not a matter with which he need concern himself. If as a result of his decision on the other points in the suit, the matter ultimately proceeded to trial, then that would be the proper time for the question of the conduct and the position of Amalkanta Sarkar to be gone into. Mr. Banerjee has argued before us, just as the learned Advocate-General has argued, that in any event, this question was not properly raised on the pleadings in the suit and he referred to paras. 13 and 14 of the plaint which appear at page 5 of the paper book. Paragraph 13 says:

"That the plaintiffs state that defendant No. 5 was at all material times under the control and domination of defendants Nos. 6 and 7 he, and he having sacrificed the interest of the plaintiffs and their eldest brother for his own ends and the benefit of defendants Nos. 6 and 7, his interest became adverse to that of the minor plaintiffs and their brother."

Paragraph 14 says:

"That having come to know that the guardian appointed by Court, *i. e.*, defendant No. 5, is acting adversely to the interests of the minors, the present

guardian applied to the Court of the District Judge, 24-Parganas, in Act VIII, Case No. 57 of 1927, for removal of the said guardian for appointment of a new guardian."

Now, looking at para. 13 by itself, it would seem that the allegation there was something in the nature of a suggestion that the guardian Amalkanta Sarkar had an interest in the property itself which conflicted with that of the minors: but there is undoubtedly in para. 14 an allegation in general terms that he was "acting adversely" to the interests of the minors, and eventually the defendants took up the challenge contained in para. 14 as is shown by their denials in para. 6 of the written statement which are these words:

"They do not admit the occasion for such appointment or that defendant No. 5, Amalkanta Sarkar acted adversely to the interest of the minors."

Upon that state of the pleadings, it does seem to us that there is or may be an issue to be tried as to whether or not this man, Amalkanta Sarkar, acted traitorously, or negligently, or fraudulently in connection with the minors' affairs and, in particular, in connection with the mortgage-suit. The other two matters, which were before Buckland, J., were in one sense interwoven, though in another way they were distinct. Those issues were in effect whether in regard to the issues in the suit one ought to apply the principle of *res judicata* having regard to the matters in issue in suit No. 936 of 1931, and whether the present suit is barred by reason of that suit No. 936 of 1931 having been dismissed for want of prosecution under the provisions of O. IX, r. 9. Now the learned Judge took the view, and we think quite rightly, that properly speaking, no question of *res judicata* arises at all because the issues which were raised or might have been raised in suit No. 936 of 1931, were never tried out and there was no judicial determination on any of them. It is not necessary that I should quote any authorities in support of that proposition. As regards the effect of O. IX, r. 9, the rule says:

"Where a suit is wholly or partly dismissed under r. 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action."

It then proceeds to say:

"But he may apply for an order to set the dismissal aside and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal....."

Although that is a procedure very frequently resorted to, however, it was not a ken in the cases of suit No. 936 of 1931. I have already indicated that the plaintiffs seem to have become queiscent after that suit had been dismissed, and that it was only after a considerable period that they eventually instituted the present suit. What we have to decide is whether the present suit is in respect of the same cause of action as suit No. 936 of 1931. Now the learned Judge discussed the point at some length and he compared the allegations which were made in the plaint in suit No. 936 with the allegations made in the plaint in the present suit and he said:

"The first seven paragraphs of the two plaints are substantially the same."

And then he proceeded to discuss the subsequent paragraph and said:

"Up to the point prior to the mortgage suits there can be no question that the cause of action are identical."

But in regard to this suit he said

"In the present plaint.....the suit is referred to and the decree is attacked in para. 21, but that is attacked on the ground of the conspiracy which in the earlier plaint was the ground of the conspiracy which in the earlier plaint was the ground of the attack upon the mortgages, and so far as there is any new cause of action in para. 21, it relates back to the subject-matter of the former suit. The only fresh grounds upon which the mortgage decree is attacked are to be found in para. 20 but that does not state any cause of action upon which the plaintiffs would be entitled to relief. Substantially the whole matter now put in issue was the foundation of the former suit and in these circumstances I hold that the suit is barred under O. IX, r. 9, Civil Procedure Code."

It may no doubt be the case that substantially the whole matter, now put in issue was the foundation of the former suit. Looking at the matter from a non-technical and non-legal point of view I have no doubt that any average person of ordinary common sense would at once say:

"are not the two suits to all intents and purposes the same and that which the plaintiffs are now seeking to get is exactly the same kind of thing they sought to obtain in the previous suit."

That no doubt would be a sensible and reasonable view to take but we have to administer the law as it is and we have to look at the matter having in mind the technicalities and niceties of adjectival law and the definitions of "cause of action" which are to be found in the authorities. I do not propose to recite a concatenation of those authorities. It is sufficient I think for the present purpose if I quote the well known passage from *Read* v. *Brown* (1), where Lord Esher said when he was referring to the meaning of the phrase "cause of action arising";

(1) (1888) 22 Q B D 128; 58 L J Q B 120; 37 W R 131; 60 L T 250.

"It has been defined in *Cooke* v. *Gill* (2), to be this every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court, it does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved. It has been suggested to-day in argument that this definition is too broad but I cannot assent to this, and I think that definition is right."

Reference may be made to the case of *Engineering Supplies, Ltd.* v. *Dhandhania & Co.* (3), where the Court of Appeal consisting of the Chief Justice and C. C. Ghose, J., upheld a judgment of my learned brother Lort-Williams in which he discussed the authorities and followed the principles laid down in *Read* v. *Brown* (1), *supra*. In one of the cases decided in India it was said:

"The cause of action is a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit."

I think it is quite correct to define "cause of action" as meaning all the congeries of facts which it is necessary for the plaintiff to establish before he can ask the Court to grant the relief which he claims in the suit. In the present case no doubt a great of the averments in the plaint were merely reiteration either in the same or other language of the averments in the plaint in suit No. 936 of 1931. No doubt the basic factor in the plaintiffs' case, in the other suits, was what they have described as the conspiracy between their parents and their present solicitor and the former guardian in connection with the four transactions—two in connection with the surrender of the property and two in connection with the mortgages, but it is a fact that in their present plaint in para. 21 as amended, they have added this:

"The plaintiffs state that the said *ex parte* decree and the final decree made in the said suit No. 2090 of 1930 of the Honourable High Court were procured in pursuance of the conspiracy and were made without jurisdiction and are, therefore, a nullity and void *ab initio*."

It seems to be tolerably clear that as regards the greater part of their case, the plaintiffs are relying on the original conspiracy but before they can get a declaration that the preliminary and final decrees in the mortgage suit are invalid, they will have to prove that those decrees were in fact made. It happens that the defendants have admitted the making of those decrees but it would have been open to them to have denied that the decrees were made, that is to say to traverse the plaintiffs' allegation in regard to the decrees in which case, the fact of the making of the decrees would have been one which the plaintiffs would have been bound to prove in order to succeed in this suit. That statement of the position seems to bring the matter within the four corners of the definition of "cause of action". We, therefore, though speaking for myself with some hesitation come to the conclusion that the view taken by the learned Judge cannot be sustained and, as regards the technical point, we must hold that the suit is not barred by O. XI, r. 9, and that the cause of action is not wholly the same as that in suit No. 936 of 1931, particularly having regard to the fact that there are averments with regard to a matter which had not even arisen at the time when the former suit was dismissed for want of prosecution, namely, the validity of the actual decree.

The case must, therefore, be sent back to the Court below for the determination of the two questions, namely, (1) the question of whether Amalkanta Sarkar did in fact act adversely to the interest of these minor plaintiffs, and (2) the vital question of whether the plaintiff are entitled to have it declared that the two decrees in the mortgage suit are bad by reason of the conspiracy or conspiracies alleged. The position is this, that as we think the learned Judge was wrong in his decision on as regards Issue No. 3, and as he never dealt with the question of whether the interest of Amalkanta Sarkar were adverse to those of the minors, the suit will have to be proceeded with. No doubt the learned Judge before whom the case comes up for trial will have due regard to the fact that there was a prior suit and that certain issues were raised in that suit, which, therefore, should be excluded from the present suit together with any other matters which might have been put in issue in the former suit.

It follows that the appeal will be allowed to the extent I have indicated but, in view of all the circumstances, we think that the costs of the proceedings before Buckland, J. and before this Court should abide the ultimate result of the trial. We express the opinion that it is desirable that the hearing of the suit should be expedited. By consent, the sale which was to have taken place in execution of the decree in the mortgage suit will be stayed until the determination of the suit.

Lort-Williams, J.—I agree.

D. *Appeal allowed in part.*

(2) (1873) 8 C P 107; 42 L J C P 98; 28 L T 32; 21 W R 334.

(3) 134 Ind. Cas. 65; A I R 1931 Cal. 659; 58 C 539 Ind Rul. (1931) Cal. 769.

RANGOON HIGH COURT

Criminal Revision Applications Nos. 628-B, 629-B and 630-B of 1934

November 14, 1934

BRAUND, J.

V. A. S. M. CHETTYAR FIRM AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY

Burma Municipal Act (III of 1898), s. 148—Pawn-broker—Who is—Isolated transaction does not make person pawn-broker.

A "pawn-broker" is a person who "carries on the business of pawn-broking." It implies one who systematically lends money upon the security of pawns, and "carrying on business" implies, "a series or repetition of acts." It is a question of fact in each case whether a "business" is being carried on, and each case must be determined by its own special circumstances unless there can be found some systematic course of lending upon pawns or such repetition as to amount to a reasonable inference that it forms part of the particular Chettyar's money-lending business to lend on pawns. His status as a pawn-broker within the Burma Municipal Act, 1898, and the rules thereunder cannot be held to be established.

A Chettyar whose business is to lend money on promissory notes and upon security of land cannot be said to be a pawn-broker where he advances an isolated loan to another on security of a chattel. *Kirkwood* v. *Gadd* (1), *Newman* v. *Oughton* (2) and *Emperor* v. *Kanappa Chetty* (3), relied on.

Cr. R. App. from an order of the Sub-Divisional Magistrate, Yenangyaung, in Criminal Summary Trial Nos. 56, 58 and 59 of 1934.

Mr. *P. K. Basu*, for the Applicant.

Mr. *Tun Byu*, for the Crown.

Order.—These are three connected cases which have come before this Court in its capacity as a Court of revision. In each of the three cases the applicant is a Chettyar firm, carrying on business at Yenangyaung. There is nothing on the record to show that the normal business of any of them differs in any way from usual business of a Chettyar firm; that is to say, the lending of money upon promissory notes and upon the security of land.

The cases are of importance to the Chettyar community as a whole, because in each of them there has been proved by the Municipality of Yenangyaung a single instance only of a loan to a member of the public upon the security of a chattel, and it is sought by the Municipality upon that ground to involve the applicants in an offence under s. 148 (renumbered 202), of the Burma Municipal Act, 1898, upon the footing that they are respectively carrying on business as "pawn-brokers" contrary to the provisions of that Act, and of the Municipal bye-laws made thereunder, s. 142, (renumbered 195) of the Burma Municipal Act, 1898, empowers the Municipal Committee, from time to time at a special meeting, to make bye-laws (*inter alia*):

"(1) for rendering licenses necessary for pawn-brokers and determining by public auction or otherwise the amount to be paid for any such license and the conditions subject to which they shall be granted and may be revoked."

and s. 148 cenumbered 202), which I have referred to above, provides for a fine not exceeding Rs. 500 in the case of any contravention or failure to comply with any such rule or bye-law, This is a typical instance of bureaucratic legislation.

The rules or bye-laws made by the Yenangyaung Town Committee in pursuance of the Act purport first to define a "pawn-broker" as:

"every person who carries on the business of taking goods and chattels in pawn for loans of money not exceeding Rs. 250 in any one transaction, provided that nothing in these rules shall apply to persons taking goods and chattels in pawn for loans exceeding Rs. 100 when the rate of interest or other profit does not exceed Rs. 15 per cent per annum."

Rule 2 provides that:

"no one shall carry on the business of a pawn-broker within the Yenangyaung Town limits without a license from the Committee;"

and the subsequent rules provide for the terms and conditions on which licenses are to be granted.

The only point relied upon before me by the applicants is that the applicants are not "pawn-brokers," and have done nothing to render themselves "pawn-brokers," within the meaning of the Burma Municipal Act, 1898; although a number of other points were taken at the hearing before the Sub-Divisional Magistrate. If they are not "pawn-brokers" within the meaning of this Act, then, whatever the definition purported to be given to the word "pawn-broker" by the bye-laws, the Act and the bye-laws have ex-hypothesi no application to the applicants.

A "pawn-broker" I conceive to be a person who "carries on the business of pawn broking." It implies one who systematically lends money upon the security of pawns; and "carrying on business" implies, in the words of Lord Loreburn, L. C., in *Kirkwood* v. *Gadd* (1) "a series or repetition of acts." I prefer the tests of "frequency" and "method" to that of "profit;" for it is possible to conceive of many cases in which a course of dealing may well amount to a "businsss" without the object necessarily being profit or gain. But, as was

(1) (1910) A C 422; 79 L J K B 815; 26 T L R 530; 54 S J 599; 102 L T 753.

pointed out by Lord James of Hereford in the same case, it is a question of fact in each case whether a "business" is being carried on, and each case must be determined by its own special circumstances.

In each of the present cases the Municipality has attempted to prove only one isolated instance of a loan upon the security of a chattel. In two of these cases there is nothing more: but, in the third, (that of V. A. S. Muthiah Chettyar) there is a causal statement by one of the defence witnesses that "all the Chettyar firms in Yenangyaung receive articles of gold, etc., on pawn." This witness has, I understand, no connection with or knowledge of the business of the applicant firms. No authority for this statement is given and, as I have said, the prosecution itself has made no attempt to prove any systematic dealing in pawns by the three applicants. I must, I think, in each case treat the Municipality as having proved no more than the three isolated transactions, which, indeed, are admitted.

In my judgment an isolated transaction of this kind does not constitute the person concerned a "pawn-broker" any more than an isolated loan by one man to another would constitute the former a "money-lender" in any technical sense. It is true that the business of a Chettyar is that of money-lending; and that it can be urged, the lending of money upon the security of a pawn is only one form of a money-lender's business, while the lending of money upon the security of a promissory note or of land is another. It is said that whether you lend money on one form of security or another makes no difference for in each case you are carrying on the same business by a varied method. That, however, I think, is a fallacy. For, in this country, there is a perfectly well understood and recognised division between the business of a Chettyar and that of a pawn-broker. Each has a separate and distinct business, though each concerns the lending of money. A "trainer" trains race horses, while a "jockey" rides them. They are not, surely, carrying on the same business because their respective avocations both happen to concern race horses. In my judgment therefore unless there can be found some systematic course of lending upon pawns or such repetition as to amount to a reasonable inference that it forms part of the particular Chattyar's money-lending business to lend on pawns, I do not think that his status as a pawn broker within the Burma Municipal Act. 1898, and the rules thereunder is established. I find considerable support for this view in the English case of *Neman* v. *Oughton* (2) and in the case in this Province of *Emperor* v. *Kanapa Chetty* (3), and it accords with the view expressed by his Lordship Dunkley, J., in this Court in Criminal Revision No. 1-B of 1931.

For these reasons therefore the convictions by the Sub-Divisional Magistrate of Yenangaung in Criminal Summary Trials Nos. 56, 58 and 59 of 1934 must, in revision, be set aside, and the fines upon the applicants repaid. I should add, for the benefit of the Chettyar community that this decision goes no further than to hold that, in the particular circumstances of the present cases, the status of "pawn-brokers" has not been proved by the Municipality. It must not, however, be supposed that this decision has any application to a case in which a Chettyar firm can be shown to dabble in lending on pawn to an extent sufficient to constitute a "business," and it should be further appreciated that, in view of the kindred natures of the business of a money-lender and a pawn-broker slight evidence only might be sufficient for that purpose.

D. *Conviction set aside.*

(2) (1911) 1 K B 792; 80 L J K B 673; 27 T L R 254; 104 L T 211.

(3) 4 L B R 8; 6 Cr. L J 118.

RANGOON HIGH COURT

First Civil Appeal No. 17 of 1934

December 6, 1934

PAGE, C. J. AND MYA BU, J.

NAN KEE—APPELLANT

versus

AH FONG—RESPONDENT

Tort—Person procuring act of another, when liable for consequences—Motive, whether material—Civil Procedure Code (Act V of 1908), O. VI, r. 4—Party pleading fraud or misrepresentation—Onus.

There are two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor and is, therefore, not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party. The motive or intention of the person doing the act is *nihil ad rem*. If it is a lawful act, however ill the motive might be, he has a right to do it If it is an unlawful act, however good his motive be, he would have no right to do

it. Motives and intentions in such a question is absolutely irrelevant.

A party who relies on plea of fraud or misrepresentation, must establish these charges. *Abdul Hossein* v. *Charles Agnew Turner* (5) and *Mahomed Mira Ravuther* v. *Savvasi Vijaya Raghunadha* (6), referred to.

F. C. A. against the judgment and the decree in Civil Regular No. 376 of 1933, dated January 3, 1934.

Mr. *McDonnell*, for the Appellant.

Mr. *Clark*, for the Respondent.

Page, C. J.—The appellant and the respondent are pawn-brokers at Pegu, and the appellant was the holder of a pawn shop license which expired on March 31, 1933. A public notice calling for tenders for pawnshop license for a period of one or three years was issued by the Municipality of Pegu on February 11, 1933. On February 28, 1933, the Sub-Committee of the Municipality received 8 tenders. The persons who submitted the tenders were present at the meeting. The tender of the respondent which was Rs. 19,500 per year for a period of three years, was the highest and was accepted. The tender of the appellant was only Rs. 10,200. The respondent executed a security bond and became entitled as between himself and the Municipality to receive the pawnshop license for three years from April 1, 1933. On March 7, the appellant and three other persons who had submitted tenders for the pawnshop license made an application to the Commissioner of Pegu to revise the action of the Municipality in accepting the tender of the respondent. By his order of March 24, the Commissioner of Pegu refused to interfere and rejected the petition. On March 27, the appellant presented an application to the Minister of Education, representing the Local Government, for an order staying all further proceedings in respect of the issue of the pawnshop license to the respondent, and restraining the Municipal Committee, Pegu from allowing the respondent to act in the licensee until application of the appellant in revision had been heard and determined by the Local Government. On March 28, the Local Government ordered that all further proceedings in connection with the license should be stayed until the revision application had been determined.

Now, the petition of March 27, for stay order was in the following terms :

"In the Office of the Honourable the Education Minister. Miscellaneous Revision Application No. of 1933. Subject : The Pawn Shop License at Pegu The humble application of Nam Kee, Pawnshop License of Pegu.

Most respectfully Sheweth :

1. Your petitioner along with four others on March 7, 1933, filed a revision application protesting against the scrutiny of tenders in respect of the pawnshop license at Pegu. The said application has been disposed of by the Office of the Pegu Commissioner.

2. Your petitioner is informed and believes the same to be true that Ah Fong, whose tender is alleged to have been accepted by the Municipal Committee, Pegu, is attempting to conduct the business of the pawnshop within three or four days hereof, and to deprive him thereby of his rights to the pawnshop under his tender.

3. Your petitioner submits that if pending the disposal of his revision at this office the said Ah Fong and the Municipal Committee are not restrained from disturbing him (the petitioner) in the conduct of his pawnshop he will suffer serious and irreparable loss.

4. It is, therefore, just and necessary that the rights of your petitioner should not be disturbed pending his revision, and that the *status quo* should be maintained.

5. Your petitioner undertakes to file his revision at this office as soon as possible.

Wherefor your petitioner prays that the Honourable Minister for Education may be pleased to order a stay of all further proceedings in respect of the pawnshop license of Pegu, to restrain the Municipal Committee, Pegu, from allowing the said Ah Fong to act as the licensee of the pawnshop and to make all necessary directions for the said purpose.

And shall ever pray."

On April 20, 1933, three of the persons who had submitted tenders for the pawn shop license, of whom the appellant was one presented a formal petition to the Minister for Education for an order :

"to set aside the license given to the said Ah Fong, to direct the disposal of the license either by public auction or by calling for fresh tenders, and to make such further or other order as may seem just and proper."

Certain affidavits were filed by the parties for and against this application in revision. On June 2, the application in revision to the Local Government was rejected ; and on June 6, the license was issued by the Municipality, Pegu, to the respondent. In these circumstances the respondent has filed the present suit for the purpose of obtaining damages from the appellant for wrongfully procuring the Local Government to issue an order restraining the Municipality from issuing the licence to the respondent, and thereby depriving him of the opportunity of carrying on the business of the pawnshop from April 1, till June 6. At the trial a decree was passed in favour of the respondent.

Now, it is common ground and we find 1898, A. C. P. that the Local Government was legally entitled to pass the stay

order: E. and B. 216 that damage thereby resulted to the respondent; (3) that the appellant had a legal right to apply for the stay order. I decline to plunge into the welter of judicial decisions on this subject, because, in my opinion, for the purpose in hand the law applicable to the present case is to be found in the judgment of Lord Watson in *Allen* v. *Flood* (1):

"There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor and is, therefore, not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (2) the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party."

In my opinion the motive or intention of the appellant in procuring the stay order in the circumstances obtaining in the present case is *nihil ad rem*; for:

"this is not a case in which the state of mind of the person doing the act can affect the right to do it If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant: per Lord Halsbury in *Mayor Aldermen and Burgesses of the Borough of Bradford* v. *Edward Pickles* (3)."

Illegal means in this connection acts which are illegal not because they are morally wrongful, but because they are legally wrongful. In *Sorrell* v. *Smith* (4) at p. 716, Lord Dunnedin observed:

"When *A* by his action causes loss to *B.*, the sole question is, was *A's* action a tort ? and the law as to what is and what is not a tort may be said to be well settled. With any law, however well settled, difficulties, may and do still arise in its application to the ever varying kaleidoscope of circumstances. But except for that there cannot be said to be much difficulty in the law of tort. One noticeable attempt for its extension was put an end to by *Allen* v. *Flood* (1). I shall have to revert to that case, but in its application to action by an individual, and that was all that as a decision it dealt with, it settled that the only question was, was there a tort ? and that in the solution of that question the motive of the doer of the act had no significance."

Now, applying the law thus enunciated to the facts of the present case the only question that falls to be determined is what were the illegal means, (if any), alleged and proved by which the appellant procured the stay order from the Local Government. In paras. 6 and 7 of the plaint it is alleged:

6. That as the defendant was unsuccessful he that is the defendant with view to obstruct and prevent plaintiff from starting his business as a pawnshop licensee, and to enable him the defendant to continue to carry on his pawnshop business which would have ordinarily terminated on March 31, 1933, falsely and maliciously made certain averments in a petition addressed to the Honourable the Minister of Education knowing the same to be false and untrue, alleging corruption on the part of the plaintiff and the Municipality of Pegu, and succeeded in inducing the Honourable the Minister of Education to pass an order preventing the plaintiff from opening his two pawnshops on April 1, 1933, with the result that it enabled the defendant to continue to carry on the said business until June 6, 1933, when he was ousted.

7. That in consequence of the said false and malicious allegations and insinuations made against the plaintiff, the plaintiff was prevented from opening his business of two licensed pawnshops on April 1, 1934."

The defendant in para. 6 of his written statement called upon the plaintiff to give full and better particulars of the "false and malicious allegations" and:

"averments alleged to have been made by defendant according to paras. 6 and 7 of the plaint."

Thereafter on September 11, 1933, the plaintiff furnished the following particulars of the allegations referred to in paras 6 and 7 of the plaint:

1. "In his application and affidavits to the Honourable the Minister of Education the defendant made the following false and malicious allegations and averments.

2. That the transaction between the plaintiff and the Pegu Municipality has created a dangerous precedent which will inevitably leave the door open for dishonest and corrupt practices in transactions between the Municipality and the public.

3. That he was prevented from checking the opening of the tenders, and had every reason to believe that this departure from the usual procedure and practice as required by law was deliberate and designed.

The action of the Municipality (in dealing with the plaintiff) left the door open for fraud and corrupt practice. That immediately after the declaration that Ah Fong's tender of Rs. 19,500 had been accepted he (the defendant) vigorously protested against the whole proceeding and challenged its fairness. His protest was ignored."

Now, by O. VI, r. 4, Civil Procedure Code :

"in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

(1) (1898) A C 1; 67 L J Q B 119; 46 W R 258; 77 L T 717.

(2) (1853) 2 El. & Bl. 216; 1 W R 432; 22 L J Q B 163; 17 Jur. 827; 95 R R 501.

(3) (1895) A C 544.

(4) (1925) A C 700; 94 L J Ch. 347; 133 L T 370.

*Page of (1925) A. C.—[*Ed.*]

It was incumbent, therefore upon the plaintiff-respondent in the present case to establish that the stay order had been procurred by the appellant by means of the particular charges as laid : *Abdul Hossein* v. *Charles Agnew Turner* (5) and *Muhammad Mira Ravuthar* v. *Savvasi Vijaya Raghunadha* (6).

True it is that in the revision application of April 20, 1933, and in the affidavits filed in support of it such statements as those set out in the particulars of the allegations in para. (6) and (7) of the plaint were made, and that it was proved at the trial that they were unfounded; and further, it may well be that these misrepresentations were made deliberately and fraudulently with a view to prevent the license being granted to the respondent. But they failed in their object; for the appellant's application in revision was rejected by the Local Government, and the license was issued to the respondent. It is common ground, however, that the misrepresentations alleged in the particulars are not to be found in the petition of March 27, upon which the stay order was granted. In order to make good the deficiency in his case, it was contended by the learned Advocate on behalf of the respondent, and the learned trial Judge held, that the stay order was obtained because the learned Advocate who presented the petition for must be assumed to have supported a stay order to the Local Government the petition by oral submissions containing the substance of these misrepresentations. In the course of his judgment, Leach, J., observed :

"It was argued on behalf of the defendants that the order was not obtained as a result of these affidavits, but as the result of the petition of March 27, 1933 It is true that that petition does not contain allegations of the nature of those contained in the affidavits which were subsequently filed, but it seems to me that they must have been advanced by the defendant's Advocate when the stay order was obtained, otherwise it is difficult to say any justification for the order."

The answer to this contention, in my opinion, is two-fold : (1) that although the respondent specifically set out in the particulars that he filed the misrepresentations upon which he relied in support of his claim, it is not alleged or suggested in the particulars or elsewhere in the pleadings that these allegations or any of them were orally made by the learned Advocate who presented to the Minister of Education the petition for a stay order on the appellant's behalf, and (2) that there is not a scintilla of evidence on the record to justify the contention that the learned Advocate supported the petition on March 27, 1933, as such oral submissions. No evidence in that behalf was led at the trial and no attempt was made by the respondent to obtain the evidence of the learned Advocate who presented the petition for a stay order to the Local Government. If an allegation of that nature had been set out in the pleadings and an issue had been raised in respect of it, it may well be that the evidence of the learned Advocate who presented the petition on behalf of the appellant on March 27, 1933, would have been forthcoming, or that evidence in rebuttal would have been led.

In these circumstances it follows that the respondent has failed to prove the illegal means by which he alleged that the appellant had procured the stay order in question. The result is that the appeal is allowed, the decree of the trial Court set aside, and the suit dismissed with costs in both Courts.

Mya Bu, J.—I agree.

D. *Appeal allowed.*

(5) 11 B 620; 14 I A 111; 5 Sar. 25; 11 Ind. Jur. 352.

(6) 23 M 227; 27 I A 17; 7 Sar. 661 (P C).

LAHORE HIGH COURT

Second Civil Appeal No. 1968 of 1933

July 17, 1934

AGHA HAIDAR, J.

KANSHI RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUNICIPAL COMMITTEE, MOGA—DEFENDANT—RESPONDENT

Punjab Municipal Act (III of 1911), ss. 172 (1), 188—Sanction under s. 172 (1)—Form of—Grant of sanction under s. 172 (1)—Imposition of conditions, legality of—Seal of Municipal Committee—Value of—Limitation Act (IX of 1908), s. 5—Appeal within time—Absence of names of parties in power-of-attorney—Defect pointed by office after limitation—Defect removed—Extension of time, if can be given.

The plaintiffs applied to the Municipal Committee to build two *tharras* of certain measurements in front of their shops, abutting on the public street and overhanging a municipal drain. The matter was placed before the Municipal Committee and on July 19, 1930, the following resolution was passed: "Sanctioned as recommended by the Building Sub-Committee. The necessary agreement deed be obtained before issuing the permit." No permit was issued to the plaintiffs, but they were given by the office of the Municipal Committee a copy of the plan which they had filed in the said office This plan bore the seal of the Municipal Committee with the words "*manzur shud*" meaning "granted."

There was also a reference in their map, to the resolution :

Held, that the plan containing the words quoted above, accompanied with the seal of the Municipal Committee must be considered as permission in writing.

No particular form is prescribed in which the permission is granted under s. 172 (1), Punjab Municipal Act.

In granting sanction under s. 172 (1), Punjab Municipal Act, the Municipal Committee cannot impose any condition on the grantee nor can a sanction once granted be revoked. *Municipal Committee, Delhi* v. *Chambeli* (2), *Kirpa Ram* v. *Notified Area Committee, Pindi* (3) and *Damodar Das* v. *Municipal Committee, Bhatian, Delhi* (4), followed.

The seal of the Municipal Committee when affixed, is equivalent to signature of the Secretary or some other competent Municipal Officer.

Where the power-of-attorney in favour of the Counsel for the appellants did not give the names of the parties at the time of filing the appeal but the defect was removed on the office pointing it out after the expiry of limitation :

Held, that the appeal could not be said to be barred by time. At any rate it was a fit case for extension of time under s. 5, Limitation Act. *Shambhu Nath* v. *Badri Das* (1), referred to.

S. C. A. form decree of the Additional District Judge, Ferozepore, dated May 8, 1933.

Mr. *Shamair Chand*, for the Appellants.

Messrs. *Suraj Krishen*, *M. L. Puri* and *Sambu Lal Puri*, for the Respondent.

Judgment.—This appeal arises out of a suit for on injunction against the Municipal Committee, Moga, prohibiting it from interfering with the plaintiffs' erecting *tharras* in front of their shops according to the sanctioned plan granted to them. There was a prayer for damages, but no argument has been addressed on the point and it was in fact formally withdrawn. Both the Courts below have dismissed the plaintiff's claim and they have come up to this Court in second appeal.

A preliminary objection was raised on behalf of the respondent that the appeal in this Court was time-barred. It was pointed out that the judgment of the lower Appellate Court was delivered on May 8, 1933, and the appeal was only filed on October 2, 1933, when the High Court reopened after the long vacation. On October 15, 1933, the power of attorney, which Mr. Shamair Chand, Counsel for the appellants had filed along with the memorandum of appeal, was returned to him by the office, because it did not give the name of the parties. On December 8, 1933, the power of attorney was re-filed by Mr. Shamair Chand. It was therefore argued that on these facts it may be taken that the appeal was really presented on December 8, 1933, when Mr. Shamair Chand re-filed the power of attorney with the names of the parties entered in it. I do not think there is any force in this objection. The omission of the names of the parties in the *vaklatnama* was a mere accidental oversight and should he condoned. In any case, I would be prepared on the facts stated above, to extend the benefit of s. 5, Limitation Act, to the appellants. Reference may be made in this connection to *Shambhu Nath* v. *Badri Das* (1). In this case the name of the pleader was not entered in the *vakalatnama* by mistake, but this was not held to be fatal to the appeal. The principle, however, applies to the present case and I overrule the preliminary objection.

I now come to the facts which led to the present litigation. The plaintiffs applied to the Municipal Committee, Moga, to build two *tharras* of certain measurements in front of their shops, abutting on the public street and over-hanging a municipal drain. The matter was placed before the Municipal Committee and on July 19, 1930, the following resolution was passed:

"Sanctioned as recommended by the Building Sub-Committee. The necessary agreement deed be obtained before issuing the permit."

It is admitted that no permit was issued to the plaintiffs, but they were given by the office of the Municipal Committee a copy of the plan which they had filed in the said office. This plan is an important document, because it bears the seal of the Municipal Committee with the words "*manzur shud*" which means "granted." There is also a reference in their map, to the resolution No. 21, dated July 19, 1930. On August 21, 1930, a resolution was subsequently passed by the Municipal Committee, cancelling the former resolution, but in the meantime the plaintiffs had built the *tharras*. Thereupon the Committee issued a notice to the plaintiffs under s. 172 (2), Punjab Municipal Act (Punjab Act III of 1911) requiring them to remove the *tharra* which they had constructed. The case for the plaintiffs is that they had built the *tharrra* with the written permission of the Committee and that the resolution, in so far as it required them to execute an agreement, was *ultra vires* and that in any event the Municipal Committee having sanctioned the building of the *tharra* had no power to add any conditions to the sanction. In my judg-

(1) 61 Ind. Cas. 410; 43 A 392; 19 A L J 183.

ment there is considerable force in the appellants' contention. In the first place the plan referred to the resolution which had been passed by the Municial Committee, sanctioning the building of the *tharra*. It may be taken that no perticular form is prescribed in which the permission is to be granted and in my opinion this plan with the words quoted above written on it together with the seal of the Municipal Committee must be considered as permission in writing. It is true that no signatures of any Secretary or other Municipal Officer are to be found on this plan, but the seal of the Municipal Committee is there. In this connection I refer to the following passage in Aiyangar's Law of Municinal Corporations in British India, Edn. 2, p. 186:

"The seal of the Corporation, when affixed, is equivalent to signature by a natural person and places the Corporation in a similar position."

My attention is drawn to s. 77 of certain bye-laws which had been framed in accordance with the directions of the Local Government under s. 31 (3), Punjab Municipal Act, III of 1911. This section merely says that the Municipal Secretary shall sign notices, processes, sanctions and permits, issued on behalf of the Committee. It is apparent that this bye-law merely prescribes and enumerates certain duties imposed upon the Municipal Secretary, but it is nowhere laid down that if his signatures do not appear on a document, otherwise valid, it would become invalid. I therefore hold that the plan already mentioned amounted, under the circumstances, to the permission in writing given by the Secretary to the plaintiffs.

No bye-laws have been framed under s. 188, Punjab Municipal Act, empowering the Municipal Committee to impose conditions while granting sanction under s. 172 (1) of the Act I adhere to the view expressed by me in *Municipal Committee, Delhi* v. *Chambeli* (2), and hold that no conditions could be imposed upon the grantee of the permission. Furthermore, a sanction once granted cannot be revoked: *vide, Kirpa Ram* v. *Notified Area Committee, Pindi Bhatian* (3). See also *Damodar Das* v. *Municipal Committee, Delhi* (4).

I do not understand what the lower Appellate Court meant by saying that the plaintiffs obtained a copy of the plan noted above, irregularly, that they had not taken the trouble of asking for a certified copy of the resolution and therefore under the circumstances the erection of the structure was at the plaintiffs' own risk, and the defendant Committee had a right to reconsider its decision before it conveyed permission to the plaintiffs.

It is not disputed before me that the plan bore the seal of the Municipal Committee and contained other particulars which I have already mentioned. It is not even suggested that this plan was a forged document It was a documeut issued by the Municipality and I do not see anything in the manner of obtaining it which would deprive it of its efficacy and prevent the plaintiffs from treating it as a valid document and making full and legitimate use of it. Again, I cannot understand why serious penalties should be imposed upon the plaintiffs for not having obtained a certiffed copy of the resolution, so long as it is brought to the notice of the Court. The learned Judge had decided the case against the plaintiffs on these grounds only, though he seemed to have been inclined in his favour on other questions. But in order to avoid the necessity of a remand to the Court below, I have recorded findings on all the points which were urged by the Counsel for the parties in the course of the arguments. No other points were raised. I therefore allow this appeal and setting aside the judgment and decree of the Court below, decree the plaintiff's suit with costs throughout.

N. *Appeal allowed.*

(2) 123 Ind. Cas. 84; A I R 1930 Lah. 246; 31 P L R 228; Ind. Rul (1930) Lah. 388; 11 Lah 276.
(3) 100 Ind Cas. 813; A I R 1927 Lah. 891.
(4) 27 P R 1901; 96 P L R 1900.

SIND JUDICIAL COMMISSIONER'S COURT

Civil Revision Application No. 74 of 1934

August 17, 1934

FERRERS, J. C. AND O'SULLIVAN, A. J. C.

FIRM OF MURLIMAL SANTRAM—APPLICANT

versus

MESSRS. BANARSIDAS & SONS AND ANOTHER—OPPONENTS

Karachi Small Causes Courts Act (IV of 1929), s. 32—Section covers any order in any case—Application on pure question of fact, whether precluded—Arbitration Act (IX of 1899), s. 19—Application for stay—Court's duty—Application rejected—Order not set aside—Second application, if maintainable—Sufficient cause in refusing application for stay—Charge of fraud or forgery—Court's jurisdiction to refuse stay—Application for postponement of hearing of suit, whether a step in proceeding irrespective

of intention of applicant—Jurisdiction—What constitutes—Erroneous order, if can be attacked collaterally—Interpretation of statutes—Language and plain meaning to be examined.

By a plain reading of s. 32, Karachi Small Causes Courts Act, there is nothing whatsoever to warrant the interpretation that it covers only "final orders." It is wide enough to cover any order in any case. [p. 898, col. 1]

Words "according to law" would preclude a multiplicity of applications on questions of pure fact unless substantial injustice has resulted. *Rupchand* v. *Minhomal* (6), relied on. [*ibid.*]

In an application for stay of a suit under the Arbitration Act, it is the *prima facie* duty of the Court to stay and the onus lies on the plaintiff to show why he should not be bound by the agreement to refer. *Abdulla Haroon* v. *E. D. Sassoon* (9), referred to [p. 900, col. 1.]

Where an application for stay is rejected and the order is not set aside, a second application for stay is barred by *res judicata* even if the first order is erroneous. [*ibid.*]

What is a sufficient cause for refusing to stay on an application for stay under s. 19, Arbitration Act, depends on the particular facts of each case. The fact that a submission clause does not include all the matters which are the subject of legal proceedings may be a sufficient cause for refusing to stay. When there is charge of fraud or forgery, against one of the parties to a submission clause, a Court has discretion to refuse a stay. Generally speaking, where the party charged desires a public inquiry, the Court will generally refuse to send the case to arbitration but where the party making the charge desires that the matter should be dealt with in Court, the Court will be less inclined to stay the suit. But to ensure a proper discretion in refusing to stay a suit on an allegation of fraud or forgery, the Court should ascertain that there is some foundation for such a charge; otherwise there will be a tendency to allege fraud in any case in which a party to a submission clause wishes to avoid arbitration. [p. 899, col 1.]

[English case-law referred to.]

An application made to the Court for postponement of the hearing of the suit is a step in the proceedings within the meaning of s. 19, Arbitration Act, irrespective of the intention with which the application is made. Whether the applicant wishes to have further time to file a written statement or to raise as a bar to the suit the agreement to refer to arbitration, in either event, his application is an application to invite the Court to do something which would enable him to establish his defence. It is for the Court to determine whether any particular act or application is a step in the proceeding, irrespective of the fact that a party may not have had any intention of submitting to the jurisdiction of the Court. *Bhowanidas Ramgobind* v. *Panachand Luchmipat* (27), referred to. [p 901, col. 2.]

Jurisdiction is the power to hear and decide and the power to decide is the power to decide erroneously as well as correctly. Consequently, unless an order has been vacated, it is operative between the parties and cannot be ignored and challenged collaterally in different proceedings. *Banarsidas & Sons* v. *Murlimal-Santramdas* (1) and *Malkarjun* v. *Narhari* (8), relied on. [p. 889, col. 2.]

In arriving at a conclusion as to the meaning of an enactment, the proper course is in the first place to examine the language of the statute and ask what is its plain meaning and not to start arguing how the law previously stood. *Bank of England* v. *Vagliano Brothers* (5), followed. [p. 898, col. 1.]

Mr. *Dipchand Chandumal*, for the Applicant.

Messrs. *Assudamal Rewachand* and *Srikishindas H. Lulla*, for the Respondents Nos. 1 and 2.

Judgment.—This is an application under s. 32, Karachi Small Causes Court Act, to reverse an order of the learned Small Causes Court Judge who has rejected an application filed before him by the applicants under s. 19, Arbitration Act, to stay a suit pending in the Small Causes Court.

The facts briefly are that the opponents No. 1 (plaintiffs) ordered by a forward contract from the applicants (defendant No. 1) a consignment of galvanized iron sheets to be sent out from Europe. The contract was brought about by opponent No. 2 (defendant No. 2) acting as a broker. There was no written agreement signed by the parties, but each party entered the terms of the contract in his own books, opponent No. 1's entry in this respect being, it is alleged, signed by the broker, opponent No. 2. Between the making of the contract and the arrival of the goods an increased duty on galvanized iron had been imposed by Government and a dispute arose between the applicants and opponents No. 1 as to who should pay the extra duty. The disputants agreed to refer their differences to arbitration. Opponents No. 1 alleged that it was a term of the contract that the applicants should pay the increased duty and maintained that the entry in their books signed by the opponents No. 2 bore this out. The applicants denied that they had consented to such a condition and contended that if opponent No. 2 had agreed to do it, he had exceeded his authority as an agent.

The dispute was referred to arbitration on December 23, 1931. On February 20, 1932, the arbitrators differed and could not agree upon an umpire. The opponent No. 1 thereupon on February 22, 1932, filed a suit in the Small Causes Court against the applicants and opponent No. 2 claiming an alternative relief against each. The summons was served on the applicants on March 14, 1932. On March 16, 1932, an application under s. 19, Arbitration Act, was made by the applicants to the Judicial Commissioner of Sind for stay of the suit. On March 17, 1932, the parties appeared in the Small Causes Court through their respective Pleaders and the following note in the

diary indicates what occurred on that day:

"Plaintiff by Mr. Assudomal, Defendant No. 2 by Mr. Lulla, Defendant No 1 by Mr. Kodumal. Adjourned by consent. Written statement in seven days. (Mr. Kodumal says that he has applied for stay as there is clause of submission between the parties)."

On April 11, 1932, the Judicial Commissioner's Court granted an *ad interim* stay. On the same date the applicants filed in the Small Causes Court, Karachi, an application under s. 19, Arbitration Act, for stay of the suit and another under s. 151, Civil Procedure Code, for an *ad interim* stay and the case was adjourned to May 4, 1932. On May 4, 1932, the learned Small Causes Court Judge passed the following order on the application under s. 19:

"Pleaders heard. Rejected."

The entry from the diary on this date reads:

"Mr. Kodumal for the defendants says the stay order has been passed by the Judicial Commissioner's Court. Mr. Manghumal for the plaintiffs. Written statement in five days. As to stay order as it has not been received by the Court, fix hearing."

Thereafter before the suit could be decided the stay order from the Judicial Commissioner's Court was produced in the Small Causes Court. The *interim* stay order passed by the Judicial Commissioner's Court had been confirmed on July 22, 1932, by Aston, Additional Judicial Commissioner. At this time there existed a conflict of decisions of this Court as to whether the application for stay should be filed in the Court before which the suit was pending or in the Court of the Court of the Judicial Commissioner of Sind in its District Court Jurisdiction, or in the Court in which the Award under the Indian Arbitration Act, has to be filed, *i. e.*, the Arbitration Court which incidentally in Karachi is the Judicial Commissioner of Sind in its District Court jurisdiction. It was apparently for this reason that the applicants had applied under s. 19, Arbitration Act, to both, the Court of the Judicial Commissioner and the Small Causes Court.

Against Aston, Additional Judicial Commissioner's order of July 22, 1932, confirming the stay of the suit, a revision application was filed in this Court in its High Court jurisdiction, and, in view of the existing difference of opinion as to in which Court the application lay, the matter was referred to a Full Bench. The Full Bench decided that the application under s. 19, Arbitration Act, should be made to the Court before which the proceedings are pending. The decision is reported in *Banarsidas & Sons* v. *Murlimal Satramdas* (1). About this time s. 19, Arbitration Act, was amended by Act XXI of 1933, which now brings the law into conformity with Full Bench decision.

In consequence of the Full Bench ruling the applicants filed an application for stay under s. 19, Arbitration Act, in the Small Causes Court on May 2, 1934. The learned Small Causes Court Judge rejected the application on May 26, 1934, and directed that the suit proceed. On the date he was hearing the case, the present application in this Court against the Small Cause Court Judge's order of May 26, 1934, was filed and an *ad interim* stay obtained. Mr. Assudomal for opponents No. 1 has raised a preliminary point of some importance and is supported by Mr. Lulla who appears for opponent No. 2. It is contended that the present application does not lie because the order sought to be set aside is an interlocutory order and as decided by a Full Bench of this Court in *Khudabux* v. *Panjo* (2), the High Court has no jurisdiction to interfere in revision with an interlocutory order. Reliance was placed on a decision of the Privy Council in *Ramchand* v. *Goverdhan Das Ratanchand* (3), in which it was held that an order refusing to stay proceedings under s. 19, Arbitration Act, does not finally dispose of the rights of the parties, but leaves them to be determined by the Courts in the ordinary way and is, therefore, not a "final order." Incidentally that decision was with reference to the term "final order" in s. 109, Civil Procedure Code, which relates to appeals to the Privy Council. The case of *Abdul Rahman* v. *Cassim & Sons* (4), was also referred to in the same connection.

It was argued that a decision of this Court in favour of the view that an application is competent under s. 32, Karachi

(1) 146 Ind. Cas. 1019; A I R 1933 Sind 376; 27 S L R 451; 6 R S 106 (F B).

(2) 127 Ind. Cas. 673; A I R 1930 Sind 265; 24 S L R 277; Ind. Rul. (1930) Sind 289.

(3) 56 Ind. Cas. 302; A I R 1920 P C 83; 47 I A 121; 47 C 918; 24 C W N 721; 18 A L J 591; 22 Bom. L R 606; 31 M L J 27; 15 L W 15; 2 U P L R P C 94; (1920) M W N 407; 28 M L T 27; 14 S L R 191 (P C).

(4) 142 Ind. Cas. 328; A I R 1933 P C 58; 60 I A 76; 11 R 53; 10 O W N 195; 37 L W 33; (1933) M W N 166; Ind. Rul. (1933) P C 59; (1933) A L J 244; 64 M L J 307; 35 Bom. L R 331; 37 C W N 405; 57 C L J 136 (P C).

Small Causes Court Act, to reverse or vary an interlocutory order would result in a multiplicity of such applications. A number of decisions have been quoted as to the circumstances under which revision lies to this Court. The determination of the preliminary question rests on a proper interpretation of s. 32, Karachi Small Causes Court Act, which is in the following terms:

"The Chief Court may for the purpose of satisfying itself that a decree or order made in any case by the Court was according to law, call for the case and pass such order with respect thereto as it thinks fit"

I think we cannot do better than follow Lord Herschell's dictum in *Bank of England* v. *Vagliano Brothers* (5), that in arriving at a conclusion as to the meaning of an enactment the proper course is in the first place to examine the language of the statute and ask what is its plain meaning and not to start arguing how the law previously stood.

This method is particularly apt in the present case. Section 32 appears to be merely a slightly modified form of s. 25, Provincial Small Causes Act, and a proper interpretation is dependent on the plain meaning of that modification. By a plain reading of s. 32 we can see nothing whatsoever to warrant the interpretation that it covers only "final orders." It would appear to us to be wide enough to cover any order in any case. All the arguments which have been addressed to us on the point are based on the wording of s. 25, Provincial Small Causes Court Act, in which the words "case decided" occur. That section is as follows:

"The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit."

Both this section and s. 115, Civil Procedure Code, have reference to a case which has been "decided" and in so far as the question of revision against an interlocutory order is concerned, the two sections are on the same footing. Now, nearly every High Court in India at one time held that it had power to revise an interlocutory order under s. 115, Civil Procedure Code, and at another time it held that it had not such power and there was a plethora of rulings on the point. In so far as this Court is concerned, the matter has been set at rest by the Full Bench decision in *Khudabux* v. *Panjo* (2), referred to above. In that case and in the rulings of the other High Courts the decision always turned upon the construction of the word "decided." In the words of Wild, Additional Judicial Commissioner, in *Khudabux* v. *Panjo* (2):

"The answer to the question depends on whether an interlocutory order is a case which has been decided."

And his conclusion is given in the following terms:

"In my opinion, the employment of the words 'case which has been decided' in s. 115, Civil Procedure Code, tends to show that the legislature did not intend to allow revision of anything which was of an interlocutory nature. There was no reason why it should have intended this, as there would always be a revision of the final order if no appeal lay and the Court had exercised a jurisdiction not vested in it by law, etc."

In s. 32, Karachi Small Causes Court Act, the important word "decided" has been omitted and the argument upon which the decision in *Khudabux* v. *Panjo* (2) and parallel cases turn, has no application. The reason for this omission is not manifest and if the omission was deliberate, it is not clear why the words "in any case" were retained. It has been stated from the Bar that the section has been taken wholesale from the Rangoon Small Causes Court Act. That however gets us no further. It is not for this Court to speculate as to what the intention of the Legislature was in effecting the alteration or whether it was deliberate or accidental. Such speculation would only lead us into the Elysian fields of doubtful hypothesis. In a case such as the present, we are of opinion that an application would lie to this Court under s. 32, Karachi Small Causes Court Act, to enable the Court to satisfy itself that the order was "according to law." These last words would preclude a multiplicity of applications on questions of pure fact unless substantial injustice has resulted within the meaning of the ruling in *Rupchand* v *Minhomal* (6). We would refer to what was said in *Poona City Municipality* v. *Ramji* (7):

"It is undesirable and would be improper for us to attempt when a power is discretionary to define the limits within which such powers should be exercised. That must depend upon the facts of each individual case."

The cardinal principle is that a High Court should only interfere to remedy injustice. We overrule the preliminary objection and will proceed to discuss the application on its merits. We would only add that we are fortified in our conclusion

(5) (1891) A C 107; 60 L J Q B 145; 55 J P 676; 39 W R 657; 64 L T 353.

(6) 27 Ind. Cas. 366; A I R 1914 Sind 98; 8 S L R 164.

(7) 21 B 250.

on the preliminary point by the following observations of Wild, Additional Judicial Commissioner in *Khudabux* v. *Panjo* (2):

"The wording of s. 25, Provincial Small Causes Court Act of 1887, is very similar to that of s. 622 of the old Civil Procedure Code, and s. 115 of the present Code. The wording of s. 32, Karachi Small Causes Court Act of 1929 is different and there is nothing in it to prevent the Court of the Judicial Commissioner of Sind (and when the Sind Courts Act of 1926 comes into operation, the Chief Court) from revising under that section any order of the Karachi Small Cause Court even though interlocutory."

The learned Small Causes Court Judge has dismissed the application mainly on the ground that it is barred by *res judicata*, the similar application filed on April 11, 1932, having been rejected by his predecessor. He also accepted the contentions of opponent No. 1's learned Advocate that the applicants had taken steps in the proceedings before applying to the proper Court for a stay under s. 19, Arbitration Act, that the suit should not be stayed because opponent No. 2 had not applied for stay, and that, as there was an allegation of forgery by one of the parties, it was desirable that the matter should be adjudicated upon by the Court. With regard to the question of *res judicata* it has been trenchantly argued by Mr. Dipchand on behalf of the applicants that the Small Causes Court Judge rejected the previous application under s. 19 filed on April 11, 1932, on the presumption that he had no jurisdiction to entertain it and that there was in fact no adjudication on the merits. The applicant's contentions in this respect are set forth in paras. 3 and 4 of this revision application and are as follows:

"That the learned Judge has erred in failing to appreciate that the prior application was rejected because according to the prior rulings of this Honourable Court in force at the time, the Small Causes Court had no jurisdiction to entertain the application for stay under s. 19, Arbitration Act, and because the suit was also stayed by order of this Honourable Court passed in its District Court jurisdiction. That the learned Judge has erred in failing to appreciate that since there was no adjudication on merits, the order of rejection on the first application could not operate as *res judicata*."

We have given the matter our most careful consideration and we are unable to agree that from the order of the learned Small Causes Court Judge "pleader heard rejected" it can be inferred that there was no adjudication on the merits. What transpired before the learned Small Causes Court Judge is a question of fact, for the decision of which, we have only before us the order itself and a portion of the Court diary. There is nothing in these to indicate with any degree of certainty that the application was rejected merely on the ground that the learned Judge considered that he had no jurisdiction to entertain it. It was argued that the use of the term "rejected" in preference to the word "dismissed" implies a refusal to accept the application rather than a decision on the merits. We are, however, unable to accept the contention. Incidentally in any event the former order would appear in the order now sought to be set aside, to have been interpreted by the Small Causes Court Judge as a decision on the merits. Even were we to go to the extent of expressing that, there is doubt as to the circumstances under which the order was passed, a conclusion on this point in Mr. Dipchand's favour must be more or less speculative in the absence of any further material and it is not for us to enter into the realms of speculation.

Mr. Dipchand argued that the suit had in fact been stayed on April 11, 1932. It is clear, however, from the diary of the Small Causes Court that on May 4, 1932, when the application of April 11 was rejected by the Small Causes Court Judge, no stay order had been received by the Small Causes Court from this Court.

In the light of the Full Bench ruling in *Banarsidas & Sons* v. *Murlimal Satramdas* (1), the Small Causes Court had at that time jurisdiction to entertain the application of April 11, 1932, under s. 19, Arbitration Act, and any order on such application, however erroneous, cannot be deemed to have been made without jurisdiction, but would be an order by a Court of competent jurisdiction. The order would not consequently be void, but the party aggrieved might in a proper proceeding have invoked the aid of a superior tribunal to have it set aside. Until it has been so vacated, it is operative between the parties and cannot be ignored and challenged collaterally in a different proceeding. Jurisdiction in brief is the power to hear and decide and the power to decide is the power to decide erroneously as well as correctly. In the words of Lord Hobhouse in *Malkarjun* v. *Narhari* (8):

"a Court has jurisdiction to decide wrong as well right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken,

(8) 25 B 337; 27 I A 216; 7 Sar. 739; 5 C W N 10; 2 Bom. L R 927; 10 M L J 368 (P C).

the decision, however wrong, cannot be disturbed."

It is not inconceivable that a revision application to set aside the order of May 4, 1934, would have been successful, it having been decided by this Court and other High Courts that in an application under the Arbitration Act for stay of a suit, it is the *prima facie* duty of the Court to stay and the onus is on the plaintiff to show why he should not be bound by the agreement to refer: see *inter alia Abdullah Haroon* v. *E. D. Sassoon* (9). No steps were, however, taken to impugn the order of May 4, 1934, and so, however erroneous that order might be, it stands and is binding on the Court which passed it. We are, therefore, of the opinion that the learned Judge of the Small Causes Court was correct in dismissing the second application under s. 19 on the ground that it was barred as *res judicata*.

In view of our decision on this aspect of the case we propose to deal only very briefly with the other points raised. It has now been decided that no appeal lies against an order staying or refusing to stay a suit under s. 19, Arbitration Act, see *Menghraj Khialdas* v. *Langley, Billimoria & Co.* (10), s. 19 gives the Court a discretion to stay or refuse to stay proceedings. The language of the section itself is clear and authorities are numerous. I would refer to the following cases *Soda Waterwala* v *Volkart Brothers* (11), *Kedarnath Babulal* v. *Sumpatram Doogur* (12), *Holland Bombay Trading Co.* v. *Essardas* (13), and *Dinkarrai Lakshmiprasad* v. *Yeshvantrai Hariprasad* (14). In the last mentioned case Rangnekar, J., observes:

"The authorities show that if a person files an action in breach of an agreement to refer the other party, has a remedy, and that is to apply for stay of the action. But the Court is not bound to stay the action. The Court has a discretion and may well refuse to stay the action. If the Court in the exercise of its discretion stays the action, the plaintiff has no remedy left but to proceed with the arbitration. If the Court refuses to stay the action, the Court has seisin of the disputes and it is by its decision, and its decision alone, that the rights of the parties are settled."

The English authorities are equally definite: see *Clough* v. *County Live Stock Insurance Association, Ltd.* (5), and the remarks of Lord Moulton in *Bristol Corporation* v *John Aird & Co.* (16), declining to interfere with the discretion exercised by the Court below which had refused to stay a suit. His Lordships said:

" . . . . . On a question of judicial discretion one ought not lightly to allow an appeal from a Court which had not proceeded on wrong judicial lines "

In its High Court Jurisdiction this Court has always declined to interfere in a discretion vested in a lower Court which has not been improperly exercised. With special reference to the Small Causes Courts, it is accepted by this Court that the powers of interference under s. 25, Provincial Small Causes Court Act, are wider than those under s. 115, Civil Procedure Code, and are not limited to correcting errors of law strictly so called. Such powers should however, be exercised only to remedy injustice : see *Ruichand* v. *Minhomal* (6). The situation would be the same regarding revision under s. 32, Karachi Small Causes Court Act, except in so far as revision against interlocutory orders are concerned, as mentioned above. We do not consider in view of the particular circumstances of the present case that, in the result, the learned Small Causes Court Judge has not exercised a proper discretion in refusing a stay either on the ground that one of the parties had not applied for stay or on the ground that forgery has been alleged. There was no agreement to refer to arbitration any disputes between opponent No. 1 and opponent No. 2 or between the applicants and opponent No. 2 and the suit as against opponent No. 2 cannot be stayed. The success of opponent No. 1's claim against opponent No. 2 is contingent upon the Court holding in favour of the applicant and the arbitrators finding in favour of the applicants would of course not be binding in the suit against opponent No. 2. Unless, therefore, the arbitrators and the Court arrive at the same conclusion there would be a conflict of decisions and possibly a consequent failure of justice.

The fact that a submission clause does

(9) 56 Ind. Cas. 76; A I R 1920 Sind 61; 13 S L R 201.

(10) 81 Ind. Cas. 759; A I R 1923 Sind 38; 17 S L R 195.

(11) 82 Ind. Cas. 81; A I R 1923 Sind 25.

(12) 60 Ind. Cas. 951; A I R 1920 Cal. 795; 47 C 1020.

(13) 98 Ind. Cas. 151; A I R 1926 Sind 286; 19 S L R 168.

(14) 124 Ind. Cas. 119; A I R 1930 Bom. 98; 54 B 197; 31 Bom. L R 1403; Ind. Rul. (1930) Bom. 247.

(15) (1916) 32 T L R 526; 85 L J K B 1185; 60 S J 642.

(16) (1913) A C 241; 82 L J K B 684; 29 T L R 360; 77 J P 209; 108 L T 434.

not include all the matters which are the subject of legal proceedings may be a sufficient cause for refusing to stay. In *Turnock* v. *Sartoris* (17), with reference to arbitration proceedings arising out of disputes regarding a lease, a stay of a suit was refused, it being held that it would not be right to split up the action by referring to arbitration the matters arising under the lease leaving the action to proceed as to the other matters. In *Young* v. *Buckett* (18), where partners had agreed to refer to arbitration dispute arising between them with respect to the partnership so that reference had to be made within a certain limited time after such dispute and various disputes had arisen at different times and after the limited time had expired as to most of the disputes, but not as to one, one of the parties required the reference to arbitration of the matters in dispute, Fry, J., in the exercise of his discretion refused to separate the matters in dispute by sending to arbitration the one as to which the limited time had not expired, but the Court dealt with the matter as a whole. I would also refer to the following remarks of Crouch, A. J. C., in *Ratanchand Ramkrishendas* v. *Sahiram Dunichand* (19):

"It is not desirable to stay a suit when only some of the matters in litigation can be settled by the award."

On the other hand as held by the Court of Appeal in *Ives & Barker* v. *Williams* (20), the fact that a small portion of the relief claimed is not within the scope of the arbitration clause is not in itself a sufficient reason for refusing to stay proceedings when the main subject of the action is within the arbitration clause. Each case must obviously be considered on its own particular facts.

With regard to the question of forgery, when there is charge of fraud or forgery, against one of the parties to a submission clause, a Court has discretion to refuse a stay. Generally speaking where the party charged desires a public inquiry, the Court will generally refuse to send the case to arbitration but where the party making the charge desires that the matter should be dealt with in the Court, the Court will be less inclined to stay the suit: see *Maninda Chandra Nandy* v. *H. V. Low & Co., Ltd.* (21). In the present case the learned Small Causes Court Judge having heard both parties came to the conclusion that it was desirable that the matter should be adjudicated in Court relying upon the decision in *Majet Subbiah & Co.* v. *Tetlay & Whitely* (22). As already indicated we are not prepared to interfere with the discretion of the learned Small Causes Court Judge which appears from his order to have been judicially exercised. However, with reference to this question we desire to sound a note of warning. To ensure a proper discretion in refusing to stay a suit on an allegation of fraud or forgery, the Court should ascertain that there is some foundation for such a charge; otherwise there will be a tendency to allege fraud in any case in which a party to a submission clause wishes to avoid arbitration.

With reference to the question whether the applicant took any steps in the proceedings within the contemplation of s. 19 of the Act, little need be said. The law upon the point epitomised in *Fleming Shaw & Co.* v. *Haji Yusif Ellias* (23), in which it was unequivocally laid down following *Sarat Kumar Roy* v. *Corporation of Calcutta* (24) and *Bartlett* v. *Ford's Hotel Co.* (25), that an application made to the Court for postponement of the hearing of the suit is a step in the proceedings within the meaning of s. 19, Arbitration Act, irrespective of the intention with which the application is made. Whether the applicant wishes to have further time to file a written statment or to raise as a bar to the suit the agreement to refer to arbitration, in either event, his application is an application to invite the Court to do something which would enable him to establish his defence. It is for the Court to determine whether any particular act or application is a step in the proceeding, irrespective of the fact that a party may not have had any intention of submitting to the Jurisdiction of the Court. I would refer to the observations of Page,

(17) (1889) 43 Ch D 150; 38 W R 340; 62 L T 209.

(18) (1881) 44 L T 206; 30 W R 511; 51 L J Ch. 501.

(19) 52 Ind. Cas 139; A I R 1919 Sind 80; 13 S L R 23.

(20) (1894) 2 Ch D 478; 63 L J Ch. 521; 42 W R 483; 70 L T 674.

(21) 83 Ind. Cas. 934; A I R 1924 Cal. 796; 39 C L J 504.

(22) 75 Ind. Cas. 673; A I R 1923 Mad 693; 32 M L T 380; 45 M L J 39; 18 L W 77; (1923) M W N 445.

(23) 40 Ind. Cas. 81; A I R 1917 Sind 12; 10 S L R 180.

(24) 34 C 443; 11 C W N 306.

(25) (1895) 1 Q B 850; 64 L J Q B 452.

J., *Bhowanidas Ramgobind* v. *Panachand Luchmipat* (26), at p. 461*. He says:

"Any act in the nature of an application to the Court which indicates that a party is willing that the suit should proceed, in my opinion, would be a step in the proceedings within s. 19, Arbitration Act. The intention of the party is to be gathered from the nature of the application which is made, and if, having regard to the form of the application, the Court is of opinion that a step has been taken, it will so hold, notwithstanding that the party may in truth and in fact have no such intention, or that the application is coupled with a protest that the party desires that the matters in dispute should be referred to arbitration"

In the light of these remarks there can be little doubt that the applicant took steps in the proceedings on March 17, 1932, in obtaining an adjournment and submitting to an order to file a written statement in 7 days. Similarly on May 4, 1932, after the rejection of the application under s. 19, Arbitration Act, and s. 151, Civil Procedure Code, the applicants clearly took steps by submitting to an order to file written statement within 5 days. On this date no order of stay had been received by the Small Causes Court. There was probably no intention whatsoever of submitting to the jurisdiction of the Court, but in effect the applicants did so and took steps in the proceedings. Mr. Dipchand relies on *Khemchand Ramdas* v. *Udhavdas Varandmal* (27). In that case there would appear to have been no submission to the Jurisdiction of the Court, as De Souza, A. J. C., observes:

"in the present case there was merely an intimation by the pleader to the Court that an application for stay will be made in this Court."

and it is significant to note that DeSouza, A. J. C., agreed entirely with the dictum of Pratt, J. C., in *Fleming Shaw & Co.* v. *Haji Yusif Ellias* (23). With these remarks we dismiss the application.

We feel constrained to say that it is with regret that we take this step. This Court has always been jealous to safeguard and foster the very salutary and beneficial facilities afforded to the mercantile community by the Arbitration Act. In this particular case the arbitrators had actually proceeded to the stage of making an award when however they differed and desired to refer the difference to an umpire. Moreover, undoubtedly the complications which afterwards occurred with regard to the stay of the suit are attributable to the then existing doubt as to the proper Court in which the application under s. 19, Arbitration Act, should be filed. We make no order as to costs.

D. *Application dismissed.*

(26) 88 Ind. Cas. 929; A I R 1925 Cal. 801; 52 C 453.

(27) 106 Ind. Cas. 565; A I R 1928 Sind 97; 22 S L R 286.

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PATNA HIGH COURT
Special Bench

Appeal from Appellate Decree
Nos. 1008 to 1021 of 1931
March 6, 1935

MOHAMMAD NOOR, JAMES AND AGARWALA, JJ.

Maharaj Kumar RAM RANBIJAY PRASAD SINGH—APPELLANT

versus

RAMGIRHI RAI AND OTHERS—RESPONDENTS

Bengal Tenancy Act (VIII of 1885), ss. 30 (a) (b), (c), 32, 105—Enhancement of rent on ground of rise in prices of staple food crops—Matters to be considered—Period to be taken for comparison—'Practicable', meaning of—S. 30 (c), applicability of—Landlord and tenant—Rent not enhanced for hundred years—Presumption of fixity of rent, if arises—Interpretation of Statutes — Plain wording of section to be followed.

The rise contemplated in s. 30 (b) of the Bengal Tenancy Act is the rise over the price which was prevailing at about the time when the current rent was fixed. It is assumed that the rent must have been fixed on the basis of the price prevailing. Section 32 provides the machinery for finding out what enhancement should be allowed in case there is a rise in the prices of these staple food crops. Sub-clause (*a*) enjoins upon the Court to compare the average prices of the two decennial periods. One of them must be the period immediately preceding the institution of the suit; and the other may be any one which is practicable to take. But at the same time it must be equitable to take that decade in consideration. By practicable, it is to be understood the period for which figures are available or can be obtained without undue inconvenience and trouble. According to the terms of the section the Court can take any period which it thinks equitable to take. The decennium may be one immediately preceding the decennium with which the comparison is to be made or any earlier decennial period. Ordinarily, however, it may be inequitable to go beyond the decennial period just preceding the time when the current rent was fixed, as in that case it will be unjust upon the *raiyats* to pay enhancement on the basis of rise of price compared with the prices which prevailed many years before the time when the rent was fixed which must have been taken into consideration at the time of the fixing of the current rent. Shorter period can only be substituted for decades if it is in the opinion of the Court impracticable to take the latter into consideration. [p. 903, col. 2; p. 904, col. 1.]

Where the rent under s. 105, Bengal Tenancy Act, must have been settled on the basis of rise in the decennium just preceding the settlement, it will be more equitable to compare the prices of the decennium just before the institution of the suit with the prices which prevailed in the decade just before the settlement of rent Sub-clause (*c*), of s. 30 has no application and for all practical purposes that sub-clause may now be taken to be obsolete. [p. 904, col. 1.]

The mere fact that the tenant only claimed that rent was not enhanced for hundred years is not enough to prove that the holding was at a fixed rent inasmuch as after the preparation of the Record of Rights the presumption for fixity of rent on account of there being no change for twenty years is no longer available to the tenant. [p. 905, col. 2]

The sections of an Act must be interpreted on the basis of the plain wordings of the sections themselves. The Legislature must be taken to have meant what they have said and not what they contemplated to say but did not say. [p. 904, col 2]

A. from a decision of the District Judge of Shahabad, dated February 11, 1931, reversing that of the Munsif of Buxar, dated February 5, 1930.

Messrs. *S. M. Mullick*, *N. K. Prasad, II*, and *Ramnandan Prasad*, for the Appellant.

Messrs. *Parmeshwar Dayal* and *P. P. Varma*, for the Respondents.

Mohammad Noor, J.—These fourteen second appeals arise out of the same number of suits for enhancement of rents of occupancy holdings of the defendants on the ground of rise in prices of staple food crops under s. 30 of the Bengal Tenancy Act. The rent of all these holdings except perhaps of the one involved in second appeal No. 1012 was settled under s. 105 of the Bengal Tenancy Act in the year 1914. That rent came into operation from 1921 *Fasli*. These suits for enhancement of rent were instituted just after the completion of fifteen years since the settled rent came into force. The learned Munsif gave the plaintiff decrees for enhancement at the rate of four annas in the rupee. For the purpose of comparison under s. 32 (*a*) of the Bengal Tenancy Act he took the two decades just preceding the institution of the suits, that is to say, he compared the average prices of the decennial period just before the institution of the suits with the decennial period just preceding it. The suits having been instituted just after fifteen years since the rent was settled under s. 105, it is obvious that three years of the earlier decennium fell into the period which was prior to the settlement of rent. The learned District Judge on appeal has dismissed the plaintiff's suits entirely. He held that the learned Munsif was not empowered to include for comparison any period prior to the settlement of rent under s. 105 of the Bengal Tenancy Act. Presumably on his interpretation of sub-cl. (*c*) of s. 32, he took into consideration only the period of the currency of rent and divided it into two periods and compared the one with the other; and having found that the rise was only six pies in the rupee, declined to give any enhancement at all. These appeals came up for hearing before a Division Bench of this Court (Macpherson and Varma, JJ.); but considering the importance of the question involved, they suggested that the appeals be heard by a Special Bench and hence these cases have come before this Bench.

The only question of law which arises is whether the learned District Judge was right in taking into consideration two shorter periods of seven years each, *i. e.*, only the period within the currency of the present rent; and whether he was right in holding that any period before the settlement of rent could not be taken into consideration. In order to decide this an examination of the provisions of law for enhancement of rent on the ground of rise in prices of the staple food crops is required. Section 30 of the Bengal Tenancy Act mentions the various grounds on which the money rent of an occupancy holding can be enhanced. We are only concerned with sub-cl. (*b*) of that section which authorises enhancement of rent on the ground that there has been a rise in the average local prices of staple food crops during the currency of the present rent. It is obvious that the rise contemplated in this sub-clause is the rise over the prices which prevailed just at or about the time when the rent was fixed. The principle is obvious. The rent represents a share of the produce of the land which from ancient times the cultivators of the soil were paying to the Government of the time being and which is now payable to the landlords. The money rent represents the price of the share of the produce which the landlord is entitled to receive from the *raiyats*. Any rise or fall in the price of staple food crops necessarily disturbs this proportion of the share of the landlord and the *raiyat*. Therefore, the framers of the Bengal Tenancy Act provided both for enhancement and reduction of rent on the ground of rise and fall of prices of the staple food crops. It is obvious from the principles on which these enhancements and reductions of rent are based that the rise contemplated in s. 30 (*b*) of the Act is the rise over the price which was prevailing at about the time when the current rent was fixed. It is assumed that the rent must have been fixed on the basis of the price prevailing. Section 32

provides the machinery for finding out what enhancement should be allowed in case there is a rise in the price of these staple food crops. Sub-cl. (*a*) enjoins upon the Court to compare the average prices of the two decennial periods; one of them must be the period immediately preceding the institution of the suit, and the other may be any one which is practicable to take. But at the same time it must be equitable to take that decade into consideration for consideration. By practicable I understand the period for which figures are available or can be obtained without undue inconvenience and trouble. According to the terms of the section the Court can take any period which it thinks equitable to take the decennium may be one immediately preceding the decennium with which the comparison is to be made or any earlier decennial period. Ordinarily, however, it may be inequitable to go beyond the decennial period just preceding the time when the current rent was fixed, as in that case it will be unjust upon the *raiyats* to pay enhancement on the basis of rise of price compared with the prices which prevailed many years before the time when the rent was fixed which must have been taken into consideration at the time of the fixing of the current rent. In the present case the rent under s. 105 of the Bengal Tenancy Act must have been settled on the basis of rise in the decennium just preceding the settlement. The learned Munsif has in these cases taken the earlier decennial period, the one just before that decennium which was immediately preceding the institution of the suits. There is nothing in this sub-clause which enjoins upon the Court not to go to a period before the date when the rent was last fixed or settled. Rather, in my opinion, it will be more equitable to compare the prices of the decennium just before the institution of the suit with the prices which prevailed in the decade just before the settlement of rent. The learned District Judge seems to have acted upon sub-cl. (*c*) which in my opinion has no application. Shorter period can only be substituted for decades if it is in the opinion of the Court impracticable to take the latter into consideration. It is to be seen that comparison between two decennial periods is obligatory. Sub-cl. (*c*) is an exception. When the Bengal Tenancy Act was passed in 1885, the Legislature must have contemplated institution of suits immediately after the passing of the Act. No definite arrangements for the publication of the price lists were prevailing then as it is now. In cl. (*c*) the Legislature provided for cases where it will be impracticable to get the prices of two decades. 'Practicable' in this clause again I think means the same thing as it does in cl. (*a*). It is not practicable to compare the prices of two decades when evidence of prices is not available or evidence can only be procured with such an amount of inconvenience and trouble that the Court thinks under the circumstances to be unnecessary. But those considerations do not arise now when we have got a complete price list of the staple food crops commencing from the year 1887. For all practical purposes cl. (*c*) may now be taken to be obsolete. Therefore, the learned District Judge in my opinion was not right in confining himself to the periods of the currency of the present rent.

The learned Advocate for the respondents has drawn our attention to a passage in the speech of Sir Stuart Bayley given in the Imperial Legislative Council during the passage of the Bengal Tenancy Act. First of all these speeches are of no value in interpreting the meaning of the statute. We must interpret sections of an Act on the basis of the plain wordings of the sections themselves. The Legislature must be taken to have meant what they have said and not what they contemplated to say but did not say. Here I feel no difficulty in interpreting the two clauses of s. 32; but the passage in the speech referred to by the learned Advocate for the respondents does not support him. There Sir Stuart Bayley was comparing the position which was before the passing of the Bengal Tenancy Act with the position which would be after the passing of the Act; and it was pointed out by him that the landlords would be in a better position in securing enhancement because it would no longer be necessary for them to prove the prices prevailing before the time when the rent was fixed, as the section authorises the Court to compare any two decennial periods even between the currency of the rent. The word used in the speech was 'may' and not 'must'.

I think the judgment of the learned District Judge in dismissing the suits cannot stand. Now the question arises—what should be done in this particular

case? The learned Munsif has given an enhancement of four annas in the rupee. We cannot ignore the fact that since that judgment, there has been a considerable fall in the prices of staple food crops on account of the general economic depression and as we are finally disposing of the cases now, we must see that no injustice is done to the *raiyats* on account of the enhancement being at a figure which may be unjust and inequitable. In my opinion four annas in the rupee in the circumstances which have arisen since the order of the learned Munsif will cause undue hardship on the tenants. The question arises whether the suits should be remanded in order to determine what should be the fair enhancement in these cases or whether we should by some rough calculation fix a reasonable amount. I find that in a case which came up on appeal from the judgment of the same learned District Judge (Mr. Davies) and was from the neighbourhood of the village involved in the present suits, the learned District Judge himself gave enhancement at one anna in the rupee. That rate was upheld in this Court by my learned brother James—(Second Appeal Nos. 928 to 953 of 1931). I see no reason why the same amount of enhancement should not be allowed in these cases. The suits in those cases were instituted at about the same time when the present suits were instituted. Therefore, in my opinion, it will serve the ends of justice if instead of remanding the cases for an elaborate enquiry, enhancement be granted in all these cases at one anna in the rupee.

The only question for consideration which seems to have been specially raised is in regard to Second Appeal No. 1012 which corresponds to suit No. 737 of 1929 before the Munsif. It seems that in that case a specific defence was taken that the holding was at a fixed rate and not an occupancy holding. At one place the learned Munsif has said that the rent of all the holdings involved in these suits were settled under s. 105 of the Bengal Tenancy Act. If so, no question of this holding being at a fixed rate did in fact arise. But later on the learned Munsif seems of have specifically considered the plea of the defendant of that suit about the fixity of the rent and while dealing with this plea, he does not seem o have considered that the rent was nhanced in the year 1914. Assuming, however, that the holding involved in that suit was not the subject-matter of settlement of rent in 1914, the plea of fixity of rent cannot be entertained for a moment. Apart from the reasons given by the learned Munsif for coming to a conclusion against the defendant, it seems that even in the evidence given by the defendant of that suit, he only claimed that rent was not enhanced for hundred years. That is not enough now since the Record of Rights has been prepared and the presumption for fixity of rent on account of there being no change for twenty years is no longer available to the defendant. Therefore, I agree with the learned Munsif in holding that the defendant of that suit has failed to prove that the holding was at a fixed rent.

The appeals are partly allowed. The rent of all the holdings is enhanced at the rate of one anna in the rupee. The appellant will be entitled to half the costs of this Court as well as of the Court of appeal below. The order for costs made by the Munsif will stand.

James, J.—I agree.

Agarwala, J.—I agree.

N. *Appeals partly allowed.*

OUDH CHIEF COURT

First Civil Appeal No. 28 of 1933

March 22, 1935

KING, C. J. AND THOMAS, J.

Mahant SUKHRAM DASS—PLAINTIFF—APPELLANT

versus

Babu MAHBUB KHAN AND OTHERS—DEFENDANTS—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 92—Mortgage—Subrogation—Subsequent mortgagee paying off prior mortgage—Presumption as to intention to keep it alive as shield against intermediate mortgagee—Intermediate mortgagee paying nothing towards redemption—Whether can get benefit of redemption of prior mortgages — Agency, doctrine of — Applicability.

The subsequent mortgagee in paying off a prior mortgage must be presumed to have intended what was to his benefit and he ought to be deemed to have intended to keep alive the prior mortgage to be used as a shield against the intermediate mortgages. *Kanhaiya Lal* v. *Gulab Singh* (4), applied. [p. 907, col. 1.]

A held a mortgage deed executed by *B* in respect of a plot of land which was included in the property mortgaged under the deed in suit executed by *B* and *C* in favour of the plaintiff. On the strength of his mortgage *A* claimed priority in respect of his mortgage which was earlier in date. The plaintiff claimed that he had redeemed certain prior incumbrances upon the mortgaged property and that he was thereby subrogated to the rights and interests

of those prior mortgagees and thus acquired priority as against the intermediate mortgage held by *A*. The consideration for the mortgage deed in suit consisted partly of certain sums of money made payable by the mortgagee plaintiff for the redemption of the prior mortgages. It was proved that the plaintiff had in fact paid off the prior incumbrances :

Held, that as a matter of a justice and equity, there was no reason why the intermediate mortgagee should get the benefit of the redemption of the prior mortgages when he has paid nothing towards such redemption and that the plaintiff could claim to be subrogated to the rights of the mortgagees whom he had paid off.

Held also, that the doctrine of agency could not be applied to deprive the claim of the plaintiff to be subrogated.

Even if s. 92 Transfer of Property Act, has no retrospective effect, nevertheless the rule laid down by the legislature in s. 92 would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of the amending Act of 1929. *Tota Ram* v. *Ram Lal* (6), followed. [p. 908, col. 1.]

A person cannot claim subrogation when he simply performs his own obligation or covenant. *Jagmohan Deo* v. *Jugal Kishore* (10), relied on. [*ibid.*]

F. C. A. against the order of the Additional Sub-Judge, Sultanpur, dated December 22, 1932.

Mr. *Harish Chandra*, for the Appellant.

Mr. *S. N. Roy*, for the Respondents.

Judgment.—This appeal arises out of a suit for sale on the basis of a simple mortgage, dated January 31, 1927, executed by defendants Nos. 1 and 2 for Rs. 9,000 in favour of the plaintiff.

The suit was defended upon a number of grounds, but for the purposes of this appeal we are only concerned with the pleas raised by defendants Nos. 6 and 9.

The defendant No. 6 holds a mortgage-deed dated October 26, 1926, executed by defendant No. 1 in favour of defendant No. 6 in respect of a certain plot of land in the village of Saresar which is included in the property mortgaged under the mortgage deed in suit. On the strength of this mortgage deed defendant No. 6 claimed priority in respect of his mortgage. The plaintiff's case was that he had redeemed certain prior incumbrances upon the mortgaged property, namely, Ex. 2, dated April 28, 1924, Ex. 3, dated October 1, 1924 and Ex. 5, dated June 16, 1926, and that therefore he was subrogated to the rights and interests of these prior mortgagees and thus acquired priority as against the intermediate mortgage held by defendant No. 6.

The consideration for the mortgage deed in suit consisted partly of certain sums of money made payable by the mortgagee plaintiff for the redemption of the prior mortgages Exs. 2, 3 and 5. In other words those sums of money were left in the hand of the mortgagee for the discharge of the prior incumbrances. It was proved that the plaintiff had in fact paid off the prior incumbrances Exs. 2, 3 and 5. The question is whether by paying off these prior mortgages the plaintiff can claim to be subrogated to the rights and interests of the prior mortgagees redeemed by him and can thus claim priority as against the intermediate mortgagee, defendant No. 6. The trial Court took the view that the prior mortgages were satisfied by the plaintiff from the money of the mortgagors in the capacity of an agent and the payments cannot therefore be held to be an independent act of the mortgagee. The plaintiff therefore could not claim to be subrogated to the rights of the mortgagees whom he had paid off.

It is contended for the appellant that the Court below has taken an erroneous view upon this point.

The learned Subordinate Judge relied mainly upon three rulings, but it is contended that these rulings are distinguishable. In the case of *Tufail Fatima* v. *Bitola* (1), a decree for sale had been passed against a mortgagor. The mortgagor then borrowed more money on a mortgage of several villages, including those previously mortgaged, and applied a portion of such money in satisfying the previous decree for sale. The subsequent mortgagee then brought a suit upon her mortgage in which she sought to bring to sale the villages which were the subject of the previous mortgage and decree. It was held that she could do so. It is true that in this case the learned Judges took the view that the plaintiff had discharged the prior mortgage at the request of the mortgagor as the mortgagor's agent. This ruling, however, does not seem to be directly in point because there was no intermediate mortgage and the question did not arise whether the plaintiff by discharging the prior mortgage could claim to be subrogated to the rights of the prior mortgagee as against an intermediate mortgagee. The same observations apply to the case of *Shafiq Ullah Khan* v. *Sami Ullah Khan* (2) which has also been relied upon by the Court below. The subsequent mortgagee who paid off a prior

(1) 27 A 400; 2 A L J 13; A W N 1904, 254.

(2) 123 Ind. Cas. 101; 52 A 139; A I R 1929 All. 943; (1930) A L J 57; Ind. Rul. (1930) All. 357.

mortgage was held to have done so as the agent of the mortgagor and it was held that there was no intention of keeping the prior mortgage alive. This case however is also distinguishable because there was no intermediate mortgage, so there was no question whether the prior mortgage could be kept alive as against the intermediate mortgagee. The case of *Said Ahmad* v. *Narain Singh* (3), can be distinguished on the same grounds.

The appellant relies strongly upon the case of *Kanhaiya Lal* v. *Gulab Singh* (4). The trial Court found this case to be distinguishable, but in our opinion it is directly in point. The facts of that case are very similar and it was held that the subsequent mortgagee in paying off a prior mortgage must be presumed to have intended what was to his benefit and he ought to be deemed to have intended to keep alive the prior mortgage to be used as a shield against the intermediate mortgages. This ruling seems to us to be clearly in the appellant's favour.

The doctrine of agency which has been accepted by the Court below seems to be of doubtful authority. The subsequent mortgagee who pays off a prior mortgage does so, not for the benefit of the mortgagor but for his own benefit. Moreover, the money paid by the plaintiff in the present case cannot, we think, be held to be the mortgagor's money which was merely paid by the plaintiff on behalf of the mortgagors. The mortgage deed in suit was indeed worded as a deed to secure a sum of Rs. 9,000 borrowed by the mortgagors, but the mortgagors cannot be held to have received consideration for the sums left in the hands of the mortgagee for the discharge of prior incumbrances unless and until those incumbrances had in fact been discharged by the subsequent mortgagee. It is doubtful whether such sums should be held to be the sums of money belonging to the mortgagor.

The doctrine of agency has been doubted in the case of *Raghunandan Prasad* v. *Ajodhiya Singh* (5). In that case certain sums of money were left with the mortgagee for the redemption of prior mortgages but it was held that the subsequent mortgagee in redeeming the prior mortgages did not act as an agent of the mortgagors but acted on his own behalf as a subsequent mortgagee. In the case of *Tota Ram* v. *Ram Lal* (6), decided by a Full Bench of the Allahabad High Court, the doctrine of agency was adversely criticised and it was pointed out that it seemed inconsistent with the Privy Council cases of *Dinobandhu Shaw* v. *Jogmaya* (7) and *Muhammad Ibrahim Husain Khan* v. *Ambika Prasad Singh* (8). This Full Bench case is indeed an authority directly in the appellant's favour. In that case there were three successive mortgages of the same property. Out of the consideration money for the third mortgage a sum was left with the third mortgagee for paying off the two earlier mortgages. The third mortgagee paid off the first mortgage but not the second. On a suit for sale by the second mortgagee it was held that the third mortgagee having redeemed the first mortgage was to that extent subrogated to the position of the first mortgagee and could claim priority. The learned Judge held that this was the correct view even before the amendment of the Transfer of Property Act in 1929 and was certainly the correct view if the law was governed by the new s. 92 as introduced by the amending Act of 1929. The learned Judges took the view that s. 92 had retrospective effect and that the case was governed by the first paragraph of s. 92. Apparently it was not argued that the third paragraph might be applicable. The third paragraph seems to apply to a person other than one of the persons referred to in s. 91, so it would not apply to a subsequent mortgagee; otherwise there would seem to be some conflict between the first and third paragraphs of that section.

For the respondents reliance has been placed upon the decision of a single Judge of this Court in *Jaidevi Kuar* v. *Sripal Singh* (9). In that case it was held that the rule against the subrogation of a mortgagor was extended to an incumbrancer who discharges the prior incum-

(3) 139 Ind. Cas. 64; 9 O W N 253; A I R 1932 Oudh 255; Ind Rul. (1932) Oudh 339.

(4) 138 Ind Cas. 206; 9 O W N 387; Ind Rul. (1932) Oudh 301; A I R 1933 Oudh 9.

(5) 129 Ind. Cas. 378; A I R 1930 All. 869; 14 R D 522; L R 11 A 241 Rev; Ind. Rul. (1931) All. 154; (1931) A L J 214.

(6) 139 Ind. Cas. 107; 54 A 897; (1932) A L J 627; A I R 1932 All. 459; Ind. Rul. (1932) All. 524 (F B).

(7) 29 C 154; 29 I A 9; 4 Bom. L R 238; 12 M L J 73; 6 C W N 209; 8 Sar. 217 (P C).

(8) 14 Ind. Cas. 496; 39 C 527; 9 A L J 332; 39 I A 68; 11 M L T 265; (1912) M W N 357; 14 Bom. L R 280; 16 C W N 505; 15 Cr. L J 411; 22 M L J 468 (P C).

(9) 147 Ind. Cas. 628; 11 O W N 139; 6 R O 281; A I R 1934 Oudh 129.

brance which he is, by contract express or implied, bound to discharge. A person cannot claim subrogation when he simply performs his own obligation or covenant. This view is supported by a ruling of the Privy Council in *Jagmohan Das* v. *Jugal Kishore* (10). The ruling of a Bench of this Court in *Muhammad Raza* v. *Bilqis Jahan Begam* (11), has also been cited for the respondents, but it does not appear to be in their favour. It was held that where a third mortgagee redeems the first mortgage then he would be subrogated to the position of the first mortgagee as against the second mortgagee. This appears to be directly in the appellant's favour. The case before us seems to be a case of legal subrogation and not conventional subrogation which is dealt with in para. 3 of the new s. 92.

Although there is no doubt some conflict of authority on this point, we think that the weight of authority is in favour of the appellant. We also agree with the view expressed in the Full Bench ruling of the Allahabad High Court mentioned above, *Tota Ram* v. *Ram Lal* (6), that even if s. 92 has no retrospective effect, nevertheless the rule laid down by the Legislature in s. 92 would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of the amending Act of 1929. As a matter of justice and equity we do not see why the intermediate mortgagee should get the benefit of the redemption of the prior mortgagee when he has paid nothing towards such redemption.

In our opinion, therefore, the appeal must succeed, so far as the defence raised by the defendant No. 6 is concerned.

The plea raised by defendant No. 9 stands on a different footing. Defendant No. 1 sold a certain plot on August 3, 1926, to defendant No. 8, the husband of defendant No. 9. On August 10, 1928, defendant No. 8 made a gift of this plot in favour of defendant No. 9. As the mortgage in suit was executed on January 31, 1927, it is clear that the plot mentioned did not belong to defendant No. 1 at the time when he executed the mortgage and therefore the mortgage in suit transferred no interest in this plot to the plaintiff. The mere fact that the plaintiff has discharged a prior incumbrance upon the plot seems to be immaterial. The plaintiff cannot claim any interest in the plot owned by defendant No. 9 on the basis of the mortgage deed in suit. We think that the view of the trial Court was correct in exempting this plot from the decree for sale.

We accordingly allow the appeal to this extent that we amend the decree by deleting the words : "The sale of Saresar shall be subject to the charge of Rs. 200 in favour of Shubrati Khan, defendant No. 6." In other respects the appeal is dismissed. Parties shall receive and pay costs of this appeal and of the Court below in proportion to success and failure.

N. *Appeal allowed.*

(10) 137 Ind Cas. 475 3 i C W N 4; A I R 1932 P C 99; 54 C L J 407; Ind. Rul (1932) P C 188; 36 L W 85 (P C).

(11) 149 Ind Cas. 84; 11 O W N 619; 6 R O 508; A I R 1934 Oudh 213.

PATNA HIGH COURT

Criminal Revision Petition No. 63 of 1935
March 6, 1935
JAMES, J.

RAM JANAM SINGH—COMPLAINANT—PETITIONER
versus
MOHAN LALL AHIR—RESPONDENT

Penal Code (Act XLV of 1860), s. 448—Inhabited house—Delivery of possession — How to be made—Actual possession not delivered to purchaser—Forcible entry by purchaser—Whether amounts to criminal trespass

In order to effect delivery of possession of an inhabited house, it is necessary to eject the former occupier, delivery of possession of the house not being a mere formal act effected by beating a drum and putting up a notice. Where the certificate-debtor makes a forcible entry into the house, possession whereof has not actually be delivered to the purchaser, the former cannot be treated as having committed an act of criminal trespass.

Cr. R. P. from an order of the Sub-Divisional Magistrate of Gaya, dated November 7, 1934, an application against which was rejected by the District Magistrate of Gaya, dated December 7, 1934.

Mr. *Rajkishore Prasad*, for the Petitioner.

Mr. *Sarjoo Prasad*, for the Opposite Party.

Judgment.—These proceedings arise out of the sale of a house in execution of a certificate issued under the Public Demands Recovery Act. The purchaser whose servant is the petitioner before the Court, obtained a writ of delivery of possession, which was taken by the *Nazir* of the Gaya Collectorate to the house on October 9, 1934. The certificate-debtors prayed for time to remove their property from the house; and they began to remove their property but remained in possession. On the following day they moved the Certificate Officer for time to

remove their property from the house; and the Certificate Officer granted them three weeks' time for that purpose. On October 11, they filed a petition praying that the sale might be set aside under s. 29 of the Public Demands Recovery Act, which was entertained by the Certificate Officer, who then recalled his writ of delivery of possession. On the evening of the 12th the petitioner attended the Gaya Kotwali Police Station where it was stated that possession had been delivered to the purchaser on October 9, but that very early on the morning of the 12th, the certificate-debtors with a number of other men had forced an entrance to the house. A complaint to the same effect was made before the Sub-Divisional Magistrate on October 31. The Sub-Divisional Magistrate, after examining the complaint and reading the Police report, came to the conclusion that possession has not been actually delivered on October 9, and dismissed the complaint under s. 203 of the Code of Criminal Procedure. On application made to the District Magistrate, he declined to interfere with this order.

It is argued on behalf of the petitioner that possession was actually delivered on October 9, so that the making of a forcible entry on the night of the 12th amounted to criminal trespass, so as to bring the action of the accused persons within the provisions of s. 448 of the Indian Penal Code; but the learned Sub-Divisional Magistrate has come to the conclusion that no delivery of possession had actually taken place; and this indeed would appear to be obvious. The *Nazir* may possibly have thought that delivery of possession of the house was a mere formal act effected by beating a drum and putting up a notice; but actually in order to effect delivery of possession of an inhabited house, it is necessary to eject the former occupier, and it appears to be clear that the accused persons had never taken actual possession of the house. On November 9, the Certificate Officer rejected the debtors' petition under s. 29 of the Public Demands Recovery Act and directed the writ of delivery of possession should reissue but on November 10, the Certificate Officer, noting that the *Nazir* had delivered possession on October 9, remarked that there was no need to reissue any further writs. Whatever the *Nazir* may have reported, it should have been obvious that possession had not actually been delivered to the purchaser and the writ which had been recalled should then have been reissued; but it is impossible in this case to treat the certificate-debtors as having committed an act of criminal trespass, and the order of the learned Sub-Divisional Magistrate was correct.

This application must be dismissed.

N. *Application dismissed.*

OUDH CHIEF COURT

First Civil Appeal No. 27 of 1933

March 12, 1935

KING, C. J. AND NANAVUTTY, J.

HIRA LAL AND OTHERS—APPELLANTS

versus

Thakurain GAJRAJ KUER AND OTHERS—RESPONDENTS

Deed—Construction—Lease—Taluqdar *acknowledging perpetual occupancy rights—Use of expression* 'naslan bad naslan'—*Provision for payment of* malikana *dues to lessor and his heirs—Under-proprietary rights, if conferred on tenants.*

At the time of the first regular settlement, the plaintiff's ancestors were found to have no under-proprietary rights and they were granted, by the Settlement Commissioner in a suit claiming such rights, merely a decree for tenancy rights for life. At the second regular settlement, the *taluqdar* granted a fresh lease in which it was mentioned that he acknowledged their "occupancy right, which was for life to be perpetual." The plaintiff's ancestors were to pay Government Revenue and *sewai* and *malikana* dues to the *taluqdar* and his heirs. He ended by saying that he executes a "perpetual lease" in favour of the persons mentioned and stated that "it behoves the lessees to remain in possession and occupation generation after generation '*naslan bad naslan*' according to the conditions of this lease and pay rent to the estate and always remain obedient and loyal to the estate:"

Held, that there were no words which would indicate any clear intention for conferring a proprietary interest or a transferable interest, that the expression '*naslan bad naslan*' was not conclusive on the point and that the mere fact that the lease was granted to the lessees and their heirs did not go further than showing that heritable rights were conferred:

Held, also that though the word "*malikana*" is not generally applied to the rent paid by an occupancy tenant but the mere use of this word is not sufficient to show that there was any intention of conferring under-proprietary rights, and that the *taluqdar* merely wished to grant to the lessees heritable occupancy rights in place of the occupancy rights for life which had previously been conferred upon them by the settlement decree and that there was no indication of any intention of going beyond this and converting their occupancy rights into the rights of under-proprietors. [p. 911, col. 2; p. 912, col. 1.]

[Case-law discussed.]

F. C. A. against the order of the Subordinate Judge of Partabgarh, dated December 12, 1932.

Messrs. *H. Husain* and *P. N. Chaudhri*, for the Appellant.

Messrs. *Radha Krishna* and *Parmeshwuri Dayal*, for the Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit for possession of a village named Ailahi. The plaintiffs claimed on the basis of a perpetual lease (Ex. 2) executed in favour of their predecessors by the *taluqdar* on July, 8. Their claim is that under the terms of that lease they acquired under-proprietary rights in the village. The defendants denied that the lease in question conferred anything more than heritable and non-transferable rights.

It is unnecessary for the purpose of this appeal to set forth the facts in any detail. The only question for our decision is whether the plaintiffs hold the village as under-proprietors or whether they hold it merely as perpetual lessees with heritable but non-transferable rights. The trial Court held against the plaintiffs on that point and that is the only question for our consideration.

The first point to consider is the decree passed in favour of the plaintiffs' ancestors at the time of the first regular settlement. Their ancestors claimed under-proprietary rights in the village. Their claim was opposed by the *taluqdar* and the Settlement Officer rejected their claim *in toto*. They appealed to the Settlement Commissioner who agreed that the plaintiffs in that suit had no under-proprietary rights but he modified the decree of the Settlement Officer by granting the plaintiffs a lease of the property for their joint lives at a rent of Rs. 201 per annum. This decree was passed on January 27, 1864.

It is perfectly clear therefore, that at that time the plaintiffs' ancestors were found to have no under-proprietary rights and they were merely granted a decree for tenancy rights for life.

At the second regular settlement the *taluqdar* granted a fresh lease (Ex. 2) on July 8, 1891, and the decision of the question before us turns upon the interpretation of that lease. The *taluqdar* starts by reciting the previous history and mentions that a *Qabzadari* decree for life had been passed in respect of the village of Sital Lal and Bisheshwar Lal by the Settlement Commissioner and that those persons are in possession and occupation under the terms of that decree. He goes on to say that as those persons are old servants and well-wishers of the estates, so now "we acknowledge that occupancy right, which was for life, to be perpetual." He goes on to exempt from the property leased certain specified plots measuring 110 *bighas* and he fixes the amount of rent which the lessees will have to pay. They have to pay Government Revenue and *sewai* and have to pay at the rate of 2 annas as *malikana* dues to the *taluqdar* himself and his heirs and the lessees and their heirs are permitted to appropriate the remaining six annas. The lessees have to provide for the pay of the *chaukidar* and the *Patwari* and for the village expenses. He ends up by saying that he executes a "perpetual lease" in favour of the persons mentioned and states that it behoves the lessees to remain in possession and occupation generation after generation "*naslan bad naslan*" according to the conditions of this lease and pay rent to the estate and always remain obedient and loyal to the estate.

It will be observed that there is nothing to show clearly any intention of conferring a transferable estate. The language is clearly clear on the point that heritable rights are conferred.

It has been argued by the learned Advocate for the appellants that the use of the expression "*naslan bad naslan*" connotes a heritable and transferable estate. For this proposition he relies upon the case of *Karim Dad Khan* v. *Bibi Ghafuran* (1). The learned Judges observed that the words "*naslan bad naslan*" have acquired a technical import in Indian conveyances. They refer to a decision of their Lordships of the Judicial Committee in the case of *Thakur Harihar Bakhsh Singh* v. *Thakur Uma Prasad* (2), in which their Lordships laid down that the words "*naslan bad naslan*" indicate an intention to confer absolute ownership.

The learned Advocate for the respondents seeks to distinguish this case on the ground that in the case cited, the learned Judges did not rely only upon the expression "*naslan bad naslan*" but also laid great stress upon another provision in the lease to the effect that the lessee should exercise all sorts of proprietary powers. These words were certainly of great importance as showing an intention of conferring a proprietary interest and when such an intention is clear, the words "*naslan bad naslan*" would unquestionably indicate that the proprietary interest was to be heritable and was not to be an estate for life only. The case of *Binda Din Tewari* v. *Ram Harakh Dubey* (3) has been cited in support of the

(1) 66 Ind. Cas. 110; 9 O L J 101 at p. 107; A I R 1922 Oudh 42.

(2) 14 C 296; 14 I A 7; 4 Sar. 766; 11 Ind. Jur. 196 (P C).

(3) 121 Ind. Cas. 95; 6 O W N 722; A I R 1929 Oudh 415; Ind. Rul. (1930) Oudh 47.

same proposition but in that case it is clear that transferable rights had been given and the only question was whether the interest conferred was a life estate or a heritable estate. The words "*naslan bad naslan*" were no doubt conclusive on that point.

In the present case, however, we have no words which would indicate any intention for conferring a proprietary interest or a transferable interest. For the respondents, reliance has been placed upon a ruling of a learned Judge of the Judicial Commissioner's Court in *Kalka Singh* v. *Suraj Bali Lal* (4). That case was somewhat similar to the case before us and the language of the document which had to be interpreted in that case was more indicative of proprietary rights than the language of the document under consideration before us. In the ruling cited, the words "*naslan bad naslan*" were used, and over and above that expression it was provided that the granter was to have mutation made in favour of the grantee by getting his name recorded in the *khana milkiat*. There were certain other points which were stressed as showing an indication of conferring under-proprietary rights, such as the mention of *malikana*, but the learned Judge took the view that there was no intention of conferring anything more than the rights of a perpetual lessee and that no under-proprietary rights had been conferred. Another argument advanced for the appellants is that when a heritable estate is given, it should be presumed that the intention was to confer also a transferable estate. For this proposition the case of *Sheo Bahadur Singh* v. *Bishunath Saran Singh* (5), has been cited. There is no doubt an observation by one of the learned Judges at p. 42* to the effect that where a man is proved to have hereditary rights, and where there is nothing to show that they are non-transferable, they must be presumed to be transferable. In that case there was nothing to show that they were not transferable. In the case before us we think that there are indications that the estate was not meant to be transferable.

It has also been argued that the lease provides for payment of *malikana* dues to the lessor *and to his heirs* and that as the lessor would undoubtedly be entitled to transfer his estate and the transferee would be entitled to claim the *malikana* dues, therefore, the word "heirs" should be understood as including a transferee. If the word "heirs" includes a transferee in that context it is further argued that when the "heirs" of the lessees are spoken of, that term must also be held to include the transferees of the lessees. The argument is no doubt ingenious but we do not think that it is sound. The lessor as a full proprietor can no doubt transfer his estate and his transferee would be entitled to claim the *malikana*, but he would make his claim as a transferee under the rights conferred by the ordinary law and he would not base his claim on being an "heir" of the original lessor, within the meaning of the expression used in the deed of lease.

The mere fact that the lease is granted to the lessees and their heirs does not go further than showing that heritable rights are conferred.

It is also pointed out that the word "*malikana*" is more appropriate to the rent paid by an under-proprietor than to the rent paid by a tenant. It is true that the word "*malikana*" is not generally applied to the rent paid by an occupancy tenant but the mere use of this word is not sufficient to show that there was any intention of conferring under-proprietary rights. As regards the liability to pay for the *chaukidar* and the *patwari*, this was simply a matter of agreement between the lessor and the lessees and does not necessarily indicate that the lessees were to be considered under-proprietors.

The fact that no right of "re-entry" has been expressly reserved to the lessor has also been stressed by the appellants as showing the intention of conferring under-proprietary rights. We do not think that this argument is convincing because if the lessor intended to give only the rights of a perpetual lessee, the power of ejectment would be given by statute and there would be no need to include any special provision for ejectment in the terms of the lease.

For the respondents, it has been strongly argued that the lessor was clearly intending merely to extend the occupancy rights, which had previously been decreed only for the lifetime of the lessees, into heritable occupancy rights, and there was no intention of converting the occupancy rights into under-proprietary rights.

Taking the language of the document as a whole we agree with this view. The lessor referred to the decree passed at the

(4) 45 Ind. Cas. 208; 5 O L J 80.
(5) 99 Ind. Cas. 876; 4 O W N 15; L R 8 A (O) 48; A I R 1927 Oudh 74; 2 Luck. 4.

*Page of 4 O W N.—[*Ed.*].

time of the first regular settlement in which the plaintiffs' under-proprietary claims were expressly denied. We think that the *taluqdar* merely wished to grant to the lessees heritable occupancy rights in place of the occupancy rights for life which had previously been conferred upon them by the settlement decree. We find no indication of any intention of going beyond this and converting their occupancy rights into the rights of under-proprietors.

In our opinion the Court below has taken the correct view and we dismiss the appeal with costs.

N. *Appeal dismissed.*

RANGOON HIGH COURT

Civil Miscellaneous Appeal No. 40 of 1934
April 6, 1934
MYA BU AND DUNKLEY, JJ.
MA FATI—APPELLANT
versus
KALIMUTHU AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7; O. XXIII—Petition for leave to compromise—Minor parties—Considerations before Court—Leave granted—Recording of compromise and passing of decree—Necessity of—Petition on behalf of guardian and on behalf of minors, indivisible — Compromise considered bad as regards minors—Effect on guardian—Remand—Point not considered by lower Court—Remand for considering it—Power of High Court to order.

When a petition for leave is filed under O. XXXII, r. 7, Civil Procedure Code, the Judge should consider whether the compromise is in the interests of the minors. If he is satisfied that it is for the benefit of the minors, then he must grant leave. If he is not so satisfied, he should refuse leave. If leave is granted, he has no option but to record the compromise and pass a decree in accordance with it. In deciding whether the petition of compromise is for the benefit of the minors, it will be open to the Court to make such alterations in the terms of the compromise agreed to by the parties, as it deems expedient. *Kalavati* v. *Chedi Lal* (1), *Manohar Lal* v. *Jadu Nath Singh* (2), *Sakinabai* v. *Shrinibai* (3), and *Chandulal Kanahayalal* v. *Nagindas Bapubhai* (5), referred to.

When the petition presented by a respondent on his own behalf and on behalf of minor respondents is an indivisible one, if the compromise is held bad in respect of the minors, it must be held to be bad so far as the other respondent also is concerned.

The High Court has ample power to make a remand in order that a point which has not been considered by the lower Court, may be considered by it. *Ghuznavi* v. *Allahabad Bank, Ltd.* (6), referred to.

M. C. A. against the order of the District Court of Thaton, dated November 23, 1933, in Civil Regular No. 4 of 1929.

Mr. *K. C. Bose*, for the Appellant.

Mr. *Thein Maung*, for the Respondents.

Dunkley, J.—This appeal arises in connection with a suit for administration of the estate of N. A. R. Arunachellam Chettyar, deceased, of Thaton. By a preliminary administration decree of this Court on appeal his estate is to be administered in accordance with the provisions of his will, the provisions of which are in effect that the present appellant, Ma Fati, shall obtain two-thirds of the estate, and his adopted daughter, Ma Fatima, shall obtain the remaining one-third, but this one-third shall be subject to certain specific legacies in favour of the wives of the deceased, Ma Fatima is now dead. The 1st respondent, Kalimuthu, is the husband of Ma Fatima, and the 2nd and 3rd respondents are their minor children, and in the present litigation, the 1st respondent is acting as their guardian *ad litem*. The other respondents are the persons, or the legal representatives of the persons, who are to obtain the specific legacies.

After the preliminary administration decree had been passed by this Court, the case was remitted to the District Court of Thaton to make the necessary enquiries as to the properties comprised in the estate and to pass a final decree. On November 4, 1933, the appellant and the 1st respondent filed a petition of compromise in the District Court and asked that a final decree should be passed in accordance with the terms of that petition. The 1st respondent, at the same time, by a separate petition asked for leave to compromise the suit on behalf of the 2nd and 3rd respondents. The other respondents were served with notices of this petition and raised no objection to the compromise provided that their rights to their specific legacies were safeguarded, save that the 4th respondent, Ma Pwe, denied that she had received her specific legacy of Rs. 7,000. By his order dated November 17, 1933, the learned District Judge held that he could not pass a decree on this compromise petition for the following reasons, namely, (1) that certain conditions were imposed by the other respondents; (2) that Ma Pwe claimed that her legacy had not yet been paid; (3) that the parties had entirely ignored the question of giving remuneration to the Receiver appointed under the District Court's order of August 23, and (4) and that the parties had made no mention in the petition of the question of paying the additional court-fees that might ultimately be found to be due. He thereupon ordered the parties

to file a fresh petition remedying these defects and gave time for this purpose up to November 23, 1933. On November 23, 1933, a fresh petition was not filed and he "dismissed" the petition of November 4. His action was misconceived. This was an agreement between the appellant and the first three respondents for adjustment of the suit so far as they were concerned, that is, for adjustment of the suit in part. It was plainly a lawful compromise, and, consequently, all that the learned District Judge could do was, under the provision of O. XXIII, r. 3, of the Code of Civil Procedure, to record the compromise and pass a decree in accordance therewith; subject to one condition that, so far as the two minor respondents were concerned, the leave of the Court was first obtained by the first respondent to enter into the compromise on their behalf, under the provisions of O. XXXII, r. 7, of the Code of Civil Procedure. A petition for such leave was filed by the first respondent, and on this petition the Court should have considered whether the compromise was or was not in the interests of the minors. See *Kalavati* v. *Chedi Lal* (1), *Manohar Lal* v. *Jadu Nath Singh* (2) and *Sakinabai* v. *Shrinibai* (3). If he was satisfied that the petition of compromise was for the benefit of the minors, then he should have granted leave; if he was not so satisfied, he should have refused leave; and if leave was granted, then he had no option but to record the compromise and to pass a decree in accordance therewith. Such a decree would be binding upon the appellant and the first three respondents, but not upon the other respondents. It would then be for the learned District Judge to settle what should be done in regard to the claims of the other respondents and to pass a further decree in regard to their claim. This appeal has been filed against the order refusing to record this compromise. It has been strenuously opposed on behalf of the first three respondents, who have resiled from their original position as parties to the petition. It has not been opposed by the other respondents.

There are two terms, *inter alia*, of the compromise petition which have been mainly attacked now, namely, first that the Receiver, who had charge of the estate of the deceased, should be discharged forthwith and, secondly, that two proceedings, which had been initiated by the appellant and were pending in the High Court, should be dismissed without costs.

As regards the term for the discharge of the Receiver, it is contended that all the respondents are interested in the Receiver remaining in charge of the estate, and that this term of the petition, which relates to the discharge of the Receiver, was incapable of being carried into effect without the consent of all the respondents. In our opinion this contention is not correct. The 4th to 7th respondents are not interested in the corpus of the estate. They have to get only a money payment from the first three respondents, and this they can do by the attachment and sale of any part of the properties which may fall to the share of the first three respondents.

In regard to the clause of the petition respecting the pending proceedings in the High Court, it is contended that the principle of election is applicable, and that the appellant having made her election is now precluded from prosecuting the petition of compromise. Reference has been made to the case of *Mangal Rai* v. *Duli Chand* (4). It is urged that there were two courses open to the appellant, that is, either to stand by the terms of the agreement of compromise and, therefore, withdraw the pending proceedings in the High Court, or to proceed further with the cases in the High Court, and that in the event of her electing to pursue the latter course, she must be debarred from pursuing the agreement, and because she did continue the proceedings in the High Court after the petition of compromise had been filed in the District Court, it is now urged that she is debarred from pursuing the petition of compromise further. In our opinion, this is not a case of election at all. The appellant could not be called upon to withdraw the proceedings pending in the High Court until a decree on the compromise petition had been passed by the District Court, and no such decree has ever been passed, and consequently, there was no reason why the appellant should not prosecute the pending cases in the High Court. Moreover, in any event, there is no question of the with-

(1) 17 A 531; A W N 1895, 126.
(2) 28 A 585; 33 I A 128; 3 A L J 710; 9 C C 219; 1 C L J 8; 8 Bom. L R 489; 10 C W N 898; 16 M L J 291; 1 M L T 210 (P C).
(3) 55 Ind. Cas. 943; 47 I A 18; A I R 1920 P C 60; 11 L W 486; 38 M L J 431; (1920) M W N 31; 18 A L J 499; 22 Bom. L R 552; 2 U P L R P C 107 (P C).
(4) 147 Ind. Cas. 932; A I R 1933 All. 579; 55 A 735; (1933) A L J 1488; 6 R A 591.

drawal of these cases under the petition of compromise. What the petition states is that the two cases pending in the High Court should be dismissed without costs, and if a decree had been passed by the District Court by consent, then the respondents themselves could at any time obtain the dismissal without costs of the pending proceedings in the High Court merely by taking the course of producing in this Court a copy of the consent decree of the District Court, which would embody this particular term.

The only point, which was really before the learned District Judge on the petition of November 4, was whether the compromise was for the benefit of the minors, and, therefore, whether leave, under r. 7, of O. XXXII of the Code of Civil Procedure, should be given to the 1st respondent, to compromise the suit on their behalf. Obviously the mind of the learned District Judge was never applied to this point, and it is plain, therefore, that the matter must be remanded to the District Court to allow the learned Judge to consider the matter in its true perspective and come to a decision as to whether leave to compromise on behalf of the minors should be granted to the 1st respondent or not. Let us add that in so deciding whether the petition of compromise is for the benefit of the minors, it will be open to the Court to make such alterations in the terms of the compromise, agreed to by the parties, as it deems expedient. See on this point *Chandulal Kanhayalal* v. *Nagindas Bapubhai* (5). Although a remand such as we propose to make is not strictly covered by the provisions of O. XLI, r. 23 of the Code of Civil Procedure, yet we consider that we have ample power to make a remand in order that a point, which has not been considered by the learned District Judge, may be considered by him. *Ghuznavi* v. *Allahabad Bank Ltd.* (6).

A further point, which has been raised in argument on behalf of the first three respondents, is that, when a guardian *ad litem* has made an application for leave to compromise the suit on behalf of the minors, he can withdraw such application at any time before the leave has been granted, and on this point the case of *Ranga Rao* v. *Rajagopala Raju* (7) is cited. That case is not on all fours with the circumstances of the present case, as in the case no petition asking for the leave of the Court to compromise the suit was ever filed by the guardian *ad litem*. In our opinion, that makes all the difference to the matter. But, be that as it may, in the present case the 1st respondent had never at any time made an application to the Court for the withdrawal of his petition for leave, and that petition still stands, and no order has yet been passed upon it.

It is further urged on behalf of the respondents that the petition of compromise is joint in regard to the first three respondents and grants to them a joint estate; that the compromise is indivisible so far as they are concerned; and that, therefore, if it is had to be bad so far as the minors are concerned, it must also be held to be bad so far as the 1st respondent, Kalimuthu, is concerned. We consider that this contention is well founded, for it is plain that it would be useless to pass a decree on this compromise petition against the 1st respondent only, he being one of the three legal representatives of the deceased Ma Fatima.

It is also contended that because the petition is silent in regard to the payment of additional court-fees, which may be found to be payable, and in regard to the Receiver's remuneration, and because it states (in para. 2) that the specific legacy of the 4th respondent Ma Pwe, has been paid, whereas Ma Pwe denies this (these being the points which were raised by the learned District Judge in his order of November 17, 1933), the compromise cannot be for the benefit of the minors. It is urged that the fact of the discharge of the obligation to Ma Pwe is an integral part of the petition, and that the circumstances of the petition are entirely altered in the face of Ma Pwe's assertion that her claim has not yet been paid. We must leave these points to the decision of the learned District Judge. It may be that, before granting leave under O. XXXII, r. 7, of the Code of Civil Procedure, he will deem it necessary to enquire whether Ma Pwe's claim has been satisfied or not, and it may be that he will find it necessary to add something to the terms of the compromise in regard to these three points, or it may be that he will hold that these points are fatal to the petition so far as the minors are concerned. These are points, which, amongst others, he will have to consider in deciding

(5) 119 Ind. Cas. 663; A I R 1929 Bom. 350; 31 Bom. L R 621; Ind. Rul. (1929) Bom. 535.
(6) 41 Ind Cas. 598; A I R 1917 Cal. 44; 44 C 929; 21 C W N 877; 26 Cr. L J 49.
(7) 22 M 378.

whether leave should be granted to compromise the suit on behalf of the 2nd and 3rd respondents.

In the result, the order of the learned District Judge of November 23, 1933, "dismissing" the petition of the appellant and the first three respondents, dated November 4, 1933, for compromise of the suit so far as they are concerned, is set aside, and the case is remanded to the District Court in order that the learned District Judge may consider whether, under the provisions of O. XXXII, r. 7, of the Code of Civil Procedure, he ought to grant leave to the 1st respondent to enter into a compromise of the suit on the terms as stated in the petition, or on such other terms as he may decide on behalf of the 2nd and 3rd respondents, and if he does so decide to grant leave, to pass a decree in accordance with the terms of the compromise.

The appellant is entitled, as against the first three respondents, to the costs of this appeal, advocate's fee, ten gold *mohurs*.

Mya Bu, J.—I agree.

N. *Petition dismissed.*

CALCUTTA HIGH COURT

Civil Appeal No. 259 of 1932
August 6, 1934
MITTER, J.

MAHAMMAD MIA PANDIT AND OTHERS—PLAINTIFFS—APPELLANTS

versus

OSMAN ALI AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 104 (2), 96 (3), O. XXIII, r. 3, O. XXXII, r. 7—Second appeal from order recording disputed compromise, whether lies—Decree on compromise is consent decree—Agreement to refer dispute to third party, whether amounts to undertaking not to appeal—Suit pending—Reference made without Court's permission—Award, if a compromise—Next friend entering into compromise without Court's permission—Same next friend representing minor in appeal—Compromise will not be set aside—Arbitration—Decision of third person, on question involving judicial and quasi-judicial work, is an award.

No second appeal lies from an order recording a compromise when the *factum* or legality of the compromise is questioned. [p. 916, col. 1]

Where there is a compromise, a decree passed thereon, whether the compromise is admitted by both parties or disputed by one of them, is still a consent decree. [p. 916, col. 2.]

Where the parties say that the determination of their disputes by a person is to be final as between them, that is to be regarded as an undertaking not to appeal, and an appeal preferred would be in violation of good faith and ought not to be entertained where the real merits of the case have been withdrawn from the Court. *Moonshee Amir Ali* v. *Maharanee Inderjeet Singh* (1), followed. [*ibid*]

An award made on a reference without the intervention of the Court during the pendency of a suit cannot be recorded as a compromise or adjustment of the suit under O. XXIII, r. 3, Civil Procedure Code. [p. 917, col. 2.]

A decision, on a reference by parties of a question involving some judicial or *quasi*-judicial work, is an award. *Khobhari Sah* v. *Jhaman* (11), distinguished. [p. 918, col. 1.]

Obiter.—A compromise effected by the next friend without the Court's permission as required by O. XXXII, r. 7, Civil Procedure Code, will not be set aside in appeal, if the minor happens to be represented in the appeal by the same next friend.

C. A. against the decree of the Sub-Judge, Second Additional Court, Noakhali, dated August 13, 1931.

Messrs. *Mohendra Kumar Ghose*, *Mahendra Nath Mitter* and *Nakuleswar Som*, for the Appellants.

Mr. *Bhagirath Chandra Das*, for the Respondents.

Judgment.—This appeal is on behalf of the plaintiffs and arises out of a suit for possession. There are seven plaintiffs. Of them plaintiffs Nos. 1 and 2 are adult males, Nos. 3, 4 and 7 are ladies and Nos. 5 and 6 are minors. The minors were represented in the Courts below by plaintiff No. 1, who also represents them in this appeal. At the instance of plaintiffs there was a local investigation by a Pleader Commissioner who submitted a report in their favour. The defendants filed an objection to the said report. At the date of the hearing of the suit, which was August 15, 1930, defendant No. 2 filed an application stating that the parties had agreed to the lands being measured by one Shama Charan and that if it was found by him that the lands in suit were in possession of the defendants, the plaintiffs would get a decree, otherwise the suit would stand dismissed, but the plaintiffs would be entitled to get Rs. 50 from the defendants. The said defendant further alleged that Shama Charan had measured the lands and had found that no part of the lands in suit was in the possession of the defendants. He accordingly prayed for the said adjustment to be recorded under the provisions of O. XXIII, r. 3, Civil Procedure Code. The plaintiffs denied the said agreement, but the learned Munsif after taking evidence found that the agreement was alleged by defendant No. 2 and dismissed the suit on the findings of Shama Charan. The attention of the Court does not seem to have been drawn to the fact that some of the plaintiffs were minors. Admittedly no leave of the Court was taken under r. 7, O. XXXII of the Code. O appeal from the decree made by the tria

Court, the point urged by the plaintiff, as the Appellate Court puts it, was

"whether the suit was adjusted between the parties out of Court and whether the compromise should be recorded"

The Court of appeal below, however, only applied its mind to the question of the factum of the agreement but did not consider whether the alleged compromise was lawful or could be recorded under the provisions of O. XXIII, r. 3 of the Code. It did not even advert to the fact that there were minors whose interest it was the duty of the Court to safeguard and protect. The Appellate Court agreed with the first Court and remarked that the

"Munsif was justified in recording the compromise under O. XXIII, r. 3, Civil Procedure Code."

The appeal was accordingly dismissed hence the second appeal by the plaintiffs. A preliminary objection has been taken to the competency of the appeal. Mr. Dass who appears on behalf of the respondents urges, firstly, that the appeal being really against the order recording the compromise under O. XXIII, r. 3, a second appeal is barred under the provisions of s. 104 (2) of the Code. Secondly, he urges that even if the appeal be regarded as an appeal from the decree, after the findings of the Court of appeal below, the decree must be taken to be a decree passed with consent of parties and s. 96 (3) of the Code, bars the appeal. In the course of the argument I indicated that possibly the preliminary objection was a sound one. On that the Advocate for the appellant asked me to interfere in revision in case I held that no appeal lay. As I considered that the case was a fit one for interference under the revisional jurisdicton I heard the learned Advocates at length who presented their cases from all aspects and I must acknowledge the great assistance I have derived from them in the case which has engaged my anxious consideration. After having heard the learned Advocates I have come to the conclusion, though not without hesitation, that no appeal lies. But I am at the same time quite convinced that I have power to interfere in revision and should so interfere in this case.

My reasons for giving effect to the preliminary objection are as follows: (1) The Code provides for one appeal when the factum of legality of a compromise of adjustment of a suit is questioned. The Court of appeal below has arrived at a finding that there was a compromise as pleaded by defendant No. 2. To allow the same matter to be re-agitated in an appeal from the appellate decree would be to allow two appeals when the Code gives one. (2) A decree passed is still a decree passed by consent, whether the compromise is admitted by both the parties or disputed by one of them and the Court finds that there was one. (3) Where the parties say that the determination of their disputes by a person is to be final as between them, that is to be regarded as an undertaking not to appeal, and an appeal preferred would, as James, L. J., observed in *Moonshee Amir Ali* v. *Maharanee Inderjit Singh* (1), be in violation of good faith and ought not to be entertained where the real merits of the case have been withdrawn from the Court. The same principle has been formulated though in different language by Rampini and Pratt, JJ., in *Bahir Das* v. *Nobin Chandra* (2) where they observe that parties 'are equitably estopped' from resiling from and impugning the decree which was given by the Court in accordance with the finding on the issue which they agreed to refer to the decision of a third person. In *Dwarka Nath Chakrabarti* v. *Atul Chandra Chakrabarti* (3) there is an observation which apparently seems to militate against the view I am taking but an examination of the case leads me to think that the point which I have been called upon to decide did not really arise in that case. The observation is of Roy, J. and occurs at p. 356*. It is as follows:

"Certain preliminary objections were taken by the learned Vakil for the respondents. They are not serious: one was that no appeal lay from a decree which is based on a compromise The contention of the plaintiff is that the whole compromise has been struck out. The dispute is over the nature of the compromise and the plaintiff has the right to show what the compromise was."

I must, first of all, remarkthat the said case came up on first appeal to this Court, but I am not placing much importance on the said fact for distin guishing the said case. From the report it appears that the plaintiff claimed a share in two villages appertaining to Touzi No. 1760/28. The contesting defendants denied the title of the vendor of the plaintiff and the vendor challenged his conveyances to the plaintiff. Issues were framed and the plaintiff was being examined on commission. At that stage a petition of compromise was presented to the

(1) 14 M I A 20?; 9 B L R 460; 2 Suther 479; 2 Sar. 731; 20 W R P C 25.
(2) 29 C 306; 6 C W N 121.
(3) 106 Ind. Cas. 509; A I R 1928 Cal. 108; 46 C L J 353.

*Page of 46 C L J.—[Ed.]

Commissioner. By the compromise the plaintiff gave up his claim on the basis of his purchase; the said two villages were to be partitioned between the plaintiff and his co sharers (not parties to the suit) on the one hand and the defendants on the other according to the shares recorded in the Record of Rights by an arbitrator Sarat Chandra Bhattacharjee and that after the division by him the plaintiff was to withdraw the suit.

No order was obtained from the Court for appointing Sarat Chandra as arbitrator. Sarat Chandra later on refused to act and on the application of the plaintiff the Subordinate Judge appointed another person as arbitrator under the provisions of para. 5, Sch. II, Civil Procedure Code. This person made the division and submitted an award and inspite of the objection of the defendants that there was no reference to arbitration under para. 2 of the said schedule the Subordinate Judge made a decree in conformity with the award. His successor, however, deleted the so-called award from the decree and the final decree that was made was one simply allowing the suit to be withdrawn without liberty to the plaintiff to bring a fresh suit. It was pointed out by this Court that the compromise between the parties was not simply that the suit was to be withdrawn but was to be withdrawn on the happening of certain contingencies *i. e.*, th division of the lands by Sarat Chandra. The final decree, therefore, was one that was not passed in accordance with the consent of the parties and hence s. 96 (3) was out of the way. The question raised before me has, however, been considered by the Lahore High Court in *Guru Charan Singh* v. *Shib lev Singh* (4). The said Court held in circumstances somewhat similar to the present case that the appeal was incompetent and I agree with the said judgment. But as I have said before, my decision on the preliminary point does not dispose of the case. I am still to see if the Courts below had jurisdiction to pass an order under O. XXIII, r. 3 of the Code.

My view is that the agreement which both the Courts below have found to be established amounts to a reference to arbitration without the intervention of the Court of the subject-matter of a pending suit and the decision of Shama Charan really amounts to an award on such a reference. Mr. Dass who appears for the respondent has contended before me that the decision of Shama Charan does not amount to an award but is to be considered as an adjustment of the suit which the Courts below have rightly recorded under O. XXIII, r. 3 and in support of his contention he has referred me to the cases of *Himanchal Singh* v. *Jatwar Singh* (5) and *Basdeo Singh* v. *Ram Raj Singh* (6). Before I examine these cases I may observe that so far as our Court is concerned it is now settled law that an award made on a reference without the intervention of the Court during the pendency of a suit cannot be recorded as a compromise or adjustment of the suit under O. XXIII, r. 3. The Bombay, Madras, Patna and Rangoon High Courts have, however, taken a different view. The divergence of opinion is due to the different interpretation put upon the words "any other law for the time being in force" occurring in s. 89 of the Code. [See the cases collected in *Rohini Kanta* v. *Rajani Kanta* (7), as also *Ramadhar Rai* v. *Subedar* (8), and *Laljee Jesang* v. *Chandra Bhan* (9)] I am bound to follow the course of decisions of our Court and if the decision of Shama Charan is an award the Courts below had no jurisdiction to record the decision of Shama Charan as an adjustment of the suit under O. XXIII, r. 3.

This leads to the question whether the said decision is an award. The cases of the Allahabad High Court cited by Mr. Dass are distinguishable. In those cases the parties to the suit agreed to be bound by the statement of a person named by them. The nominee made a certain statement and the question raised was whether the suit could be disposed of in accordance with the statement so made. Suleman and Kanhaiyalal, JJ., base their decision, firstly, on s. 20, Evidence Act, and secondly, on the judgment of the Madras High Court in *Chinna* v. *Venkataswami* (10). The Madras case proceeds on the view that an award in a pending case made by an arbitrator appointed without the intervention of the Court can be

(4) 66 Ind. Cas. 258; A I R 1922 Lah. 309; 3 Lah. 175.

(5) 80 Ind. Cas. 16; A I R 1924 All. 570; 46 A 710.

(6) 137 Ind. Cas. 263; A I R 1932 All 166; (1932) A L J 71; Ind. Rul (1932) All. 291.

(7) 151 Ind. Cas. 661; A I R 1934 Cal. 613.

(8) 133 Ind. Cas 82; A I R 1931 Pat. 205; 11 Pat. 237; Ind. Rul (1932) Pat. 173; 13 P L T 431

(9) 134 Ind. Cas. 57; A I R 1931 Rang. 58; 9 R 39; Ind. Rul (1931) Rang. 121.

(10) 51 Ind. Cas. 827; A I R 1920 Mad. 800, 42 M 625; 36 M L J 291; (1919) M W N 221; 25 M L T 397.

recorded under O. XXIII, r. 3, a view which as I have said is against the decisions of our Court, and s. 20, Evidence Act, cannot have any possible application to the case before me. Nor does the case of *Khobhari Sah* v. *Jhaman* (11), support the contention of the respondent. There no judicial or *quasi*-judicial work had to be done by the person nominated who was only to see with his own eyes a certain state of things, *e. g.*, existence of furnace, bellows, etc., in the defendant's house and make a statement in Court. I hold that Shama Charan had to do some work which was in the nature of judicial work and that his determination is an award and that the Courts below had no jurisdiction to pass a decree which is in accordance with the decision of Shama Charan under the colour of exercising the powers under O. XXIII, r. 3. In the view I have taken it is not necessary to consider the other contentions raised by the appellants. If I had held that the case came under O. XXIII, r. 3, I would not have set aside the decree of the Courts below so far as the minors are concerned seeing that they are appearing even in this Court by plaintiff No. 1 as their next friend but would have made the same reservations in their favour as were made by the Acting Chief Justice in *Golnur Bibi* v. *Abdus Samad* (12). The result is that the appeal is dismissed, but the decrees of the Courts below are set aside and the learned Munsif is directed to proceed with the suit. I make no order as to costs.

D. *Decree set aside.*

(11) 34 Ind. Cas 220; A I R 1917 Cal. 327; 23 C L J 482.

(12) 130 Ind. Cas. 209; A I R 1931 Cal. 211; 58 C 628; 52 C L J 298; 35 C W N 238.

PATNA HIGH COURT

Civil Appeal No. 302 of 1932

January 15, 1934

WORT AND FAZL ALI, JJ.

RADHA MOHAN—APPELLANT

versus

Musammat WAHIDAN—RESPONDENT

Civil Procedure Code (Act V of 1908), ss. 73, 64, O. XXI, r. 55—Assets in s. 73, meaning of—Assets not held by Court—Decree-holder, if entitled to rateable distribution—Two decrees against same judgment-debtor—Attachment of property in execution of first decree—Private sale of property by judgment-debtor—Application for rateable distribution—Purchaser depositing decretal amount with consent of decree-holder—Release of property from attachment—Legality of—Waiver by decree-holder.

A fund or a sum of money cannot be regarded as assets unless it is in some sense the property of the judgment-debtor and can therefore be legitimately applied to the payment of his debt. Any money which belongs to a stranger or any money paid into Court by a third party under a misapprehension cannot be described as assets. When no assets are held by the Court the holder of the second decree is not entitled to rateable distribution. [p. 925, col. 2.]

The decree-holder had two decrees against the same judgment-debtor. In pursuance of execution of first decree, a property of the judgment debtor was attached Before the sale, the judgment-debtor sold the property. In execution of the second decree, the decree-holder applied for rateable distribution of the assets in the first execution proceedings. The purchaser of the property with the consent of the decree-holder deposited the decretal amount and costs in the first execution case and the property was released from attachment. The execution case was struck out on full satisfaction. To this the decree-holder objected contending that the order striking out the execution case was wrong in law and that as he had applied for rateable distribution, the sum deposited should be rateably distributed between the two execution cases in which he was the decree-holder and that the sum if so rateably distributed would be in part satisfaction of the decrees and he was entitled to have the property sold in execution:

Held, that as the decree-holder had consented to the deposit and by his conduct he must be deemed to have waived the benefit of s. 64, Civil Procedure Code, the attachment of the property must be necessarily deemed to have terminated and the private sale by the judgment-debtor must be held to be valid. [p. 926, col. 1]

C. A. from an order of the District Judge, Gaya, dated August 12, 1932.

Appellant in person.

Messrs. *K. Husnain* and *H. R. Kazimi*, for the Respondent.

Wort, J.—The matters before us are first a Rule directed against an order of the Munsif allowing the decree-holder, named Radha Mohan, rateable distribution of assets and secondly, an appeal from the order of the District Judge confirming the decision of the Munsif to the effect that a certain attachment was not subsisting and that the execution case should be dismissed on part satisfaction. To understand the matters it is necessary to state the facts.

The decree-holder Radha Mohan, who in this case appears in person and has argued his case in great detail, obtained a decree and took out certain execution proceedings which were known in this case as Execution Case No. 1472 of 1930. Sometime after the execution proceedings, which I have just mentioned, had been started the same Radha Mohan obtained another decree against the same judgment-debtor in the Court of the Munsif of Allahabad. This was on April 15, 1931. Other execution proceedings were taken out known as Execution Case No. 578 of 1931.

In the meantime, on December 17, 1930, in pursuance of Execution Case No. 1472 a house, the property of the judgment-debtor, situate on the Club Road, Gaya, was attached. There were certain proceedings in the Execution Case No. 1472 which I shall hereinafter refer to as the first execution case which it is unnecessary to refer to in detail. The sale of the house attached was fixed for May 16, 1931. In the meantime two important events happened. One was, as early as January 29, 1931, that is, about a little over a month after the house in Gaya had been attached. The same house was sold to *Musammat* Wahidan, petitioner in the application in revision and respondent in the appeal before us. Again just prior to the date which was fixed for the sale the decree-holder applied for rateable distribution of the assets in Court resulting from the first execution case. This was on May 11, 1931. An order was made on this application of May 11, that the matter would be considered when the assets came into the hands of the Court.

It is to be noted that, first, the sale to the lady of the attached property was subsequent to the attachment and, secondly, the application for rateable distribution was made also subsequent to the attachment, that is to say, some five months afterwards, on May 11, 1931. On May 13, some three days before the date of the sale, the lady by her Advocate petitioned the Court to accept the decretal amount and costs in the first execution case and to have the property released from attachment. She stated that she had purchased the property and for that reason she desired to deposit the sum named. By his Advocate the decree-holder agreed to this course subject to a payment also of certain costs in a miscellaneous case with which we are not concerned. This was agreed to and these costs were to be ascertained. On May 14, in the presence of the decree-holder's Advocate it was discovered that no costs had been incurred. Therefore on May 16, on the date of the sale, again in the presence of the Advocate of the decree-holder the decretal amount with the costs relating thereto were paid into Court and the execution case struck out on full satisfaction and the attachment released. The sum paid into Court was about Rs. 1,957, but nothing turns on that, excepting to emphasise the fact that this was the full amount under the first decree in the first execution case. Now, the substance of the argument of the appellants is that the Judge in making that order striking out the execution case was wrong in law. Indeed he goes so far as to say that it was without jurisdiction. His contention is that as he had applied for rateable distribution, the sum of Rs. 1,957 was the sum which should be rateably distributed between the two execution cases in which he was the decree-holder and that the sum of Rs. 1,957 if so rateably distributed would be in part satisfaction only of the decrees. The Judge was therefore wrong in making the order that the first decree was fully satisfied.

On behalf of the respondent in the appeal, who is the applicant supporting the Rule in the revision case, it is contended in short that whatever may be the rights of the decree-holder, he, having consented to the order of May 16, 1931, is bound by it. The sale to the *Musammat* was thus confirmed. Consequently the attachment ceased by reason of the operation of O. XXI, r. 55; being the property of a person other than the judgment-debtor it can neither be attached nor sold. The matter raises a number of questions under s. 64, Civil Procedure Code, s. 73 and O. XXI, r. 55. Section 64, Civil Procedure Code provides:

"that any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend, etc, shall be void as against all claims enforceable under the attachment."

The explanation states that included in claims enforceable under an attachment are claims for the rateable distribution of assets. Mr. Radha Mohan contends that the sale to the lady in January 1931, being after the attachment, was void and that when by his Pleader in the execution case he consented to the payment into Court by the purchaser, the lady, he was not waiving his rights under the second order under s. 73 of the Code, entitling him to rateable distribution. Section 73 provides:

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

From the circumstances of the case, on the face of it, it would appear that in his capacity as the judgment-creditor in the second execution case the conditions of s. 73 have been complied with, with one possible exception. It was faintly argued by Mr. Khurshed Husnain on behalf of the

respondents in the appeal that the words "and more persons than one" are to be construed strictly; as the decree-holder in the two execution cases in the case before us was the same person, that part of the section is not complied with. There is some authority for this view, but I would hesitate before deciding in favour of this very technical construction of the section. Two authorities have been relied upon in support of the case of the *Musammat*. One is the case before the Judicial Committee of the Privy Council: *Mina Kumari Bibi* v. *Bejoy Singh* (1), the other being a Full Bench decision in Madras: *Annamalai Chettiar* v. *Palamalai Pillai* (2). Before dealing with these decisions it would be as well to analyse the position in which the decree-holder found himself. It is possible on the authorities to take a contrary view, but it is difficult to understand the argument of the appellant that he was by law forced to accept the proposal of the *Musammat*, made by her petition of May 13, that she being the purchaser should be allowed to pay the decretal amount into Court. To hold that view would appear to me on the face of it to have the effect of repealing s. 64, Civil Procedure Code, as her only interest was her doubtful title to the property by her purchase of January of the same year. I can hardly take a view other than that in January, on the date of the purchase, it was a transfer contrary to the attachment within the meaning of s. 64, although I am aware of the provision of O. XXI, r. 55, which appears to be sufficiently wide to allow the payment under the order to be made by persons other than the judgment-debtor. But the case, it seems to me, cannot be determined on this point.

In continuation of this part of the argument, however, reference may be made to O. XXI, r. 69. Then again I find difficulty in holding that the decree-holder would not be entitled to call upon the purchaser to pay the full amount of the purchase money into Court (see O. XXI, r. 83), as this was a sale by the judgment-debtor to a private purchaser. On this point I feel quite satisfied that in law the decree-holder was not bound to accept as a payment into Court a part of the consideration for the sale to the *Musammat*, and not the whole. This seems to me to be the position on May 13 when the lady came forward offering to pay the decretal amount and costs in satisfaction of the decree. There are a number of points of view from which one can approach the point in dispute in this case, but from whatever point of view the matter is approached, the answer, in my judgment, seems to be the same. The question substantially is—what was the effect of the decree-holder consenting to the order which was finally made on May 16, 1931? As I have already stated, Mr. Radha Mohan argues that Rs. 1,957 was an asset which by reason of his application in the latter execution case was distributable between the two decrees, and in furtherance of this argument his contention at one stage of the case was that the expression "charges" in O. XXI, r. 55, was to be construed as meaning any subsequent claim which was enforceable under the attachment, that is to say, in this case the decretal amount which was the subject-matter of the second execution case; and that without payment of this sum by the *Musammat* the Judge had no jurisdiction to strike out the execution case as fully satisfied.

It will be seen by mentioning this argument that I have already stated that from whatever point of view one approaches the case one comes back to the same point—what was the effect of the decree-holder's agreement to accept the first decretal amount plus the costs in the miscellaneous case? In other words, how can it be said that the larger sum should have been paid into Court when a decree-holder, being the same person in the first execution case as in the application for distribution of assets, agreed that that amount should be paid by the *Musammat*. The case of *Annamalai Chettiar* v. *Palamalai Pillai* (2), it has been argued, concludes the matter, and it would appear from one point of view that the matter decided there was the very same question which we have to determine. The question referred to the Full Bench was:

"whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise, are entitled to question a private alienation made during the continuance of such attachment"

It will be seen, as I have said, that in this question is included the point we have to determine. But again it will be seen that

(1) 40 Ind. Cas. 242; A I R 1916 P C 238; 44 I A 72; 44 C 662; 1 P L W 425; 5 L W 511; 32 M L J 425; 21 C W N 585; 21 M L T 341; 15 A L J 382; 25 C L J 508; 19 Bom. L R 424; (1917) M W N 475 (P C).

(2) 43 Ind Cas. 539; A I R 1918 Mad. 127; 41 M 265; 22 M L T 461; 33 M L J 707; (1917) M W N 852; 7 L W 298 (F B).

the question submitted to the Full Bench contemplated a non-attaching decree-holder who was a person different from the decree-holder who had attached the property and that of course makes a vast difference and again brings us to the very same point which I have already repeated more than once. If the Full Bench decision is an answer to the question—the answer being that a non-attaching decree-holder cannot question a private alienation—how much more must it be said that a non-attaching decree-holder who has agreed to a private alienation in his capacity of a decree holder in another execution case is bound by his own agreement. The facts in the Madras case were these. The judgment-debtor who was the 29th defendant in the case was indebted and had a large number of decrees against him. The case was concerned with some of these decrees only. He executed a sale-deed, dated June 15, 1910. An application was subsequently made for attachment when the plaintiff who was the purchaser under the private sale objected. Having a decision against him, he commenced the suit.

Although it was clear that the attachment, the application for which I have mentioned, was not subsisting at the time of the sale there was an argument in the case that a previous attachment was already subsisting. That attachment related to another decree in execution, the attachment having taken place some five or six months before the private sale of June 15, 1910. The application for execution was eventually dismissed in March 1910, that is, three months before the private sale. The contention in the case was that the earlier attachment was still subsisting. But either by reason of the fact that that application had been dismissed or that the subsequent application for attachment had been made to a Court other than the Court which would be entitled to distribute the assets, it was held that neither availed the person questioning the private sale. The contention of Mr. Radha Mohan is that although the question submitted to the Full Bench covers the point in dispute in this case, yet the radical difference is that the decretal amount had not been paid into Court. Therefore the Court not being in possession of the assets a material difference exists between that case and the one before us. In discussing the question submitted to the Court reliance was placed upon a decision in *Mina Kumari Bibi* v. *Bejoy Singh* (1), a decision of the Judicial Committee of the Privy Council. Before I deal with that case, I may mention one or two observations in the principal judgment delivered by the Full Bench of the Madras High Court. It was pointed out in the first place that s. 276, Civil Procedure Code, 1882, was wider in its terms than s 64 of the present Code. Section 276 provided:

"When an attachment has been made by actual seizure or by order, etc., any private alienation of the property attached, whether by sale, etc., during the continuance of the attachment, shall be void as against all claims enforceable under the attachment"

The present s. 64 makes alienations of property "against the attachment" void. The view expressed by Kumaraswami Sastriyar, J., was that the explanation to s. 64 was merely legislative sanction of the decision in *Sorabji Edulji* v. *Govind Ramji* (3), there having been a difference between that case and the case of *Manohar Das* v. *Ram Autar Pande* (4), that it did not extend the law excepting to include in claims enforceable under the attachment within the meaning of s. 64 those claims for rateable distribution. The substance of the decision was that not only was a subsequent decree-holder who had applied for rateable distribution not entitled to question the alienation but that the attaching decree-holder himself was not if it was for the purpose of paying off the decretal amount. From one point of view the decision in *Mina Kumari Bibi* v. *Bejoy Singh* (1), in Privy Council was of more importance, although perhaps more limited. The case arose out of an action for possession, the facts being that the judgment-debtor had three decrees against him. An application was made by the decree-holder for execution of one of the earliest decrees and an order for attachment was made, also an order under s. 274, Civil Procedure Code of 1882, prohibiting the judgment-debtor from alienating the property. Nothing seems to have been done until some two or three years later when the application for execution was dismissed. Some two years later another application was made for execution of the same decree. A warrant of attachment appears to have been issued a month later. Another application was made for execution of a later decree and in 1907 attachment was effected. This was in August of 1907. Meanwhile, on July 15, 1907, the judgment-debtor had sold the property privately. The question which came

(3) 16 B 91.
(4) 25 A 431; A W N 1903, 92.

before the Courts was—whether the sale to the private purchaser was to be preferred to the purchase in the execution proceedings in which the order for attachment of August 1907, was made. I have left unmentioned a number of facts which perhaps are not necessary to mention.

The contention was, in the first place, that the earlier attachment to which I have made reference was subsisting at the time of the private sale, and the further contention was that the private sale of July 15, 1907, was antedated. This latter contention was rejected. The earlier point was not specifically decided. Sir Lawrence Jenkins, in delivering the opinion of the Judicial Committee of the Privy Council, lays stress on the fact that although the word "attachment" was used several times in s. 276, the only attachment which would in any way assist the purchaser in the execution sale was the particular attachment which was made in the execution sale at which he was the purchaser. To use the words of Sir Lawrence Jenkins:

"it still is the attachment in Execution Case No. 16 of 1907, that is, the only weapon of attack, and it is not made more effective by the earlier attachment in Execution Case No. 8 of 1902."

As the attachment which was "the only weapon of attack," to use the words of Sir Lawrence Jenkins, was made later than the sale to the private purchaser, it was held that it was of no assistance to the purchaser in the execution sale and that the private sale is to be preferred to the execution sale Sir Lawrence Jenkins points out in the course of his opinion that in order to bring s. 295, which is now s. 73, into play, certain conditions are necessary. One of them is that there should be assets held by the Court; and further he went on to say that it was not shown that there were assets. For the reason which I have indicated that although the Full Bench decision of the Madras case raised the very point which we have to deal with, it does not assist us in this case and, for the reason stated by Sir Lawrence Jenkins, the case of *Mina Kumari Bibi* v. *Bejoy Singh* (1), does not assist us, the reason being that in the latter case the relevant attachment was not subsisting at the time of the private sale. Sir Lawrence Jenkins points out, as I have said, that in order to make s. 73 apply it is necessary that there should be assets in the hands of the Court. It was, therefore, contended in this case that as there were assets, being the Rs. 1,957, the conditions of the section had been complied with. In this connection reliance was placed upon the case of *Bhattoo Singh* v. *Raghunandan Prasad Singh* (5), which held that the payment into Court for the purpose of setting aside a sale under O. XXI, r. 89, was "assets distributable." Therefore payment under O. XXI, r. 55, was "assets distributable."

It is difficult to hold that if payment into Court under O. XXI, r. 89, is an asset a payment into Court under O. XXI, r. 55, is not an asset; but I specifically reserve that question, first, by reason of the fact that I think it is unnecessary to decide it in this case and, secondly, because to hold that the payment under O. XXI, r. 55, was an asset distributable amongst decree-holders would raise difficulties which from one point of view are unsurmountable. The slight consideration will show what these difficulties are. Can it be disputed that a judgment-debtor is entitled to pay the decretal amount into Court with costs and charges under O. XXI, r. 55? There is only one answer to that question. If he pays such sum, which quite clearly he is entitled to irrespective of any other claims against him or against his property the section quite clearly states that the attachment ceases and the execution case can be struck out in full satisfaction. If we were to hold that the sum was "assets distributable" then the payment into Court equivalent to the amount of one decree, which payment is distributable amongst a number of decree-holders, results in the decree, in relation to which the payment is made, being satisfied in part only. Therefore contrary to the order and implication of the rule full satisfaction could not be declared.

I see no answer to this question if reliance is to be placed upon the decision of this Court to which I have just referred. An anomaly appears to exist in this part of the Civil Procedure Code, the only answer to the difficulties appearing to be the decision in *Annamalai Chettiar* v. *Palamalai Pillai* (2) and the case in the Judicial Committee of the Privy Council, the substance of which is that in spite of the provision that an alienation is void its invalidity is limited in the sense that it is void only as against the attachment and again only in the in sense which the purpose of the attachment is obstructed by

(5) 145 Ind. Cas. 390; A I R 1933 Pat. 303; 12 Pat. 772; 14 P L T 357; 6 R P 172.

the alienation. This discussion brings me back to the point from which I started. Assuming that there are differences between the cases relied upon by the respondent and the case before us, they are immaterial for the purpose of deciding this case. Whether in the circumstances that decree-holders were two different persons—one attaching and the other applying for rateable distribution—the latter could not question a private alienation to which the former had consented, yet in this case where the decree-holders are one and the same person, it is impossible to contend that the private alienation is void in the sense that the decree-holder is not in a position in law to consent to it. The argument of the decree-holder here that he was merely considering his rights in the first execution case irrespective of his rights in the second execution case cannot be supported in the light of the orders which were made by the Munsif. On May 13, he specifically agreed to the payment by the *Musammat* of the decretal amount plus the costs in the miscellaneous case, she having stated that she had purchased the property in a private sale. As I have pointed out, he could have objected to this. He could have demanded payment of the full consideration which was upwards of Rs. 5,000 and it was in his presence or in the presence of his legal adviser that the two subsequent orders were made, the latter of which was to the effect that the decree was fully satisfied and that the attachment was withdrawn. That in my judgment disposes of the case. The order made by the Munsif against which the Rule in revision is directed was to the effect that the decree-holder is entitled to rateable distribution. In so far as that purports to set aside the order of the Munsif dated May 16, 1931, striking out the execution case, it was without jurisdiction. But the substantial question is one which is raised in the appeal and as Mr. Khurshed Husnain does not press the revisional application I make no order and leave it with the above observation.

As regards the appeal in my judgment the learned Judge was right. The attachment cannot be considered to be subsisting. Consequently the property now having passed to the *Musammat* cannot be sold again in execution. The appeal is, therefore, dismissed with costs.

Fazl Ali, J.– Shortly put the appellant's contentions are as follows:

The amount deposited in Court by the respondent Wahidunnissa must be regarded as "assets held by the Court" and, therefore, liable to rateable distribution under s. 73, Civil Procedure Code. That being so, neither the first nor the second decree has been satisfied and under s. 64, Civil Procedure Code, the private sale of the property is invalid as against the claim under both the decrees and the house in question is thus liable to be sold in execution of the decree in execution of which it had been attached. The attachment could not validly terminate under O. XXI, r. 55, as that decree was in fact not satisfied. The expression "amount decreed with costs" as used in O. XXI, r. 55, means not only the amount of the decree in execution of which a certain property has been attached, but also the amounts of such other decrees as may be under execution in the same Court giving rise to claims under s. 73, Civil Procedure Code. These contentions are met on behalf of the respondent on the following four grounds: (*i*) It is contended that as the second decree was not in existence at the time when the house in question was purchased by the respondent the private sale though void as against the claim in the previous decree cannot be held to be void as against the subsequent decree-holder. This argument is sought to be supported by the following observations made by Mookerjee, A. C. J., in *Barendra Nath* v. *Martin & Co.* (6):

"The expression 'claims enforceable under the attachment' taken apart from the explanation unquestionably refers to a claim in existence as such on the date of alienation. The explanation, no doubt, enlarges the scope of the words by the inclusion of claims for the rateable distribution of assets, but clearly such claims must possess the same quality as the claims primarily enforceable under the attachment, that is, actual existence at the time of alienation. In our opinion it would be unreasonable to hold that claims of the latter description include claims that might possibly arise in the future"

(2) It is next contended that the present case is entirely covered by the Full Bench decision of the Madras High Court in *Annamalai Chettiar* v. *Palamalai Pillai* (2). In that case the question which was referred to the Full Bench was formulated in these words:

"whether non-attaching decree-holders who had applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise are entitled to question the private alienation during the continuance of such attachment."

This question was answered in the negative by all the learned Judges of

(6) 62 Ind. Cas. 167; A I R 1921 Cal. 691; 33 C L J 7.

the Madras High Court who composed the Full Bench. One of them, Sir John Wallis, expressed himself as follows:

"Section 64 of the present Code affords no greater protection to the attaching decree-holder than s. 276 of the old Code and if he cannot protect himself against an alienation after an attachment unless the attached property is brought to sale in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in any better position. It may even be said that as regards the other decree-holders the language used in the body of s. 64 is, if anything, less favourable than the language of s. 276, because it only renders void as against the claimants specified alienations which are 'contrary to such attachment' and alienations by means of which the decree in execution of which the attachment was made is satisfied can scarcely be regarded as an alienation contrary to the attachment"

Another learned Judge in delivering his opinion made the following observations:

"If the legislature intended the attachment to enure for the benefit of all persons entitled to rateable distribution, it would similarly have declared that the attachment should cease only on all their claims being satisfied or that the cesser of the attachment should be without prejudice to their rights. That the difficulty created by rr. 55 and 57, O. XXI is real will be clear from the fact that the existence of a valid attachment is necessary in order to bring the property to sale and if the attachment ceases when the decree-holder who attaches is paid off, a re-attachment will be necessary which will be of no avail if it is subsequent to the alienation: see *Gobind Singh* v. *Jalim Singh* (7) and *Mina Kumari Bibi* v. *Bejoy Singh* (1)."

Now, what the respondents contend, relying on the observations of Sir John Wallis, is that only in those cases where the attaching creditor follows up the attachment by bringing the attached property to sale, a question will arise as to whether the title created by the execution sale will or will not prevail as against the title of the private purchaser from the judgment-debtor. If however before the attached property is brought to sale, the attachment for some reason or other comes to an end or is withdrawn, neither the attaching decree-holder nor any other decree-holder who claims rateable distribution under s. 73, Civil Procedure Code, can question the private alienation. It is pointed out that the second decree-holder who claims rateable distribution under s. 73 is under the existing law entirely at the mercy of the first decree-holder or the decree-holder who has already attached the property. For example, if the latter accepts the decretal amount from the private purchaser of the artached property out of Court and then certifies satisfaction in Court or allows the execution to be dismissed for default, the second decree-holder cannot question the private alienation, nor can he claim any rateable distribution of the amount received out of Court by the first decree-holder. Upon the same analogy it is argued that once the attachment terminates by reason of the entire decretal amount due under the first decree being deposited in Court under O. XXI, r. 55, the alienation at once becomes binding on the second decree-holder who has not attached the property, but who has merely claimed rateable distribution under s. 73. It is urged that the decretal amount referred to in O. XXI, r. 55, means the amount of the particular decree which is in execution and in execution of which the property is attached and cannot mean the amount due under all the decrees that may be under execution at the same time in the same Court. It is further contended that on a correct reading of s. 64 it would appear that the attaching creditor is in a far more advantageous position than a creditor who has not attached the property and who claims merely the benefit of s. 73. The former it is said, has a right to proceed to sell the property ignoring the private alienation, but so far as the latter is concerned the alienation must be held to be good as against him so long as his right to the assets in the hand of the Court is not prejudiced provided that such assets do come into the hands of the Court.

(3) The next contention put forward on behalf of the respondent is that if the appellant questions the validity of the sale in favour of *Musammat* Wahidunnissa, the amount paid by her in Court cannot be regarded as assets and the second decree-holder cannot be entitled to the benefit of s. 73 of the Code.

(4) Lastly, it is pointed out that the appellant by his conduct both on the 13th and on the 16th May, must be deemed to have waived the benefit of s. 64 and, therefore, he cannot question the purchase of the house by the respondent. I will only briefly deal with the first two grounds because in my opinion the last two grounds are sufficient to dispose of this appeal.

The observations made by Mookerjee, J., in *Barendra Nath* v. *Martin & Co.* (6), have been dissented from in *Siva Pratapa*

(7) 6 A 33; A W N 1884, 183.

Bhattadu v. *A. E. L. Mission Rajahmundry* (8), and do not appear to me to be quite in consonance with the decision in *Sorabji Edulji* v. *Gavind Ramji* (3), or with the prior decision of the Calcutta High Court in *Kali Kumar* v. *Kali Prasanna* (9). There is much however in the decision of the Privy Council in *Mina Kumari Bibi* v. *Bejoy Singh* (1) and *Annamalai Chettiar* v. *Palamalai Pillai* (2), which supports the respondent's view. On principle there should be no difference between payment of the decretal amount to the attaching creditor out of Court and its being paid into Court to his credit. I do not see why in the former case the alienation should be held to be binding upon the second decree-holder who claims the benefit of s. 73, Civil Procedure Code, and in the latter case should be held to be void against him. At the same time it appears to me that by extending the principle laid down in *Annamalai Chettiar* v. *Palamalai Pillai* (2), we would be drifting further and further away from the object which the legislature had in view in enacting s. 73, Civil Procedure Code. The object clearly was to avoid multiplicity of attachment and execution proceedings and I think that the difficulties which often arise in the interpretation of s. 64 and O. XXI, r. 55, will be avoided if it is provided in clear terms: (1) that no private alienation would bind either the attaching creditor or any other decree-holder who applies for execution of his decree while the attachment still subsists; (2) that the expression "amount decreed" as used in O. XXI, r. 55, shall include the amount of any decree or decrees passed against the same judgment-debtor in respect of which a valid claim for rateable distribution of the assets may have been made under s. 73, Civil Procedure Code. It is however unnecessary to pursue the matter any further because as I have already indicated, this appeal can in my opinion be disposed of on the other two grounds referred to by me.

The plain dictionary meaning of the word "assets" is the entire property of a person or company which may be so liable for his or their debts. In the majority of cases decided under s. 73, Civil Procedure Code, the word "assets" has been used to mean any fund in the hands of a Court which could be applied by the Court for the payment of a judgment-debtor's debt. It follows, therefore, that a fund or a sum of money cannot be regarded as assets unless it is in some sense the property of the judgment-debtor and can therefore be legitimately applied to the payment of his debt. It is clear that any money which belongs to a stranger or any money paid into Court by a third party under a misapprehension cannot be described as assets. The question, therefore, is whether the money deposited by *Musammat* Wahidunnissa in Court can be regarded as assets held by the Court executing the decree in Execution Case No. 1472 of 1930. If the appellant insists on regarding the sale in favour of *Musammat* Wahidunnissa as void, I am doubtful whether the money realized by means of a sale which is void in the eye of law can be regarded as the judgment-debtor's assets. It is well settled that when no assets are held by the Court the holder of the second decree is not entitled to rateable distribution. Here however the appellant who is the holder of both the decrees has been contending all along that the sum of money deposited by *Musammat* Wahidunnissa must be treated as assets and that it should be applied to the satisfaction of the two decrees held by him. As far as I can see, he could possibly take up this position only if he did not question the validity of the sale in favour of the respondent for it seems to me that he cannot both approbate and reprobate it. This at once brings me to the consideration of the conduct of the appellant at the time the respondent offered to deposit the money in satisfaction of the first decree in Court. As will appear on a reading of the order-sheet the Court gave a full opportunity to the appellant to raise any objections that he could raise in law to the respondent depositing the money, and his Pleader was accordingly heard on the subject.

It was open to him to show that the respondent had no *locus standi* to deposit the money; that the sale was not valid as against him; that he meant thereafter to question the sale; that there being already his application for rateable distribution before the Court in Execution Case No. 578 of 1933, the whole of the first decree could not be satisfied by the amount and so the house in question was still liable to be sold. None of these objections however appear to have been raised on his behalf. On the other hand, his Pleader clearly intimated to the Court that he would have

(8) 97 Ind. Cas. 496; A I R 1926 Mad. 307; 49 M 38.
(9) 33 Ind. Cas. 492; A I R 1917 Cal. 561.

no objection to the money being received by the Court, if certain costs incurred by the decree-holder in a miscellaneous proceeding was also paid by the appellant. It was subsequently ascertained in the presence of the decree-holder's Pleader that no costs had been incurred by the decree-holder and *Musammat* Wahidunnissa was therefore directed to pay into Court the decretal amount with costs and interest. This amount was paid into the treasury on May 15. The order-sheet shows that on May 16 when the Execution Case No. 1472 was dismissed, the decree-holder raised no objection.

It appears to me that in these circumstances the appellant must be deemed by his conduct to have waived the benefit of s. 64, even if he was entitled to any such benefit, and to have agreed to receive the decretal amount due in Execution Case No. 1472 in satisfaction of the decree for which the execution had been taken out. That being so, the attachment must necessarily be deemed to have terminated and the sale in favour of the respondent must be held to be valid. In my opinion therefore the order of the Court below that the house in question cannot be sold in execution of the appellant's decree is correct and this appeal must be dismissed with costs.

N. *Appeal dismissed.*

CALCUTTA HIGH COURT

Civil Appeal No. 659 of 1932
August 2, 1934

MUKERJI, AG. C. J. AND S. K. GHOSE, J.

Sm. NURANNESSA KHATOON AND OTHERS—PLAINTIFFS—APPELLANTS

versus

OSMAN GANI AND OTHERS—RESPONDENTS

Registration Act (XVI of 1908), ss. 17 (1), (b), 21—Sale deed—Property mentioned as existing in district where deed is registered not actually existing but introduced as fictitious item—Deed containing clause making it non-testamentary instrument creating vested rights—Document, whether valid—Properties sufficiently identifiable—Document registered—Document, if operative.

There was a clause in a sale-deed executed by the defendants in favour of the plaintiffs, which ran in these words: "Be it known that if in future owing to any dispute about the above mentioned family arrangement and amicable partition it be found or become divulged that we the executants have not the entire 16 annas right in the properties sold, then of the immovable properties left by our father in the District of Dacca and Goalpara and in the Garo hills including the properties given in the schedule below, the total 6 annas 4 *gandas* 9 *kaks* 2 *tils* inherited by us the executants from our father, will be counted as sold to you the recipients of the deed. On the strength of this *kobala* being owner and possess of our 6 annas 4 *gandas* 9 *kaks* 2 *tils* share in the immovable properties left by our father including the properties given in the schedule below, you either jointly or on partition, will enjoy and possess the same in whatever way you like down to your sons grandsons and other heirs and legal representatives":

Held, that this clause in the document satisfied the requirements of s. 17, sub-s. 1, cl. (*b*), Registration Act, inasmuch as the document by reason of this clause would be a non-testamentary instrument which purported to create or declare, though in future, a right vested or contingent in favour of the plaintiffs. That being the position the document would be registrable in the District of Dacca even though as a *kobala* transferring the three items of property mentioned in the document it would not be so registrable [p. 927, col. 2; p. 928, col. 1.]

Held, further that treated as a *kobala* the document could not be registered in any Registration Office in the District of Dacca in view of the fact that the only property which purported to have been covered by it as lying within the District of Dacca was a tin-shed which had no existence whatever and inasmuch as the introduction of a fictitious item of property in the sale deed for the purpose of getting it registered at a particular place would make the registration of the document invalid. But the document regarded as a non-testamentary instrument falling within cl. (*b*), sub-s. 1, s. 17 could be registrable at a Registration Office in the District of Dacca and it was not invalid. [p. 928, col. 1.]

Section 21, Registration Act, merely lays down certain particulars which have got to be complied with before a document can be accepted for registration. If the properties are sufficiently identifiable, the document, if registered, would be operative in respect of such properties as would be found to answer the description contained in the document. [*ibid*]

C. A. from an appellate decree of the Additional District Judge, Dacca, dated July 18, 1931.

Messrs. *Radhabinode Pal* and *Syed Farhat Ali*, for the Appellants.

Mr. *Ramendra Chandra Roy*, for the Respondents.

Judgment.—In this appeal the question which arises for our consideration is whether a sale-deed was invalid by reason of its being registered at a place at which it could not be registered under the law. The facts necessary to be stated are the following. The suit was instituted by the plaintiffs for partition of certain properties, six in number, described in the schedule attached to the plaint. The plaintiffs claimed certain specified properties corresponding to a share which they alleged had belonged to defendants Nos. 8 and 9. Their case was that there was a family arrangement under which the said defendants had got those properties in lieu of their undivided share in all the six properties mentioned in the plaint and that in 1926 there was a deed of sale executed by the said defendants in their favour under which

they became entitled to the said specified properties. Their case further was that there was a stipulation in the said document that in case there was any difficulty in obtaining possession of the said plots on account of the fact that the family arrangement was not established then they would be entitled to the shares of their vendors in the whole lot of properties mentioned in the plaint. The trial Court made a preliminary decree for partition in the plaintiffs' favour in respect of all the properties and that decree has been reversed by the lower Appellate Court on the ground that the sale-deed was invalid by reason of the fact that it had been registered at a place at which it could not under the law be registered. The lower Appellate Court in dismissing the suit has observed thus:

"I would, therefore, if the bar of invalid registration did not arise, confirm the lower Court's decree in respect of properties other than property No. 5 only, that property being left to be shared by the legal heirs of Ahmad Ali Shah. But owing to the bar of invalid registration, the appeal succeeds and the suit must fail."

The question which requires consideration in this case is whether a particular item of property described in the sale deed, namely, Item No. 3, can be held to have passed under it. This item concerned a plot of land on which stood a tin-shed, according to the description as given in the document. The other two items of property, mentioned in the sale-deed are properties situate in the province of Assam. So far as the Item No. 3 is concerned it is a property which is situate in the District of Dacca. The document was presented for registration at a Sub-Registry Office in the District of Dacca. The learned Judge has found that the tin-shed mentioned in Item No. 3 had no existence and he has referred to certain evidence in his judgment in support of this finding. This finding has not been challenged before us on behalf of the appellants. The learned Judge has also held that upon a proper reading of the description of Item No. 3 as contained in the document it should be held that there was no intention that any title to the land itself should pass under it; and being of opinion that the only property which was intended to be conveyed by Item No. 3 was the tin-shed which had no existence he held that the document was not registrable at any Registration Office in the District of Dacca.

The appellants' first endeavour before us was to make out that the interpretation which the learned Judge has put upon the description given in the document as regards Item No. 3 was not correct and that on a proper reading of the said description it should be held that intention of the parties was that the land on which the tin-shed stood should also pass under it.

We have considered the arguments that have been put forward in support of this contention, but we are unable to say that the view which the learned Judge has taken is wrong. The learned Judge has referred to the fact that if the description given of Item No. 3 be read in the light of what has been said in connection with the other two items of property there can be no doubt that Item No. 3 which was to pass under the deed was not land but only the tin-shed standing on it. The learned Judge has also relied on certain other evidence for the purpose of showing that the land as described in Item No. 3 would include not merely the share of the vendors but also the share of their co-sharers and that it could never have been the intention of the parties, that the share of persons other than that of the vendors would pass. We are clearly of opinion that the learned Judge was right in the view which he has taken as regards the interpretation to be put on the description contained in the document as regards Item No. 3. The appellants have next drawn our attention to the fact that there is a clause in the sale-deed which runs in these words:

"Be it known that if in future owing to any dispute about the above mentioned family arrangement and amicable partition it be found or become divulged that we the executants have not the entire 16 annas right in the properties sold then of the immovable properties left by our father in the District of Dacca and Goalpara and in the Garo hills including the properties given in the schedule below, the total 6 annas 4 *gandas* 9 *kaks* 2 *tils* inherited by us the executants from our father, will be counted as sold to you the recipients of the deed. On the strength of this *kobala* being owner and possessed of our 6 annas 4 *gandas* 9 *kaks* 2 *tils* share in the immovable properties left by our father including the properties given in the schedule below, you either jointly or on partition, will enjoy and possess the same in whatever way you like down to your sons, grandsons and other heirs and legal representatives."

Now this clause in the document, it has been pointed out, satisfies the requirements of s. 17, sub-s. 1, cl. (*b*), Registration Act, inasmuch as the document by reason of this clause would be a non-testamentary instrument which purported to create or declare, though in future, a right vested or contingent in favour of the appellants. It has been argued that that being the position

the document would be registrable in the District of Dacca even though as a *kobala* transferring the three items of property mentioned in the document it would not be so registrable. We are of opinion that this contention is well-founded. It is quite true that treated as a *kobala* the document could not be registered in any Registration Office in the District of Dacca in view of the fact that the only property which purported to have been covered by it as lying within the district of Dacca was the tinshed which had no existence whatever and inasmuch as the introduction of a fictitious item of property in the sale-deed for the purpose of getting it registered at a particular place would make the registration of the document invalid. But there is yet the other contention of the appellants to which we have just referred and according to which the document regarded as a non-testamentary instrument falling within cl. (*b*), sub-s. 1, s. 17 would be registrable at a Registration Office in the District of Dacca. There is no question, as far as we can make out that the value of the right such as it was, was over Rs. 100. We are of opinion, therefore, that the learned Judge was not right in holding that the document was invalid. Inasmuch as the other findings of the learned Judge have not been challenged before us and there is no dispute whatsoever as regards the facts, we think we would be right in giving effect to the observations which the learned Judge made and to which we have already referred at the commencement of this judgment. Our attention has been drawn on behalf of the respondents to s. 21, Registration Act, which enjoins that

"no non-testamentary document relating to immovable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same."

That section merely lays down certain particulars which have got to be complied with before a document can be accepted for registration. If the properties are sufficiently identifiable there is no reason why the document, if registered, would not be operative in respect of such properties as would be found to answer the description contained in the document. Our order therefore, is that the appeal should be allowed, the decrees of the Courts below should be set aside and a preliminary decree for partition be entered in favour of the appellants in respect of properties other than property No. 5 only and that the other directions contained in the preliminary decree which the Court of first instance had made should form part of the decree of this Court. The appellants will be entitled to their costs in all the Courts, hearing fee in this Court being assessed at two gold *mohurs*.

D. *Appeal allowed.*

ALLAHABAD HIGH COURT

Second Civil Appeal No. 141 of 1933

March 7, 1935

BAJPAI, J.

NAWAB SINGH—PLAINTIFF—APPELLANT

versus

DALJIT SINGH—DEFENDANT—RESPONDENT

Fraud—Joint fraud by plaintiff and defendant—Court finding they were acting together to perpetrate fraud and there is no difference in degree of guilt—Court should not assist either party—Relief sought on basis of transaction—Defence of fraudulent nature of transaction—Maxim—In pari delicto potior est conditio possidentis *and* nemo allegans turpitudinem *—Applicability—Transaction entered into by plaintiff's predecessor—Plaintiff, if can enforce transaction—Contract—Consideration—Document found to be without consideration—Enforceability.*

Where a plaintiff is relying upon a deed, the defendant is entitled to give evidence of the circumstances under which the document came into existence and when these circumstances include an allegation of a joint fraud by both plaintiff and defendant the particulars of that fraud must be pleaded; and it is then the duty of the Court to look into the matter, and if the Court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud and did in fact perpetrate the fraud, and that there is no difference in the degree of the guilt of the plaintff and that of the defendant, the duty of the Court is not to assist either party. *Vilayat Hussain* v. *Misran* (4), applied.

Where the plaintiff is not seeking to avoid a certain transaction but wants relief on the basis of the transaction and alleges that there is a document of transfer in his or his predecessor's favour and possession has not been delivered to him on the basis of the document, possession may so be delivered and if the defendant pleads that the transaction should not be given effect to on the ground that the transaction was brought about in order to perpetrate a fraud on creditors the defendant should not be heard on the maxim *nemo allegans turpitudinem*, then the principle that is applicable is the principle contained in the maxim *in pari delicto*. The defendant will be permitted to state that the document is not supported by consideration and the document was executed in order to defraud another person and on proof of the defendant's averments if it is found that the plaintiff and the defendants were *in pari delicto* the Court shall stay its hand and refuse its support to either confederate letting the estate lie where it falls.

Where the plaintiff is seeking to enforce a transaction which is not supported by consideration and whose object the Court perfectly well knows to have been a fraudulent one, he should not be allowed to do so even if the party to the transaction was not he but his predecessor-in-interest. *Nand Lal* v.

Jethu Mal (10), relied on. *Muckleston* v. *Brown* (8 and *Matthew* v. *Hanbury* (9), distinguished.

Where the plaintiff wants to enforce a document which the defendant alleges to be without consideration and the Court which is the final Court of facts has come to the conclusion that there was no consideration for the docnment,the plaintiff who is setting up the document must, necessarily fail.

S. C. A. from the decision of the Subordinate Judge, Farrukhabad, dated November 3, 1932.

Mr. *R. C. Ghatak*, for the Appellant.
Mr. *S. B. Johari*, for the Respondent.

Judgment.—This is a plaintiff's appeal whose suit was decreed by the trial Court but dismissed by the lower Appellate Court. The facts may be stated. On June 28, 1920 one Phul Kunwar sold the plaint property to Daljit Singh defendant to the present suit for Rs. 400. On April 21, 1921, Daljit Singh sold the same property along with certain mortgagee rights to Gajraj Singh for Rs. 800. It has been alleged in the present controversy that the sale in favour of Gajraj was a bogus sale and it was not the intention of the parties that ownership should be transferred to Gajraj, but it was apprehended that the sale by Phul Kunwar might be pre-empted by a co-sharer and, therefore, Daljit and Gajraj adopted the trick of getting a document of transfer executed, Gajraj being an equal co-sharer with the potential pre-emptor. A pre-emption suit was actually filed by one Narain Singh on June 21, 1921, and he impleaded Phul Kunwar, Daljit and Gajraj as defendants. His allegation naturally was that the sale by Daljit to Gajraj was a bogus sale. In this pre-emption suit Daljit and Gajraj both pleaded that the sale of April 21, 1921, was a real and genuine sale by which ownership was transferred from Daljit to Gajraj; Daljit further appeared as a witness and said that he had received the consideration of Rs. 800 mentioned in the sale-deed of April 21, 1921. In the result the pre-emption suit was dismissed.

It appears that Gajraj applied for mutation on September 6, 1923, on the basis of the sale-deed in his favour. This application, however, was dismissed on the ground that the name that stood in the revenue papers as against the property was the name of Phul Kunwar and the name of Daljit even, the vendee from Phul Kunwar, had not been mutated and it was not possible, therefore, to enter the name of Gajraj. Gajraj and his heirs do not seem to have taken any steps after this. On March 16, 1927, Daljit asked for the mutation of his name on the basis of the sale-deed dated June 28, 1920, executed by Phul Kunwar and his name was mutated. Daljit has remained in possession of the property all along.

In January 1931 the present suit was instituted by Nawab Singh alleging himself to be the reversioner of Gajraj Singh for recovery of possession of the property sold to Gajraj Singh by Daljit Singh on April 21, 1921. Daljit Singh disclosed the true nature of the transaction in his written statement and pleaded that the object of the transaction was to defeat a possible pre-emption suit and as a matter of fact no consideration passed upon the document of April 21, 1921. The lower Appellate Court has distinctly held that sale-deed of April 21, 1921 was "fictitious, without consideration and was executed on account of the fear of a pre emption suit". He took into consideration the fact that Gajraj Singh and Daljit Singh were related, that both of them lived in one and the same house and that the mortgage deed which was sold along with the property by the sale-deed of April 21, 1921, also remained all along with the defendant Daljit Singh. The two sale-deeds, namely, one in favour of Daljit and the other in favour of Gajraj were also produced by Daljit Singh. On these considerations the lower Appellate Court came to the conclusion that the sale-deed in question was "fictitious and without consideration" and dismissed the plaintiff's suit.

In second appeal it is argued before me that it was not open to the defendant to plead fraud and to disclose the true nature of the transaction. It is said that a deed cannot be avoided on the ground of fraud by a party to the fraud and reliance is placed upon the case of *Sidlingappa* v. *Hirasa* (1). Reference is also made to the cases of *Kamayya* v. *Mamayya* (2), and *Shiva Narain Ram* v. *Phuljharia*, 52 Ind. Cas. 402 (3). These cases, no doubt, support the contention of the plaintiff appellant but the Bombay case was considered by this Court in the case of

(1) 31 B 405.
(2) 43 Ind. Cas. 352; 32 M L J 484.
(3) 52 Ind. Cas. 402.

Vilayat Husain v. *Misran* (4), and the Letters Patent Bench came to the conclusion that that case was of doubtful authority. After a review of certain English decisions and following a well considered judgment of the Calcutta High Court in the case of *Raghupati Chatterji* v. *Nrishingha Hari Das*, 71 Ind. Cas. 1 (5), it was held "that where a plaintiff is relying upon a deed the defendant is entitled to give evidence of the circumstances under which the document came into existence and when these circumstances include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the Court to look into the matter, and if the Court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud and did in fact perpetrate the fraud, and that there is no difference in the degree of the guilt of the plaintiff and that of the defendant, the duty of the Court is not to assist either party". Applying this principle I am of the opinion, that it was open to the defendant to plead the circumstances under which the document which is the basis of the present suit came into existence and when those circumstances are scrutinised there cannot be the slightest doubt that Gajraj Singh and Daljit Singh both sat down in order to defraud a possible pre-emptor who was actually defrauded and under these circumstances "the estate should lie where it falls", and the Court should help neither party. This principle was mentioned with approval by their Lordships of the Privy Council in the case of *Petherpermal Chetty* v. *R. Muniandy Servai* (6), where a passage from Mayne's Hindu Law, seventh editon, p. 595, para. 446, was quoted *in extenso*, and it was observed that the priniciple was correctly stated by the learned author. In the Bombay case the conflict between the two legal maxims *nemo allegans turpitudinem suam audi endus* and *in pari delicto potior est conditio possidentis* was stated and it was said that authority could be cited for the contention of either party who sought to invoke the aid of the legal maxim that best suited him, but their Lordships of the Bombay High Court preferred to follow the rule laid down in *allegans turpitudinem suam*. I have already said that the authority of the Bombay case was doubted by this Court in *Vilayat Husain's case* (4), and by the Calcutta High Court in *Raghupati Chatterji's case* (5). It was also doubted by the Lahore High Court in *Qadir Bakhsh* v. *Hakam* (7), where Tek Chand, J. delivering the judgment of the Full Bench has reviewed the entire case-law on the subject and has pointed out that there is no real conflict between the two maxims and that whereas the one embodies the general rule the other provides an exception.

"A person who has polluted his hands by being a party or privy to a fraudulent transaction shall not be allowed to approach the fountain of justice with his own infamy on his lips and obtain relief on the strength of such a transaction, and the moment he relies on such an agreement he will be told *nemo allegans suam turpitudinem audi endus est.*"

This maxim is applicable where the plaintiff who has become a transferee under a fictitious transaction but who has not actually obtained possession of the property wants to enforce his right against the transferor who is in possssion of the property. I am of the opinion that even if the object of the fictitious transaction was to cheat an innocent person and that innocent person has been cheated, the plaintiff would not be permitted to assume the individuality which was just a mere mask, and the Court in its obvious duty of masterly inaction should not help the plaintiff on the principle that a party cannot be heard to plead his own fraud and succeed on its basis. If the fraud has succeeded there is abundant authority for the proposition that the grantor or transferor who has made a fictitious transfer and has put the transferee in possession will not be allowed to recover possession inasmuch as he has by the transfer cheated a stranger and because the transaction has ceased to be in the words of Mayne "a mere mask and has become a reality" and it may be very proper for a Court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others.

The position in the present case, however, is slightly different, because the plaintiff is not seeking to avoid a certain transaction but wants relief on the basis of the transaction. He alleges that there is a document of transfer in his or his

(4) 72 Ind. Cas. 92; 21 A L J 303; 45 A 396; A I R 1923 All. 504.

(5) 71 Ind. Cas. 1; 36 C L J 491; A I R 1923 Cal 90.

(6) 5 A L J 290; 35 C 551; 35 I A 98; 10 Bom. L R 590; 12 C W N 562; 7 C L J 528; 18 M L J 277; 4 M L T 12; 4 L B R 266; 14 Bur. L R 108 (P C).

(7) 139 Ind. Cas. 17; A I R 1932 Lah. 503; Ind. Rul. (1932) Lah. 547; 13 Lah. 713; 33 P L R 851 (F B).

predecessor's favour and possession has not been delivered to him on the basis of the document, possession may so be delivered and he says that if the defendant pleads that the transaction should not be given effect to on the ground that the transaction was brought about in order to perpetrate a fraud on creditors the defendant should not be heard on the maxim *nemo allegans turpitudinem*. It is under these circumstances that there is an exception to the general rule and the principle that is applicable is the principle contained in the maxim *in pari delicto*. The defendant will be permitted to state that the document is not supported by consideration and the document was executed in order to defraud another person, namely, the pre-emptor in the present case and on proof of the defendant's averments if it is found that the plaintiff and the defendants were *in pari delicto* the Court shall stay its hand and refuse its support to either confederate letting the estate lie where it falls. There is thus no real conflict between the two maxims, the first maxim stating the general rule and the second maxim providing an exception to the general rule. In the present case, therefore, it is possible to apply the exception *i. e.*, the principle of *in pari delicto* in order to defeat the plaintiff's suit.

It is, however, said that the plaintiff in the present case is not Gajraj Singh who was a party to the fraud but his heir Nawab Singh and he is neither pleading any fraud nor when the fraud is allowed to be proved, can it be said that he is *in pari delicto*. The argument is that he is trying to enforce a transaction and the defendant should not be heard because of the application of the general maxim stated by me before. The answer to this is that the defendant is not necessarily setting up any fraud but is putting the plaintiff to strict proof of his title and is alleging that the basis of the plaintiff's title is not supported by consideration. On the finding of the lower Appellate Court that the document is without consideration the defendant's case is that the plaintiff should be non-suited. It is argued on behalf of the plaintiff that in order to state his defence fully the defendant will have to state the circumstances under which the fraud was enacted and he should not be permitted to do so as against the plaintiff who was not his confederate at the time the fraud was perpetrated. Reliance is placed on the case of *Muckleston* v. *Brown* (8), and the case of *Matthew* v. *Hanbury* (9), and in both these cases it was held that although the testator himself might not be able to obtain relief, there was nothing to prevent the executor from maintaining a suit. The cases to my mind are different. In those cases it was held that where a person has parted with his property in order to defraud strangers or where he has incurred liability under unlawful circumstances he would not be permitted to obtain relief but his heir or executor would be able. This is not a case where Nawab Singh is seeking to obtain relief from the effects of any transaction entered into between his predecessor and the defendant by which a liability has been cast on the plaintiff's estate. The plaintiff is seeking to enforce a transaction which is not supported by consideration and whose object the Court perfectly well knows and I am of the opinion that neither Gajraj Singh nor his heir should be allowed to do so. I am fortified in my opinion by the view taken by the Punjab Chief Court in *Nand Lal* v. *Jethu Mal* 33 Ind. Cas. 255 (10).

Reference was also made by Mr. Ghatak to the recent Privy Council case of *Ma Ngwe Nang* v. *Maung Tha Maung* (11), and my attention was drawn to a passage in the report at page 254*. Their Lordships found it unnecessary to decide the point on which a forceful argument was advanced but their Lordships held that if certain facts regarding fraud are alleged, it is the duty of the Court adjudicating on the allegation of the grantor to see that he proves by cogent evidence the averment that he makes. This case, however, does not help me in any way in deciding the present appeal.

One simple way in which this case may be looked at is that the plaintiff wants to enforce a document which the defendant alleges to be without consideration and the Court which is the final Court of facts has come to the conclusion that there was no consideration for the

(8) (1801) 6 Ves. 52; 31 E R 934; 5 R R 211.
(9) (1790) 2 Vern. 188; 23 E R 723.
(10) 33 Ind. Cas. 255; 21 P R 1916; 197 P W R 1915.
(11) 114 Ind. Cas. 595; 56 M L J 244; A I R 1929 P C 55; 49 C L J 167; 31 Bom. L R 311; (1929) M W N 235; 29 L W 669; 33 C W N 513; 7 R 4 (P C).

* Page of 56 M.L. J.—[*Ed.*]

document. The plaintiff who is setting up the document must, therefore, necessarily fail.

For the reasons given above, I dismiss this appeal with costs, but grant leave to file an appeal by way of Letters Patent.

N. *Appeal dismissed.*

BOMBAY HIGH COURT

Original Civil Jurisdiction Appeal No. 26 of 1934

September 24, 1934

BEAUMONT, C. J. AND RANGNEKAR, J.

KARUMUTHU THIAGARAJAN CHETTIAR—PLAINTIFF—APPELLANT

versus

THOS. SMITH & Co.—DEFENDANT RESPONDENT

Arbitration—Stay of suit, when granted.

The Court will ordinarily stay a suit, if the parties have agreed to refer their dispute to arbitration, and refer the matters in dispute to arbitration but where difficult questions of law are involved in such dispute, the suit will be allowed to proceed. *Cottage Club Estate* v. *Woodside Estate* (1), followed.

O. C. J. A. from Suit No. 732 of 1934.

Messrs. *Jamshed Kanga* and *Y. B. Rege*, for the Appellant.

Mr. *D. N. Bahadurji*, for the Respondent.

Beaumont, C. J.—This is an appeal against an order made by the Judge in Chambers staying the suit and referring the matters in dispute to arbitration. The suit is a suit by the plaintiff against the defendants, who are brokers in Bombay. The plaintiff asks for accounts of the dealings between him and the defendants and for payment of the amount found due and various consequential reliefs. Various contracts were made between the plaintiff and the defendants, and there is a clause in them providing for matters in dispute to be referred to arbitration. The contracts being contracts relating to cotton are governed by the bye-laws of the East India Cotton Association, Ltd. The issues in the suit show that there are various questions of fact and of law to be decided, some of the questions of law possibly involving some difficulty. Although the Court will generally stay a suit and refer the matters in dispute to arbitration when the parties themselves have agreed that matters should be so decided still the fact that there are difficult points of law involved is one reason which always weighs with the Court in deciding whether to stay the suit or not, because experience shows that awards involving points of law almost invariably come before the Court, and the only result of the arbitration in such a case is to add to the expense and delay. But apart from that general consideration, there are two reasons which induce us to think that this suit ought not to be stayed.

The first is that the defendants have entered into an agreement with five persons under which the defendants have agreed to assign by way of mortgage their claims against the plaintiff. Now that assignment or agreement to assign is apparently challenged in a suit (No. 1905 of 1933) filed for the specific performance of the said agreement. In that suit a Receiver has been appointed, and the Receiver was authorised to continue or adopt proceedings in arbitration under the bye-laws of the East India Cotton Association, Ltd., in the name of the defendants. But at the moment undoubtedly that agreement by the defendants charging all their claims against the plaintiff must be treated as subsisting, and it seems to me to present considerable difficulty in relation to any arbitration. The agreement to refer to arbitration is between the plaintiff and the defendants, and not between the plaintiff and the assignees of the defendants or the Receiver appointed by the Court. If the arbitration proceeds as between the plaintiff and the defendants and the arbitrators find that something is due to the defendants, they cannot give effect to that finding and no order can be made for payment to the defendants because on this mortgage it appears that the defendants are not the persons entitled to receive the moneys. Therefore it seems to me that in the event of the defendants succeeding in the arbitration, the award would be in effect a nullity. That view of the matter follows the decision of Wright, J. (as he then was) in *Cottage Club Estate* v. *Woodside Estate Co.* (1), and the fact that that difficulty may arise in relation to the arbitration is one good reason for not staying the action and referring the disputes to arbitation.

Then there is another difficulty. One of the arbitrators appointed by the East India Cotton Association is a gentleman named Mowji Bhimji. Now Mr. Mowji Bhimji is a director and a shareholder in a private company which is an assignee of the interest of one of the five persons to whom the defendants have mortgaged their

(1) (1928) 2 K B 463; 97 L J K B 72; 44 T L R 20; 33 Com. Cas. 97; 139 L T 353.

claims against the plaintiff. So that it seems to me to be clear that Mr. Mowji Bhimji is an interested person since he is interested in the award being made in favour of the defendants. Of course it may be that he would not allow his own interest to affect his judgment, but that is not the point, because bye-law No. 40 of the bye-laws of the East India Cotton Association povides that no member of the Association having an interest in the particular matter in dispute shall be competent to sit on any arbitration. The learned Judge in his judgment thinks that the plaintiffs cannot rely on the disqualification of Mr. Mowji Bhimji because he has not pursued his remedy available to him under the bye-laws of the East India Cotton Association. I do not know exactly what remedy the learned Judge refers to—as there does not seem to be any rule or bye-law on that point—but in any case that hardly meets the point. The fact that one of the arbitrators is disqualified from acting affords another good reason for not staying the suit and referring the matter to the arbitrament of that arbitrator. For these reasons it seems to me that no sufficient case is made out here for staying the suit which the plaintiff had commenced before any arbitration proceeding, and we ought therefore to allow the appeal with costs and dismiss the defendant's notice of motion, costs of which will be costs in the case.

Rangnekar, J.—I agree.

D. *Appeal allowed.*

ALAHABAD HIGH COURT

First Civil Appeal No. 135 of 1933
April 20, 1934
BENNET AND BAJPAI, JJ.
Lala MADHO RAM AND ANOTHER—EXECUTORS—APPELLANTS
versus
JAI CHAND RAI AND OTHERS—RESPONDENTS

Charitable and Religious Trusts Act (XIV of 1920), s. 7—Trust for public purposes of a religious or charitable nature—Trustee, if can apply to Civil Court for opinion, advice or direction—Probate—Application for sale of property covered by will after obtaining probate—Application not specifically headed as one under Succession Act (XXXIX of 1925), s. 307—Duty of Court.

A trustee of an express or constructive trust created or existing for a public purpose of a charitable or a religious nature can apply by petition to the Civil Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon.

Where an application for sale of property covered by a will is made by a person who has obtained probate of the will but the application is not specifically headed as being one under s. 307, Succession Act, it is the duty of the Court to find out whether it had jurisdiction in the matter of the application or not under any provision of law.

F. C. A. from an order of the District Judge, Saharanpur, dated April 11, 1933.

Mr. *Gopi Nath Kunzru*, for the Appellants.

Mr. *G. S. Pathak*, for the Respondents.

Judgment.—This is an appeal from an order of the District Judge, Saharanpur, dated April 11, 1933, by which he purported to dispose of two applications, one dated November 28, 1931, by Jai Chand Rai and others and the other dated February 20, 1933, by Col. D. P. Goyel. The facts of the case are that one *Musammat* Kasturi executed a will on March 20, 1920, by which she gave certain directions regarding her property. On August 1, 1931, Col. Goyel who had obtained probate of the will of his wife, *Musammat* Kasturi, applied for the sale of certain immovable property covered by the will. Permission was granted to Col. Goyel on August 17, 1931, and we have been informed that in pursuance of the permission the property was actually sold on October 14, 1931.

On November 28, 1931, Jai Chand Rai and others applied to the learned District Judge that:

"the order dated August 17, 1931, be set aside and proper directions for the due administration of the trust be ordered and the damages resulting from misfeasance of the trust be recovered from the security of the trustees or any other suitable order be passed."

This application was opposed by one Lala Madho Ram who was also mentioned as a trustee in the will of *Musammat* Kasturi. Later on Col. Goyel made an application on February 20, 1933, by which he prayed for permission to sell certain other properties mentioned in the will of *Musammat* Kasturi Bai. The learned District Judge considered these two applications on April 11, 1933, and came to the conclusion that the application of Col. Goyel was under s. 307, Succession Act, which section was not at all applicable inasmuch as "permission to transfer is not asked in this case in order to pay debts and legacies." He therefore, refused the application of Col. Goyel dated February 20, 1933, and at the same time set aside the order of August 17,

1931, which he considered to be an *ex parte* order.

In this appeal it is contended before us that the learned District Judge had erred in holding that he had no jurisdiction to grant the permission sought for. It is true that it has been reiterated before us that s. 307, Succession Act, is applicable to the present case, but as arguments have proceeded before us on the assumption that the learned District Judge has got jurisdiction under other provisions of law to grant the permission sought for, we have got to see whether such jurisdiction exists in the District Judge or not. Our attention has been drawn to s. 7, Charitable and Religious Trusts Act (XIV of 1920) and there cannot be the slightest doubt that a trustee of an express or constructive trust created or existing for a public purpose of a charitable or a religious nature can apply by petition to the Civil Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon. The Court below has not considered whether the application of Col. Goyel could be treated under s. 7 of the Act or not. It has confined its attention to a consideration of the applicability of s. 307, Succession Act, and on that consideration alone has failed to exercise jurisdiction. We make it clear that all questions arising under s. 7, Charitable and Religious Trusts Act, are open and Jai Chand Rai and others can agitate the point before the Court below. It must be mentioned that the application of Col. Goyel was not specifically headed as one under s. 307, Succession Act, and it was the duty of the Court to find out whether it had jurisdiction in the matter of the application or not under any provision of law.

It was then contended before us that Mr. Mundle, the District Judge, had no jurisdiction to set aside his previous order of August 7, 1931. It is argued that after having passed the order, the learned District Judge was *functus officio* and his order could be set aside, if at all, by a superior authority. The contention of the respondents is that every Court has got inherent jurisdiction to recall an order passed without jurisdiction and reliance is placed upon the case of *In the matter of Indrani* (1). The facts of that case are slightly different. A learned District Judge had passed certain orders giving permission to the trustees to sell certain properties and in pursuance of the permission, properties had been sold and an application was made to the successor of the former District Judge to confirm the sales. The learned District Judge before whom the matter came up was of the opinion that s. 307, Succession Act, was not applicable and he therefore dropped the proceedings and refused to confirm the sale. It was held that :

"where a Judge for the time being discovers that an order has been passed without jurisdiction either by himself or by his predecessor-in-office it is his duty to undo that order so far as it may lie in his power."

It was within the competence of the successor to refuse to confirm the sales which had been sanctioned by his predecessor and to that extent he could, if he thought that the order of his predecessor was without jurisdiction, undo the previous order. In the present case there is no question of undoing any previous order so far as it lies in his power. In the present case he has completely set aside his former order dated August 17, 1931, and as we stated before, in pursuance of this order a certain sale has already taken place. The case relied on by the respondents is therefore clearly distinguishable. At the same time we are not satisfied whether the order of the learned District Judge dated August 17, 1931, was passed under s. 7, Religious and Charitable Trusts Act, or under s. 307, Succession Act. It is also clear that that order was passed without reference to a previous order of Mr. Mundle wherein he had refused permission to sell the self-same property under the self-same circumstances. We are therefore of the opinion that it is desirable that the entire matter should be left open and the learned District Judge be asked to consider the application of August 1, 1931, after notice to all the parties concerned as if that were an application under s. 7, Religious and Charitable Trusts Act. We therefore allow this appeal, set aside the order of Mr. Mundle dated April 11, 1931, and send back the case to him to register it on its original number and dispose of it according to law bearing our observations in view. The matters which the Court below will consider are the applications of

(1) 130 Ind. Cas. 498; A I R 1931 All. 212; 53 All 422; (1931) A L J 36.

Col. Goyel dated August 1, 1931 and February 20, 1933, and the application dated November 28, 1931, of Jai Chand Rai and others. Parties will bear their own costs of this appeal and costs in the Court below will abide the event. The appellant is entitled to a refund of court-fees in this Court.

N. *Appeal allowed.*

RANGOON HIGH COURT

Letters Patent Appeal No. 3 of 1934

December 3, 1934

PAGE, C. J. AND MYA BU, J.

K. S. A. V. CHETTYAR FIRM—APPELLANT

versus

MAHMOO—RESPONDENT

Promissory note—Usage in Burma and India among Nattukottai Chettiars—Held, on usage, that firm was payee and sole proprietor could sue on it.

A promissory note was executed to K. S. A. V. Ramiah Raja, and the firm was carrying on business under the style of K. S. A. V :

Held, in accordance with usage prevailing in Burma and India among Nattukottai Chettiars by which a Chettyar firm described generally by initials of firm prefixed to name of partner and agent, that the firm was the payee under the note and the appellant who was the sole proprietor of it could sue on it. *S R. M. C. T. S. S. P. A. Chettyar Firm* v. *Manickam Chettyar* (8), not followed.

[Case-law considered.]

L. P. A. against the judgment and decree of the High Court, Rangoon, and reported in 152 Ind. Cas. 410.

Mr. *Chari*, for the Appellant.

Mr. *U Thein Maung*, for the Respondent.

Page, C. J.—In this case the appellant is the sole proprietor of the K. S. A. V. Chettyar Firm of B. Road, Mandalay, and carries on business under the style or vilasam K. S. A. V.

The suit was brought in the Sub-Divisional Court of Mandalay by the appellant, trading under the vilasam K. S. A. V. to recover Rs. 5,762 as the principal and interest due under a promissory note executed by the defendant in favour of K. S. A. V. Ramaiah Raja. At the trial a decree was passed in favour of the appellant. An appeal to the District Court of Mandalay was allowed and the suit was dismissed. On a further appeal being presented to the High Court Ba U., J., confirmed the decree of the District Court. The appellant then obtained leave under the Letters Patent to file the present appeal.

A number of issues were raised and decided at the trial in favour of the appellant, but the District Court without considering the other grounds of appeal dismissed the suit upon the ground that, regard being had to the form of the promissory note, the appellant could not maintain the suit. The promissory note was in the following terms:—

"Mandalay Rs. 2,000. K. S. A. V. Ramaiah Raja. On First Waning Wagaung 1287 the undersigned Ko Po Hla and Mah Moo of Nyaunghla North village, Yenangyaung township do hereby promise to pay at once in full the sum of Rs. 2,000 (two thousand only) borrowed and taken from Kana Savana Ana Vana Ramiah Raja bearing interest at Rs. 2-8-0 per cent. per mensem jointly or severally on demand made at any time and anywhere by the creditor personally or by their authorized agent. Accordingly this promissory note is signed with consent. Sd. Po Po Hla, Mah Moo".

It is not disputed that the words Kana Savana Ana Vana mean and are equivalent to the words K. S. A. V., and it is common ground that the defendants made themselves liable under the promissory note to K. S. A. V. Ramaiah Raja. In para. (1) of the plaint it was alleged that :

"at Mandalay, on the First Wagaung lazok 1287 B. E. equivalent to August 4, 1925, E. E the defendants abovenamed, by their promissory note hereto attached in original, jointly and severally promised to pay to the plaintiff the sum of Rs. 2,000 bearing interest at Rs. 2-8-0 per cent. per mensem".

The first defendant did not file an appearance or defend the suit. In para. (2) of his written statement the second defendant, who is the present respondent, admitted the allegations in para. (1) of the plaint, but by para. (8) of the written statement the second defendant denied that "the present agent of the plaintiff" was legally empowered, to file the suit". A power of attorney duly authorising Muthuramalingam to file the suit on the plaintiff's behalf was produced at the trial, and the question that falls to be determined in the present appeal is whether the words "K. S. A. V. Ramaiah Raja" in the promissory note disclosed that the K. S. A. V. Firm was the payee under the promissory note with sufficient clearness to indicate to all and sundry into whose hands the instrument might pass that the K. S. A. V. Firm was the party to whom the executants of the promissory note had bound themselves under the instrument: *Sadasuk Jankidas* v. *Kishen Pershad* (1), *Ramgopal Ghose* v.

(1) 50 Ind. Cas. 216; A I R 1918 P C 146; 46 I A 33; 46 C 663; 29 C L J 340; 17 A L J 405; 25 M L J 258; 36 M L J 429; 21 Bom. L R 605; 1 U P L R (P C) 37; (1919) M W N 310; 23 C W N 937; 10 L W 143; 12 Bur. L T 160 (P C).

Dhireada Nath Sen (2) and *P. R. M. P. R. Chettyar* v. *Muniyandi Servai* (3).

It was not disputed by the learned Advocate for the respondent—indeed it was common ground and I am satisfied that the words "K. S. A. V. Ramaiah Raja" would in Burma plainly indicate and disclose that the payee was a firm trading under the vilasam of K. S. A. V., the contention on behalf of the respondent being that the proprietor of the firm in whose favour the defendants had executed the promissory note was Ramaiah Raja and not the plaintiff. In my opinion, however, having regard to the pleadings and the admissions of the respondent in his written statement it was not open to the respondent to contend that the proprietor of the K. S. A. V. Firm was not the plaintiff, as he had expressly admitted that the plaintiff was the person to whom the defendants had promised by the promissory note to re-pay the principal and interest due thereupon. In these circumstances, in my opinion, there was no defence to the suit, and the decree of the Sub-Divisional Court ought to be affirmed. In the course of the argument at the hearing of the appeal reference was made to the decision of the Judicial Committee of the Privy Council in *Firm of R. M. K. R. M.* v. *Firm of M. R. M. V. L.*, (4), in which case their Lordships held, affirming the view expressed by Barrett-Lennard, J., that in Penang :

"when a local representative of a Chetty firm carries on the business under the vilasam (*i. e.*, the letters) of the firm coupled with his own distinct name, the announcement to the external world in general is that, whether a co-partner with, or a mere agent of, other persons, he is to be looked upon as a principal".

I confess that I am surprised to learn that in Penang Chettyar money lenders do business in the manner described by Barrett-Lennard, J., for it is clear and undoubted both in Burma and in Madras that with regard to Chettyar money lenders :

"who carry on most extensive business by means of agents in different parts of India, Burma, and the farther East, it is well-known that they trade under names made up of a series of initials. Thus defendant No. 1's firms are known as the A. L. V. R. C. T. firms and defendant No. 2's as he N. P. L. S. P. firm, and in firm transactions the initials which are the name of the firm are prefixed to the name of the signatory as may be seen in the correspondence and documents in the present case and this is the ordinary way in which documents are signed on behalf of these firms, and may even be said to be the ordinary way in which these firms sign."

Having regard to the well-known usage which has been proved in this case, and which has been adverted to if not judicially recognized in *Muthar Sahib* v. *Kadir Sahib* (5), I am of opinion that in this case the principal was sufficiently disclosed which the *hundies* were drawn of A. L. V. R. C. T. Chinnaya Chetty, which as I have pointed out is the name of the firm followed by the name of the agent. Having regard to the usage in question it is clear upon the face of the *hundies* that the drawers intended to contract with the firm and not with the agent. Various English cases have been cited, but they were all cases of construction of the language of the particular bill or note, and in none of them was there a well-established usage as there is here to indicate the meaning of the language used; *Munguman Jessa Singh* v. *A. L. V. R. C. T. T.*, (6), per Wallis, J. Again, in *M. V. MayaNadan & Brothers* v. *Arunachalam Chettyar* (7), Coutts-Trotter, C. J., observed :

"There is no doubt that A. Bonsinalai Chetty entered into partnership with a firm trading under the vilasam of V M. A. C. and Sons,' and that partnership unquestionably traded under the style of V. M. A. C, and Sons and A P.'..... .. There is also no doubt that the partnership gave a power of attorney to Arunachellam to act as agent for the partnership. If therefore he signed the promissory note with the partnership signature and merely added his own name the inference would be irresistible that the operative signature was that of the firm, and that he merely added his own name as agent. It is true that he added no qualificatory words such as 'agent' or 'by' or 'per pro'; but documents in that form are executed by Natukottai agents every day, and are universally understood to be the firm's signature merely vouched as such by the agent who adds his own name."

I should have thought that in Burma as in Madras the legal position of a Chettyar Firm which contracts under a vilasam to which the local agent affixes his name was well settled and thoroughly understood. Nevertheless, a doubt has been cast upon the legal effect of this usage of the Chettyars by reason of certain observations passed by Cunliffe, J., in *S. R. M. C. T. S. S. P. A. Chettyar Firm* v. *Manickam Chettyar* (8), in which case that learned Judge thought it

(2) 101 Ind. Cas 573; A I R 1927 Cal. 376; 54 C 380; 31 C W N 397.

(3) 139 Ind. Cas. 460; A I R 1932 Rang. 97; 10 R 257; Ind .Rul. (1932) Rang. 194.

(4) (1926) A C 761.

(5) 28 M 544; 15 M L J 381.

(6) 4 M L T 309.

(7) 97 Ind. Cas, 981; A I R 1926 Mad. 1106; (1926) M W N 671.

(8) 145 Ind. Cas. 573; A I R 1933 Rang. 265; 6 R Rang. 50.

his duty to animadvert upon the judgment of a Divisional Bench of this Court in *P. R. M. P. R. Chattyar* v. *Muniyandi Servai* (3). In the case tried by Cunliffe, J., and also in the two Madras cases to which reference has been made it is well to point out that in the body of the instrument the party stated to be liable thereunder is described by the same vilasam as that which appears in the signature of the executant although no doubt the agent whose name is affixed to the vilasam may not be the same: whereas in *P. R. M. P. R. Chattyar* v. *Muniyandi Servai* (3), the party undertaking liability to repay the loan is stated in the body of the promissory note to be a specified person who purported to contract in his personal capacity, and not a firm or the agent of a firm delineated by a vilasam or otherwise; the signature of the executant (assuming that it was the signature of a firm) not being that of the person who undertook liability in the body of the instrument. Nevertheless, Cunliffe, J., expressed the opinion that "Muniyandi Servai's case was in many respects very similar to" the case then before him, regardless of the radical difference in the facts upon which the two cases fell to be decided; and upon the footing that the two cases were substantially on all fours passed strictures upon the judgment in *P. R. M. P. R. Chettyar* v. *Muniyandi Servai* (3), because it appeared to him to throw doubt upon the legality of the usage whereby Chettyar Firms are wont to contract under a vilasam: *P. R. M. P. R. Chettyar* v. *Muniyandi Servai* (3), in my opinion, was a plain case which turned on its own facts, and I adhere to what I said in my judgment in that case, which with all due deference to Cunliffe, J., I see no reason to think was not correctly decided. In *Muniyadi Servai's case* (3), my learned brother and I did not, and did not purport to discuss or determine whether the well-established usage among Chettyar money lenders of contracting under a vilasam was legal or not, as the question did not arise for consideration; and it is, I think, sufficient to dispel any doubt as to the legality of the usage that may have arisen by reason of the observations of Cunliffe, J., in Civil Regular No. 356 of 1932, and to dispose of the criticism passed by the learned Judge in that case upon the judgment in *Muniyandi Servai's case* (3), that we should hold, as we feel constrained to hold for the reasons that I have stated, that any misapprehension that may have arisen is due to the fact that Cunliffe, J., (if we may say so with due respect), apparently failed to understand fully the burden and effect of the judgment the correctness of which he challenged.

As the learned District Judge decided the appeal before him upon the sole ground upon which it was also decided by Ba U, J., in the High Court the learned Advocate for the respondent now applies that the proceedings should be remanded to the District Court in order that one other issue in the appeal should be determined, namely, whether the suit was barred by limitation. We are of opinion, however, that the evidence upon the record is sufficient to enable this Court to pronounce judgment upon the issue of limitation, and we propose finally to determine the appeal (O. XLI, r. 24).

This issue of limitation depends upon whether the plaintiff has proved that there was a payment of Rs. 50 by way of interest on the loan on February 27, 1930. If there was, the suit was filed in time; otherwise it must fail. Now in para. (2) of the plaint seven payments of interest are alleged to have been made, the sixth payment having been on February 27, 1930. In para. (2) it is further alleged that the first six of the above payments:

> "have been endorsed on the reverse of the promissory-note and each of such endorsements has been duly signed by both the defendants."

In para. (3) of the written statement the second defendant admitted having signed endorsements on the promissory note which according to the plaintiff's statement to him related to payments of interest made by defendant No. 1.

At the trial the plaintiff's agent Muthuramalingam stated that the payment of Rs. 50 in question was made by both the defendants at the plaintiff's shop, and that the endorsement in Burmese relating to the payment was written by the first defendant and was signed by both the first and second defendants. The second defendant on the other hand in his evidence stated that he signed the endorsements, including that of February 27, 1930, at the Rangoon Race Course, and that when he signed the document, there was no signature thereon by the first defendant and no writing in Burmese. The defendant's evidence was corroborated by Maung Tha Tin, who stated that he was a race horse trainer. The learned trial Judge disbelieved the evidence of the defendant Mah Noo and of Maung Tha Tin on the issue of limitation, and held that there

had been a payment of Rs. 50 on February 27, 1930, and that the suit was not barred by limitation. In my opinion not only was there evidence to support the finding of the learned trial Judge upon that issue, but the conclusion at which he arrived was correct: and I am fortified in taking this view because the story told by the second defendant and Maung Tha Tin on this issue is inconsistent with the admission of the second defendant in para. 3 of his written statement, namely, that he had signed the endorsements on the promissory note which the plaintiff told him related to payments made by the first defendant. In my opinion the finding of the learned trial Judge upon the issue of limitation must be affirmed.

The result is that the appeal is allowed, the decrees of the District Court and of Ba U., J., of the High Court are set aside, and the decree passed in favour of the appellant in the Sub-Divisional Court is restored. The appellant is entitled to his costs in all the Courts.

Mya Bu, J.—All the points involved in the case having been, if I may very respectfully say so, fully and cogently discussed in the judgment of my Lord the Chief Justice in which I fully concur, I desire to add only a few remarks with reference to the adverse comments appearing in Civil Regular No. 356 of 1932 of this Court on the decision in *P. R. M. P. R. Chettyar* v. *Muniyandi Servai* (3), With all respect to the learned Judge who made the comments I venture to think that such comments are due to lack of proper appreciation of the *ratio decidendi* in that case. A proper perusal of the judgment in *P. R. M. P. R. Chettyar* v. *Muniyandi Seravi* (3), to my mind is sufficient to show that the well-recognized practice in India and in Burma of describing a Chettyar Firm in documents by the initials of the firm prefixed to the name of the partner or agent, the actual person through whom the firm enters into the contract, evidenced by the document is not infringed by anything said in the judgment; but that the fact that in the body of the promissory note in question the maker of the promissory note was not described in the fashion usually employed in denoting the firm of which the maker was either an agent or a partner, constitutes the ground of the dismissal of the suit filed against the firm on the promissory note. If this point is kept in view, in my opinion there is no room for the fear expressed by the learned Judge in Civil Regular No. 356 of 1932 and it will be clearly seen that there was no lack of appreciation of "time honoured custom" among the Chettyar community to which the ruling in *P. R. M. P. R. Chettyar* v. *Muniyandi Servai* (3), is considered to have run counter.

The only other observation that I wish to make in this case is that the first defendant not having filed an appearance or put in a written statement to the claim, the decree as against him should on no account have been set aside by the Court of first appeal, and should have been restored by the Court of second appeal. With these remarks I concur in the judgment of my Lord the Chief Justice.

D. *Appeal allowed.*

LAHORE HIGH COURT

First Civil Appeal No. 871 of 1931
June 12, 1934
DALIP SINGH AND BHIDE, JJ.

DIWAN CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

MANAK CHAND AND OTHERS—PLAINTIFF—DEFENDANTS—RESPONDENTS

Provincial Insolvency Act (V of 1920), s. 28 (4)—On death of person property devolving on undischarged insolvent—Property vests in Receiver—Mortgage of such property by insolvent — Receiver not claiming property in insolvency proceedings—Property if revests in mortgagor - Transfer of Property Act (IV of 1882), s. 3—Co sharers—Mortgage by one, of his undivided share—Partition—Mortgagee can proceed against property falling to mortgagor's share only—Mortgagee, if party to partition—Interpretation of Statutes—Positive enactment—Meaning to be ascertained uninfluenced by previous law or English law.

Where on the death of a person the share of his estate devolves on an insolvent, it forthwith vests in the Receiver, and a mortgage of that share by the insolvent is invalid. *Ma Phaw* v. *Mg. Ba Thaw* (5), followed. *Cohen* v. *Mitchell* (4), explained and distinguished. *Alimahomed Abdul Husain* v. *Vardilal Devchand* (1), *Chhote Lal* v. *Kedar Nath* (2) and *Dasru Mahar* v. *Official Receiver* (3), not followed. [p. 940, col. 2.]

Although the property vested in the Receiver, if he never claimed it in the insolvency proceedings, in the absence of any order to the contrary, the property in question must be considered to have revested in the mortgagor on his discharge, and the principle laid down in s 43 of the Transfer of Property Act would be applicable and on the revesting of the property in the mortgagor the mortgagee will be entitled to enforce the mortgage. *Rup Narain Singh* v. *Har Gopal Tewari* (7), followed.

The property being joint at the time of the execution of the mortgage, one co-sharer can only mortgage his undivided share in the property. Such a right is always subject to the right of the other co-sharers to effect a partition and when such partition is carried out the mortgagee can only enforce

his rights against such property as falls to the share of his mortgagor, unless he can show that the partition was fraudulent. It is not necessary that the mortgagee must be a party to the partition proceedings. He has only a charge on the undivided share of the mortgagor and he has no right to prevent the co-sharers from partitioning property. *Mohamad Afzal Khan* v. *Abdul Rehaman* (8), followed.

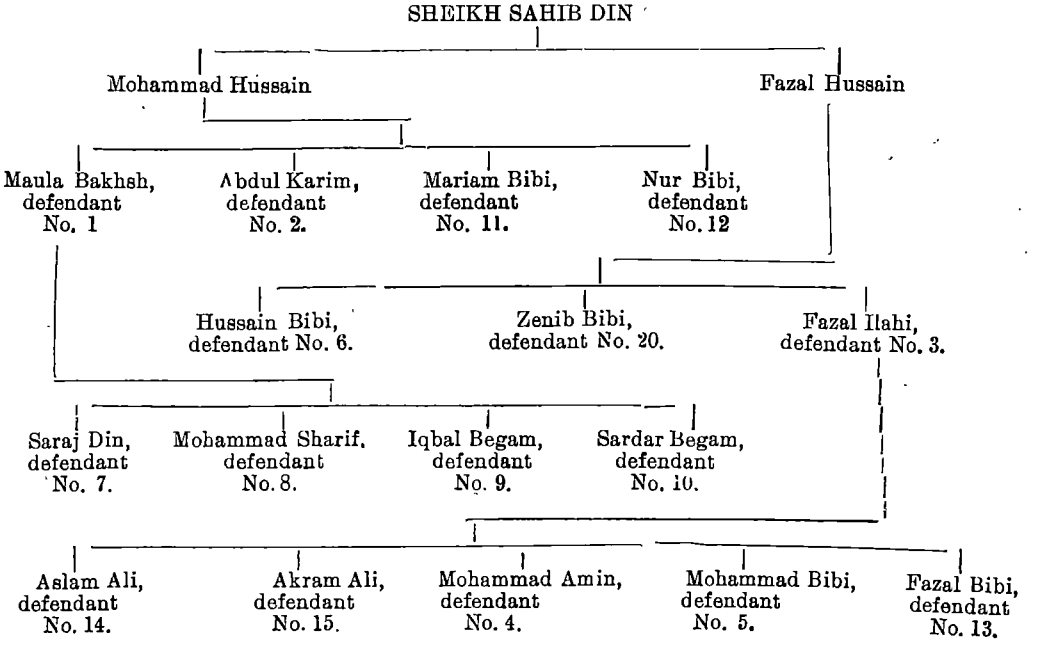
When there is a positive enactment of the Indian Legislature, the proper course is to examine the language of the statute and to ascertain its proper meaning uninfluenced by any considerations derived from the previous state of the law or of the English law on which it may be founded. *Ramanandi Kuer* v. *Kalawati Kuer* (6), followed.

F. C. A. from the preliminary decree of the Senior Sub-Judge, Gujranwala, dated February 3, 1931.

Messrs. *J. N. Aggarwal* and *J. L. Kapur* for the Appellants.

Messrs. *Shamair Chand* and *Jagan Nath Talwar*, for the Respondents.

Bhide, J.—This was a suit for recovery of Rs. 10,000 on the foot of a mortgage of certain house property effected by Maula Bakhsh defendant No. 1, in favour of the plaintiff by a deed dated December 27, 1922. Defendants Nos. 2 to 15 and defendant No. 20, are relatives of defendant No. 1, being descended from Sahib Din, the common ancestor, as shown in the pedigree table given below :



It may be pointed out here that the pedigree table given at page 40 of the printed record is not correct and the above table represents the relationship of the parties as admitted before us. The property mortgaged by Maula Bakhsh was a portion of the estate of Sahib Din who died on March 15, 1919.

Defendants Nos. 4, 5, 7, 8, 9 and 10 claim an interest in the property on the basis of a will dated February 27, 1919, left by Sahib Din and a subsequent partition of that property effected by arbitrators who gave their award on May 26, 1921 (*vide* Ex. D/10 at p. 78 of the printed record). Defendants Nos. 16 to 18 are purchasers of the mortgaged property. Defendant No. 16 claims to have purchased house No. 1 in the mortgage deed from *Musammat* Hussain Bibi, guardian of defendants No. 7 to 10 (who are minors) to whose share the house had fallen as a result of the partition. The guardian sold his house to defendant No. 16 with the sanction of the Court under the Guardians and Wards Act on February 9, 1926 (*vide* Exs. D-1 and D-2 pp. 88-91 of the printed record). House No. 3 in the mortgage-deed was sold by Government in 1923 after the death of Sahib Din for recovery of arrears of income tax due from him. It was purchased at an auction sale by one Rattan Chand, who sold it to Dr. Maula Bakhsh (not the mortgagor) and Dr. Maula Bakhsh in his turn sold it to defendant No. 17. Defendant No. 18 similarly claimed to have purchased house No. 2 in the mortgage deed but it is unnecessary to go into the

details of his claim as he has not appealed.

Defendants Nos. 16 and 17 who were the principal contesting defendants resisted the plaintiff's claim mainly on the following grounds: (*a*) The property in dispute belonged to Sahib Din and devolved on his heirs including the mortgagor Maula Bakhsh on Sahib Din's death in 1919. Maula Bakhsh was adjudged insolvent in 1916 and was not discharged till 1927. He was, therefore, an undischarged insolvent in December 1922 when the mortgage in question was executed. According to the provisions of s. 28, sub-s. 4 of the Provincial Insolvency Act, 1920, Maula Bakhsh's share in Sahib Din's property, vested forthwith in the Official Receiver and consequently the mortgage effected by Maula Bakhsh in favour of the plaintiff was invalid. (*b*) Sahib Din had left a will in respect of which letters of administration were granted to Abdul Karim, a nephew of Sahib Din, on the July 26, 1921 (*vide* Ex. D-3 at p. 71 of the printed record). According to law Abdul Karim was, therefore, the only person entitled to dispose of the property at the time of the execution of the mortgage. (*c*) Defendants Nos. 16 and 17 were *bona fide* purchasers for value of a part of the mortgaged property and their title could not be defeated. (*d*) Maula Bakhsh mortgaged 1-3rd of his share in the property specified in the mortgage deed in favour of the plaintiff; but his share in the property according to Muhammadan Law was much less. He could not in any case mortgage more than his own share.

The plaintiff denied any knowledge of the will left by Sahib Din and pleaded that the alleged partition of the property was a fraudulent transaction which was not binding on him. The learned Subordinate Judge found the material issues in favour of the plaintiff and granted plaintiff a decree under O. XXXIV, r. 4, Civil Procedure Code, for recovery of Rs. 10,000 by the sale of the mortgaged property, with costs and future interest at the stipulated rate of Rs. 2 per cent. per mensem up to realization. The costs were directed to be borne in equal shares by (*i*) descendants of Maula Bakhsh, (*ii*) defendant No. 16 and (*iii*) defendant No. 17. From this decision defendants Nos. 7 to 10, 16 and 17 have appealed. Defendant No. 18 who claimed to be a purchaser of house No. 2 in the mortgage deed has not appealed.

The main points agitated in this appeal were (*a*), (*b*), (*c*) and (*d*) as given above. As regards (*a*), it is not disputed that at the time of the execution of the mortgage-deed Maula Bakhsh was an undischarged insolvent and the property in suit was really vested in the Receiver according to s. 28 (4) of the Provincial Insolvency Act. But the learned Judge of the trial Court has held that the mortgage was all the same valid, as the Receiver had not yet intervened and claimed the property. In support of this view he has relied on *Alimahomed Abdul Husain* v. *Vardilal Devchand* (1), *Chhote Lal* v. *Kedar Nath* (2) and *Dasru Mahar* v. *Official Receiver* (3). It was held in these cases on the basis of the rule laid down in *Cohen* v. *Mitchell* (4), that the property acquired by an insolvent after adjudication but before his discharge can be transferred by him provided that the transaction is *bona fide* and for value and is completed before the intervention of the Receiver. The learned Counsel for the appellants has submitted that these decisions cannot be held to lay down the law correctly in view of the clear language of s. 28 (4) of the Provincial Insolvency Act and has cited in support of this contention *Mg Phaw* v. *Ma Ba Thaw* (5), in which it was held that the rule laid down in *Cohen* v. *Mitchell* (4) could not be applied in a case governed by the provisions of s. 28 (4) of the Provincial Insolvency Act, 1920. Sub-s. (4) of s. 28 of the Provincial Insolvency Act runs as follows:

> All property which is acquired by or devolves on insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or Receiver, and the provisions of sub-s. (2) shall apply in respect thereof.

According to the plain language of the section it seems clear that on the death of Sahib Din the share of his estate which devolved on Maula Bakhsh forthwith vested in the Receiver, Maula Bakhsh being an undischarged insolvent at the time. The facts in *Cohen* v. *Mitchell* (4), are distinguishable as the property had not devolved on the insolvent in that case by inheritance. The rule laid down therein was based on equitable grounds and given

(1) 53 Ind Cas. 197; A I R 1919 Bom. 115; 43 B 890; 21 Bom. L R 849.

(2) 84 Ind Cas. 289; A I R 1924 All. 703; 46 A 565; 22 A L J 455; L R 5 A 329 Civ.

(3) 97 Ind. Cas 980; A I R 1927 Nag. 16.

(4) (1890) 25 Q B D 262; 59 L J Q B 409; 63 L T 206; 28 W R 551; 7 Morrell 207.

(5) 97 Ind. Cas. 221; A I R 1926 Rang. 179; 4 R 125; 5 Bur. L T 98.

effect to in a long series of decisions and eventually received statutory recognition in England in s. 47 of the Bankruptcy Act of 1914. The Provincial Insolvency Act now in force in India was enacted in 1920; but the Legislature has not thought it fit to import therein the provisions of s. 47 of the English Bankruptcy Act, 1914. It was pointed out by their Lordships of the Privy Council in *Ramanandi Kuer* v. *Kalawali Kuer* (6), that when there is a positive enactment of the Indian Legislature, the proper course is to examine the language of the Statute and to ascertain its proper meaning uninfluenced by any considerations derived from the previous state of the law or of the English Law on which it may be founded. In view of this dictum of their Lordships and the plain language of s. 28 (4) of the Provincial Insolvency Act, 1920, I would adopt the view taken by the Rangoon High Court in *Ma Phaw* v. *Mg. Ba Thaw* (5), and hold that the mortgage executed by Maula Bakhsh in favour of the plaintiff in 1922 was invalid as the mortgagor's interest in the property was vested in the Receiver at that time.

It follows from the above that the subsequent partition of the property amongst the descendants of Sahib Din was also not valid so far as Maula Bakhsh's share was concerned inasmuch as the Receiver in whom that share was vested was not a party to that partition.

In view of the above finding it is hardly necessary to discuss point (*b*) relating to the situation created by the issue of letters of administration to Abdul Karim in 1921. But it may be mentioned that the will with respect to which the letters of administration were granted had been really superseded by another will dated February 27, 1919, and during the arbitration proceedings relating to the partition the former will was treated as cancelled and the later will was accepted as binding on the parties concerned. Abdul Karim the administrator was himself a party to these partition proceedings. The letters of administration cannot therefore affect the validity of the mortgage in question.

The mortgage in favour of the plaintiff must be treated as invalid in its inception owing to the insolvency of Maula Bakhsh as stated above. But the insolvency proceedings having come to an end by the discharge of Maula Bakhsh in 1927, it is necessary to consider the effect thereof on the plaintiff's claim. Although the property which is the subject-matter of the appeal vested in the Receiver, he apparently never claimed it in the insolvency proceedings and even in the course of the present suit he did not care to appear or put forward any claim. In the absence of any order to the contrary, the property in question must therefore be considered to have revested in the mortgagor on his discharge. The question for consideration now is whether in view of this revesting of the property in the mortgagor the plaintiff is entitled to any relief on the basis of the mortgage. It was held in similar circumstances in *Rup Narain Singh* v. *Har Gopal Tiwari* (7) that the principle laid down in s. 43 of the Transfer of Property Act would be applicable and on the revesting of the property in the mortgagor the mortgagee will be entitled to enforce the mortgage. Similarly, the partition of 1924 must also be held to be now binding. For although the Receiver was not a party to it, Maula Bakhsh, the mortgagor was, and he is consequently estopped from repudiating that transaction.

Assuming then that the plaintiff can now enforce his mortgage, the next point for consideration is whether he is entitled to enforce it against the specific property mortgaged in spite of the fact that in the course of a subsequent partition it fell to the lot of other co-sharers. The property being joint at the time of the execution of the mortgage, Maula Bakhsh could only mortgage his undivided share in the property. As pointed out by their Lordships of the Privy Council in *Mahomed Afzul Khan* v. *Abdul Rahman* (8), such a right is always subject to the right of the other co-sharers to effect a partition and when such partition is carried out, the mortgagee can only enforce his rights against such property as falls to the share of his mortgagor, unless he can show that the partition was fraudulent. In the present instance, it was no doubt alleged by the plaintiff that the

(6) 107 Ind. Cas. 14; A I R 1928 P C 2; 55 I A 18; 7 Pat. 221; 5 O W N 96; I L T 40 Pat. 19; 30 Bom. L B 227; 47 C L J 171; 54 M L J 281; 9 P L T 97; 32 C W N 402; 26 A L J 385; (1928) M W N 282; 27 L W 782 (P C).

(7) 113 Ind. Cas. 836; A I R 1933 All. 449; 55 A 503; (1933) A L J 475; Ind. Rul. (1933) All. 343.

(8) 139 Ind. Cas. 85; A I R 1932 P C 235; 59 I A 405; 13 Lah. 702; Ind. Rul. (1932) P C 285; 9 O W N 829; 36 C W N 1129; 33 L W 456; (1932) M W N 1063; 63 M L J 664; (1932) A L J 909; L R 13 A 350 Cr; 16 R D 522; 56 C L J 324; 35 Bom. L R 1; 34 P L R 631 (P C).

partition carried out through the arbitrator was fraudulent; but there seems to be no adequate evidence on the record to establish this allegation. All that the learned Counsel for the plaintiff pointed out in this connection was that Maula Bakhsh got very little in the way of immovable property and that his share consisted mostly of cash or actionable claims, while some of the minor members of the family got considerable immovable property. This circumstance is no doubt suspicious but some of the other co-sharers also appear to have been allotted movable property. The schedules giving full details of the property were not proved, nor was the arbitrator Ghulam Rasul, who was examined as a witness, questioned on the point. In the circumstances I am unable to hold on the evidence as it stands on the record that the partition was fraudulent.

If the partition was valid, it follows that according to the decision of their Lordships of the Privy Council in *Mohamed Afzal Khan* v. *Abdul Rahman* (8), the mortgagee can now enforce his rights only against the property which fell to the share of Maula Bakhsh in the course of the partition. It was urged that the mortgagee was not a party to the partition proceedings but no authority has been cited to show that this was essential. The mortgagee was not a co-sharer. He had only a charge on the undivided share of the mortgagor and he had no right to prevent the co-sharers from partitioning the property. In the event of partition he could, therefore, only enforce it against such property as fell to the share of the mortgagor. It may be pointed out that in the case before their Lordships of the Privy Council in *Mohamed Afzul Khan* v. *Abdul Rahman* (8) also the mortgagee does not appear to have been a party to the partition proceedings.

The property purchased by defendant No. 16 did not admittedly fall to the share of the mortgagor and his appeal must therefore succeed. The property purchased by defendant No. 17 stands on a different footing. It had already been sold before the partition for realization of the arrears of income-tax due from Sahib Din and this property was therefore not affected by the partition. All that need be considered in the circumstances is whether the incumbrance created by Maula Bakhsh thereon in 1922 was binding on Ratan Chand who purchased it later at the auction sale in 1923 and on the subsequent transferees.

It has been pointed out above that the mortgage in favour of the plaintiff was invalid in its inception as the mortgagor was insolvent at the time of the execution of the mortgage in 1922. Consequently no valid incumbrance was created in favour of the plaintiff at that time. Subsequently the property was sold at an auction sale in 1923 for realization of the arrears of income-tax due from Sahib Din, Maula Bakhsh's share in the property was vested in the Receiver at the time. But the Receiver did not claim it and in fact he could not have raised any objection, as the debts due from Sahib Din formed a first charge on the estate. Ratan Chand consequently acquired an indefeasible title by the auction sale and so did defendant No. 17 who stands in his position now. The learned Counsel for the plaintiff referred to para. 32 of Mulla's Muhammadan Law (edition of 1935), in which it is stated that any heir may even before the distribution of the estate transfer his own share and pass a good title to a *bona fide* transferee for value notwithstanding any debts due from the deceased; but this cannot help the plaintiff, as he acquired no valid title by the mortgage of 1922 as pointed out above. The appeal of defendant No. 17 also must, therefore, succeed.

On the above findings it seems unnecessary to go into the question as to what share in the estate of Sahib Din Maula Bakhsh was entitled to get according to Muhammadan Law, or the question of future interest which was argued before us. As the appellants have succeeded, there seems to be no good reason why they should not get their costs throughout. The plaintiff took the mortgage long after Maula Bakhsh was adjudged insolvent and he could scarcely have been unaware of his insolvency, especially in view of the evidence given by Banarsi Das, P. W. No. 4.

Sardari Mal, defendant No. 18, who had purchased a portion of the mortgagor's property, and the mortgagor have not appealed. Consequently the decree passed against them must stand. I would, therefore, accept the appeal and modify the decree of the lower Court to the extent of directing that houses Nos. 1 and 3 which were purchased by defendants Nos. 16 and 17 shall not be liable to be sold for satisfaction of the plaintiff's claim. The plaintiff will, however, be entitled to realize the decretal amount from house No. 2 in the mortgage-deed as ordered by the learned Subordinate Judge and shall also be entitled to realize it from such property as fell to

the share of Maula Bakhsh by virtue of the partition effected by the award of the arbitrators dated May 26, 1924. The appellants shall get their costs throughout.

Dalip Singh, J.—I agree to the order proposed. I would like only to add that I do not think the rule in *Cohen* v. *Mitchell* (4) applies in the circumstances of this case. I should prefer to express no opinion on the question whether it might not apply in another case.

D. *Appeal accepted.*

ALLAHABAD HIGH COURT
Full Bench

Second Civil Appeal No. 10 of 1932
February 20, 1935
SULAIMAN, C. J., KENDALL AND BAJPAI, JJ.
LALLU SINGH—DEFENDANT—APPELLANT
versus
Lala CHANDER SEN—PLAINTIFF—RESPONDENT

Agra Tenancy Act (III of 1926), *s.* 225—*Interest—Court, if bound to give* 12 *per cent. interest only up to date of suit—Interest* pendente lite *and future interest is governed by Civil Procedure Code (Act V of* 1908), *s.* 34

Under the provisions of s. 225, Agra Tenancy Act, a co-sharer is entitled to claim interest at the rate of 1 per cent. per mensem. The Court is, therefore, bound to award him interest at 12 per cent. per annum up to the date of the suit. As regards the interest *pendente lite* and future, the case is governed by s. 34, Civil Procedure Code, which is applicable to suits in the Revenue Court as well, and under that section, in addition to any interest adjudged on the principal sum for any period prior to the institution of the suit, the Court may order interest at such rate as it deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, as well as further interest from the date of the decree till the date of realization. It is, therefore, incumbent on the Court to fix rates for *pendente lite* and future interest if it decides to award such interests; but it is not obligatory on the Court to award interest at the rate of 12 per cent. per annum, just as it is not obligatory on a Court to award *pendente lite* and future interest at the contractual rate in case of simple money debts. *Mohammad Abdul-Jalil Khan* v. *Mohamad Abdul Salam Khan* (2), explained.

S. C. A. from a decision of the District Judge, Bulandshahr, dated November 16, 1931.

Mr. *Shiva Prasad Sinha*, for the Appellant.

Mr. *A. M. Khwaja*, for the Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for profits under s. 226, Agra Tenancy Act. The facts are fully set forth in the order dated November 22, 1933, which is reported in *Lallu Singh* v. *Chander Sen* (1). Before remanding certain issues it was decided by the Full Bench that the plaintiff as assignee of the profits for 1934 *F* was entitled to maintain the suit against the *lambardar* and also that such a suit lay in the Revenue Court. It was further held that the defendant can claim adjustment on account of any decree held by him in respect of any payment of Government revenue made during the year 1334 *F*., but not earlier. It was also laid down that when an ostensible purchaser who is not a *bona fide* purchaser and has simply lent his name to a debtor to be used as a cloak for the property, brings a suit to enforce the debtor's claim, it is open to a creditor of the debtor to prove the nature of the transfer, and that the suit can be regarded as a suit instituted by the debtor herself through her *benamidar*. The further question whether if the transfer was not a sham and bogus transaction, but had really passed properly, though it was effected in order to defeat or delay creditors and was therefore fraudulent in that sense, the defendant can still be allowed to defeat the plaintiff's claim on the ground that the transfer is not binding upon him, was not decided. And as the facts had not been clearly found, issues were sent down to the lower Appellate Court for fresh findings.

The lower Appellate Court has now found that Rs. 527-15-0 was the amount of the Government Revenue paid by the *lambardar* on account of the plaintiff's share in the year 1334 *F*.; and therefore the defendant is undoubtedly entitled to claim a deduction of this amount from the principal sum of Rs. 696, which was the share of the profits of the assignor of the plaintiff in that year. The learned Advocate for the plaintiff urges before us that that he is entitled to support the decree of the lower Appellate Court on the ground that the amount should not be reduced inasmuch as the plaintiff should be given interest at the rate of 1 per cent. per mensem *pendente lite*, and not only 6 per cent. per annum which was allowed by the trial Court. No doubt the plaintiff was entitled to support the decree on such a ground if valid. But the trial Court had fixed only 6 per cent. per annnm as the rate of *pendente lite* and future interest and no objection was taken in the lower Appellate

(1) 147 Ind. Cas. 937; A I R 1934 All. 155; 56 A 624; (1934) A L J 1; 6 R A 586; 18 R D 32; L R 15 A 29 Rev. (F B).

Court to this rate, although the lower Appellate Court actually reduced the amount decreed to the plaintiff. No cross-objections were filed in this High Court in respect of the lower rate of interest.

The learned Advocate for the plaintiff relies on the case of *Mohammad Abdul Jalil Khan* v. *Mohammad Abdul Salam Khan* (2), for the proposition that the plaintiff is entitled to get simple interest at the rate of 1 per cent. per annum on his share of the net profits from the date when they became divisible till actual realisation. No doubt in that case, having regard to the circumstances there present, such a rate of interest was allowed instead of allowing to the plaintiff the principal sum with interest at 12 per cent. per annum up to the date of the suit and *pendente lite* and future interset at 6 per cent. per annum on the consolidated amount. But it was nowhere laid down in that case that the plaintiff co-sharer is entitled as of right to recover interest at 12 per cent. per annum on the principal amount of profits from the date when they accrued till the date of realization. Under the provisions of s. 225 a co-sharer is entitled to claim interest at the rate of 1 per cent. per mensem. The Court is therefore bound to award him interest at 12 per cent. per annum up to the date of the suit. As regards the interest *pendente lite* and future, the case is governed by s. 34, Civil Procedure Code, which is applicable to suits in the Revenue Court as well, and under that section, in addition to any interest adjudged on the principal sum for any period prior to the institution of the suit, the Court may order interest at such rate as it deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree as well as further interest from the date of the decree till the date of realization. It is, therefore, incumbent on the Court to fix rates for *pendente lite* and future interest if it decides to award such interests but it is not obligatory on the Court to award interest at the rate of 12 per cent. per annum, just as it is not obligatory on a Court to award *pendente lite* and future interest at the contractual rate in case of simple money debts. In *Mohammad Abdul Jalil Khan* v. *Mohammad Abdul Salam Khan* (2), the particular method of calculating interest was chosen because there were altogether 34 appeals between the parties which were conveniently to be disposed of on some common principle. It was not intended to be laid down there that in every case a plaintiff is entitled as of right to claim interest at the rate of 1 per cent. per mensem even after the institution of the suit. In the circumstances of the present case we do not think that we should award to the plaintiff interest at 12 per cent. per annum *pendente lite*.

The next point whether the defendant can take advantage of the principle underlying s. 53, Transfer of Property Act, against the plaintiff assignee of the profits by showing that the transfer was with intent to defeat and delay her creditors does not arise, because of the clear finding of fact by the lower Appellate Court that in the present case there is absolutely nothing to show that the present plaintiff had colluded with his assignor to defraud the appellant by getting the profits sold to him fictitiously, or even that he had any knowledge that his assignor wanted to defraud any of her creditors by making the transfer to him. We do not think that the lower Appellate Court has placed the burden of proof wrongly on the defendant-appellant. He is not invoking the provisions of s. 53, Transfer of Property Act, in terms, but is seeking the aid of the principles of justice, equity and good conscience which cannot be applied unless the facts are fully established by him.

We would accordingly allow this appeal in part, and modify the decree of the lower Appellate Court in this way, that we order that a sum of Rs. 527-15-0 be first deducted from the principal sum of profits of Rs. 696, leaving a balance of Rs. 168-1-0, and that the plaintiff should have interest at 12 per cent. per annum on this balance from August 1, 1927, till September 17, 1927, and thereafter at 6 per cent. per annum on the consolidated amount till the date of realization or till the date of the deposit in the Court below, if made in this case. Parties will receive and pay costs in proportion to success and failure in all Courts.

D. *Appeal allowed*

(2) 137 Ind. Cas. 166: A I R 1932 All 178; (1932) A L J 93; L R 13 A 29 Rev; 16 R D 110; Ind. Rul. (1932) All. 278.

BOMBAY HIGH COURT

Original Civil Jurisdiction Appeal No. 29 of 1934

September 21, 1934.

BEAUMONT, C. J. AND RANGNEKAR, J.

D. N. REGE—APPELLANT

versus

V. C. VIJAYAKAR—RESPONDENT

Solicitor—Bill of costs—Taxation — English Law—Applicability in Bombay—Bombay High Court Rules (Original Side), 1930, *r.* 559—*Bill of costs, if can be amended—Costs — Discretion — Correspondence of Solicitor undignified—Solicitor deprived of his costs —Discretion, if properly used.*

The law and practice in England relating to Solicitors and to taxation of bills of costs applies in Bombay Presidency, except where that law or practice is inconsistent with the rules or practice of the High Court. [p. 946, col. 1.]

There is no rule in Bombay restricting the normal right of a Solicitor as a professional man to amend his bill of costs which he has once presented to his client. He is at liberty to present another and revised bill for taxation. It is within the discretion of the Taxing Master to saddle him with costs of taxation if he is of opinion that he has delivered to his client an exorbitant bill of costs. [p. 947, col. 1.]

Judges have a very wide discretion in the matter of costs, but it is a discretion which must be exercised judicially. For a Judge to deprive a Solicitor of costs because the Judge disapproves the style of his correspondence and would be glad to see the controversial methods of Solicitors generally altered, is, to confuse the functions of a Judge with those of a school-master. [p. 947, cols 1 & 2.]

Appeal against the order of Mr. Justice Tyabji, dated September 5, 1934.

Messrs. *Jamshed Kanga* and *N. G. Nadkarni*, for the Appellant.

Mr. *M. L. Maneksha*, for the Respondent.

Mr. *K. McI. Kemp*, for the Incorporated Law Society.

Beaumont, C. J.—This is an appeal from an order made by Tyabji, J., in Chambers relating to a bill of costs of Solicitors who are the appellants. The appellants had acted as Solicitors for a client who was engaged in certain disputes with his father. There had been a testamentary suit which had terminated, and then there was a partition action. In 1932 there was a proposal to settle the partition action, and in connection with such settlement the son desired to know the amount of the Solicitors' bill. He accordingly asked the Solicitors to send him their bill, and on May 13, the Solicitors sent in what they described as copy of a draft bill of costs. They sent it in with a covering letter saying:

"As we have had not the time to go through the draft bill and examine the same, we make it clear that the bill submitted to you herewith is subject to our revising the same in the event of taxation, in which case we shall, of course, submit to you a copy of our revised bill. As it is, we are prepared to settle our costs with you on the basis of the bill submitted herewith."

So that it is clear that in the first instance the bill was not delivered as a final bill. Subsequent correspondence took place, in which it may be said that the Solicitors treated this draft bill as a bill formally delivered, and I will deal with the case on that basis. Eventually, however, they applied for taxation of a revised bill. In the first instance the Taxing Master agreed to tax the bill. Then an application was made to him to review his taxation, and on that application he came to the conclusion that he must reject the whole bill. In so doing he took the view that the English cases dealing with the law on the subject prevented a Solicitor from delivering a fresh bill after having already delivered a previous bill. Then there was an application to the Chamber Judge to review the order of the Taxing Master, and the learned Judge came to the conclusion that the view of the Taxing Master was right, and from his judgment this appeal is brought.

The question for decision is whether the law on the subject which prevails in England applies to taxations in this Court. Now in England taxation between Solicitor and client is, or was, until recently, dealt with under s. 37, Solicitors Act, 1843. That section provides that a Solicitor shall not be entitled to sue for his fees until one month after the date of the delivery of his bill to the client, and within the month the client can apply for an order for taxation. If the client does apply, the common form order is made which directs the Taxing Master to tax and settle the bill and certify the amount due, and then orders the client to pay what is found to be due, because an application for taxation involves an undertaking on the part of the client to pay what is found to be due. Then the section deals with the costs of the taxation, and provides that the costs of the reference shall be paid according to the event of the taxation, that is, if the bill when taxed be less by a sixth part than the bill delivered, then the Solicitor has to pay the costs, and if the bill when taxed shall not be less by a sixth part than the bill delivered, then the party chargeable has to pay the costs, and the only discretion as to costs which is left in the Taxing Master is that if he thinks there are special circumstances, he may certify the circumstances to the Court, and the Court then may make such order as to the payment of the costs of taxation as it thinks fit. There is no statutory provision in England which prevents a Solicitor from

delivering more than one bill, but it has been held in many cases that a Solicitor is bound by the bill once delivered, subject to certain exceptions, which I need not discuss. The reason for the rule is this, that if the Solicitor is at liberty to deliver an exorbitant bill, and then, when he finds that it is going to be taxed, he is entitled to substitute for that exorbitant bill a proper bill, the result will be that he will generally escape having to pay the costs of taxation, because less than a sixth is likely to be taxed off a proper bill whereas more than a sixth would probably have been taxed off the exorbitant bill. The object of the rule is to protect the client from having exorbitant bills delivered, but it is obvious that the protection afforded is partial only; the rule does not prevent the Solicitor delivering an exorbitant bill, nor does it afford any relief to the client who pays the exorbitant bill; at the most it may be said that the rule tends to discourage a Solicitor from delivering an exorbitant bill, because of the fear that he may be left to pay the costs of taxation. The question is whether that rule of English practice ought to be applied in this Presidency. It is, I think, true to say generally that the law and practice in England relating to Solicitors and to taxation of bills of costs applies in this Presidency, except where that law or practice is inconsistent with the rules or practice of this Court. But there is no statute in Bombay dealing with the matter, and it is clear that the English Solicitors Act does not apply. Taxation is dealt with in this Court by rules of the Court commencing at r. 519. That rule provides:

"The Taxing Officer shall tax the bills of costs on every side of the Court (except the Appellate Side) and in the insolvent Court. All other bills of costs of Attorneys shall also be taxed by him when he is directed to do so by a Judge's order."

The bill in this case dealt with matters on the original side of the Court, and therefore, the obligatory portion of the rule applied. It is argued by the appellant that the Taxing Master being ordered to tax bills on the original side, was not at liberty to refuse to tax the bill in the present case. On the other hand, it is contended by the respondent that the obligation on the Taxing Master to tax bills only means proper bills, and I agree that the Taxing Master might refuse to tax a bill which was not in conformity with the rules, or was otherwise improper. It is, however, rather a strong thing to say that when a bill is delivered for taxation the Taxing Master can refuse to tax it because a bill has been previously delivered by the Solicitors, there being no rule of this Court forbidding such an act. Then it is to be noticed that there is no rule which requires delivery of the bill to the client. No doubt, in practice the Taxing Master will see that the client has a proper opportunity as considering a bill before taxation, but there is no rule of this Court which makes delivery of the bill a condition precedent to any suit to recover the fees. Then r. 559 deals with costs, and that rule provides that except when a bill is taxed between party and party, whenever one-sixth part of the bill shall be taken off by taxation, the Attorney shall pay all costs whatever attending the taxation. Now it is to be observed that that rule is much less comprehensive than the English statutory rule. It provides that if more than a sixth is taxed off, the Solicitor shall pay the costs, but it does not provide that if less than a sixth is taxed off the party chargeable shall pay the costs. No doubt in practice that would be the course ordinarily adopted by the Taxing Master, but he is not, as in England, compelled to adopt that course. It seems to me that if the Taxing Master comes to the conclusion that the only reason why less than a sixth has been taxed off a bill is that the Solicitor has substituted a proper bill for a more exorbitant one previously delivered, that would be a very good reason for depriving the Solicitor of any costs of taxation. So that, the protection which the rule in question is designed to afford in England, a modified protection against the delivery of exorbitant bills, is, it seems to me, provided for in this country by the wider discretion given to the Taxing Master in dealing with the costs of his taxation. Having regard to the peremptory terms of r. 519, the absence of any obligation on the Solicitor to deliver a bill one month before suing, and the difference in the rule as to costs, it seems to me that there is no sufficient reason for holding that the English rule that a Solicitor must be bound by a bill once delivered applies to this Court. It must be remembered, as was pointed out by Fletcher Moulton, L. J., in *Lumsden* v. *Shipcote Land Co.* (1) that if a Solicitor is not to be at liberty to amend a bill once delivered or to substitute a fresh bill, he is deprived of a right which any other professional man would enjoy, and that deprivation can only be justified either on the ground of some statute, or on the ground of the

(1) (1906) 2 K B 433; 75 L J K B 665; 22 T L R 559; 54 W R 461; 95 L T 17.

disciplinary jurisdiction which the Courts exercise over Solicitors. There is no statute applicable in Bombay, and it is difficult to see why the disciplinary jurisdiction should be invoked in a case like the present where it has been held by the learned Judge that the Solicitor's conduct was perfectly fair, and was not intended in any way to overreach the client. The original bill was delivered at the express request of the client because he wanted to know in a hurry what the amount of costs to which he was liable was likely to be. I see no sufficient reason for incorporating in this country this rule which restricts the normal right of a professional man to amend his bill. I am only dealing with the case of a fresh bill delivered before the former one has been lodged for taxation. I do not mean to suggest that after a bill has been lodged for taxation the Solicitor would have any right to withdraw the bill or to alter it without the consent of the Taxing Master. In my opinion, therefore, the decision of the Taxing Master and the learned Chamber Judge was not correct. Before parting with the case I desire to say that I cannot approve of the principle on which the learned Judge dealt with a part of the costs. He said in his judgment:

"I wish to leave no room for misunderstanding the significance of the order as to costs which I am making. My order, that the costs of these proceedings should be borne by the Solicitor in form follows the usual practice that the costs should follow the event but in reality my order makes the Solicitor pay a considerable portion of the costs from which I should have been inclined to relieve him if the correspondence had not been in terms which I highly disapprove and the tendency to adopt which I should like to eradicate. Much correspondence is carried on in Bombay in terms that are offensive to the Court."

Now it appears that after the original bill was delivered, some correspondence took place and the client suggested to the Solicitor that he should take a sum considerably less than the sum claimed to be due, and this seems to have annoyed the Solicitor and it is, I think, a legitimate criticism upon some of the correspondence that it is couched in terms that are unnecessarily acrimonious and in doubtful taste: but it is not suggested that the tone of the correspondence had any influence whatever on the course of events or increased to any extent the costs. Judges have a very wide discretion in the matter of costs, but it is a discretion which must be exercised Judicially. For a Judge to deprive a Solicitor of costs because the Judge disapproves the style of his correspondence and would be glad to see the controversial methods of Solicitors generally altered is, in my opinion, to confuse the functions of a Judge with those of a school-master. In my opinion the appeal must be allowed. The respondent should pay all costs of the appellants throughout except the costs of the order by the learned Chamber Judge on September 5, 1934, on speaking to the minutes, the lower Court's order of costs as to which will stand.

Rangnekar, J.—I agree both on the merits as also with the observations of my Lord the Chief Justice as regards the order for costs in this matter. The learned Judge has given two reasons for his order. The first is that some of the sentences in two letters written by the Solicitor were expressed in objectionable language and second is the desire of the learned Judge to eradicate the tendency which according to him exists among the Solicitors in Bombay to carry on correspondence in offensive language. As to the first, even assuming that the sentences invited criticism it is clear that the style of the correspondence did not in any way increase the costs. As to the latter, speaking for myself a generalisation of this nature must be deprecated and speaking for myself and with respect there is no ground for it. Apart from this, in my opinion, the reasons given can hardly be relied upon as supporting the order.

On the merits the matter is exhaustively dealt with in the judgment just delivered. I only wish to add a few words. It is broadly stated that the law and practice prevailing in England must in every case of such a nature be made applicable in this country. I entirely dissent from this proposition. In my view it is only in case where there is no law of the land or no statutory rules applicable that one can turn to the law and practice in England on the principle of "justice, equity and good conscience." In my view the High Court Rules, and in particular rr. 519 to 529 read with notice in Form No. 140 mentioned therein make it clear (1) that the Taxing Master is bound to tax a bill of costs which is in accordance with the rules; (2) a Solicitor is not bound to deliver his bill to his client; (3) the English rule that a Solicitor is bound by a bill once delivered does not apply. The Advocate-General has drawn our attention to various points of difference as regards procedure relating to taxation under the Solicitors Act in Eng-

land and our rules. It is not necessary to refer to them except one point which is important. In England the delivery of a bill to a client is a condition precedent to the right to bring an action for costs. Here it is conceded that a solicitor can sue for recovery of his costs without having previously submitted his bill to the client.

As a matter of practice, however, the majority of Solicitors send a copy of a bill of costs to their clients before lodging the same for taxation and the Taxing Master in practice sees that this is done. Assuming, however, that the English practice applied to this case, it is quite clear that in England it is competent to a Solicitor to send a bill of costs to the client at his request subject to a condition. The only question is whether the condition which is imposed by the Solicitor at the time of submitting the bill to the client is a fair condition or not. This is clear from *In re Thompson* (2). The first para. of the head-note is as follows:

"A Solicitor may, when sending in his bill of costs to his client, reserve to himself the right to withdraw or alter it on condition, provided the condition is fully and clearly stated to the client but if the Solicitor has sent in his bill without any condition or with a condition which he could not fairly impose, he cannot afterwards withdraw it or send in an amended bill."

It is argued that the case only decides that the only condition which a Solicitor can impose on the client when he sends his bill to him must be that he must tell the client that the bill contains charges which cannot be sanctioned on taxation. I am unable to accept the contention. The condition mentioned by Cotton, L. J., in that case was mentioned by him as an illustration or example and it can hardly be urged that the learned Lord Justice intended to lay down that condition for all times and in all circumstances. The learned Lord Justice observed as follows (p. 450*):

"It would I think, be wrong to say that a Solicitor who sends in his bill subject to a fair condition, and one which we ought to hold lawful, is not entitled to do so just as much as anyone else might be entitled to send either moneys or securities on a condition but such a condition as we find here is not one which ought to be allowed nor one which a Solicitor can impose upon his client."

Lindley, L. J , observed (p. 453*):

"..... it appears to me that they have not fulfilled their obligation as Solicitors to their client, in expressing the condition in the language which they did."

A careful perusal of the case shows clearly that the principle laid down was that in imposing a condition upon a client the Solicitor must act in a fair manner and not in a fraudulent or dishonest manner so as to overreach the client in other words, the condition must not be such as would "open a door to fraud." On the facts of this case I find it impossible to hold that a bill as such was finally delivered or intended to be delivered to the client even within the meaning of the English rule and I am not prepared to say that the condition was not fair. I further find from the notes of argument which the Taxing Master has taken down, that on the very first day the Solicitor contended that what he sent to the client was a rough copy of the bill. That contention was accepted by the Taxing Master, and he overruled the objection made by the respondent and he proceeded to tax the bill and it is only on an application for a review brought in that he changed his mind and held that the bill could not be taxed as it was not the original bill submitted by the Solicitor to the client. Now it seems to me extremely doubtful whether the Taxing Master had any jurisdiction to vary the order which he had made. An application for review is made under r. 554; and it states that the party dissatisfied with the allowance or disallowance of any item or items by the Taxing Master may at any time before the allocatur is signed, deliver to the other party interested therein and carry in before the Taxing Master an objection in writing to such allowance or disallowance specifying in a short list the item or items or part or parts thereof objected to and under r. 555 the Taxing Master has to consider the items which are specifically objected to and reconsider his taxation. But that was not the position here.

D. *Appeal allowed.*

(2) (1885) 30 Ch. D 441.

*Pages of (1885) 30 Ch. D.—[*Ed.*]

MADRAS HIGH COURT

Civil Revision Petition No. 878 of 1933

October 16, 1934

VENKATASUBBA RAO, J.

DASARI NAGABHUSHANAM—PETITIONER

versus

KUNAMNENI VENKATAPPAYYA—RESPONDENT

Court Fees Act (VII of 1870), s. 7 (iv-A), Sch. II, Art. 17-A (1)—Specific Relief Act (I of 1877), s. 39—Suit for declaration that a registered document is forgery—Prayer for cancelling deed, whether necessary—Proper court-fee—Effect of registration on onus

of proof—Prayer for refund of costs in registration enquiry, nature of.

Where the plaintiff brought a suit alleging that a sale deed which purported to have been executed by him and which was directed by the Registrar to be registered was in fact a forgery by the defendant and praying that the instrument may be declared a forgery:

Held, that it was not incumbent on the plaintiff to have it cancelled or set aside and the suit was governed for purposes of court-fee, by Sch. II, Art. 17-A (1) of the Court Fees Act and not by s. 7 (*iv-A*). *Arunachallam Chetty* v. *Rangaswamy Pillai* (1), *Venkatasiva Rao* v. *Venkatanarasimha Satyanarayanamurthy* (2), *Achathil Balakrishnan Nair* v. *Vishnu Nambudri* (3), *Kalliya Pillai* v. *Ramaswamy Pillai* (4) and *Ratnamasari* v. *Akilandammal* (5) referred to.

In a suit rightly framed under s. 39, Specific Relief Act, it is the Court's function to order the instrument to be cancelled and to send a copy of its decree to the Registrar. The plaintiff need not pray for it.

The decision of the Registrar that a document is genuine and the registration of the document have not got even the effect of shifting the onus of proof from the party who alleges that the document is genuine. *Mohima Chundar Dhur* v. *Jugul Kishore Bhattacharji* (6), referred to.

A prayer in a suit of this nature for refund of the costs incurred in the registration enquiry is not a prayer for a consequential relief but only one for an additional relief.

Petition under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Tenali, dated February 21, 1933 and made in O. S. No. 306 of 1931.

Messrs. *V. Subrahmanyan* and *V. Satyanarayana*, for the Petitioner.

The Government Pleader, for the Rospondent.

Judgment.—In my opinion, the view of the court-fee examiner and the decision of the District Munsif supporting that view, are clearly wrong. There is a distinction between the getting rid of a document to which a person is a party and one to which he is not. The plaintiff in the suit complains that the sale deed was forged by the defendant, that in spite of his objection, the Registrar directed its registration and he prays that the instrument may be declared to be a forgery.

When a person impeaches a deed as having been forged, to refer to him as being a party to it, is an obvious mis-use of words. Mr. K. Subba Rao, who supports the lower Court's view, contends that the provision applicable is s. 7 (*iv-A*) of the Court Fees Act, which runs thus:

"In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value, according to the value of the subject-matter of the suit, and such value shall be deemed to be if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed, if a part of the decree or other document is sought to be cancelled, such part of the document or value of the property."

His contention is that for the purposes of the Court Fees Act, it is incumbent upon the plaintiff to have even a forged sale-deed set aside or cancelled; in other words, that the section (in regard to the decrees and instruments of the kind dealt with by it) forbids declaratory suits and enacts that cancellation should always be prayed for. This argument is, in my opinion, utterly untenable. To declare what the substantive rights of the parties are or to prescribe the modes of enforcing those rights, is outside the province of a fiscal enactment, like the Court Fees Act. The question then really is, when a person alleges that a forged instrument has been brought into existence as if he were a party to it, does the law cast upon him a duty to have it cancelled or set aside by suit? There are two statutory provisions which show that a suit for declaration lies: (1) s. 39 of the Specific Relief Act: Illustation (*b*) to that section contains an express reference to forged instruments and (2) Art. 93 of the Limitation Act refers to suits "to declare the forgery of an instrument issued or registered." While the law thus entitles a person to sue to have the document adjudged a forgery, does it compel him or make it obligatory upon him to get it cancelled or set aside? The cases cited by Mr. Subba Rao refer to instruments or decrees to which the plaintiff was a party. In *Arunachalam Chetty* v. *Rangasamy Pillai* (1) the referring Judges clearly point out the distinction between a document to which a person is a party and that to which he is not. When a document is of the former class, they point out that until it is set aside, it cannot be treated as void and that the necessary result of declaring that such a document is not binding on the plaintiff, is to cancel or set aside the deed. The case might be different, they go on to add, where a declaration is sought by a person who is not a party to the document; the suit may in such a case be properly regarded as one for declaration only. In

(1) 38 Ind. Cas. 79; 38 M 922; 28 M L J 118; (1915) M W N 118; 17 M L T 154.

the second case referred to by the learned Counsel, namely, *Venkatasiva Rao* v. *Venkatanarasimha Satyanarayanamurthy* (2), this distinction is equally borne in mind. Adverting to *Achathil Balakrishnan air* v. *Vishnu Nambudri* (3), Reilly, J. affirms that it was correctly decided, because the plaintiffs there, not having been parties to the decree, could have asked only for a declaration and it would not have been appropriate for them to pray that the decree should be set aside. Throughout his judgment, the learned Judge makes it perfectly clear that he is dealing with decrees obtained by fraud: in such a case, the plaintiff being a party to the decree which, he complains, is vitiated by fraud, there can be no doubt that he must get it set aside. Anantakrishna Ayyar, J. refers to this distinction in even clearer terms. Observes the learned Judge:

"In fact not being a party to the document, he cannot have it 'set aside.' All that he can pray for is a declaration that he is not affected in any way by that document."

Dealing with the case of a forged will, I made the following observation in *Kalliya Pillai* v. *Ramaswamy Pillai* (4), which, I think, applies with equal force here:

"For instance, if a person, who feels aggrieved by a will, sues for recovery of immoveable property covered by it which happens to be in the possession of a third party, claiming the property on the strength of the will, can it be successfully contended that such a suit is governed not by the ordinary 12 years' period but that the plaintiff is first bound to get the will set aside within the shorter period provided by Art. 91 of the Limitation Act? Such a contention cannot prevail."

In *Ratnasari* v. *Akilandammal* (5) there is an observation of Bhashyam Ayyangar, J. which is even more germane to the present discussion, as it deals with forged instruments. The learned Judge treats it as beyond doubt, that when a person seeks to recover immoveable property, the period of limitation is not under Arts. 92 and 93 abridged, because the defendant resists the action by relying upon a forged conveyance (see p. 313)*. In deciding what the proper court-fee payable is, the Court must have regard to the substance of the thing and not to the mere form in which the relief has been prayed for [*Kalliya Pillai* v. *Ramaswamy Pillai* (4)]. Where it is, therefore, essential for the plaintiff to pray for cancellation, he cannot, by merely asking for a declaration, evade the provisions of the Court Fees Act. But in the present case I am clearly of the opinion that the only relief that the plaintiff can ask for, is that of declaration and that a prayer for cancellation would be quite inappropriate.

It is next contended that s. 39 of the Specific Relief Act itself shows that the plaintiff is under a duty to pray for cancellation also. In overruling a similar contention, I made the following observations in *Kalliya Pillai* v. *Ramaswamy Pillai* (4), already referred to:

"The plaintiff asks that the will may be declared void. That section further enacts that in such a suit the Court may, in its discretion, adjudge the instrument void or voidable and order it to be delivered up and cancelled. In a suit rightly framed under that section, it is the Court's function to order the instrument to be cancelled; it is not a part of the prayer in the plaint Then again the section goes on to say that if the instrument is one that has been registered under the Registration Act, the Court shall send a copy of its decree to the Ragistration Officer, who shall note in his book that the instrument has been so cancelled. This again, is not a relief which it is the duty of the plaintiff to sue for, but is the duty of the Court to grant."

Reilly, J., who was also a party to that judgment, concurred in this view.

As to the effect of registration, I think the judgment in *Mohima Chunder Dhur* v. *Jugul Kishore Bhattacharji* (6) may be usefully referred to. As in the present case, the defendant there obtained from the Registrar an order for the registering of the document, and the plaintiff, alleging it to be a forgery, brought the suit to have it declared void. The learned Judges held that the decision of the Registrar, whose proceedings were only those of an execution officer, did not have even the effect of shifting the onus of proof and that it lay upon the defendant to establish that the deed impeached was genuine.

I must mention that Mr. Subba Rao has brought to my notice the decision of Stone, J. in C. R. P. 1597 of 1933. He says that in circumstances somewhat similar, the learned Judge held that the case fell within s. 7 (*iv*-A). The judgment contains no discussion and merely purports to follow *Venkatasiva Rao* v. *Venkatanarasimha Satyanarayanamurthy* (2), which, as I have shown above, does not bear out the learned Counsel's contention

(2) 139 Ind. Cas. 317; 56 M 212; 34 L W 225; Ind. Rul. (1932) Mad. 643; (1932) M W N 992; A I R 1932 Mad. 605; 63 M L J 764.

(3) 132 Ind. Cas. 129; (1930) M W N 509; A I R 1931 Mad. 375; Ind. Rul. (1931) Mad. 625.

(4) 119 Ind. Cas. 35; 56 M L J 394; (1929) M W N 286; 29 L W 584; A I R 1929 Mad. 396; Ind. Rul. (1929) Mad. 867.

(5) 26 M 291.

*Page of 26 M.—[*Ed.*]

(6) 7 C 736.

Lastly, it is argued that the prayer for the refund of the costs incurred in the registration enquiry must be deemed to be one for consequential relief. I do not think this contention requires serious notice. The relief for the refund is undoubtedly an additional relief but in no sense a consequential relief; it is not a relief consequential upon the declaration.

My decision, therefore, is, that so far as the relief of declaration is concerned, the case falls under Sch. II, Art. 17-A (*i*) and that the court-fee that the plaintiff has paid, is proper. In regard to the refund claimed, *ad valorem* fee on the amount should be paid.

I make no order as to costs.

A. *Order accordingly.*

LAHORE HIGH COURT

Second Civil Appeal No. 1373 of 1933
June 12, 1934
RANGI LAL, J.

MUNICIPAL COMMITTEE, MULTAN—DEFENDANT—APPELLANT
versus
ABDUL GHAFUR AND ANOTHER—PLAINTIFFS AND DEFENDANTS—RESPONDENTS

Punjab Municipal Act (III of 1911), s. 173—Municipal Committee if can let out one portion of public street for private purposes—Evidence Act (I of 1872), s 115—Estoppel—Infringement of right allowed on previous occasion—Whether bar to asserting it later on.

The Municipal Committee has no right to interfere with the enjoyment of the right of way by the public on a public street by letting out a portion of it to a particular individual for a private purpose. *Municipal Committee, Multan* v. *Tahlia Ram* (1), followed.

Plaintiff is not estopped from asserting his legal rights at any time on the ground that he himself permitted its infringement on some previous occasion.

S. C. A. from the decree of the Additional District Judge, Multan, dated May 25, 1933.

Mr. *Har Gopal*, for the Appellant.

Mr. *Muhammad Din Jan* for Mr. *Muhammad Monir*, for the Respondents.

Judgment.—The Municipal Commitee of Multan leased a plot of land which admittedly forms part of a public street and lies in front of the shop of the plaintiff. The lessee erected a structure on the plot after leaving a passage two feet wide in front of the shop. The plaintiff sued the Municipal Committee and the lessee for a permanent injunction restraining the former from leasing the plot and praying that the structure erected by the latter be demolished and the wooden *takht-posh* placed by him under the structure be removed. The suit having been decreed by the Courts below a second appeal has been filed in this Court. It has been urged that under s. 173, the Municipal Committee has the power to lease a portion of a public street. In the first place, this section was amended after the present suit was filed, and, secondly, even the amended section does not give unrestricted powers to a Municipal Committee to lease out any portion of a public street. The amended section runs as follows :

"The committee may grant permission in writing, on such conditions as it may deem fit for the safety or convenience of persons passing by, or dwelling or working in the neighbourhood and may charge fees for such permission, to any person to place in front of any building any movable encroachment upon the ground level of any public street or over or on any sewer, drain or watercourse or any movable overhanging structure projecting into such public street at a point above the said ground level."

It is clear that the Municipal Committee has to exercise its rights with due regard to the safety or convenience of the persons passing by or dwelling or working in the neighbourhood. Moreover, it is apparently only the owner of a building who can be allowed to place a moveable encroachment in front of his building on the drain or sewer. Under the law as it existed before 1933 the Municipal Committee had no express power to lease a portion of a public street. In the case reported as *Municipal Committee, Multan* v. *Tahila Ram* (1) it was held that the Municipal Commitee cannot give any person permission to deposit goods for sale on any public street and cannot lease any portion of a public street. The Municipal Committee cannot use the public street otherwise than as a public street and it has no right to interfere with the enjoyment of the right of way by the public by letting out a portion of it to a particular individual for a private purpose. In the present case it has been held that the Municipal Committee had acted in a wanton and cruel manner and that the plaintiff had suffered special damage from its act in leasing the plot in question. This is a finding of fact and cannot be questioned in second appeal.

The learned Counsel for the appellant urged that previously the plot in question

(1) 73 Ind. Cas. 292; A I R 1923 Lah. 272; 5 Lah. L J 26.

had been let by the Municipal Committee without objection by the plaintiff. It appears that the previous lessee merely placed a platform in front of the plaintiff's shop with the plaintiff's permission and paid him some rent. The present lessee had erected a building in front of the plaintiff's shop. It cannot by any means be said that the plaintiff is estopped from objecting to this building because he allowed the previous lessee to place a moveable wooden board in front of his shop. The decision of the Courts below is, in my opinion, correct and I dismiss the appeal with costs.

D. *Appeal dismissed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Criminal Appeal No. 420 of 1934
December 5, 1934
MIR AHMAD, A. J. C.
MIR BAZ—ACCUSED.—APPELLANT
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 378, 392—Offence under s. 392—Nature of—Removing of property found by chance after quarrel—Held, offence came under s. 378.

Section 392, Penal Code, contemplates that the accused should have, from the very start, the intention to deprive the complainant of the property and should for that purpose either hurt him or place him under wrongful restraint. Where the inception of the struggle was only a quarrel and it was at the end that the accused found a chance of taking the *chaplis* and the sheet of the complainant in order to ensure the payment of the money due to him:

Held, that the offence was one under s. 378 and not under s. 392, Penal Code.

Cr. A. from an order of the Additional District Magistrate, Peshawar, dated September 22, 1934.

Mr. *Ar. Taj Mohd. Khan*, for the Appellant.

Mr. *S. Raja Singh*, for the Crown.

Judgment.—Nazardin foot Constable lodged a report at Badaber Police Station on August 21, 1934 at 2 P. M. He said that he was returning to the *thana* after taking his meals in the Badaber village, when he met Mirbaz. The latter asked him to get him the javelin. The reporter told him to take the permission of the Sub-Inspector. Mirbaz then caught hold of him, threw him down and took away from him one pair of *Kohati chaplis*, a sheet and Rs. 4. He mentioned Harisingh, Gulbaz and one *mochi* as witnesses of the occurrence. Mirbaz was sent up under s. 392, Indian Penal Code. At the trial Nazardin said that there had been a riot in the village on the night between August 17, 18, and a javelin had been left on the spot. It was this javelin which Mirbaz was asking for. In other respects he re-iterated what he had said in the F. I. R. Gulbaz said that he saw Nazardin and Mirbaz at grips and that Mirbaz then went away taking Nazardin's *chaplis* and sheet. Nazardin said that Mirbaz had taken Rs. 4 also from him. Abdulla, on the other hand, stated that the parties were fighting over money, which Mirbaz was demanding from Nazardin. They had only a quarrel and nothing more happened. He did not see the sheet and the *chaplis* being taken away. Harisingh supported Nazardin. He admitted that *khazanchi*, his brother, had litigation with Mirbaz. H. C. Mohan found a sheet and a pair of *chaplis* in the house of the accused which were identified by Nazardin as his property. The accused denied having taken the *chaplis* and the sheet. He said that they had quarrelled over money which was due to him from the complainant and produced two witnesses in support of this allegation who are men of straw.

The accused had been previously convicted under s., 392, Indian Penal Code, and sentenced to one month's imprisonment. The Magistrate First Class who had convicted him definitely found that the offence was only technical. The City Magistrate has now convicted Mirbaz under s. 392-75 and sentenced him to five years' rigorous imprisonment and to 30 stripes under s. 4, Whipping Act. He appeals.

The resume of the evidence given above clearly shows that Nazardin and Mirbaz fell out over something, may be, the javelin or the demand of money by the accused from the complainant. They had a quarrel. It is a matter of common knowledge that *Pathans* discard their sheets and *chaplis* in fights in order to enable them to be more agile. It appears that the complainant did so and after the fight was over Mirbaz took away the *chaplis* and the sheet belonging to him. To my mind his taking away of these articles points more to the existence of a debt rather than to a dispute over a javelin. I am not prepared to believe that he deprived him of Rs. 4 which appears to be an exaggeration. It follows, therefore, that the fight did not start with the object of obtaining these things and that the taking away of the articles was only a

corrollary to it. On these grounds I am strongly of opinion that s. 303 does not apply. The section contemplates that the accused should have, from the very start, the intention to deprive the complainant of the property and should for that purpose either hurt him or place him under wrongful restraint. In this case it is clear that the inception of the struggle was only a quarrel and it was at the end that the accused found a chance of taking the *chaplis* and the sheet in order to ensure the payment of the money due to him. I alter the conviction therefore to one under s. 379, Indian Penal Code. As regards the punishment I do not think the previous conviction makes the position serious. It was only due to a technicality that s. 392, Indian Penal Code, was applied in the previous case and the fact remains that the accused was given only one month's imprisonment. The ends of justice would, therefore, be met if the accused is sentenced to two years' rigorous imprisonment. It is ordered accordingly. The sentence of whipping is unnecessary and is hereby set aside.

D. *Order accordingly.*

NAGPUR JUDICIAL COMMISSIONER'S COURT

Civil Revision Application No. 8-B of 1934
March 21, 1935
SUBHEDAR, A. J. C.

GOPIKISAN SHEONARAIN—DEFENDANT —APPLICANT
versus
JETHMAL GOVERDHANDAS—PLAINTIFF —NON-APPLICANT

Promissory note—Payment, where to be made—Principle that debtor should make payment where creditor resides—Whether applicable to negotiable instruments—Negotiable Instruments Act (XXVI of 1881), s. 70.

The principle, that in the absence of any specific agreement as to the place where the payment of a debt is to be made, it is the duty of the debtor to make the payment where the creditor resides, or where his place of business is, is not applicable to negotiable instruments. Payment due under a promissory note, in the absence of a contract to the contrary, is ordinarily to be made at the usual place of business of the maker or at his residence.

Application for revision of the order of the Additional Sub-Judge, Second Class, Khamgaon, dated November 29, 1933, in Transfer C. S. No. 156 of 1933, pending for January 15, 1934.

Mr. *W. B. Pendharkar*, for the Applicant.

Mr. *V. K. Rajwade*, for the Non-Applicant.

Order.—On January 11, 1932, the defendant executed a promissory note (Exh. P-1) in favour of the plaintiff. On the basis of it the plaintiff filed a suit in the Court of the First Class Subordinate Judge, Khamgaon, to recover from the defendant Rs. 1,100 due on it. The plaintiff alleged that he was a resident of Khamgaon having also his place of business there and that the note itself was executed at Khamgaon under an express agreement to pay the amount at Khamgaon. The defendant questioned the jurisdiction of the Court to try the suit on the allegation that the promissory note in suit was executed by him at Nimgaon which is within the jurisdiction of the Malkapur Court, that he resided at Nimgaon and that there was an express agreement to pay the amount a Nimgaon.

The lower Court held that the promissory note in suit was executed at Nimgaon which was the place where the defendant resided and that there was no express agreement to pay the debt either at Khamgaon or at Nimgaon. Nevertheless applying the general principle that a debtor must find out his creditor and make the payment due to him at the latter's place of residence the lower Court held that it had jurisdiction to try the suit. It is against this order that the defendant has come up to this Court in revision.

It is contended on behalf of the defendant applicant that the ordinary principle laid down in *Ramchandra* v. *Mohanlal* (1), that in the absence of any specific agreement as to the place where the payment of a debt is to be made, it is the duty of the debtor to make the payment where the creditor resides, or where his place of business is, is not applicable to Negotiable instruments. In my opinion this contention is sound. Under s. 70 of the Negotiable Instruments Act (No. XXVI of 1881) a promissory note or bill of exchange not made payable as mentioned in ss. 68 and 69, must be presented for payment at the place of business (if any), or at the usual residence, of the maker, drawee or acceptor thereof, as the case may be. When the Legislature itself has declared that payment due under a promissory note, in the absence of a contract to the contrary, is ordinarily to be made at the usual

(1) 121 Ind. Cas. 668; 26 Nag L R 300; Ind. Rul. (1930) Nag. 124; A I R 1930 Nag. 207; 13 N L J 4.

place of business of the maker or at his residence, it is clear that on the findings given by the lower Court the plaintiff could not file the present suit to recover the amount due under the promissory note at any place other than the one where the defendant admittedly resides, that is Nimgaon, which is in the jurisdiction of the Malkapur Court. I, therefore, reverse the finding of the lower Court that it has jurisdiction to try the suit and order it to return the plaint to the plaintiff for presentation to the proper Court. There will be no order for costs either in this Court or in the lower Court.

N. *Order accordingly.*

RANGOON HIGH COURT

First Civil Appeal No. 149 of 1933
July 19, 1934

MOSLEY AND MACKNEY, JJ.

WAN TAIK YA AND OTHERS—APPELLANTS
versus
M. S. S. CHETTYAR FIRM AND OTHERS—RESPONDENTS

Mortgage—Sale of portion of mortgagee's security alleged to be with consent of mortgagee—Evidence of such consent — Registered mortgage — Mortgagee, if should secure title-deeds — Prior and subsequent mortgagees—Prior mortgagee bringing mortgage suit for sale—Subsequent mortgagee can receive his money from surplus money or redeem prior mortgagee— He cannot sell property if prior mortgagee's claim is satisfied before sale—Separate suit, necessity of—Transfer of Property Act (IV of 1882), s. 82 - Intention of.

Where it is alleged that a portion of the mortgagee's security has been sold with his consent, very definite evidence must be produced that that consent was obtained. [p. 956, col 2]

It is not ordinarily obligatory for a person who takes a registered mortgage to secure the title-deeds of the properties mortgaged and ordinarily his registered mortgage is sufficient protection to him. [p. 957, col. 1.]

As regards a mortgage suit for sale, the rights of the subsequent mortgagee are very limited; he has the right to redeem the prior mortgage or to receive his mortgage money out of the surplus sale proceeds after satisfaction of the prior mortgage, treating the suit as one for his benefit; but he cannot ask for a sale of the property if the prior mortgagee's claim is satisfied before the sale, nor can he ask for sale of some other property included in his own mortgage: and for either of these purposes he must bring a separate suit for sale on his own mortgage. *Kalipada Mukherji* v. *Basantakumar Datta* (2), followed. [*ibid.*]

The intention of s. 82, Transfer of Property Act, is not that the lien of the mortgagee should be divided, but simply to determine the liability of the purchasers of the property *inter se.* [*ibid.*]

F. C. A. against the decree of the District Court, Maubin, dated September 6, 1934.

Mr. *P. K. Basu*, for the Appellants.

Messrs. *Hay, Anklesaria* and *Chari*, for the Respondents.

Mackney, J.—It will be necessary to state as briefly as possible the circumstances in which arose the suit from which this appeal arises.

One U Ba Thaw and his wife Ma Sein Khin of Einme Township in the District of Myaungmaya owned a rice mill and several acres of paddy land all situated in Myaungmya District. About April 30, 1926, by a registered deed U Po Mya and his wife Ma Nagwe Yin, (1st and 2nd defendants) of Maubin Town purchased the mill for Rs. 40,000. Apparently on the same date without consulting his wife, U Po Mya entered into an agreement with the vendors to resell the property whenever they should desire for the same amount. (It is true that the sale-deed purports to sell only U Ba Thaw's and Ma Sein Khin's one-half share in the mill, but it is admitted that in effect U Ba Thaw and Ma Sein Khin owned the mill and sold the whole of it to U Po Mya and Ma Ngwe Yin). Again, by a registered sale-deed dated January 10, 1925, Ma Ngwe Yin, the wife of U Po Mya, and their daughter Ma Aye Tin, bought a quantity of paddy land in Myaungmya District from U Ba Thaw. These paddy lands will be referred to as items Nos. 1, 4 and 5 and the rice mill as item No. 6. On May 15, 1926, U Po Mya and Ma Ngwe Yin mortgaged to the O. V. E. Chettyar Firm, (12th defendants), of Maubin item No. 6 together with items Nos. 2 and 3 (paddy fields in the Myaungmya District measuring some 480 odd acres), and item No. 7, a house in Maubin Town. The principal amount was Rs. 30,000. It seems that U Ba Thaw after the sale of the rice mill continued in possession under a lease and in Civil Suit No. 63 of 1927, of the District Court of Myaungmya U Po Mya and Ma Ngwe Yin sued U Ba Thaw and Ma Sein Khin for ejectment from the rice mill. The parties came to a compromise and a decree was made in accordance with the compromise petition. It directed that the defendants, U Ba Thaw and Ma Sein Khin be ejected from the mill premises, but that if they should pay to the plaintiffs, U Po Mya and his wife on or before May 31, 1928, the sum of Rs. 55,000 the properties transferred by the registered deed dated January 10, 1925 (*i. e.*, the paddy lands items Nos. 1, 4 and 5), together with the rice mill, should be reconveyed to them. The defendants

were to vacate the rice mill and its premises if they failed to pay the said sum before the said date. U Ba Thaw and his wife were unable to raise the sum of Rs. 55,000, but as U Po Mya and Ma Ngwe Yin were apparently anxious to sell the properties U Ba Thaw found purchasers for them.

By a registered sale-deed dated June 5, 1928, Taik Ya, Ket Sin and Sin Gwa Nat, (3rd, 4th and 5th defendants), together with one Kabin, whose interests were later acquired by the other purchasers, bought the rice mill and its premises for Rs. 35,000. In this deed the vendors are named as U Po Mya and Ma Ngwe Yin, but the agreement to repurchase between U Po Mya and U Ba Thaw is mentioned and it is stated (wrongly that the agreement was to re-transfer the said properties to U Ba Thaw and Ma Sein Khin or their nominees; and a further statement is made that:

"it has now been agreed between the vendors and the said U Ba Thaw and Ma Sein Khin that that the vendors shall retransfer the said mill, etc., to their nominees the said vendees for Rs 35,000."

On the same date by a registered sale-deed U Po Mya, Ma Ngwe Yin and Ma Aye Tin sold for Rs. 25,000 the paddy lands, items Nos. 1, 4 and 5, to Maung Ba Hmaw, Ma Saw Yin, Maung Tha Han and Ma Ngwe Yon, (6th, 7th, 8th and 9th defendants). The deed contains a similar reference to an alleged agreement to resell to U Ba Thaw and Ma Sein Khin or their nominees. On June 7, 1928, U Po Mya repaid to the O. V. E. Chettyar Firm on the mortgage-deed already mentioned Rs. 17,000, principal and Rs. 5,568-12-0 interest. Ultimately on September 3, 1931, the O. V. E. Chettyar Firm assigned to the M. S. S. Chettyar Firm, the plaintiff in the suit, their rights on the mortgage bond for a sum of Rs. 16,750 being the amount alleged to be due on the bond. On October 14, 1929, U Ba Kmaw, Ma Saw Yin, U Tha Han and Ma Ngwe Yon had mortgaged to the A. K. A. C. T. A. L. Chettyar Firm, (11th defendant), items Nos. 1, 4 and 5, together with other properties not included in this suit. These properties they subsequently conveyed outright to that firm. On May 12, 1929, U Po Mya and Ma Ngwe Yin mortgaged to the Sir S. R. M. M. A. Chettyar Firm, items Nos. 2, 3 and 7, together with other properties measuring about 116 acres for Rs. 15,000. On November 4, 1931, this mortgage was transferred to the Bank of Chettinad Limited, Maubin, by a registered deed.

The plaintiff, (1st respondent), the M. S. S. Chettyar Firm in Civil Suit No. 50 of 1932 of the District Court of Maubin, out of which the present appeal arises, sued U Po Mya and Ma Ngwe Yin for recovery of the amount due on their assigned mortgage and included the other defendants mentioned above. Ma Aye Tin was not included as a party to the suit.

It was contended that the O. V. E. Firm had notice of the sale of the mill and had consented thereto; that owing to their gross negligence they were not entitled to have priority to the mortgage which had been transacted in favour of the A. K. A. C. T. A. L. Chettyar Firm and that the 10th defendant, the Bank of Chettinad, Limited, was entitled to have the claim of the plaintiff, if any, apportioned between items Nos. 2, 3 and 7, and the other items. In the end the District Court passed a preliminary mortgage decree directing the sale of the mortgaged properties on failure to redeem on the part of "the defendants" (not specified). The decree further directed that if there were any surplus after the sale, the specified items of the mortgaged properties would be liable, in the proportions set out in the decree, for the mortgage debt due to the plaintiff and the surplus in each case was to be paid over to the parties entitled to them, the 10th defendant being entitled to Rs. 15,000 principal and Rs. 6,105 interest up to July 6, 1932. Against this decree the defendants Nos. 3, 4, 5, 6, 7, 8, 9 and 11, Wan Taik Ya. Kit Sin, Sin Gwa Nat, U Ba Hmaw, Daw Saw Yin, U Tha Han, Daw Ngwe Yon and the A. K. A. C. T. A. L. Chettyar Firm, have appealed making the plaintiff, M S. S. Firm, the 1st respondent, U Po Mya and Daw Ngwe Yin, 2nd and 3rd respondents, the Bank of Chettinad the 4th respondent and the O. V. E. Chettyar Firm, the 5th respondent.

The learned Advocate for the appellants attempted to establish six points : (*i*) that the sale to his clients was with consent ; (*ii*) that the transaction on account of the mill between U Ba Thaw and U Po Mya amounted to a mortgage by conditional sale and that this mortgage had been redeemed without notice of the mortgage to the O. V. E. Chettyar Firm ; (*iii*) that under s. 27, Specific Relief Act, this contract could be enforced by U Ba Thaw against all persons , (*iv*) that the O. V. E.

Chettyar Firms had shown gross negligence in not making inquiries and that the O. V. E. Chettyar Firm had shown gross negligence in not informing the M. S. S. Chettyar Firm of the sale with their consent of the rice mill; (*v*) that the apportionment as arranged in the decree of the lower Court should not be allowed, and (*vi*) that Ma Aye Tin's interest was not affected by the mortgage to the O. V. E. Chettyar Firm.

As regards the first point, it will be noticed that although the mortgage to the O. V. E. Chettyar Firm was made and registered in Maubin, of all the very considerable properties mortgaged only one house was actually situated in the District of Maubin. It is stated in evidence, but not proved beyond doubt, that intimation in due course was sent to the Registration Office at Myaungmya in regard to the properties situated in that District. This limitation was never received and so no entry regarding the mortgage can be found in the Registers of Myaungmya. The O. V. E. Chettyar Firm clearly cannot be penalised for this failure on the part of the Government Departments concerned.

U Po Mya admits that when he made the mortgage the title deeds relating to the paddy lands were not handed over to the O V. E. Chettyar Firm. He states that the title-deeds relating to the mill were handed over and that when he sold the rice mill to Wan Taik Ya and his partners he informed the agent of the O. V. E. Firm, obtained his consent thereto, and received from him the title-deeds of the mill. The learned District Judge has commented adversely on the evidence produced by U Po Mya in support of this allegation and he believed neither U Po Mya nor his two witnesses. The learned District Judge has, in my opinion, given adequate reasons for disbelieving this evidence. It is indeed both vague and incredible.

It is argued that the agent of the O. V. E. Firm would not have received so large a payment on account of the mortgage debt without making inquiries of U Po Mya as to how he could raise this amount. The agent of the firm denies that U Po Mya informed him how he obtained the money. It may be that the agent did inquire, but we have no proof whether U Po Mya did tell him the true story. U Po Mya states that he asked the agent to endorse on the mortgage deed the fact that the rice mill had been sold, but that the agent declined to make such an endorsement. There was no reason why the agent should not make the endorsement, the properties left with him amounting to well over 600 acres of paddy lands, together with a house, were in those days ample security for the balance of the debt. In my opinion, it cannot be concluded inevitably from the fact that so large an amount of money was repaid, and from the fact that the balance of the debt was so amply secured by the rest of the security, that the O. V. E. Chettyar Firm consented to the sale of the rice mill. Where it is alleged that a portion of the mortgagee's security has been sold with his consent, very definite evidence must be produced that that consent was obtained. Such evidence is, in my opinion, not forthcoming in the present case. U Po Mya is not an honest man. He sold these properties to the appellants concealing the fact of this mortgage. He is a man whose word cannot be believed.

As regards the second point, this point has been raised for the first time on appeal. As already remarked, the agreement to resell to U Ba Thaw was made by U Po Mya without the consent of his wife who was a purchaser of the rice mill. The point not having been raised in the lower Court no evidence was taken and it seems to me that, on a mere consideration of the two documents of sale and of the agreement to resell, it cannot be held that the transaction was a mortgage by conditional sale. In any case this contract, if it existed, was terminated by the decree on the compromise which was made in Civil Suit No. 63 of 1927. U Ba Thaw and Ma Sein Khin failed to carry out the terms of that decree and had to vacate the mill premises. In any case, the fact that to oblige U Po Mya he sought out persons who would purchase the properties is immaterial. In the transaction to sell the paddy lands U Po Mya, Ma Ngwe Yin and Ma Aye Tin were the vendors. Their purchasers cannot claim to have stepped into the shoes of U Ba Thaw and Ma Sein Khin.

As regards the third point this also is a point which was not raised in the lower Court. On the findings to which I have come in regard to the first two points, it is not necessary to say anything further in regard to this point. As regards the fourth point, the M. S. S. Firm as assignees take

the right, title and interest of the O. V. E. Firm and I cannot see how negligence can be attributed to them. As to the O. V. E. Firm I also fail to see how negligence can be attributed to them because they failed to make searches into the exact position of U Ba Thaw at the time of the mortgage, nor do I see on my findings in regard to the point already discussed, how they can be affected by the position of U Ba Thaw in view of the fact that U Ba Thaw's rights, if any, were never exercised and became of no value. It is not ordinarily obligatory for a person who takes a registered mortgage to secure the title-deeds of the properties mortgaged and ordinarily his registered mortgage is in this country sufficient protection to him.

As regards the fifth point it appears to me that there is much force in the contention of the appellants. The intention of s. 82, Transfer of Property Act, is not that the lien of the mortgagee should be divided but simply to determine the liability of the purchasers of the property *inter se*. Therefore all the mortgaged properties are liable in satisfaction of the mortgagee's claim: *Raghunath Pershad* v. *Harilal Sadhu* (1). (It is true that this section has been amended since the latter case was decided but not in such a way as to affect the truth of this dictum). The proper course to take is to direct that the whole of the mortgaged properties or such amount as may be sufficient to satisfy the decree be sold. If there is a surplus remaining after the sale of items Nos. 2, 3 and 7 (subject to the second mortgage to the Bank of Chettinad, Limited), the Bank of Chettinad, Limited is entitled to receive its mortgage money out of that surplus; see *Kalipada Mukherji* v. *Basantakumar Datta* (2), at foot of p. 123*:

"As regards a mortgage suit for sale, the rights of the second mortgagee are very limited; he has the right to redeem the prior mortgage or to receive his mortgage money out of the surplus sale proceeds after satisfaction of the prior mortgage, treating the suit as one for his benefit but he cannot ask for a sale of the property if the prior mortgagee's claim is satisfied before the sale, nor can he ask for sale of some other property included in his own mortgage; and for either of these purposes he must bring a separate suit for sale on his own mortgage."

When the decree has been satisfied it will be for the parties interested in the properties sold in satisfaction thereof to seek their remedies against the persons whom they consider liable to them. It might be simpler for the present owners of the items Nos. 1, 4, 5 and 6, to redeem this mortgage and seek their further remedy against U Po Mya and Ma Ngwe Yin or from whomsoever else they consider they have a claim.

As regards the sixth point it is obvious Ma Aye Tin's interest in items Nos. 1, 4 and 5, cannot be affected by the decree. U Po Mya and Ma Ngwe Yin could mortgage only their own interest in those properties and not Ma Aye Tin's. I am of opinion that the decree of the lower Court should be modified in agreement with these findings, *i. e.*, it should direct that the right, title and interest of U Po Mya and Ma Ngwe Yin existing at the time of the mortgage to the O. V. E. Chettyar Firm in the properties, items Nos. 1 to 7, be sold to the extent necessary and that if items Nos. 2, 3 and 7 be sold the Bank of Chettinad, Limited, are entitled to the surplus of the sale proceeds of the items towards the satisfaction of their mortgage. The appeal having failed on the main issues, the appellants must pay the costs to the M. S. S. Chettyar Firm for one Advocate. The respondents, U. Po Mya and Ma Ngwe Yin were not represented; the respondent the O. V. E. Chettyar Firm was represented but their case was entirely the same as that of the M. S. S. Chettyar Firm and their learned Advocate had nothing to add. The respondent Bank of Chettinad, Limited, supported the decree of the lower Court in regard to the apportionment although objecting to the rate of apportionment. It is not entitled to any costs.

Mosley, J.—I agree.

D. *Order accordingly.*

(1) 18 C 320.

(2) 138 Ind. Cas. 177; A I R 1932 Cal. 126; 59 C 117; 35 C W N 877; Ind. Rul. (1932) Cal. 427.

*Page of 59 C.—[*Ed.*]

PATNA HIGH COURT

Civil Revision Application No. 350 of 1933

October 9, 1933

MACPHERSON, J.

AKHAURI HERAMBO NARAIN SINHA —PETITIONER

versus

JAMUNA SONAR—OPPOSITE PARTY

Bihar and Orissa Public Demands Recovery Act (IV of 1914), ss. 21 and 24—Purchaser of property in certificate sale in possession in good faith—Claim under s. 21 by another purchaser in execution of money decree dismissed—No title suit brought within one year by claimant—Subsequent petition under O. XXI, r. 97, Civil Procedure Code—Order dismissing claim is conclusive—Civil Procedure Code (Act V of 1908), O. XXI, r. 97, s. 115—Summary view of justice is not safe guide where real obstacle of opposite party is bar of limitation.

In a certificate sale, the entire property of joint family was sold even though the names of

the members excepting one was not mentioned in the certificate and the purchaser was in possession of the whole property in good faith. Another person who had obtained a money decree against all the members of the joint family purchased the property in execution of his decree and he put in a claim under s. 21, Public Demands Recovery Act. The claim was dismissed and he did not file any title suit within one year. Subsequently, he filed a petition under O. XXI, r. 97, Civil Procedure Code, as he could not obtain delivery of possession. The Court held that the certificate Court had no jurisdiction to attach and sell or give possession of the share of the other members whose shares were not mentioned and ordered joint possession :

Held, that the order dismissing the claim became conclusive, that the certificate purchaser was in possession in good faith and that the Court had no jurisdiction to go into the question of title.

Where the conditions set out in s. 115, Civil Procedure Code, are present, a summary view of justice is often not a conclusive or even a very safe guide, especially, where the real obstacle in the way of the opposite party is a statutory bar of limitation.

C. R. A. from the order of the 2nd Court Munsif, Buxar, dated June 17, 1933.

Mr. *D. N. Varma*, for the Petitioner.

Messrs. *Parmeshwar Dayal* and *P. P. Varma*, for the Opposite Party.

Judgment.—This is an application by the Liquidator of the Friends Co-operative Society Dumraon, for revision of the order of the Munsif of Buxar allowing an application under O. XXI, r. 97, Civil Procedure Code, in respect of 15-16ths of the property in dispute.

The petitioner filed a certificate under the Bihar and Orissa Public Demands Recovery Act, 1914, against one Thakur Prasad and notice under s. 7 was served on June 30, 1930. One Piari Kuar applied on December 8, 1930, for execution of her money decree against 13 persons, being Thakur Prasad and other members of his joint Mitakshara family. In this execution the petitioner asked that his charge on the property in suit consisting of houses which were to be sold in execution be declared. But the Court did not grant a declaration of the charge but only directed notification of the petitioner's charge under s. 8 at the time of sale and the High Court on revision, while acknowledging the existence of the share, declined to make the declaration as the sale had taken place. On April 8, 1931, the present opposite party purchased the property at the sale in execution of Piari Kuar's decree. The petitioner obtained stay in the High Court which lasted from 8th May till November 24, 1931. When the property was on sale under the Public Demands Recovery Act at the instance of the petitioner the opposite party, on May 25, 1931, filed a claim to it under s. 21 which was dismissed on June 4, 1931, on which date the petitioner purchased the present property in dispute in the certificate sale. He obtained delivery on September 28, 1931. In February 1933 the oposite party applied for delivery of possession of the property purchased by him but could not obtain it as the petitioner was found to be in possession. The opposite party applied under O. XXI, r. 97 with the result already mentioned.

Now at the certificate sale only the right, title and interest of Thakur Prasad, judgment-debtor, passed. The contention of of the present application, however, was that s 25, Public Demands Recovery Act, operated to make the decision of June 4, 1931, conclusive against the opposite party who had not brought within one year of the date a suit to estabtish his title to the property, his petition in respect of which was dismissed under s. 24. The learned Munsif negatived the contention on the ground that as the certificate Court had no jurisdiction to attach and sell or give possession of the share in the family property of the members of Thakur Prasad's family who were not named in the certificate, the claim under s. 21 of the present opposite party and the order under s. 24 could not have related to 15-16ths of the property. He accordingly allowed the opposite party to take out *dakhaldehani* afresh with regard to 15-16ths of the houses in question and directed him to be put in possession jointly with the opposite party. On behalf of the petitioner it is urged that as the petitioner was clearly in possession on his own behalf in good faith, no other consideration could arise, that (as indeed the Munsif himself conceded in so many words) the question of title could not be gone into and that the order for joint possession is unsound. For the opposite party Mr. Parmeshwar Dayal relies mainly upon the provisions of s. 26 (1) of the Act, which sets out that,

"where property is sold in execution of a certificate there shall vest in the purchaser merely the right, title and interest of the certificate-debtor at the time of the sale, even though the property itself be specified,"

and urges that the petitioner could not be in possession in good faith. There can be no doubt, however, that the property specified for sale and the property which was sold of which delivery of possession was given included the property now in dispute. There is absolutely no reason to believe that the petitioner was not in possession on his own account. In my judgment the

learned Munsif has clearly acted with material irregularity in the exercise of his jurisdiction. One cannot help seeing that he did not consider only the one question which was open to him, namely whether the petitioner was "claiming in good faith to be in possession on his own account," but permitted himself to be influenced by the fact that the remedy of the opposite party by suit had become barred, though if it still existed the opposite party would, on the findings of fact of the Munsif, have been entitled in such suit to all but the 1-16th found to be the share of Thakur Prasad, certificate-debtor. Mr. Parmeshwar Dayal urges that the petitioner was not so in possession in good faith of the whole of this property from the date of delivery of possession to him. I am unable to agree. The definition of the Penal Code under which,

"nothing is said to be done or believed in good faith which is done or believed without due care and attention,"

is not applicable. In ordinary language good faith is opposed to bad faith and not to negligence and this is the view ordained in the Bihar and Orissa General Clauses Act, which sets out that,

"a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not."

It is not enough therefore to indicate that the petitioner must have known the provisions of s. 26 (1) and that the certificate-debtor Thakur Prasad was only a member of a joint family so that only the right, title and interest of Thakur Prasad could pass at the sale. Indeed it would be most unreasonable to affect the auction-purchaser with such knowledge. He may well have been mistaken, but he did honestly hold the view that he was really entitled to the possession of the property purchased by him, of which the Court had given him possession. His contention was that the loan which was the basis of the certificate debt had been taken by Thakur Prasad on behalf of himself and the joint family. Mr. Parmeshwar Dayal has further attempted to show that the opposite party's application for release of the property from sale which purports to be under ss. 21 and 22 of the Bihar and Orissa Public Demands Recovery Act, 1914, may be taken to refer only to the share of Thakur Prasad, judgment- debtor, and not to the whole of the property. Therein he fails. The petition sets out that the portion specified below of the property advertised for sale had been purchased by the petitioner on April 8, 1931, and the judgment-debtor ceased to have any titile thereto after that sale and it could not be sold for satisfaction of his debt. The opposing contentions therefore were that the property specified could and that it could not be sold in the certificate sale. Rightly or wrongly the certificate officer held that the whole property on sale could be sold in execution of the certificate. That and not merely 1-16th of it was the property of which the petitioner obtained delivery of possession, and he was certainly in possession of it *bona fide* on his own account.

The opposite party could only get possession of it or any part of it if in the suit contemplated by s. 25 he established that such property or part thereof was not that of Thakur Prasad liable to sale in execution of his certificate debt. Further, no such suit being brought within limitation the order under s. 24 is conclusive. Mr. Parmeshwar Dayal finally urges that the High Court ought not to interfere in revision inasmuch as the order is just. But in the first place, it is not so clear, as is suggested, on which side on a broad view equity lies, and again where the conditions set out in s. 115 are present, a summary view of justice is frequently not a conclusive or even very safe guide especially where the real obstacle in the way of the opposite party is a statutory bar of limitation. The Rule is made absolute with costs and the application unde. r. 97 is rejected; Pleader's fee, Rs. 16.

D. *Rule made absolute.*

RANGOON HIGH COURT

First Civil Appeal No. 23 of 1934
August 29, 1934
MYA BU, OFFG. C. J., AND BAGULEY, J.
U NYO—APPELLANT
versus
U PO THIT—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 22—Decree more than three years old—Application after an year from last order—No notice—No reasons recorded—Objection stated with clarity—Advocate pointing out wrong rule—Objection, if waived.

Where a decree is more than three years old, and the application for execution of the decree is made more than a year after the passing of the final order on the last application for execution and no reason is recorded for not issuing notice as required by O. XXI, r. 22, Civil Procedure Code, the omission to issue notice to the judgment-debtor is not a mere irregularity, but is a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction. *Shyam Mandal* v. *Satinath Banerjee* (1), *Ramdas* v. *Kannamal* (2), *Raghunath Das* v. *Sunder Das* (3)

and *Bimalanandan Prasad* v. *United Refineries, Ltd.* (4), relied on

If the objection based upon the provisions of O. XXI, r. 22, is stated with substantial clarity in the petition of objection, the fact that the Advocate at the hearing happened to point out an inapposite rule of O. XXI, does not alter the fact that objection under r. 22 was in reality taken, and cannot be regarded as being tantamount to a waiver of that objection.

F. C. A. against an order of the District Judge, Myaungmya, in Civil Execution No. 49 of 1932.

Mr. *Ba Mg.* for the Appellant.

Mr. *R. C. Banerjee*, for the Respondent.

Mya Bu, Offg. C. J. -This appeal must be allowed. The appeal is against an order dismissing the objection raised by the appellant, one of the judgment-debtors against whom a decree had been passed in favour of the respondent's assignor, as legal representative of the estate of Daw On, deceased, in Civil Regular No. 63 of 1925. In the execution case from which this appeal has arisen, the respondent applied for execution of the decree by attachment of a piece of paddy land and a piece of garden land alleged to be belonging to the estate of Daw On. No notice of this application was issued, but immediately upon the presentation of this application the Court ordered the issue of a warrant of attachment, in consequence of which attachment was effected. After issue of notice to the appellant for settlement of the terms of the proclamation of sale of the properties under attachment, the appellant filed his objection to the proceeding, stating several grounds upon which the objection was based, one of which runs as follows:

"That this judgment-debtor submits that the attachment is bad in law inasmuch as no notice was issued to him before such attachment, as required by law."

This objection was filed on December 19, 1932, but because the files of the connected proceedings necessary for reference in the consideration of the dispute raised in this proceeding were in the High Court, the hearing of the objection upon the grounds stated above did not take place till October 20, 1933, when the learned District Judge decided *inter alia* that the want of notice to the judgment-debtor before proceeding with the application of the assignee did not invalidate the proceeding, as no such notice was necessary under O. XXI, r. 16, Civil Procedure Code. In pursuance of that decision the learned District Judge held that the objection was to be tried on the merits. The final decision upon the objection having been given by the District Court on December 8, 1933, the appellant has filed this appeal, raising many grounds, one of which, and the one upon which we think the case may be disposed of, is that the failure by the excuting Court to issue notice to the respondent as required by O. XXI, r. 22 (1) (*a*), Civil Procedure Code, is fatal to the validity of the proceeding.

In my opinion this contention prevails. The decree was more than three years old, and the application for execution of the decree has been made more than a year after the passing of the final order on the last application for execution. In these circumstances the Court would be justified in omitting to issue notice to the judgment-debtor only if it considered that the issue of such notice "would cause unreasonable delay or would defeat the ends of justice", and recorded reasons for such conclusion under sub-s. 2, O. XXI, r. 22. In the present case no reason whatever was recorded, and therefore the omission to issue notice to the judgment-debtor is not a mere irregularity, but is a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction: *Shyam Mandal* v. *Satinath Banerjee* (1); followed in *Ramdas* v. *Kannamal* (2). This proposition receives support from the Privy Council case of *Raghunath Das* v. *Sundar Das* (3), and also from *Bimalanandan Prasad* v. *The United Refineries, Ltd.* (4).

The learned Advocate for the respondent contends that no objection under O. XXI, r. 22 (*a*) having been taken expressly in the lower Court, the appellant should not be allowed to raise it here, and that in any event the appellant should be regarded as having waived this ground of objection. This contention is based upon the fact that apparently the appellant's Advocate in the lower Court did not place before the Court the provisions of O. XXI, r. 22, but only the provisions of O. XXI, r. 16, and that thereafter the attention of the Court was never drawn to O. XXI, r. 22, but the appellant fought the case upon the merits up to the end.

(1) 38 Ind. Cas. 493; 44 C 954; 24 C L J 523; A I R 1917 Cal. 728; 21 C W N 776.

(2) 117 Ind. Cas. 245; A I R 1929 Rang. 161; 7 R 110.

(3) 24 Ind. Cas. 304; A I R 1914 P C 129; 41 I A 251; 42 C 72; 18 C W N 1058; 1 L W 567; 27 M L J 150; 16 M L T 353; (1914) M W N 747; 16 Bom. L R 814; 20 C L J 555; 13 A L J 154 (P C).

(4) 143 Ind. Cas. 299; A I R 1933 Rang. 52; 11 R 79; Ind. Rul. (1933) Rang. 57.

With reference to this contention it may be pointed out that although the rule and the Order was not specifically stated, the objection based upon the provisions of O. XXI, r. 22, was stated with substantial clarity in the petition of objection, and the fact that the Advocate at the hearing happened to point out an inapposite rule of O. XXI, does not alter the fact that objection under r. 22 was in reality taken, and cannot be regarded as being tantamount to a waiver of that objection. The appellant in this case, by his conduct has gained no improper or undue advantage in the proceedings so that he might justly be precluded from challenging the validity of the proceedings as the appellant in *Bimalanandan Prasad* v. *The United Refineries, Ltd.* (4) was. He cannot, therefore, justly be deprived of the advantage of a rule wich operates in favour of his objection, owing to the failure on the part of the Court to issue notice to him.

The proceedings in execution, including the attachment made therein, must, therefore, be held, and are hereby declared, to be null and void. The parties to bear their own costs in both Courts.

Baguley, J.—I agree. The point is a purely technical one, but the appellant is entitled to take advantage of the technicality. I would, however, point out that this kind of concession cannot be repeated: *Fakhrul Islam* v. *Bhubaneshuari Kuer* (5).

D. *Appeal allwed.*

(5) 117 Ind. Cas. 648; A I R 1929 Rang. 79; 7 Pat. 790.

PATNA HIGH COURT

Appeal from Original Decree No. 86 of 1930

December 7, 1934

WORT AND VARMA, JJ.

KAMTA PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DURGA DAT AWASTHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Partition — Witnesses not present at partition can testify as to the fact of separation—Alienation—Legal necessity—Lender making enquiries—Unsubstantial part of consideration not applied for legal necessity — Legal necessity, if established — High rate of interest—Lender must prove necessity for it.

The mere fact that the witnesses were not present at the time of the partition of the family would not of itself be sufficient to disregard their evidence testifying to the partition entirely. The matter of separation may be and often is a question of reputation or notoriety. [p. 963, col. 1.]

Where it has been established not only that enquiry was made by the lender that the money was actually required and was expended for the legal necessity but that the lender also made enquiries from the members of the family as regards an amount which formed an unsubstantial part of consideration although no enquiry was made from third persons, then under the circumstances legal necessity is established either on the ground that that amount forms an unsubstantial amount of the consideration or on the ground that enquiries were made of the *only* persons who could give the lender any information with regard to the matter. [p. 963, col. 2.]

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it would not be unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate and those terms cannot stand. *Nazir Begam* v. *Rai Raghunath Singh* (1) and *Ram Bujhawan Prasad Singh* v. *Nathuram* (2), relied on. [p. 964, col. 2.]

Quaere.—Whether in *Nazir Begam* v. *Rai Raghunath Singh* (1) and *Ram Bujhawan Prasad Singh* v. *Nathuram* (2) their Lordships of the Privy Council intended to modify in any sense the principle enunciated in *Hanuman Prasad's case* (3). [*ibid.*]

A. from a decision of the Additional Subordinate Judge, Saran, dated June 25, 1929.

Messrs. *Ram Prasad* and *S. C. Mazumdar*, for the Appellants.

Messrs. *Parmeshwar Dayal*, *Jaleshwar Prasad* and *B. P. Sinha*, for the Respondents.

Wort, J.—This is an appeal from the decision of the learned Subordinate Judge of Saran in an action on three mortgage bonds. The plaintiffs appeal from that part of the judgment and decree by which the learned Judge has disallowed interest at the rate of 2 per centum per mensem compound, with yearly rests and has reduced the interest to 12 per centum per annum simple. The defendants appeal from the judgment of the learned Judge except as regards that which relates to interest.

The case of the plaintiffs in the Court below was that after the execution of the mortgage bonds the last of which was in November 1917, the defendants Nos. 1 to 12 who, up till then, were members of the joint family, separated. Their case also was that the bonds were executed for legal necessity. By his judgment the learned Judge had decided both these questions in favour of the plaintiffs and he in the circumstances granted a mortgage decree.

The judgment of the learned Subordinate Judge was supported by the plaintiff appellants in this Court on the two points which I have mentioned, and that, they added the argument that, having regard to the fact

that defendants Nos. 1 to 2 (who executed the mortgage bonds) mortgaged only those shares which fell to them on partition and that as partition has now taken place and that as the mortgage decree is sought to be enforced only against those interests, the question of legal necessity is involved, the question of interest cannot be doubted after the decisions of the Privy Council in the case of *Nazir Begum* v. *Rai Raghunath Singh* (1) and in the case of *Ram Bujhawan Prasad Singh* v. *Nathuram* (2). In the view which I take with regard to the matter of legal necessity, the point to which I refer does not arise.

The mortgage bonds were three in number, the first being of June 12, 1914, for Rs. 1,000 by which defendants Nos. 1 and 2 mortgaged 9 annas 7 pies odd interest in village Tiar and the same interest in village Shankra and the same in village Majhaulia. The second bond was dated November 16, 1914, by which the defendant No. 2 executed a mortgage of 1 anna 7 pies 4 *karants* in the three villages, the interests whereof were mortgaged in the bond of June 12, 1914. By the third bond the defendant No. 1 on the November 2, 1917, mortgaged his 8 annas interest in the three villages which I have named together with the same interest in village Darhla. As I have stated, the interest reserved under these bonds was 2 per centum per mensem compound with yearly rests.

I propose in the first instance to deal with the question of cross-appeal of the defendants with regard to the two matters decided by the learned Subordinate Judge, namely, whether the parties separated after the execution of the mortgages, and whether the mortgages were for family necessity. The plaintiffs in support of their case called a number of witnesses stating the fact that the members of the family had separated. The learned Judge as I have said has come to the conclusion that the separation did take place but has come to no definite conclusion as regards the date. The witnesses called on behalf of the plaintiffs to prove this fact were Mahadeo Prasad (P. W. No. 4) a neighbour *zamindar* and money lender who was a witness to some of the bonds executed in the case and had lent money to defendant No. 3 in 1921; Sukhdeo Prasad (P. W. No. 5), also a *zamindar* who had been lending money to the defendants for a period of fourteen or fifteen years and was a co-sharer with the defendants in another village; Brij Nandan Prasad, again a *zamindar* who was on visiting terms with the defendants was the scribe of the mortgage bonds in suit and was also a scribe of other bonds executed by defendants and also spoke to the fact of separation. The Judge has discounted the evidence of these witnesses on the ground that none was present at the time when the partition took place. He then proceeds to rely upon a number of documents (mostly mortgage bonds) executed by the defendants from which he draws the inference that a separation did in fact take place. He has stated in his judgment that there was no documentary evidence to prove the fact of partition; and by that we understand him to mean that there was no partition deed. The most important of the documents relied upon was Ex. 1, a mortgage-bond dated May 3, 1922, where defendant No. 3 dealt with his specific shares in the properties. Again in the same month defendant No. 2 executed a bond, one of the purpose of which was to provide money for the *Sradh* ceremony of the widow of Debi Dat. Debi Dat was the brother of defendants Nos. 2 and 3, uncle of Chandrika (defendant No. 4) and the cousin of Durga Dat Awasthi (defendant No. 1). The other bonds dated April 17, 1919, Ex. 2 and 2-*a*, were relied upon for the reason that a certain share in the two debts which were incurred by the mortgage related to the widow of Debi Dat and that certain members who had been joined in the mortgage bonds gave an idemnity therefor. Exhibit No. 3 which is not before us but which is another document upon which the learned Judge has relied is dated November 10, 1918, and reliance is placed on this as showing that the widow of Debi Dat was described as his heir, which would certainly have been an inappropriate description had the family been joint. This, however, it is contended by Mr. Parmeshwar Dayal who appears on behalf of the defendants, has no significance having regard to the case which the plaintiffs made out. It is quite clear from the evidence that Debi Dat died about the year 1912 or 1913, and the statement which it is asserted was consistent only with the partition having taken place is obviously inconsistent with the

(1) 50 Ind. Cas. 434; 46 I A 145; 36 M L J 521; 17 A L J 591; 23 C W N 700; 21 Bom L R 484; 26 M L T 40; 30 C L J 86; (1919) M W N 498; 1 U P L R P C 49; 11 L W 188; 41 A 571 (P C).

(2) 71 Ind. Cas. 933; 50 I A 94; 4 P L T 29; A I R 1923 P C 37; 32 M L T 129; 44 M L J 615; 25 Bom. L R 508; (1923) M W N 382; 2 Pat, 285; 38 C L J 25; 18 L W 767; 1 Pat. L R 445; 28 C W N 446 P C).

plaintiffs' case that the members of the family were joint up to the date of the last bond which was in November 1917.

Four other documents to which I have already referrd, it is contended, are equally consistent with the case of jointness or a case of separation; they are consistent with the case of jointness, as the idea of the members of a family executing mortgage bonds charging the shares which would fall to them in the event of a partition is by no means uncommon. But in the Court below the deeds were relied upon more for the purpose of showing that the members of the family were by these transactions raising funds to meet their own particular expenses and that there was thus an indication that there was no common fund from which the expenses of the members of the family would be met. As an instance more particularly of this matter are the bonds executed by defendant No. 2 on September 2, 1914, and on October 28, of the same year wherein he mortgaged his 1 anna 7 pies odd share in village to meet his own personal necessities. Again defendant No. 3 by the bond of June 5, 1919, mortgaged his share in the property to meet certain antecedent debts. On August 12, 1921, the same person mortgaged his 1 anna 7 pies odd share for his antecedent debts together with maintenance of his own family. It is true, as Mr. Parmeshwar Dayal argues, that the mere execution by these persons of those bonds charging thereunder their particular shares in the family property is not necessarily inconsistent with the state of jointness. However, the facts proved by those bonds would give some support to the evidence called by the plaintiffs on the question of separation. It would be difficult for this Court to come to a conclusion with regard to the credibility of the witnesses different from that at which the learned Subordinate Judge has arrived but the mere fact that the witnesses were not present would not of itself be sufficient to disregard their evidence entirely. The matter of separation may be and often is a question of reputation or notoriety; and the witnesses called by the plaintiffs certainly were competent to state the facts of which they gave evidence. The reasons which the learned Subordinate Judge has given therefore for coming to the conclusion that separation did take place seem to be supported by the oral evidence also.

The other substantial question that remains is as I have already mentioned. The first bond was for Rs. 1,000. The greater art of the consideration was Rs. 930 which was given by the lender in cash, the balance being Rs. 70 for previous dues. There is no very serious argument as regards the Rs. 930 for the expenses of the marriage. It has been established by the evidence that enquiries were made by the lender and the only comment that can be made with regard to the Rs. 70 is (as I have said) that it went to meet previous dues. It seems to me, however, that this bond can be supported on two grounds. First of all it has been established not only that enquiry was made by the lender that the money was actually required and was expended for the marriage, but that the lender also made enquiries from the members of the family as regards the Rs. 70 although no enquiry was made from third persons. Either on the ground that the Rs. 70 forms an unsubstantial amount of the consideration or on the ground that enquiries were made of the only persons who could give the lender any information with regard to the matter, legal necessity is established.

The second bond was of November 16, 1914, for a consideration of Rs. 599. This was made up of a previous bond of Rs. 105-8-0 and Rs. 493-8-0 for *chhatia* ceremony. Mr. Parmeshwar Dayal attacks more particularly the larger amount namely, Rs. 493 for *chhatia*; but it is not seriously disputed that in a family of the standing of the defendants the *chhatia* ceremony was usual and could not have been described as unnecessary and in the circumstances there is no serious doubt as to the expenditure on this account. So far as the balance of Rs. 105-8 is concerned, the lender satisfied himself as to the existence of the debt.

The third bond was of November 2, 1917, for Rs. 600 which was made up of various items; two hand-notes of Rs. 50 each together with *bahi khata* account for Rs. 67 together with Rs. 156 interest. The hand-notes were proved. The comment regarding the *bahi khata* account was that no *bahi khata* books were produced. With that I shall deal in a moment. The other sums were mortgage bond dated September 5, 1915 for a sum of Rs. 200 a further item of *bahi khata* account of Rs. 32 making in all with interest Rs. 371 the total being Rs. 600 which includes the amount paid by the lender to defendant No. 2 in cash. There is some controversy with regard to what took place as regards this *bahi khata*

account. There seems to be some misunderstanding with regard to the matter. On September 27, 1929, the plaintiff filed these documents whereupon the Subordinate Judge made an order that the inadmissibility or otherwise would be considered when the documents were tendered in evidence, ultimately on June 6, 1929, they were rejected. The plaintiffs contended that they were wrongly rejected; but it is clear from what took place that the plaintiffs merely filed them on May 27, 1929, but, not during the time when the trial was proceeding, did they ever tender these documents in evidence. The trial appears to have come to an end on June 5, 1929. It is quite obvious, therefore, that the learned Judge was right when he decided that the documents at this stage (that is to say, after the defendants' evidence was closed) were to be rejected. But even so, that does not necessarily dispose of the point. The plaintiffs so far as the sums due on *bahi khata* account were necessary to be established was concerned, went into Court without the accounts, at their risk, and, if the Judge accepted their evidence unsupported by documents, the mere fact that the documents were not produced is no reason for now holding that their evidence is not to be accepted. That is the only ground upon which that part of the consideration for the bond of November 2, 1917, was attacked. It has been proved that the lender satisfied himself by a *bona fide* enquiry that the debts existed and therefore of the existence of legal necessity. The judgment, therefore, of the learned Subordinate Judge with regard to legal necessity seems to me to be one which cannot be attacked. The reasons advanced by the learned Advocate on behalf of the respondents do not justify a finding that the learned Judge was erroneous in the conclusion at which he arrived. That disposes of the two main questions in the appeal.

There remains only the question of interest which was the subject-matter of the plaintiffs' appeal. It was contended by the plaintiffs (as I have already stated) that as separation had taken place, only the interests of the persons who actually executed the three bonds with regard to their own shares were charged by the mortgage decree and that neither the question of legal necessity as regards the loan itself nor the question of interest arose. The learned Judge in the Court below was not asked to decide that question. In my judgment it is not necessary to decide the contention in this case for the reason that at the time the mortgage was entered into on their own showing the plaintiffs were members of the joint family; and, as they were contracting with regard to the joint family property, it was necessary to show in order to validate the transaction that the joint family necessity for raising the money at the rate of the bond existed. I have already referred to the decision of the Judicial Committee in *Nazir Begum* v. *Rai Raghunath Singh* (1) which establishes clearly the proposition that it was necessary for the lender to prove that it was not unreasonable to borrow money at the rate of interest reserved by the mortgage bond. The passage of Lord Phillimore's opinion is to this effect:

"It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it would not be unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate and those terms cannot stand".

The same proposition is to be found in the case of *Ram Bujhawan Prasad Singh* v. *Nathuram* (2). Whether in these cases their Lordships of the Privy Council intended to modify in any sense the principle enunciated in *Hanuman Prasad Panday* v. *Babooee Munraj Koonwerri* (3) seems to be open to doubt. The statement to which I have referred in *Nazir Begum's case* (1) was

"It is incumbent upon those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms."

In *Hanuman Prasad's case* (3) it was stated that the existence of legal necessity was not a condition precedent to the validity of the charge and that a mere *bona fide* enquiry as regards the matter would be sufficient. Whether their Lordships intended by the later cases to hold that in the case of interest it is necessary for the lender to prove that the necessity existed, that is to say, apart from a *bona fide* enquiry, is doubtful; but for the reasons which appear the matter does not arise.

In disposing of the matter in this case the learned Judge has dealt with it on two grounds: first of all he has considered the case made by the plaintiffs which was to the effect that the parties agreed to pay the high rate of interest. He characterizes the evidence in this respect as conflicting

(3) 6 M I A 393; 18 W R 81 *n*; 2 Suther 29; 1 Sar 552.

and appears to come to the conclusion that no such agreement was arrived at but that the lender instructed the scribe who drew up the bonds to state the rate of interest at 21 per cent. per annum. Then the learned Judge finds that there was no proof of necessity. The plaintiffs in order to establish necessity had relied upon several mortgage bonds entered into by the parties. They were bonds dated July 2, 1914, September 12, 1914, October 28, 1914, September 5, 1915 and September 8, 1915. The learned Judge is inaccurate to some extent in saying that these were all of later dates, because it will be seen that the latest of the three bonds in suit was of 1917. The bonds relied upon by the plaintiffs would, however, be some indication at any rate of the rates upon which the defendants were borrowing money, although as the learned Judge points out, not necessarily evidence of the actual necessity to borrow at that rate. In any event the plaintiffs have not been able to establish the necessity of borrowing at the rate reserved in the bonds nor do the appellants very curiously contend that they have. In my judgment, therefore, the plaintiffs' appeal fails as regards the proof of necessity for the members of the family to borrow at this rate.

The only question that remains is the rate at which they were entitled to recover under the bonds. The learned Judge using his own experience with regard to the matter has come to the conclusion that the proper rate in the circumstances would be at 12 per cent. per annum simple interest—a view with which this Court concurs.

In my judgment, therefore, both the appeal and the cross-appeal fail and both of which must be dismissed with costs.

Varma, J.—I agree.

D. *Appeal dismissed.*

LAHORE HIGH COURT

Civil Revision Petition No. 776 of 1933

July 6, 1934

TEK CHAND, J.

Musammat PARBATI—PLAINTIFF—PETITIONER

versus

TEK SINGH—DEFENDANT—OPPOSITE PARTY

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 38—Suit "relating to maintenance"—Proceedings under s. 488, Criminal Procedure Code, by wife against husband—Husband agreeing to provide maintenance to wife—Wife bringing suit in Small Cause Court for arrears of maintenance—Maintainability.

Where the parties are husband and wife, and some years ago the latter took proceedings against the former under s. 488, Criminal Procedure Code, and in the course of that litigation an agreement was entered into between them whereby the defendant agreed to pay to the plaintiff maintenance at certain specified rates and the plaintiff brings a suit for arrears of maintenance alleged to be due under the agreement, the suit is one "relating to maintenance" and is clearly excluded from the jurisdiction of the Court of Small Causes by Art 38 of the Second Schedule of the Provincial Small Cause Courts Act. *Dhirta* v. *Nihal Devi* (1) and *Kadiyam Rayudu* v. *Kamarsu Veeraju* (2), relied on.

C. R. P. from the decree of the Small Cause Court Judge, Kangra, dated August 24, 1933.

Mr. *Bhagwat Dayal*, for the Petitioner.

Mr. *Vishnu Datt* for Mr. *Achhru Ram*, for the Opposite Party.

Order.—This suit was wrongly tried by Lala Rala Ram, Senior Subordinate Judge, Dharamsala, under the Small Cause Courts Act. His judgment and decree therefore, are without jurisdiction and should be set aside. The parties are husband and wife, and some years ago the latter took proceedings against the defendant under s. 488, Criminal Procedure Code. In the course of that litigation an agreement was entered into between them whereby the defendant agreed to pay to the plaintiff maintenance at certain specified rates. The plaintiff has now sued for arrears of maintenance alleged to be due under the agreement. The suit is, therefore, one "relating to maintenance" and is clearly excluded from the jurisdiction of the Court of Small Causes by Art. 38.

Mr. Vishnu Datt urges that the suit is based on an agreement and not on the personal law of the parties and, therefore, Art. 38 does not apply. There are, however, numerous authorities which lay down that the article applies "to all suits relating to maintenance whether based on contract, bond, award, decree or personal law." See *Dhirta* v. *Nihal Devi* (1) and *Kadiyam Rayudu* v. *Kamarsu Veeraju* 112 Ind. Cas. 257 (2), and the rulings cited therein. I accept the petition, set aside the judgment and decree of the lower Court and remand the case to the Senior Subordinate Judge for disposal in accordance with the ordinary procedure. He may try the case himself or send it to another Subordinate Judge of competent jurisdiction. Costs shall abide the event.

D. *Petition accepted.*

(1) 123 P R 1889.
(2) 112 Ind. Cas. 257.

PATNA HIGH COURT

Appeal from Appellate Decree No. 624 of 1932

January 18, 1935

WORT, J.

JANGBAHADUR SINGH—PLAINTIFF —APPELLANT

versus

THITHAR SINGH—DEFENDANT —RESPONDENT

Easement—Profit a pendre—*Presumption—Defendant neither tenant nor licensee—Defendant cutting trees - Proprietor's right to price of timber cut—Easements Act (V of 1882)—Applicability in Bihar —Limitation Act (IX of 1908), ss. 2, 26.*

What is known as profit in England is included in India in the term 'easement' in s. 2 of the Limitation Act of 1908.

The Easements Act does not apply to Bihar province, but the law relating to easements which is the law of justice, equity and good conscience in this respect excepting in so far as there is any statute applicable.

There cannot be any presumption in the case of an easement that what was the state of facts twenty or thirty years ago has continued since. The law provides that an easement is established only when it is shown that there has been a continuous enjoyment.

The plaintiff was admittedly the proprietor of the land upon which certain bamboo clumps stood. The defendant admittedly was not the tenant nor was there any relationship between him and the plaintiff. The plaintiff came to the Court with a story that there was an agreement under which the defendant would pay the price of the timber cut, and, the defendant denied that he cut any trees during the years in question. The suit was dismissed on the ground that the defendant was in adverse possession for over twenty years :

Held, (1) that such an agreement, if any, naturally would take the nature of a license;

(2) that there could not be any custom strictly so called to appropriate the trees unless the defendant were a tenant. If there had been anything established in the nature of a custom to appropriate the timber, the defendant not being a tenant, it would not be a custom but would be in the nature of what is known in England as a profit *a pendre*;

(3) that there was an easement, and hence a right to trees was not established by the defendant and the fact that the plaintiff made some sort of admission by saying that he was entitled to take the leaves and branches but not the timber did not assist the defendant.

A. from a decision of the Additional Subordinate Judge of Darbhanga, dated December 14, 1931, against the decision of the Munsif of Samastipur, dated July 11, 1930.

Mr. *Gendhari Prasad Singh*, for the Appellant.

Mr. *Janak Kishore*, for the Respondent.

Judgment—This appeal arises out of an action for price of certain bamboos. The learned Judges in the Courts below dismissed the plaintiff's suit, the appellate Court holding that the defendant had been in possession for over twenty year and, therefore, the action was barred The only point that I have to decide in this case, having regard to what has happened, is whether the matter should be remanded to the Courts below for determination of certain questions upon which the case really depends.

It is necessary to state certain facts from which will be seen the point which is at issue. The plaintiff is admittedly the proprietor of the land upon which these bamboo clumps stand. The defendant admittedly is not the tenant nor is there any relationship between him and the plaintiff. He is not tenant as I say and his case quite clearly was that he was not a licensee; at any rate that is what in substance it amounted to. His case depended entirely upon an allegation that there was a custom by which he had exclusive right in the timber. The plaintiff came to the Court with a story that there was an agreement under which the defendant would pay the price of the timber cut and, in this connection I might say that the claim was for the timber cut in the years 1334, 1335 and 1336. The Courts below, as I have said, have held that the defendant had been in adverse possession for more than twenty years, or to use the exact words in the judgment of the Court below,

"and having been in exclusive possession of the clumps since the publication of Record of Rights, the plaintiffs' title is barred by adverse possession".

It is quite obvious from an analysis of the judgments of the Courts below that neither the learned Judges nor the parties addressed themselves to the real point in the case. There was no question of tenancy. Was there any question of license ? Unless indeed the plaintiffs' story was accepted that the defendant had agreed to pay for the trees which had been cut by him, such an agreement naturally would take the nature of a license. But this story has been disbelieved by the Courts below.

There could not be any custom strictly so called to appropriate the trees unless the defendant were a tenant. If there had been anything established in the nature of a custom to appropriate the timber, the defendant not being a tenant, it would not be, as I have said, a custom but would be in the nature of what is known in England as a profit *a pendre* and in this case, as there was no question of tenancy between the defendant and the

plaintiff or a tenancy of any other land, it would be what is known as a profit *a pendre* in gross. But what is known as profit in England is included in India in the term 'easement' in s. 2 of the Limitation Act of 1908. It would be more accurate for me to state that this particular profit would be included in India in the definition; some of the profits known to the English Law may not be included, but that is a matter which I do not propose to determine. Under s. 2, "Easement includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to, or subsisting upon, the land of another". And this certainly included the right to appropriate the bamboos which by the decision of this Court in *Maharaja Sir Rameshwar Singh Bahadur* v. *Basudev Singh* (1) would be properly described as timber. We have, therefore, by reason of the provisions of s 2 of the Limitation Act and in the circumstances of the case, there being no license and there being no relationship of landlord and tenant, to deal with an easement. The Easements Act does not apply to this province, but the law relating to easements which is the law of justice, equity and good conscience in this respect excepting in so far as there is any statute applicable.

In this connection s. 26 of the Limitation Act must be referred to. Section 26 provides that an easement arises when it has been enjoyed as of right without interruption and for twenty years. The explanation to the section should be mentioned although it does not affect the point in dispute:

"Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant."

We are not concerned here whether there was a discontinuance, but we are concerned here whether there was a continuance in enjoyment for upwards of twenty years. Now the unfortunate part about the matter is, as I have said, that the parties did not address their minds to the point at issue: indeed the defendant came into the witness-box by his witnesses and expressly denied that he had appropriated any trees for the period in suit. What he did before it does not appear; but the learned Judge in the Court below has relied on the Record of Rights for the determination of this point. Twenty years ago or more, this person was described as being in possession, but this statement by itself was not sufficient. He was in possession and I suppose we must assume that his possession consisted of appropriating either the produce of these trees or the actual trees themselves, exactly what, the Record of Rights does not say.

Two points arise: what was the nature of the defendant's possession 20 years ago, and secondly, what has happened since? The plaintiff's case appears to have been that the defendant was entitled to take the leaves and branches but not the actual timber itself. Whether the possession was of that nature, it does not appear.

Now the second point is that, assuming for the moment against the plaintiff that the defendant's possession was of the nature of actully appropriating the bamboos themselves, what has happened since? Now the only light we have got with regard to the matter is from the defendant's own evidence in which he expressly denied having cut the timber. So we are left in the position of not knowing whether the plaintiff's version of the defendant's right over those trees is correct or whether the defendant is actually in possession. There is no evidence on that point but the bare statement in the Record of Rights in favour of defendant's possession. Again to repeat myself, we do not know whether the possession which was then in existence has continued since. There cannot be, it must be remembered, any presumption, in the case of an easement, that what was the state of facts twenty or thirty years ago has continued since. The law provides that an easement is established only when it is shown that there has been a continuous enjoyment; and when it is necessary, as the law lays down, to prove that fact, no presumption can possibly arise. I say and repeat the defendant did not address his mind to this point; and the fact that the plaintiff made some sort of admission by saying that he was entitled to take the leaves and branches but not the timber does not assist the defendant.

To come back to what I said in the commencement of my observations, the question is, am I to allow this case to go

(1) 60 Ind. Cas. 521; 6 P L J 127; 3 P L T 90; A I R 1923 Pat. 95.

back to be reheard with the directions which are suggested, or am I to dispose of the matter as it stands at present? It is quite clear from the evidence which I have perused that the matter could not be determined on that evidence. Ross, J. in *Maharaja Sir Rameshwar Singh Bahadur's case* (1) to which I have referred, laid down a principle which in my judgment applies to this case. The fact that the case which I am quoting may have been under the Bengal Tenancy Act makes no difference to the matter, because the principle laid down is the same. There by what is described as the common law the landlord had a right to the timber and Ross, J. remarked in the decision that because the landlord set up a custom which he had failed to prove, therefore, the defendant tenant was entitled to the whole of the trees. Once it is determined that the landlord is entitled to the timber, the custom which he set up is only a partial admission in favour of the tenant-defendant and the tenant, therefore, is entitled to what that admission allows him and by that admission he is entitled to half the trees. There is no such admission in this case. If there is anything in the nature of admission there is the claim that there was a license. Now in my judgment I do not think that I am entitled to allow the parties to go back and to adduce evidence to fill up the gaps in the evidence already adduced. That being so I must dispose of it on the considerations which I have stated. The plaintiff in this case certainly failed to establish the existence of a contract to pay for the trees; but his statement to that effect was not inconsistent, indeed it was in agreement with the proposition that he was entitled to the trees. The defendant for the reasons best known to himself which are reasonably apparent, asserted that he had not cut any timber within the years in suit. Now the onus to establish the existence of an easement and, therefore, a right to these trees was clearly upon the defendant. Not only did he give no evidence of what has happened between the Record of Rights and the years in suit, the evidence adduced as to the exercise of the rights during the years in suit is insufficient. In the circumstances it seems to me that the only decision that I can arrive at is that the plaintiff should have been allowed to succeed; and the appeal in this Court, therefore, must be allowed with costs. As the parties in the Court below agreed that the figures arrived at by the Commissioner appointed in the case were correct ones, there will be a decree in favour of the plaintiff on those figures.

The appeal is allowed with costs.

A. *Appeal allowed.*

LAHORE HIGH COURT

Civil Miscellaneous Petition No. 459 of 1932

June 22, 1934

ADDISON AND SALE, JJ.

AMAR SINGH—PETITIONER

versus

COMMISSIONER OF INCOME TAX, PUNJAB—OPPOSITE PARTY

Income Tax Act (XI of 1922), ss. 10 (vi) and 66 (3)—Printing press—"Type", whether part of machinery or plant is a question of law.

In the case of a printing press whether "type" is part of the machinery or plant is a question of law. *Corporation of Calcutta* v. *Cossipore Municipality* (1), referred to.

C. Mis. P. from the decision of the Income-tax Commissioner.

Mr. *Kirpa Ram Bajaj*, for the Petitioner.

Messrs. *Asa Ram Aggarwal* and *Jagan Nath Aggarwal*, for the Opposite Party.

Order.—Sardar Amar Singh, proprietor of the Model Electric Press, Lahore, has applied under sub-s. (3), s. 66, Income Tax Act, against a refusal of the Commissioner to state a case. The applicant has been assessed for the year 1929-30 in respect of an electric press housed in a "first class building" in Lahore and the point involved in this application is the amount of depreciation permissible to the applicant under cl. (6), sub-s. (2), s. 10, Income Tax Act. The first question raised is whether the assessee is entitled to claim depreciation on the business premises at 5 per cent. instead of two and a half per cent. on the authority of the first remark in the "column of remarks" of the statement prescribed in the rules for the depreciation of buildings. (see r. 8 of the rules made under s. 10 (2) (6) of the Act). We agree with the Income-tax Commissioner that no question of law here arises. The petitioner claims a higher rate of depreciation on the ground of the alleged severe vibration caused by an electric plant of 440 voltage. It seems that the petitioner produced no evidence before the Income-tax Commissioner to prove the effect of the alleged vibration. The Commissioner has come to a finding of fact that the electric press cannot be held to cause any special deterioration of the building. Under these circumstances, no

question of law arises for our decision. The applicant will be at liberty to re-open this question before the Commissioner in connection with future assessments and support his case by producing expert evidence on the question of the effect of vibration on the building.

The next point raised in this application is the rate of depreciation to be allowed on the furniture under Item No. 2 of the Schedule in r. 8 made under s. 10 (2) (6) of the Act. It is obvious from the Schedule in question that furniture is subject merely to the general rate of 5 per cent. depreciation since furniture is clearly not a part of the machinery. The special rates allowed in the remarks column attached to Item No. 2 apply only to electric machines. If the applicant wishes to secure the advantage of these special rates, he should apply to be assessed on the electric portion of the machinery separately from the furniture. We agree with the Income-tax Commsssioner that on this point, no question of law arises.

The only other question pressed before us is the question whether "type" forms part of the machinery of the press. Clause (*b*) (1) (6), s. (2) of the Act allows depreciation for machinery and plant, and it was urged by the applicant before the Income-tax Commissioner that type is part of the machinery. The Commissioner held that in this respect the petitioner was laying claim to something not provided for by law and that no point of law, therefore, arises.

It is argued before us that "type" is an essential part of the machinery because without the type the machinery of the press would be useless. We are informed that the Income-tax Authorities while not allowing depreciation in respect of the type, do make allowances for replacements; but it is contended that the allowance for replacement is far less than the depreciation permitted by the Act if it be held—as is now pleaded—that "type" is included in the articles in respect of which depreciation is allowed by cl. (6), s. 10. The only authority to which our attention has been directed in this connection is *Corporation of Calcutta* v. *Cossipore Municipality* (1) a Privy Council ruling in which it was held that a large tank erected by the Cossipore Corporation in connection with the Calcutta water supply and intended to increase the supply during the part of the day when the hourly consumption exceeded the capacity of the reservoir was not "machinery." It is clear that this ruling is not on all fours with the present case. It does, however, appear to us that a substantial point of law does arise in, *viz.*, whether in the case of the printing press in suit "type" is part of the machinery or plant. Clause (6) uses both expressions "machinery" and "plant." It may be open to doubt whether type is a part of the machinery but the expression "plant" has obviously a far wider application than the expression "machinery," and, even though type may be held not to be part of the machinery it does appear arguable that it is part of the "plant."

Accordingly we accept this application to the extent of requiring the Commissioner to state a case and refer to this Court a question of law which we would formulate as follows:

"Is the type in use at the Model Electric Press, Lahore, part of the machinery or plant of Press within the meaning of cl. (*vi*), sub-s. (2), 10, Income Tax Act?"

The rate of depreciation would be a matter for the Income-tax Authorities to decide. We make no order as to costs of this application.

D. *Order accordingly.*

(1) 67 Ind. Cas. 926; A I R 1922 P C 27; 48 I A 435; 49 C 190; 15 L W 253; 26 C W N 761 (P C).

PATNA HIGH COURT

Civil Appeal No. 91 of 1933
July 25, 1934
MUHAMMAD NOOR AND LUBY, JJ.
F. A. MCNAUGHT—APPELLANT
versus
Musammat SARASWATI THAKURAIN
—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXII, rr. 12, 3, 4—Execution proceedings—Whether abate on death of decree-holder—Representative, if can get his name substituted and continue execution—Fresh application, if necessary.

An execution proceeding does not abate on the death of the decree-holder and there is no bar to the execution continuing at the instance of his representative The representatives of a deceased decree-holder can get their names substituted during the pendency of an execution proceeding and proceed with it. No fresh application is necessary for this. *Venkatachalam Chetti* v. *Ramaswamy Servai* (2), followed.

C. A. from the order of the Sub-Judge, Purnea, dated February 24, 1933.

Messrs. *Mehdi Imam* and *Asisullah*, for the Appellants.

Mr. *U. N. Banerjee*, for the Respondent.

Muhammad Noor, J.—The simple question involved in this appeal is whether the representatives of a deceased decree-holder can get their names substituted during the pendency of an execution proceeding and proceed with it. It seems that Mr. A. J. Forbes held a decree against the respondent He died, and his estate was administered by his executor, Mr. A. H. Forbes. Mr. A. H. Forbes took out execution of the decree and then died. His executors applied for the substitution of their names in the execution proceedings in place of Mr. A. H. Forbes and wanted to proceed with the execution. There were certain objections raised as to the right of the executors of Mr. A H. Forbes to continue the execution proceedings. That has been decided in favour of the appellants, and there is no cross-objection before us.

The second objection was that there was no provision in the Civil Procedure Code by which a representative of a deceased decree-holder could be substituted in the course of an execution proceeding. This objection prevailed before the learned Subordinate Judge. He relied upon a decision of the Madras High Court in *Palaniappa Chettiar* v. *Valliammal Achi*, (1) and held that the representative of a deceased decree-holder should start fresh execution proceedings. The executors of Mr. A. H. Forbes have preferred this appeal.

It appears that the decision relied upon by the learned Subordinate Judge was expressly over-ruled by a Full Bench of the Madras High Court in *Venkatachalam Chetti* v. *Ramaswamy Servai* (2). The reason for the decision in *Palaniappa Chettiar* v. *Valliammal Achi*, (1) was that the Code made no provision for the substitution of the name of the representative of the decree-holder during the course of execution proceedings, and further that O. XXII, r. 12, clearly took out the provision of rr. 3 and 4, O. XXII, Civil Procedure Code, from the execution proceedings. As has been pointed out by the two learned Judges who composed the Full Bench of the Madras High Court, r. 12 by excluding rr. 3 and 4 does not prohibit the substitution of a name in execution proceedings. It is needless to give in detail the reasonings given by them for holding that substitution is permissible. We respectfully agree with the views expressed by them, and the decision must be followed. The learned Advocate on behalf of the respondent has drawn our attention to two cases: one is a Full Bench decision of the Allahabad High Court in *Baij Nath* v. *Ram Bharos* (3). The observations relied upon by the learned Advocate are to be found at p. 514* of the report; but those observations, in my opinion, are more or less *obiter dicta*. What was decided in the case was that an application for substitution was not a fresh application so as to come within the mischief of s. 48, Civil Procedure Code, but it was an application to continue the pending execution. This case helps the appellants. The learned Advocate has further relied upon the case on *Mirza Muhammad Sadiq Ali Khan* v. *Sajjad Mirza* (4), but that case also, in my opinion, helps the appellants rather than the respondent. There also there was an application for substitution and the Oudh Chief Court held it to be an application to continue the pending execution proceedings. These two decisions were noticed by the Full Bench of the Madras High Court and the learned Judges used them as well as the two decisions of this Court to which I shall presently refer in support of the view that substitution in the course of the execution proceedings was permissible. A similar view seems to have been taken by a Bench of this Court in *Gulab Kuer* v. *Muhammad Zaffar Hussan Khan*, (5) where it was held that where the decree-holder assigned his interest to another, an application by the assignee for substitution of his name in place of that of the assignor was an application under O. XXI, r. 16, Civil Procedure Code, 1908, and not an application under O. XXII, r. 10, and if, at the time of such application, execution proceedings were pending, the application was not a fresh application for execution but merely an application for buringing the assignee on the record and for continuing the pending execution proceedings. This case was followed in *Bhagwantia Kuer* v. *Zamir Ahmad Khan*, (6), where an application for substitution

(1) 99 Ind. Cas. 627; A I R 1927 Mad. 184; 50 M L J 745; (1926) M W N 981; 25 L W 354.

(2) 135 Ind. Cas. 561; A I R 1932 Mad. 73; 55 M L J 34; 34 L W 866; (1931) M W N 1209; 62 M L J 1; Ind. Rul. (1932) Mad. 145 (F B).

(3) 101 Ind. Cas. 116; 49 A 509; A I R 1927 All. 165; 25 A L J 248.

(4) 105 Ind Cas. 611; 3 Luck. 126; A I R 1928 Oudh 30; 4 O W N 1025.

(5) 62 Ind. Cas. 30; A I R 1921 Pat. 180; 6 P L J 358; 2 P L T 619.

(6) 78 Ind. Cas. 766; A I R 1924 Pat. 576; 3 Pat. 596; 5 P L T 451; (1924) Pat. 221; 2 P L R 249.

*Page of 49 A—[*Ed*].

of the name of the representative of a deceased decree-holder filed in the course of the execution proceedings was held to be an application to continue the execution proceedings so as to save the application from becoming barred by limitation.

No doubt, there is no express provision for substitution of the name of a representative of the deceased decree-holder during the pendency of the execution proceedings; but as is apparent from a number of decided cases, such applications are filed and allowed, and the Courts have almost invariably treated such applications to be applications for continuation of the pending execution proceedings. It has been held more than once that the Code is not exhaustive. It is clear from O. XXII, r. 12, read with rr. 3 and 4, that an execution proceeding does not abate on the death of the decree-holder. If so, there is no bar to the execution continuing at the instance of his representative. I see no reason why a fresh application should be necessary. I am therefore of opinion that in view of the decisions of this Court and of the Full Bench decision of the Madras High Court, the view taken by the learned Subordinate Judge is wrong. His order is set aside. He is directed to substitute the names of the appellants, and then proceed to execute the decree according to law. The appeal is allowed with costs.

Luby, J.—I agree.

N. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Revision Application No. 172 of 1934

November 29, 1934

FERRERS, J. C. AND HAVELIWALLA, A. J. C.

ADAM ALI AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY

Public Gambling Act (III of 1867), s. 7—Private room, rented by members of one caste and containing paraphernalia of club, whether prima facie *gaming house.*

A private room containing all the paraphernalia of a club and rented by members of only one caste is not *prima facie* a common gaming house within the meaning of the Act. *Tayabali Mahomedali* v. *Emperor* (1) and *Pabaumi* v. *Emperor* (2), relied on.

Mr. *P. S. Shahani*, for the Applicants.

Mr. *C. M. Lobo*, for the Crown.

Judgment.—On March 4, 1934, an informant, Nazir Beg, was placed by the Police before Mr. Punthakey, who is a First Class Magistrate. Nazir Beg made oath and said that on March 2 he had gambled in a certain house and lost five rupees, and that the accused, Adamali had taken "*nal*." Nazir Beg went to the same house on the following day, and this time he was not allowed to play. The learned Magistrate was satisfied that there were good grounds for suspicion, and he accordingly issued a warrant under s. 6, Bombay Act, IV of 1887. Unsuccessful attempts were made to execute this warrant, but on March 20, a Sub-Inspector acting on the information of Nazir Beg raided the house and found nine of the accused seated in a circle playing cards, while accused No. 10 was lying on a cot nearby. The Sub-Inspector also seized three rupees which were lying on the ground in the centre of the circle.

The learned Magistrate considered that from the above facts a presumption arose under s. 7, Gambling Act, that the house was used as a common gaming house, that it was in the occupation of accused No. 1 and that the accused were there for the purpose of gaming. He has accordingly found Adamali, accused No. 1, guilty of an offence punishable under s. 4 and sentenced him to pay a fine of Rs. 15. He has also found the whole of the accused including Adamali guilty of the offence punishable under s. 5, Gambling Act, and sentenced each of them to pay Rs. 5 or Rs. 10.

The learned Advocate who has argued this revision application before us has dealt with a variety of points, which, for the purposes of this application, it will not be necessary for us to discuss and decide. We proceed upon one ground only: The learned Public Prosecutor does not attempt to uphold this conviction. He concedes that even if it be allowed that the warrant was good and the presumption raised under s. 7 was properly drawn, nevertheless the conviction cannot be sustained. The reason is that the presumption in question is in force only "until the contrary is made to appear."

Now, in our opinion, in the present case, the record does with reasonable certainty make the contrary to appear. The applicants are all of the same caste. They are all Boras, and there is some reason to suppose that the reason why Nazir Beg, when he went to the house, was not allowed to play may have been

that he himself is not the member of the same caste. The Magistrate himself visited what he calls the gambling den, and he found that there were in it all the paraphernalia of a club. Against this, there is nothing but the sworn information given by Nazir Beg. But Nazir Beg is himself an avowed gambler, and as such an accomplice. His evidence is, therefore, tainted. We have more than once disposed of cases arising out of the Gambling Act, upon grounds similar to those upon which we think that we should deal with the present case. When a few members of the same caste assemble and meet together in a house containing all the paraphernalia of a club, we shall be in haste to suppose, that even if they indulged in a game of cards, and even if there was a certain amount of money at stake upon the issue of the game, these young men should be convicted of a criminal offence.

We have not attempted to go into any of the questions concerning the validity of the warrant, and the consequent presumption on which the Magistrate has proceeded. We dispose of this case simply upon the ground that a private room containing all the paraphernalia of a club and rented by members of only one caste does not *prima facie* appear to be a common gaming house within the meaning of the Act. Cases which have been disposed of on the like ground will be found in *Tayabali Mahomedali* v. *Emperor* (1), and *Pabumal* v. *Emperor* (2). We, therefore, grant this application and order that the conviction of Adamali, Fida Hussain and Tayabali be reversed, and the fine, if paid, be refunded.

D. *Application granted.*

(1) 3 Ind. Cas. 894; 3 S L R 80; 10 Cr. L J 407.
(2) 142 Ind. Cas 522; A I R 1933 Sind 42; (1933) Cr. Cas. 188; 34 Cr. L J 356. 27 S L R 32; Ind. Rul. (1933) Sind 102; 34 Cr. L J 356.

PATNA HIGH COURT

Appeal from Appellate Decree No. 1490 of 1930

January 4, 1935

AGARWALA AND ROWLAND, JJ.

RAMDHANI SAHU AND OTHERS—DEFENDANTS—APPELLANTS

versus

Thakur PITAMBAR SINGH—PLAINTIFF—RESPONDENT

Transfer of Property Act (IV of 1882), s. 60, proviso—Mortgage—Subsequent lease by mortgagor to mortgagee—If a clog on the equity of redemption.

A permanent lease by a mortgagor to a mortgagee is not always void as being a clog on the equity of redemption. On the contrary the proviso to s. 60 of the Transfer of Property Act contemplates that the equity of redemption may be extinguished, without limiting the method of extinguishing it by sale of the equity of redemption to the mortgagee. *Parashram Yeshwantshet* v. *Lakshmibai Babaji* (1), *Ram Narain Pattack* v. *Surath Nath Bandopadhya* (2), *Subrao Mangeshaya* v *Mangappa Chetti* (3), *Mahomed Musa* v *Jijibhai Bhagwan* (6) and *Bhimrao Nagojirao* v. *Sakharam Sahaji* (7), distinguished.

A. from a decision of the Judicial Commissioner of Chota Nagpur, dated May 22, 1930, modifying that of the Subordinate Judge, Ranchi, dated May 18, 1928.

Messrs. *B C. De*, *Syed Mehdi Imam* and *K. K Banerji*, for the Appellant.

Messrs. *B. N. Mitter*, *K. N. Maitra*, and *P. R. Das*, for the Respondent.

Agarwala, J.—This appeal arises out of a suit for redemption in the following circumstances. In 1886, 20 *kats* of *majhias* land in village Jamudag were given in usufructuary mortgage by the mother of Thakur Dubraj Singh to Achhaibar for three years, to secure an advance of Rs. 800. On attaining majority, Thakur Dubraj Singh gave a *zarpeshgi* of the same land, plus 13 *kats* of land in village Dirsir, to Achhaibar, in April 1889. The *zarpeshgi* was for a period of five years and the consideration was Rs. 466-3 0 The mortgagor was unable to put the mortgagee in possession of the lands in Dirsir. In the following year, that is to say, in June 1890, Dubraj granted a permanent *raiyati* lease of the same 20 *kats* of *majhias* land of Jamudag and also of 2 *kats* of *don* land and 15 *kats* of *tanr* land to the sons of Achhaibar in consideration of a *salami* of Rs. 300. The lessees are the defendants-appellants in the present suit. Two days after the grant of this lease Dubraj Singh executed a *zarpeshgi* of all the lands covered by the lease in favour of Achhaibar. A manager of the mortgagor's estate was appointed under the Chota Nagpur Encumbered Estates Act in 1897. The estate was released in 1923. In the meantime Achhaibar was recorded as mortgagee in the Record of Rights in 1903 and his sons were recorded as *raiyats*. Dubraj died in 1909 and was succeeded by his son Pitambar, the present plaintiff. In 1917 the manager re-paid all the sum due on the three mortgages of 1886, 1889 and 1890, and thereafter recovered from the defendants the rent due under the lease. In the present suit, which was instituted on February 21, 1927, Pitambar sought to redeem the

three mortgages and also prayed for an account. In the plaint it was alleged that the lease of June 1890 was void by reason of its having been obtained by the exercise of undue influence on the part of Achhaibar and his sons. It was further alleged that the lease was never acted upon; that there was no consideration for it and that in any event it was void as being a clog on the equity of redemption. The findings of fact are that the lease was genuine and for consideration and was acted upon; but the Court below has granted the plaintiff a decree on the ground that the lease was a clog on the plaintiff's right to redeem. In view of the findings arrived at by the Court of fact, the only question for determination is whether in the circumstances the lease is void as being a clog on the equity of redemption.

It is contended on behalf of the defendants-appellants that the lease was a transaction entirely separate from the mortgage; and that it was a transaction of which the mortgagor has had the fullest advantage, and that it was in no way unfair to him. On behalf of the plaintiff-respondent reliance has been placed upon the decision of Baker, J. in *Parshram Yeshwantshet* v. *Laxmibai Babaji* (1), in which it was held that a permanent lease by a mortgagor to a mortgagee is void. That case went in appeal to a Division Bench which upheld the judgment of Baker, J. apparently on the ground that the lease was void on the ground of failure of consideration and of unfairness. The findings of fact in that case, therefore, differ from the findings in the present case. The Court below has also relied upon a decision of this Court in *Ram Narain Pathak* v. *Surath Nath Bandopadhya* (2), in which the question was raised as to whether a lease by the mortgagor in favour of the mortgagee was binding on the former. It was held by Dawson Miller, C. J., that if the lease in question was a lease *in futuro* it was void altogether, and if it was a lease *in presenti* it was void as being a clog on the equity of redemption. It is to be observed that in that case the equity of redemption had been sold to a third party; and that in fact rent under the lease had never been paid, so it would appear that the lease was not acted upon. Das, J. a member of the Bench who decided that case, guarded himself against expressing an opinion that a lease by a mortgagor to a mortgagee is necessarily void. He pointed out that although a mortgagee may take a release of the equity of redemption from the mortgagor, he may not take from him an interest such as a long lease at any ordinary fixed rent, by the grant of which the value of the estate is materially lessened, and the mortgagor is hindered from redeeming while at the same time remaining liable to a suit for foreclosure or for recovery of the debt. The latter eventuality does not arise in the present instance for the debt was repaid in 1917. The decision in *Ram Narain Pathak* v. *Surath Nath Pandapadhya* (2), follows that in *Subrao Mangeshaya* v. *Manjappa Chetti* (3), which was also a case in which rent had never been paid by the lessee. That case was based on two Irish cases *Webb* v. *Rorke* (4), and *Hickes* v. *Cooke* (5). In both of these cases relief was granted to the mortgagor not on the ground that the lease granted was a clog on the equity of redemption, but on the ground that the transaction was unfair and unconscionable. The decision in *Mahomed Musa* v. *Jijibhai Bhagwan* (6), which was cited also in the judgment of the Court below is distinguishable from the present case inasmuch as in that case the lease was contained in the mortgage deed itself. Similarly, in the case of *Bhimrao Nagojirao* v. *Sakharam Sabaji* (7), it was held that a lease executed contemporaneously with a mortgage constituted one transaction and, therefore, the lease was a clog on the equity of redemption. In Halsbury's Laws of England, Volume 21, page 144, para. 276, it is stated that a lease by a mortgagor to a mortgagee for a long period at an inadequate rent will not be upheld by the Courts, but an ordinary occupation lease at a fair rent is not objectionable. In the present case the question of the adequacy of the rent was never raised by the plaintiff and, as has already been stated, the manager of the plaintiff's estate realised from the defendants rent at the rate stipulated for in the lease from 1903 until the estate

(1) 115 Ind. Cas. 405; 53 B 300; 31 Bom. L R 229; A I R 1929 Bom. 186.
(2) 57 Ind. Cas. 337; 5 P L J 423; 1 P L T 575; (1920) Pat. 351.
(3) 16 B 705.
(4) (1806) 9 R R 122; 2 Sch. & Lef. 661.
(5) (1816) 16 R R 1; 4 Dow. 16; 3 E R 1074.
(6) 9 B 524.
(7) 64 Ind. Cas. 612; 46 B 409, 23 Bom. L R 126; A I R 1922 Bom. 277.

was released in 1923. Before 1908, of course, the rent was payable to Achhaibar, the mortgagee, and not to the plaintiff's estate. The findings of fact arrived at on the issues raised by the plaintiff negative the suggestion that there was anything unfair or unconscionable in the transactions between the mortgagor and the mortgagee. The authorities cited do not establish that a permanent lease by a mortgagor to a mortgagee is always void as being a clog on the equity of redemption. On the contrary the proviso to s. 60 of the Transfer of Property Act contemplates that the equity of redemption may be extinguished, without limiting the method of extinguishing it by sale of the equity of redemption to the mortgagee. Viewing the transaction between the parties as a whole, it does not appear to me that in the circumstances of the present case the lease and mortgage can be held to form one transaction. At the time of the original mortgage in 1886 it is clear that it was not in contemplation of the parties that the transaction should be followed by a lease. It was only after the mortgagor failed to put the mortgagee in possession of the additional land which was mortgaged in 1889 that he was driven to adopt other means of securing from his creditor an additional advance. It was in consequence of this necessity that the lease of 1890 was executed. It was clearly no part of the original transaction between the parties and, as I have already stated, cannot now, in view of the findings of fact, be challenged on the ground of unfairness or want of consideration. In this view of the matter, it is not necessary to consider the further questions that were raised, namely whether the mortgage had been properly cancelled by the manager under the Chota Nagpur Encumbered Estates Act, or whether the defendants have acquired occupancy rights in the land. In the result I would allow the appeal and set aside the decision of the Court below, and dismiss the paintiff's suit with costs throughout.

Rowland, J.—I agree.

D. *Appeal dismissed.*

LAHORE HIGH COURT

Letters Patent Appeal No. 20 of 1934
January 14, 1935.
MONROE AND CURRIE, JJ.

ACHHRU RAM—ASSIGNEE—DECREE-HOLDER—APPELLANT

versus

FAZAL MOHAMMAD - JUDGMENT-DEBTOR AND ANOTHER—ASSIGNOR—RESPONDENTS

Decree—Assignment of—Validity of assignment at issue—Judgment-debtor having no interest in it—Judgment-debtor, whether bound by it—Execution—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 16.

Where the issue on the validity of the assignment of a decree decided by the executing Court was an issue solely between the decree-holder and his assignee:

Held, that the decree-holder was bound by the decision and he could not appeal against it.

[Case-law referred to.]

Achhru Ram v. *Fazal Mohammad*, 154 Ind. Cas. 730, **reversed.**

L. P. A. from the judgment of Mr. Justice Hilton, dated January 3, 1934, in Civil Appeal No. 531 of 1933 reported as 154 Ind. Cas. 730, affirming that of the District Judge, Hoshiarpur, dated December 21, 1932, who reversed that of the Subordinate Judge, Fourth Class, Hoshiarpur, dated June 23, 1932.

Mr. *Shamair Chand*, for the Appellant.

Dr. *Shuja-ud-Din*, for the Respondents.

Monroe, J.—On April 14, 1925, Umar Din, defendant No. 1, obtained a simple money decree against Fazal Mohammad defendant No. 2, which he sold to the appellant who applied for its execution. Fazal Mohammad objected that the decree had not been assigned in writing in accordance with the provisions of O. XXI, r. 16, and an issue on this point was decided by the Executing Court in favour of Umar Din, Umar Din having appeared and supported the assignment. The document produced by the appellant bore a stamp of one anna only and at the hearing the appellant was required to stamp it as an assignment; the view of the learned trial Judge was that the document was an assignment of the decree. The judgment-debtor appealed to the District Judge who held that there was no written assignment, the document being only a receipt and that the decree could not be executed. On second appeal to this Court, Mr. Justice Hilton, affirmed the decision of the District Judge, but gave leave to appeal under the Letters Patent. Two points were argued before us, the first, whether the document was a receipt or an assignment, the second whether any appeal lay from the judgment of the Executing Court. In my opinion, the reference in the document to an oral sale is decisive

of the first question and the document did not operate to transfer the decree: it recorded that a transfer had taken place orally, in order to show why money had been paid and received: it was not, therefore, an assignment in writing.

The second question turns on the interpretation of s. 47 of the Code of Civil Procedure, which provides in sub-s. (1) that all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree, and not by a separate suit, and further in sub-s. (3) that where a question arises whether any person is or is not a representative of a party, such question shall for the purposes of this section be determined by the Court. It is contended that no appeal lay in the present case at the instance of the judgment-debtor; the dispute must, so far as sub-s. (1) is concerned, be between the original decree-holder and the judgment-debtor or between the assignee of the decree and the judgment-debtor and must relate to the execution, discharge or satisfaction of the decree. The question now at issue is one under sub-s. (3). Such questions arise between a decree-holder and a person claiming to be assignee or between rival assignees. In the resulting decision, the judgment-debtor has no interest. He is entitled by the decision to get a discharge from the person entitled to the decree: but which of two rival claimants is so entitled does not seem to me to concern the judgment-debtor at all.

This view is supported by the fact that by an alteration in the rule applicable O. XXI, r. 16 (made after the date of the application in this case) the words requiring notice to the judgment-debtor of an application under the rule have been deleted. As the rule now stands, the judgment-debtor does not even get any notice of the application, so that he may have an opportunity of objecting to the transfer: the alteration shows that the rule-making authority took the view that the judgment-debtor was not entitled to raise objections to the validity of the transfer. Counsel for the respondent in urging that an appeal lay to the District Judge and that the judgment in his favour should be upheld has relied on several cases. In *Badri Narain* v. *Jai Kishen Das* (1) the transferee of a decree applied for execution and it was held that the execution of the decree was barred: an appeal to a single Judge of the High Court was dismissed by him on the ground that there was no order, by which the transferee had been recognised and against this decision a further appeal under the Letters Patent was taken, and it was decided that the dismissal of the application for execution as barred by limitation was not justified by law or in fact. This decision has no application to the present case. In *Krishnama Chariar* v. *Appasami Mudaliar* (2), the dispute was between a trustee who had been plaintiff and obtained a decree in a suit and his successors-in-office as trustee, who applied for execution as transferees: execution was allowed and *ex*-trustee appealed. The case is entirely different from the present case. In *Krishnan Chetty* v. *Avudayammal*, 98 Ind. Cas. 433 (3), a Madras case, *Krishnama Chariar* v. *Appasami Mudaliar* (2) was followed without discussion. In *Harditta* v. *Nigahiamal*, 79 Ind. Cas 546 (4), a decision of this Court in second appeal, the order under appeal was one dismissing an application for execution; it was held that such an order affected the rights of the decree-holder against the judgment-debtor and was within s. 47 and appealable: the dispute again was between the decree-holder and a transferee and is not in point. In *Mohini Mohan Mozumdar* v. *Surendra Chandra Dev*, 32 Ind. Cas. 524 (5), the contest was between the purchaser of a decree who sought execution and a judgment-creditor of the decree-holder who had attached the decree: the appeal was by the assignee of the decree-holder to whom the right to execute had been refused. In *Ganga Das Seel* v. *Yakub Ali Dobeshi* (6), the appeal about which the question arose was again at the instance of an assignee to whom execution had been refused.

It will be observed that in none of the cases cited has it been held that an appeal lies at the suit of the judgment-debtor when the issue is one of the validity of an assignment. The only case, which at all bears on the point at issue cited by the learned Counsel for the assignee, was *Krishnaswami Naidu* v. *Karuppan Chettiar*, 109 Ind. Cas. 563 (7), in which it was held

(1) 16 A 483; A W N 1894, 184.

(2) 25 M 545; 12 M L J 280.
(3) 98 Ind. Cas. 783; 24 L W 600.
(4) 79 Ind. Cas. 546; 4 Lah. L J 259; A I R 1922 Lah. 396.
(5) 32 Ind. Cas. 524.
(6) 27 C 670.
(7) 109 Ind. Cas. 563; 27 L W 538; A I R 1928 Mad. 478; 54 M L J 663; 51 M 681.

(*inter alia*) that a decree could be validly assigned without writing and that where there had been an irregularity connected with a latter transfer in writing, which was executed for the purpose of completing the transaction, there was no reason why the judgment-debtor should be allowed to raise an objection. The present case is not governed by the last mentioned authority, the facts in which differ materially: and the value of the decision for the present purposes rests on the point that the learned Judges expressed the opinion that when the validity of an assignment was at issue, the judgment-debtor was not necessarily an interested party. In the present case, the issue on the validity of the assignment decided by the learned trial Judge was an issue solely between the decree-holder and his assignee. It was the duty of the Judge to see that the rules had been observed and being satisfied that they had been to give effect to the transfer: the decree-holder was bound by the decision and the judgment-debtor was entitled to get on payment a good discharge from his liability under the decree.

In my opinion, the learned District Judge ought to have refused to entertain the appeal of the judgment-debtor on the ground that he had no interest in the issue decided, and I would set aside his judgment and that of Mr. Justice Hilton* and restore that of the trial Judge and give the appellant his costs in all the Courts.

Currie, J.– I agree.

D.

*See *Achhru Ram* v. *Fazal Mohammad*, 154 Ind. Cas. 730; A I R 1934 Lah. 328 (2).—[*Ed.*]

PATNA HIGH COURT

Civil Revision Petition No. 479 of 1934

February 12, 1935

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

Raja Bahadur HARIHAR PRASAD NARAIN SINGH—PLAINTIFF AND DECREE-HOLDER—PETITIONER

versus

Maharaj Kumar GOPAL SARAN NARAIN SINGH AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 2, O. XXIII, r. 3, O. XXXIV, rr. 4, 5—High Court's power of interference—Limits of—"Decree of any kind" in O. XXI, r. 2—Meaning of—Mortgage suit—Compromise—Preliminary decree—Application for making final decree—Proceedings, whether proceedings in suit or execution—Maxim—Expressio unius est exclusio alterius—*Applicability of.*

Per Courtney-Terrell, C. J.—The High Court will not interfere in revision with a decision on the merits even if the lower Court should err both in law and in fact, provided always that such subordinate Court had jurisdiction to entertain the dispute between the parties. But if the Court had no jurisdiction whatever to entertain the matter, the High Court must listen to the contention and if it finds that the lower Court has made a mistake as to the extent of its jurisdiction, it may then interfere and this is particularly so when the lower Court, in determining the ambit of its own jurisdiction, construes a legislative enactment. *Yad Ram* v. *Sundar Singh* (1), commented upon? [p. 978, col. 2]

The words "of any kind" in para. (1) to O XXI, r. 2, Civil Procedure Code, were introduced in the Code of 1908 in order to get over conflicts between various High Courts on the question of whether or not the mere word "decree" as it orignally stood referred only to decrees for the payment of money. The words "decree" of any kind" mean a decree of any kind capable of execution. It does not include a preliminary decree? [p 980, col. 1]

Order XXXIV, Civil Procedure Code has no application to a compromise decree and the application to make a decree absolute is not a proceeding in execution and O. XXI, r. 3, does not prevent the Court from recognizing an uncertified payment or adjustment made out of Court? [p. 981, col. 1.]

[Case-law discussed.]

Per *Dhavle, J.*—An erroneous decision on a question of law or fact after jurisdiction has been once legally assumed would not be a ground for interference, but if the decision is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers it at once comes within the purview of the s. 115, Civil Procedure Code and the petitioner should be heard as the objections on the ground of another remedy being open to him are not objections *in limine*? [p. 982, col. 2.]

[Case-law discussed.]

Proceedings for obtaining a final decree are proceedings in the suit and not proceedings in execution? [p 983, col. 1.]

There had been some conflict of judicial opinion before 1908 on the question whether proceedings for obtaining the order absolute for sale were proceedings in the suit or proceedings in execution, and the amendments of 1908 made it clear beyond dispute that they are proceedings in the suit itself. There is thus even less reason now than before for holding that O. XXI, r. 2 (3) bars the recognition of uncertified payments in proceedings for obtaining a final decree under O. XXXIV, r. 5? [p 984, col. 2.]

There is nothing in O. XXIII, r 3 to make it inapplicable to a suit after the preliminary decree and before the final decree Even if the contrary were to be held there is no doubt that in proceeding upon a preliminary decree which is based on a compromise and therefore does not come within O. XXXIV of the Code, the Court will have inherent jurisdiction to take into account payments and satisfaction after that decree before passing the final decree? [p 986, col 1.]

[Case-law discussed.]

The doctrine *expressio unius est exclusio alterius* does not affect cases in which the express provision appears, upon the true construction of the contract, to have been super-added for the benefit of the mortgagor and to have been inserted for the purpose of adding to, and not qualifying, the provision which the law implies for his benefit. *Manga Sahu* v. *Bhattoo Singh* (6), referred to. [p. 986, col. 2.]

Where the decree on the basis of which the petitioner moves the Court for passing a final decree

for sale of the mortgaged property is based on a compromise, which expressly calls it a preliminary mortgage decree and provides that it is not to be made final until a specified date, such a decree does not come under O. XXXIV, r. 4, Civil Procedure Code, and therefore O. XXXIV, r. 5 does not apply to the case and the proceedings for obtaining the final decree in the matter are proceedings in the suit and not in execution.

C. R. P. from an order of the Subordinate Judge, First Court, Patna, dated July 24, 1934.

Messrs. *P. R. Das, P. C. Manuk, A. T. Sen, G. N. Mukharji, S. N. Roy* and *L. K. Jha*, for the Petitioner.

Sir *Tej Bahadur Sapru*, Sir *Sultan Ahmed*, and Messrs. *Syed Hasan, Syed Ali Khan, H. R. Kazimi, S. N. Bose, D. L. Nandkeolyar*, and *Shah Rasidullah*, for the Opposite Party.

Courtney-Terrell, C. J.—The facts which have given rise to this petition in civil revision are, in so far as they are material to our decision, as follows:—

The Maharajadhiraj of Darbhanga (hereinafter called the Maharajadhiraj) was a creditor of *Maharaj Kumar* Gopal Saran Narayan Singh of Tikari (hereinafter called Tikari as that form was throughout used in the course of argument) for a sum of money amounting to 34 lakhs of rupees secured by a certain mortgage deed. He brought a mortgage suit No. 25 of 1921 against Tikari as defendant 1st party and a number of other persons whose names it is not necessary to mention as defendants 2nd party, Saiyida Khatun, the wife of Tikari (hereinafter called the Kumar Rani) as defendant No. 13 and others.

A compromise was executed on February 3, 1923. The terms of the compromise were that there should be a preliminary mortgage decree for 34 lakhs of rupees which Tikari might pay off by instalments. If at any time the arrears of instalments due should exceed five lakhs, the Maharajadhiraj might apply for a final decree for sale; but if the provided instalments were maintained, the Maharajadhiraj was not to make an application for a final decree until March 1935. The terms of the compromise contemplated that Tikari might sell the equity of redemption of the mortgage and apply the purchase-money to the payment of the mortgage debt.

On April 12, 1926, Tikari conveyed the equity of redemption in the Jehanabad Circle which was part of the mortgaged property, to the Kumar Rani, defendant No. 13 in the mortgage suit, and the Kumar Rani covenanted to pay 28 lakhs to the Maharajadhiraj so as to discharge the mortgage debt to that etxent. On March 29, 1930, Tikari conveyed the bulk of the estate to the Rani, the wife of the Raja of Amawan. The consideration for this conveyance was that the Rani should pay off certain debts of Tikari amounting in all to 10 lakhs and including 3 lakhs and 63 thousand odd, the balance of the mortgage debt to the Maharajadhiraj. She also covenanted to pay to Tikari an annuity.

As a result of these transactions, Tikari still remained under his liability to Darbhanga but the Kumar Rani and the Rani of Amawan had covenanted with Tikari to discharge his liability to the Maharajadhiraj.

On April 27, 1930, the Kumar Rani surrendered the Jehanabad Circle which had been conveyed to her by Tikari to the Rani of Amawan. It will be remembered that the Kumar Rani was a defendant in the mortgage suit, and the Rani covenanted to indemnify the Kumar Rani in respect of any liability under which the Kumar Rani might lie by reason of the mortgage decree.

In the year 1931, there were transactions between the Maharajadhiraj on the one side and the Raja of Amawan and the Rani of Amawan on the other. They were as follows:—

On June 15, 1931, the money still due to the Maharajadhiraj on the agreement of compromise was Rs. 33,84,936. The Maharajadhiraj assigned the benefit of his rights under the preliminary decree to the Raja of Amawan. As a term of the assignment Amawan paid Rs. 1,54,936 in cash and gave to the Maharajadhiraj a *zurpeshgi thika* lease of Amawan property for 17 years in order to satisfy the amount of the indebtedness under the compromise out of the profits of the estate during that period. At the same time and by the same deed the mortgage debt was reduced by Rs. 2,30,000.

On August 15, 1931, the Maharajadhiraj entered into an arrangement with the Rani by which he assigned the *zurpeshgi thika* lease granted to him by Amawan to the Rani and the Rani in exchange gave him a lease of her own property.

In November of 1933, the following steps were taken in the mortgage suit. On the 7th, Amawan applied to have the decree which had been assigned to him made final. On the 8th, that is to say simultaneously, Tikari applied for an order

to record full satisfaction of the decree and on December 1, the Kumar Rani made a similar application.

The contention on behalf of Tikari and his wife was that as an assignee of the benefits of the preliminary decree, Amawan was really a mere *farzidar* for his wife, the Rani, and that by reason of the transactions between Tikari and the Kumar Rani with the Rani of Amawan she had undertaken with them to satisfy the mortgage decree and that she had in fact done so by paying through her husband Amawan the sum of Rs. 1,54,936 and by giving him a *thika zurpeshgi* of her own properties and that the *thika* lease which Amawan had granted to the Maharajadhiraj in part satisfaction of the decree subsequently exchanged by the Maharajadhiraj for a *thika* lease of the Rani of Amawan's properties was a mere subterfuge to cover the substantial transaction which was in fact the lease by the Rani of her own properties in satisfaction of the said preliminary decree, and that the reduction in the amount of the mortgage debt was for the benefit of the Rani. They contend that Amawan merely obtained an assignment of a decree which had already been satisfied, so that nothing remained to be assigned. The Raja of Amawan, on the other hand, contended that the applications by Tikari and his wife to record satisfaction of the preliminary decree were out of time and barred by limitation, and he urged by petition that before the Court should enter into questions of fact, the question of limitation and the question of the maintainability of the applications by Tikari and his wife should be decided as a preliminary point. The Subordinate Judge accordingly heard arguments on these matters. He decided that the applications were not barred by limitation and were maintainable under O. XXIII r. 3 of the Civil Procedure Code, and also decided that at a convenient time he would investigate the allegations of fact. From this decision the Raja of Amawan comes to this Court.

It is conceded on his behalf that if the Subordinate Judge was at liberty under O. XXIII r. 3 to entertain the applications, the allegations of fact by the opposite party must be investigated. But it is contended (*a*) that the applications cannot be entertained under that Order and (*b*) that the applications could only be entertained under O. XXI, r. 2, and in that case they are barred by limitation. It is further suggested that in the exercise of our discretion we should interfere to prevent the investigation of fact which it is said will involve an immense inquiry and the evidence of over a thousand witnesses, and that considerations of general convenience should induce us to place the opposite party in the position that they must appeal to the highest tribunal on the property of our decision before such an inquiry should be allowed to proceed.

It is contended on behalf of the opposite party (*a*) that the Subordinate Judge has decided upon the extent of his jurisdiction by examination of the Orders of the Civil Procedure Code and that, whether his decision upon the extent of that jurisdiction be right or wrong, this Court has no jurisdiction to interfere by way of revision; this is urged as a preliminary point; (*b*) that the decision of the Subordinate Judge was right upon the merits, that the applications are entertainable by him under O. XXIII, r. 3, that in any case they are not governed by O. XXI, r. 2; and (*c*) that even if they are governed by XXI, r. 2, the Subordinate Judge is not precluded from hearing them, the prohibition contained in clause (3) of that rule applies only to a Court acting in execution, the applications are not in execution proceedings and are not barred by limitation.

We were given the benefit of a lengthy argument in support of the contention of the opposite party that we had no jurisdiction under s. 115 of the Code of Civil Procedure to entertain the petition of the Raja of Amawan; but in my opinion this must fail. It amounts to a contention that a Subordinate Court is the sole and final Judge of the ambit of its own jurisdiction. It is certainly true that the High Court will not interfere in revision with a decision on the merits even if the lower Court should err both in law and in fact provided always that such subordinate Court had jurisdiction to entertain the dispute between the parties. But if it be contended, as in this case, that the Court had no jurisdiction whatever to entertain the matter, this Court must listen to the contention and if it should find that the lower Court has made a mistake as to the extent of its jurisdiction, it may then interfere and this is particularly so when the lower Court, in determining the ambit of its own jurisdiction, construes a legislative enactment.

We were referred to two cases as showing that the Courts of Allahabad and of Patna

have taken differing views upon this matter. An examination of the cases, however, does not, to my mind, disclose any such difference, although it may be the case, as Sir Tej Bahadur has informed us, that in practice applications in revision are less easily pressed in Allahabad than in this Court.

The case of *Yad Ram* v. *Sundar Singh* (1), came before a Full Bench and a question arose as to the construction of O. XXI, r. 89 of the Code of Civil Procedure. The Allahabad Court took a view of the construction which differed from that adopted by this Court and by the Court of Madras. It is true that Banerji, J., who presided, seemed to be of opinion that the Subordinate Judge had adopted a certain construction (which in fact was in accordance with prior decisions of the Allahabad High Court) and said that whether or not that decision was right, it could not be interfered with in revision. Piggott, J. however, held that the Subordinate Judge, having taken a view which was in accordance with reported decision of the High Court to which he was subordinate, could not be said to have acted illegally or with material irregularity whether or not the view of the High Court which was followed was right or not. Walsh, J. was of opinion that the earlier decisions of the High Court with regard to the construction of the rule were erroneous and he agreed with the construction adopted by thePatna and Madras Courts. I am of opinion that Banerji, J. went too far in his expression of opinion. Had he confined himself to the view expressed by Piggott, J., I would respectfully have agreed with the decision in so far as it relates to the exercise of power in revision, notwithstanding that I would support the view of the Patna and Madras Courts on the construction of the particular enactment then under discussion. The case is of little, if any, assistance. Save in so far as the expression of opinion by Banerji, J. is concerned, the decision of the Court does not conflict with the opinion expressed by Mullick, J. in *Dhanwanti Kuer* v. *Sheo Shankar Lall* (2).

"An erroneous decision on a question of law or fact, after jurisdiction has once been legally assumed, would not be a ground for interference under s. 115 of the Code of Civil Procedure, but if the decision is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers, it at once comes within the purview of the section. The judgment of their Lordships of the Privy Council in *Balkrishna Udayar* v. *Basudeva Ayer* (3), is, in my opinion, authority for this view."

Indeed learned Counsel for the opposite party was constrained to admit that if a particular jurisdiction originates in some special law or enactment, the High Court can always interfere in the sense that it can construe the law and in accordance with that construction compel the lower Court to exercise such jurisdiction or to refrain from exercising the jurisdiction if not warranted by the law or enactment in question.

In this case it is contended on behalf of the petitioner that the Subordinate Judge did not possess the jurisdiction which he purported to exercise, and although it is admitted that if the jurisdiction was properly exercised, this Court could not interfere in revision with the decision arrived at, whether right or wrong.

I, therefore, now approach the merits of that contention. The argument of the petitioner may be put thus. It is contended that on the allegation of the opposite party the satisfaction of the Maharajadhiraja's decree could not be entertained in the preparation of the final decree because it had not been recorded as provided by O. XXI, r. 2. Further that considered as an application to record satisfaction of the decree it was out of time under Art. 174 of the Limitation Act. Mr. Das on behalf of the petitioner conceded that if the proceedings were not governed by O. XXI, then O. XXIII, r. 3 would apply as the Subordinate Judge has held and that his petition for revision must fail.

The real merits of this petition are, therefore, reduced to a very simple point which I am of opinion presents no difficulty. Notwithstanding the authority in what is known as *Piran Bibi's case* [*Piran Bibi* v. *Jitendra Mohan Mukherjee*] (4) to which I will refer later, it will be noted that O. XXI deals with "execution of decrees and orders." Rule 2 of O. XXI, is as follows:—

"2. (1) Whether any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court

(1) 74 Ind. Cas. 778; 45 A 425; 21 A L J 313; A I R 1923 All. 392.

(2) 51 Ind. Cas. 873; 4 P L J 340; (1921) Pat. 364.

(3) 40 Ind. Cas. 650; 22 C W N 50; 15 A L J 645; 2 P L W 101; 33 M L J 69; 26 C L J 143; 19 Bom. L R 715; (1917) M W N 628; 40 M 793; 6 L W 501; 11 Bur. L T 48; 44 I A 261 (P C).

(4) 40 Ind. Cas 845; 25 C L J 553; 21 C W N 920.

whose duty it is to execute the decree and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree."

The words "of any kind" in paragraph (1) were introduced in the amendment Code of 1908 in order to get over conflicts between various High Courts on the question of whether or not the mere word 'decree' as it originally stood referred only to decrees for the payment of money.

It has been argued that the word 'decree' having reference to the definition in s. 2 of the Code includes 'preliminary decrees'. In my opinion, this view is not sound. The Code, in O. XXI, is dealing with execution and the words "decree of any kind" mean, in my opinion, in this connection a decree of any kind capable of execution. This view is supported by the qualifying words "the Court whose duty it is to execute the decree". There can hardly be a duty to execute a decree which is not executable. Furthermore throughout the Order the persons in the earlier stages of the proceedings referred to as plaintiff and defendant (see *e. g.*, O. XXXIV, rr. 4 and 5 and Form 6, Appendix D) are at this stage referred to as decree-holder and judgment-debtor, respectively. It has long been held that proceedings to obtain a final decree are not proceedings in execution. But lastly sub-r. (3) forbids recognition of unrecorded payments by "any Court executing the decree". It is important to notice the history of this sub-rule the Codes of 1859 (s. 206) and 1877 (s. 258) provide that a payment or adjustment made out of Court should not be recognized by any Court "executing the decree" unless it had been certified to that Court. In 1879, the Code of 1877 was amended and the words "executing the decree" were deleted and this was followed in the Code of 1882. The result was that differences arose between the various High Courts upon the question whether a suit would lie to enforce an uncertified agreement of adjustment of a decree against a judgment-debtor.

It was held in Bombay in *Haji Abdul Rahiman* v. *Khaja Khaki Aruth* (5), that such a suit would not lie which was a manifest injustice. The judgment of the Chief Justice in that case shows that but for the amendment by which the words were deleted he would have held that the prohibition extended only to the Court acting in execution.

Accordingly in the year 1888 the section was again altered by the restoration of the words "executing the decree" and this re-amendment was followed in the present Code. The prohibition, therefore, extends only to the Court which executes the decree.

We were referred to the case of *Piran Bibi* v. *Jitendra Mohan Mukherjee* (4). In that case having obtained a preliminary mortgage decree, the plaintiffs obtained *ex parte* a subsequent absolute decree, no payment having been made. The defendants then got the decree absolute set aside for non-service of notice and the case was restored. The defendants objected that the plaintiffs had amicably received the decretal amount and had granted a receipt and said that the decree absolute could not be passed. The Court held that as the payment had not been certified under the provisions of O. XXI, r. 2, it could not be recognized. The satisfaction relied upon by the defendants in their objection was that the payment relied on had been made more than three years previously. The learned Judge (Fletcher, J.) said—

'It is said that any Court not being an Executing Court can recognize an uncertified payment made out of Court. I am not prepared to agree with that. It seems to me that the whole of the provisions of the law providing a certification either by the decree-holder or by the judgment-debtor within the period within which the certification is to be made would be rendered nugatory if a defendant in a suit, years after, when the evidence would neither be afresh nor perhaps available, is allowed to come forward and say that he has satisfied this preliminary decree out of Court three years ago by paying the money to the plaintiff. It seems to me that it will be opposed both to the terms of the Civil Procedure Code and also to the provisions of the Indian Limitation Act".

This was a case under O. XXXIV, r. 5, and not as in the case before us of a compromise decree. In any case I venture to disagree with the decision on this point and I am unable to follow it.

An attempt was made on behalf of the petitioner to argue that once a preliminary decree has been obtained, the rights of the parties are finally decided and by reason of O. XXXIV, rr. 4 and 5, the preparation of the final decree is a purely ministerial act which follows automatically and should

(5) 11 B. 6.

be considered as a stage of execution. I am unable to agree with this contention and it has no force whatever in the case of a compromise which itself sets forth that a decree absolute is to be made as a preliminary to execution.

Both contentions were dealt with by this Court in *Manga Sahu* v. *Bhattoo Singh* (6), in which it was held that O. XXXIV, had no application to a compromise decree. Further the application to make a decree absolute is not a proceeding in execution and O. XXI, r. 3, does not prevent the Court from recognizing an uncertified payment or adjustment made out of Court. It was argued that Jwala Prasad, J. in that case had approved of the decision in *Piran Bibi's case* (4). I am unable to agree. Such expression of approval as appears on page 677* of the report was of a limited character and did not apply to the proposition in support of which the case was relied upon. The learned Judge said—

"Clause (3) of r. 2, O. XXI, restricts the application of the rule only to the Court executing the decree. Hence payments made out of Court in respect of a mortgage decree can be recognized in a proceeding instituted by the decree-holders for obtaining an order absolute or a final mortgage decree. This is but just and equitable. The decree-holder is not entitled to a final decree for a higher sum than what is actually due to him at the date of making that decree. This necessarily involves an investigation into allegations of payments out of Court on account of the decree".

The agreements between the parties in this case made it clear that the preliminary decree on the compromise should not be executed until a final decree had been obtained. It is true that the agreement provides for payment in various ways but it nowhere specifies that the parties are not at liberty to effect an arrangement by which the decree is to be satisfied in some other manner.

As I have already said, it was conceded by Mr. Das that, if O. XXI, r. 2, has no application, the application is within the jurisdiction of the Subordinate Judge under O. XXIII, r. 3, and in my opinion he was right in making that concession. The word "suit" in that rule is not used in any narrow sense but having regard to the division of the subject-matter in the various Orders and rules the word "suit", if applied to the proceedings from the beginning of the plaint up to the time when an executable decree has been obtained, this sharp division of the proceedings at a point of time is, with different conditions as to proving satisfaction applying to the parties on either side of the dividing line, not only shown by the arrangement of the Code itself but is in accordance with good sense and practical convenience. An executable decree can be sold and passed to other people after a successful plaintiff has left the scene, and it is not unreasonable that the provisions for recording proof of satisfaction should be more severe in the case of a decree than in that stage of the case where the parties are still before the Court.

But there is another aspect of this matter which is, to my mind, most important. The jurisdiction in revision is limited to cases in which there is no appeal or other suitable regular remedy. If the entire case is dealt with by the Subordinate Judge and a decision arrived at after investigating the facts, either party will have an unlimited right of appeal. Moreover, it is the case of the petitioner that a great number of witnesses will have to be called if the question of fact is to be decided. We were informed that the petitioner proposes to call over a thousand of such witnesses. Whether this is his genuine intention, and if so, whether he will be allowed to do so are matters which do not arise at present; but in any case it is surely better that such evidence shall be heard while it is still available. If we were to accede to the petition, the opposite party would be obliged either to submit to execution of the mortgage decree against them or to appeal to His Majesty in Council. In the latter case if our view should be held to be erroneous, the inquiry will have to be conducted some years hence when the many witnesses said to be necessary will either have died or have forgotten the matters in controversy. Considerations of convenience are in any case in favour of holding the inquiry at an early date.

I would, therefore, dismiss this petition with costs. One set of costs only will be paid to opposite parties Nos. 1 and 8 and we fix the hearing fee at a hundred and twenty gold *mohurs*.

Dhavle, J.—I agree that this application in revision should be dismissed with costs.

A preliminary objection was taken on behalf of the opposite party that as the lower Court is obviously the only Court to which applications relating to the mortgage suit can be made and as, further, the lower Court must have power to deal with the applications made on behalf of the opposite party under O. XXI, r. 2, if not

(6) 57 Ind. Cas. 473; 5 P L J 672; 1 P L T 416.

*Page of 5 P. L. J.—[*Ed.*]

(as the lower Court has held) under O. XXIII, r. 3, there was no question of jurisdiction involved so as to enable this Court to entertain the present application under s. 115 of the Civil Procedure Code. But the learned Subordinate Judge has held that he has jurisdiction under O. XXIII, r. 3, to deal with the applications made to him, and this position is still contested by the petitioner in revision. Nor was it conceded below, as has since been done here, that failing O. XXIII, r. 3, the applications would come within O. XXI, r. 2. Assuming, moreover, that the jurisdiction of the lower Court is referable to O. XXI, r. 2, the adjustment and full satisfaction alleged by the opposite party is dated more than 90 days before their applications to the lower Court, and the petitioner before us is *prima facie* entitled to raise the question whether the lower Court had jurisdiction in the circumstances to entertain those applications. The mere fact that the Subordinate Judge has decided that he has jurisdiction under O. XXIII, r. 3 to do so cannot prevent us from examining the jurisdiction, though there can be no interference in revision with conclusions of law or fact, whether right or wrong, in which the question of jurisdiction is not involved. The meaning of the word 'jurisdiction' in s. 115 of the Code of Civil Procedure, has been the subject of much judicial discussion. Questions of jurisdiction do not arise merely on "propriety of forum", as Rankin, J. put it in *C. D. M. Hindley* v. *Joynarain Marwari* (7), for (as the learned Judge further observed in the same case):

"Jurisdiction to try a suit does not mean jurisdiction to do anything whatever by order made in the suit: if it did, an exception for material errors in procedure (strictly so called) will be almost ludicrous."

In *Brij Mohan Thakur* v. *Rai Uma Nath Chowdhury* (8), an order passed by a Court of unquestioned jurisdiction to execute a decree was set aside by the High Court under s. 622 of the Code of Civil Procedure, 1882, and in upholding this decision their Lordships of the Judicial Committee said that the Subordinate Judge had

"declined to exercise a jurisdiction which he had (*viz.*, jurisdiction to confirm the execution sale under s. 312), and exercised one which did not belong to him (*viz.*, jurisdiction to set the sale aside at the instance of the auction-purchaser in circumstances not covered by s. 313), and consequently his judgment was liable to be reviewed by the High Court under the 622nd section of the Code of Civil Procedure"

In *Balakrishna Udayar* v. *Basudeva Aiyar* (3), their Lordships of the Judicial Committee upheld the view of the Madras High Court that the District Court had no jurisdiction to pass certain orders under s. 10 of the Religious Endowments Act, 1863; and this was in a case in which there was no question at all about "propriety of forum." This plainly supports the view taken in *Dhanwanti Kuer* v. *Sheo Shankar Lal* (2), and followed in Madras, that:

"The Court's decision upon the point whether the applicant has the necessary legal character (to file an application under O. XXI, r. (89) is clearly a question involving jurisdiction. An erroneous decision on a question of law or fact after jurisdiction has been once legally assumed would not be a ground for interference, but if the decision is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers, it at once comes within the purview of the section."

The view of Banerji, J. in the Full Bench case of *Yad Ram* v. *Sundar Singh* (1), that in similar circumstances the lower Court had jurisdiction, rightly or wrongly, to decide the question whether a party was entitled to apply under O. XXI, r. 89, and that, therefore, it was not open to the High Court to interfere with it in revision, was not shared by Piggott and Walsh, JJ., who with Banerji, J. decided that case. I am, therefore, unable to see any sufficient reason in that Full Bench decision to doubt the correctness of the view taken in this Court. The preliminary objection must, therefore, be overruled.

It was also urged on behalf of the opposite party that revisional interference is discretionary and is not as a rule exercised where the petitioner has another remedy open to him (such as a regular appeal from the final decree that may be passed in the case), unless irreparable injury is threatened. But these considerations cannot be urged as objections *in limine*, and *prima facie* the enquiry that the lower Court has decided to make at the instance of the opposite party would be an intolerable waste of time and money (unless of course it is made with jurisdiction), since they propose, so we are informed, to call no less than 150 witnesses in support of their allegations of *farzi* and fraud, to say nothing of the fact that the number proposed by the petitioner exceeds 1000.

It is thus plainly necessary that the petitioner should be heard on the question of jurisdiction.

It was contended on behalf of the petitioner that the only provisions under which adjustments of suits and decrees can be dealt with by the Courts are to be found

(7) 54 Ind. Cas. 439; 46 C 962; 24 C W N 288.
(8) 20C 8.

in O. XXIII, r. 3 and O. XXI, r. 2 of the Code of Civil Procedure, that the former of these provisions does not apply to the case, and that the lower Court would have had no authority to deal with the matter under O. XXI, r. 2 either, by reason of the failure of the opposite party to apply within 90 days of the alleged adjustment.

Before dealing with these contentions and the cases cited in support, it is desirable to observe that the decree on the basis of which the petitioner moved the lower Court to pass a final decree for sale of the mortgaged property is based on a compromise, which expressly calls it a preliminary mortgage decree and provides that it is not to be made final until a specified date over 12 years later, unless interest (to be paid annually on January 31), and compound interest be in arrear to the extent of 5 lacs or more, in which case the mortgagee is to be entitled to get a final decree for the entire amount of principal, interest and compound interest and to realize it by the sale of the mortgage properties. Payment was to be in sums of not less than Rs. 10,000, at a time. The compromise also gives the mortgagor liberty to sell or grant a permanent *mukarrari* of any of the mortgaged properties and pay the entire sale proceeds to the decree-holder, subject to certain restrictions as regards the price, and to the further restrictions that in such cases the mortgagee is to have the first refusal. It also provides that all payments of interest or principal will be made by deposit in the Imperial Bank, Patna Branch, or in such other Bank as may be agreed upon by both parties in writing, to the credit of the plaintiff.

The law is clear and there is also no dispute that such a decree does not come under O. XXXIV, r. 4, and that accordingly O. XXXIV, r. 5, is not applicable to the case.

It is also settled law that proceedings for obtaining a final decree are proceedings in the suit and not proceedings in execution.

It has accordingly been held in some cases (such as *Durga Dev* v. *Nand Lal*, 136 Ind. Cas. 732 (9), that the provisions of O. XXI, r. 2, have no application to payments and adjustments between the preliminary and the final decrees in mortgage suits, the stage reached in the present case. This is contested on behalf of the petitioner on the wording of the rule. The opening words are: "Where any money payable under a decree of any kind is paid out of Court," and the petitioner points out that money may well be paid in accordance with a preliminary decree, and urges that money so paid is "money payable under a decree."

The rule goes on to provide for certification to "the Court whose duty it is to execute the decree," and it is contended on these words that the Court referred to need not be a Court which is actually engaged in executing the decree, for the expression merely indicates the forum (as given in s. 38) without requiring that the stage of execution should have reached. It seems to me that the contention is not without force. It is true that O. XXI deals with the Execution of Decrees and Orders, but the first two rules are headed "Payment under decree," and the next seven "Courts executing Decrees," before we come to a group of 16 rules under the heading "Application for Execution". The first rule provides three different modes of paying money payable under a decree, and one of these modes is payment "Out of Court to the decree-holder", which may obviously be done by the judgment-debtor before the decree-holder takes out execution and incurs costs only to charge them to the judgment-debtor himself. If such payments are made by the judgment-debtor and certified by the decree-holder under r. 1 or recorded as certified at the instance of the judgment-debtor under r. 2, this would effectively stop execution. It is true that even after a preliminary decree under O. XXXIV, r. 4, the parties are referred to in the next rule as plaintiff and defendant, while O. XXIII, r. 2, speaks of decree-holder and judgment-debtor, but the definitions of these terms in s. 2 of the Code do not restrict them to executable decrees. It may therefore be conceded that the payments dealt with in O. XXI, rr. 1 and 2 need not be due under an executable decree, and that money may be "payable" within the meaning of these rules, even under preliminary decrees in cases where the final decree alone makes execution possible. The petitioner's contention that the expression "the Court whose duty it is to execute the decree" merely indicates the Court to which certification is to be made and does not imply executable decrees is supported by *Sambasiva Aiyar* v. *Thirumalai Ramanujathathachariar* 54 Ind. Cas. 137 (10). On the words of O. XXI r. 2, (1) and (2) it may thus well be that the mortgagor is entitled to apply under cl. (2) and get his payments recorded. In the present

(9) 136 Ind. Cas. 732; 33 P L R 138; A I R 1932 Lah. 231; Ind. Rul. (1932) Lah. 268.

(10) 54 Ind. Cas. 137; 37 M L J 356.

case it is now too late to make any such application, to say nothing of the fact that the opposite party do not claim to have brought about the adjustment and full statisfaction alleged by any dealings of theirs with the mortgagee. But does it follow that the rule prevents the opposite party from urging the adjustment as a bar to the passing of the final decree? Clause 3 definitely provides that a payment or adjustment, which has not been certified or recorded as provided in the first two clauses shall not be recognized by "any Court executing the decree", an expression definitely implying actual execution. The lower Court which has been asked to pass the final decree is, however, not "a Court executing the decree" and on the wording of the clause it is difficult to see how it can be read as standing in the way of the opposite party when they seek to show that no final decree ought to be passed because the mortgagee has been paid off in fact and his transferee, the petitioner before us, has taken nothing by the assignment of the claim under the preliminary decree. It has, however, been urged that the contrary has been held in several cases, beginning with *Piran Bibi* v. *Jotindra Mohan Mukerjee* (4). That was a case in which the mortgagors set up against the passing of the final decree a plea that they had paid the amount awarded by the preliminary decree out of Court to the plaintiffs more than three years previously. The trial Court accepted the plea, but the Court of first appeal held that the payment could not be recognized because it had not been certified under O. XXI, r. 2. This was upheld in second appeal on the ground (as I read the decision) that O. XXXIV, r. 5, which applied to the case, leaves the Court no discretion except to follow the statutory form of the decree when no payment has been made into Court as mentioned in the rule. Fletcher, J., who gave the judgment of the Court, went on to observe that:

"the only other matter that there can be is that the Court may hold that the suit has been adjusted under O. XXI, r. 2"

and as to this he declined to accept the mortgagor's contention that it is only by the executing Court that an uncertified payment made out of Court can be recognized. The reason was that the learned Judge regarded the contention as opposed both to the terms of the Civil Procedure Code and also to the provisions of the Indian Limitation Act. It may perhaps be doubted whether he really intended to hold that O. XXI, r. 2 had any application in such cases, or whether he did not merely mean that if the appellants before him were to receive the benefit of payments made otherwise than in strict conformity with the terms of O. XXXIV, r. 5, they could only be permitted to do so by proving compliance with O. XXI, r. 2 as a whole. He refers to reasons given in a judgment of his own in another case, but these are not available to us. The learned Judge makes no reference to the previous decisions of the Calcutta High Court in which it was held even under the law as it stood before the amendments of the Civil Procedure Code and the Transfer of Property Act in 1908 that proceedings for obtaining an order absolute for sale were not proceedings in execution, and that payments in accordance with a decree under s. 88 of the Transfer of Property Act (often called the decree *nisi*), though not certified under s. 258 of the Code of Civil Procedure, could be taken into consideration in such proceedings—see the cases referred to in *Hatem Ali Khundkar* v. *Abdul Gafur Khan* (11) and also *Hiranmoy Biswas* v. *Musa Khan* (12) though in this latter case the point actually decided arose after the order absolute. There had been some conflict of judicial opinion before 1908 on the question whether proceedings for obtaining the order absolute for sale were proceedings in the suit or proceedings in execution, and the amendments of 1908 made it clear beyond dispute that they are proceedings in the suit itself. There is thus even less reason now than before for holding that O. XXI, r. 2 (3) bars the recognition of uncertified payments in proceedings for obtaining a final decree under O. XXXIV, r. 5. This was pointed out in *Mangar Sahu* v. *Bhatoo Singh* (6), a case which actually related to a preliminary mortgage decree based on consent allowing instalments and thus not coming under O. XXXIV, r. 5. The point arose rather more directly in *Ramji Lal* v. *Karan Singh* (13), where it was held that limitation for applying for a final decree in pursuance of a preliminary mortgage decree awarding instalments runs not under Art. 182 but under Art. 181 of the Limitation Act "from the time when default was made" in the payment of the instalments fixed. This necessarily implies the recognition of instalments previously paid even if they should not be certified under O. XXI, r. 2 (3). The references to *Piran Bibi's case* (4)

(11) 8 C W N 103.
(12) 7 Ind Cas. 625; 16 C L J 169
(13) 40 Ind. Cas. 424; 39 A 532; 15 A L J 448.

in *Singa Raja* v. *Pethu Raja* (14) and *Rasan Chettiar* v. *Rangaya Chettiar*, 120 Ind. Cas. 72 (15) support the view that I am inclined to take of that decision; and in any event it is not in point in the present case where we are dealing with a preliminary decree not coming within O. XXXIV, r. 4. Another case cited before us is *Ahmad Rahman* v. *A. L. A. R. Chettiar Firm* (16), where the preliminary decree was based on consent. That, however, was a case not of any payments under or satisfaction of the preliminary decree, such as we have in the case before us, but of an agreement to extend the time given by the preliminary decree, which (as the learned Judges pointed out) could not be regarded as an adjustment of the suit within the meaning of O. XXIII, r. 3. It seems to me that even if O. XXXIV, r. 5 had applied to the case before us, O. XXI, r. 2 (3) would have had no application, and that as laid down in *Mangar Sahu's case* (6) the adjustment and satisfaction alleged by the opposite party must be taken into account before passing the final decree, notwithstanding any expressions in the first two clauses of O. XXI, r. 2, which may not unreasonably be regarded as applicable to such a case. That the preliminary decree does not require payment into Court does not affect the inapplicability of cl. 3 of O. XXI, r. 2 to the present proceedings for a final decree.

An attempt was made in the concluding stages of the arguments to show that the satisfaction of the preliminary decree was a matter for the executing Court only in view of the terms of s. 47 (1) of the Code of Civil Procedure. But once it is conceded that proceedings for obtaining a final decree are not proceedings in execution, the provision referred to becomes irrelevant at the present stage, for it speaks of the Court executing the decree and thus can only be invoked after a decree capable of execution has been passed.

The petitioner's contention that O. XXIII, r. 3 has no application is based on the fact that this provision deals with the compromise (or satisfaction) of a suit, in accordance with which the Court is required to pass a decree. It is urged that in the present case a decree has already been passed and that adjustment or satisfaction of the decree will not constitute a compromise of the suit. But the preliminary decree did not ever purport to end the suit, and though it is possible to imagine adjustments of such a decree which are not adjustments of the suit (such as the agreement for extension of time in the Rangoon case of *Ahmed Rahman* v. *A. L. A. R. Chettiar Firm* (16), already referred to), it does not by any means follow that such payments and satisfaction as we have to deal with in the present case do not go to end the suit itself. The decree before us expressly contemplates a final decree for the complete disposal of the suit, and in that respect differs from such decrees as those in *Abir Paramanik* v. *Jahar Mahmud Mandal* (17), *Hemendra Lal Singh* v. *Fakir Chandra Datta* (18) and *Askari Hasan* v. *Jahanjira Mal* (19) which required no final decrees and could be put into execution without any further application in the suit itself. It is not pretended that in the present suit, execution can be taken out for realizing the debt from the mortgaged property before obtaining a final decree; and this shows pretty clearly that the suit was not really terminated by the preliminary decree. It is only the final decree that will completely dispose of the suit, and there is nothing in the language of O. XXIII, r. 3, against a compromise or other satisfaction on which to base a final decree. The amount, if any, be outstanding, for which the final decree is to be passed will obviously depend not merely on the sum fixed by the preliminary decree together with interest and compound interest, but also on such sums (or satisfaction in other ways) as the mortgagee may have received from the mortgagor or other persons liable to pay the mortgage money. Rule 4 in O. XXIII, provides that nothing in the Order shall apply to any proceedings in execution of a decree or order; and it seems to me that this, taken with the heading of O. XXI, "Execution of Decrees and Orders", indicates clearly enough up to what stage O. XXIII, r. 3, will extend in suits in which a preliminary decree has to be followed by a final decree. Even where there is but one decree in a suit, it has been held with reference to O. XXIII, r. 3, that the term 'suit' has not been used in the Code of Civil Procedure in its narrow sense as being terminated by the decree of the

(14) 48 Ind. Cas. 196; 42 M 61; (1918) M W N 809; 35 M L J 579; 8 L W 497; 24 M L T 501.

(15) 120 Ind. Cas. 72; 30 L W 551; Ind Rul. (1929) Mad 1032; (1929) M W N 867; A I R 1930 Mad. 105.

(16) 110 Ind. Cas. 873; 6 R 285; A I R 1928 Rang. 194.

(17) 34 C 886.

(18) 74 Ind. Cas. 929; 50 C 650; 27 C W N 621; A I R 1923 Cal 626.

(19) 100 Ind. Cas. 59; 49 A 297; 25 A L J 107; A I R 1927 All. 167.

first Court, and that it will include so late a proceeding as a proceeding for setting aside a sale in execution—*Jagadish Missir* v. *Sureshwar Missir* (20), because it is not itself a proceeding in execution. Order XXIII, r. 3, empowers the Court, where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, to order such satisfaction to be recorded, and to pass a decree in accordance therewith. The final decree to be passed in favour of a mortgagee is merely a consequence of the mortgagor's failure to pay the amount fixed by the preliminary decree; and it is plain that to the extent to which the mortgagee has been paid, he cannot have a final decree. It thus seems clear that there is nothing in O. XXIII, r. 3, to make it inapplicable to a suit after the preliminary decree and before the final decree. Even if the contrary were to be held, I entertain no doubt that in proceeding upon a preliminary decree which is based on a compromise and therefore does not come within O. XXXIV of the Code, the Court will have inherent jurisdiction to take payments and satisfaction after that decree into account before passing the final decree. As a matter of fact, there is a decision of this Court—*Jogendra Prasad Narain Singh* v. *Gouri Shankar Prasad Sahu* (21) in which it was held that though O. XXXIV, r. 5, contemplates that all payments upon a preliminary decree should be made into Court, there is nothing in the rule to justify the view that O. XXIII, r. 3, does not apply to adjustments of accounts made between the date of the preliminary decree and the date on which the accounts between the parties are finally settled. The procedure in O. XXXIV, is not exhaustive, and though rr. 4 and 5 involve the deliberate omission of payments out of Court, O. XXIII is not inapplicable to mortgage-suits and r. 3 of this Order is imperative in terms. A different view seems to have been taken in such cases as *Singa Raja* v. *Pethu Raja* (14), *Rasan Chettiar* v. *Rangaya Chettiar*, 120 Ind. Cas. 72 (15) and *Durga Devi* v. *Nand Lal* 136 Ind. Cas. 732 (9) besides *Piran Bibi's case* (4) already dealt with but the point does not directly arise in this case as the decree here does not fall under O. XXXIV, r. 4. There is, moreover, express authority in *Manga Sahu* v. *Bhatoo Singh* (6) which was followed in *Sital Singh* v. *Baijnath Prasad* (22) for holding that there is no bar to the judgment-debtors setting up and proving the payments and adjustment or satisfaction alleged by the opposite party. An attempt has been made to distinguish these cases on the ground that the amendments of 1929 in O. XXXIV make it unnecessary before passing a final decree to determine the amount actually outstanding under the preliminary decree. It is, however, difficult to see any substantial difference between the defendant 'paying into Court the amount declared due.....', as r. 5 before the amendment put it, and 'making payment into Court of all amounts due from him.....' as the rule now has it. It has also been urged that the final decree must be determined by the preliminary decree and that, therefore, no payments or adjustment ought to be taken into account unless they are in accordance with the preliminary decree. The compromise upon which one preliminary decree is based specifies certain modes of payment and adjustment, and it was urged that this excludes other modes—*Expressio unius est exclusio alterius*. But this doctrine does not affect cases in which the express provision appears, upon the true construction of the contract, to have been super-added for the benefit of the mortgagor and to have been inserted for the purpose of adding to, and not qualifying, the provision which the law implies for his benefit: see Broom's Legal Maxims, page 426 and *Mangar Sahu's case* (6). The compromise, moreover, permits such other modes of payment (than by deposit in the Imperial Bank) as may be agreed upon by the parties in writing, and it is thus open to the opposite party to establish payments coming within this provision, agreements being infeasible from acceptance. It also appears from the order of the lower Court that certain sums of money were deposited by the opposite party in Court (if not also in the Allahabad Branch of the Imperial Bank) and withdrawn by the mortgagee; these must obviously be considered before a final decree can be passed. The adjustment and full satisfaction alleged by the opposite party is not, on the face of it, excluded by the compromise, and even if we were to accede to the contention on behalf of the petitioner that accounts are only required to be taken after the passing of the final decree, that does not absolve the Court from the duty of

(20) 62 Ind. Cas. 608; 6 P L J 253; 2 P L T 273.

(21) 40 Ind. Cas. 138; 2 P L J 533.

(22) 75 Ind. Cas. 485; 44 A 668; 20 A L J 602; A I R 1922 All. 383.

investigating the allegation of the opposite party that the entire claim of the mortgagee having been paid off, his assignee, the petitioner before us, has taken nothing under the assignment and there is nothing outstanding for which a final decree can be passed.

It has been urged on behalf of the Rani of Amawan that O. XXIII, r. 3, cannot be taken to contemplate arrangements in satisfaction raising questions of title between third parties and that the opposite party could not be heard under the rule to say that the Maharajadhiraj has been paid off, when the party that now appears in the record as plaintiff is the Raja of Amawan. But these so-called questions of title (*farzi* and fraud) between third parties can be limited to parties entitled to be on the record and actually found on the record, the Rani of Amawan at her own instance as a defendant and the Raja of Amawan on his own application as transferee from the Maharajadhiraj. It is true that it is not the case of the opposite party that the plaintiff on record has been paid off; but that does not prevent them from being heard to say that he is not entitled to obtain a final decree because there was nothing outstanding from the mortgagee's claim for assignment to the petitioner.

The order of the lower Court is, therefore, not without jurisdiction, and there is no reason why the opposite party should be exposed to the risk of loss of valuable evidence which might arise if we were to stop the investigation.

D. *Petition dismissed.*

CALCUTTA HIGH COURT

Civil Appeal No. 215 of 1932

August 22, 1934

NASIM ALI, J.

KRISHNA CHANDRA DAS—

DEFENDANT – APPELLANT

versus

PURNA CHANDRA DAS AND OTHERS—

RESPONDENTS

Co-sharer—Adverse possession—Entry by co-sharer into possession of share of other co-sharer, not as co-tenant but in denial of such right—Possession, if enures for benefit of other co-sharer—Possession of tenant-in common, if adverse to that of his co-tenant—Principle, if applies to person not recognised as co-tenant—Sole possession by one tenant-in-common continuously for a long period—Ouster—Presumption.

Where a co-sharer enters into possession of the share of the other co-sharer not in his right as a co-tenant but in denial of such right of the co-tenant, it cannot be said that his possession would enure for the benefit of the other co-sharers whom he has excluded from the enjoyment of the property. It is true that the principle of possession between the co-owners is that every co-owner is a tenant-in-common and that the possession of a tenant-in-common is not adverse to that of his co-tenants, but a person cannot be a tenant-in-common with a person whom he never recognized as a co-tenant. *Biswa Nath* v. *Rahija Khatun* (1) and *Bhavrao* v. *Rakhmin* (2), relied on.

Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenant-in-common may be presumed. *Chandbhai Mahomadbhai Vohra* v. *Hasanbhai Rahimtolla* (4), referred to.

C. A. from the appellate decree of the Sub-Judge, Murshidabad, dated June 4, 1931.

Messrs. *Satindra Nath Mukherjee, Jnan Chandra Roy* and *Hara Krishna Pramanik*, for the Appellant.

Mr. *Gopendra Nath Das*, for the Respondents.

Judgment.—This appeal arises out of a suit for joint possession of certain lands after declaration of title. The plaintiffs' case, as stated in the plaint is as follows: The disputed lands comprising a *Bastu* and a small tank formerely belonged to the two brothers Kailash Nath Adhikari and Bhairab Nath Adhikari in equal shares. Kailash used to possess exclusively the northern half portion of the *Bastu* land, the southern half portion of the western bank of the tank and the five palm trees on the western bank and another one on the south-western corner. Bhairab used to possess the southern half of *Bastu* land. the northern half of the western bank of the tank and six palm trees to the south of the tank. The tank was in joint possession of both the brothers. Kailash made a gift of his moiety in favour of defendant No. 2 and his brother Ananda Gopal Das by a deed of gift, dated 9th *Saraban* 1289 *B. S.* Ananda left home about 25 years ago relinquishing his interest in favour of defendant No. 2. Defendant No. 2 left the village Singedda in which the disputed lands are situated for Mandunia after the death of his mother entrusting the care of his properties to the sons of Bhairab and was in *Ijmali* possession by enjoying the usufruct of his share of the property. On 3rd *Ashar* 1331 *B. S.* defendant No. 2 sold away his eight annas interest in the disputed lands to plaintiffs Nos. 1 and 2 and the husband of plaintiff No. 3 by a registered *Kobala*. Defendant No. 1 claimed to have purchased the entire

16 annas interest of the suit lands and dispossessed the plaintiffs. There was a proceeding under s. 145, Criminal Procedure Code, in which defendant No. 1 succeeded. On these allegations the plaintiffs brought the present suit for declaration of their title to and for recovery of joint possession of the eight annas share of the disputed lands with defendant No. 1.

The defence of defendant No. 1 is that the disputed lands originally belonged to Kailash and Bhairab in equal shares, that Kailash died without any issue and after his death Bhairab became entitled to this eight annas share by right of inheritance from Kailash and after his death his sons possessed the entire 16 annas share of the suit lands and that defendant No. 1 subsequently purchased the entire 16 annas interest of the said lands from the sons of Bhairab by registered *Kobalas*, the last of which was executed on 23rd *Kartic* 1322 *B. S.* The defence further was that the title of the plaintiffs' vendor and of the plaintiff, if any, was extinguished by adverse possession of Bhairab and his successors-in-interest for more than 12 years. The trial Court on a consideration of the evidence in the case came to the following findings:

(1) That defendant No. 1 was in exclusive possession of the suit lands for about 18 years; (2) that defendant No. 1 planted various trees on the eastern bank of the tank and converted it into a garden: (3) that defendant No. 1 re-excavated the tank: (4) that neither the plaintiffs nor their vendor had ever any possession in any part of the suit lands within 12 years from the date of the institution of the suit: (5) that the title of the plaintiffs' vendor, if any, was extinguished by adverse possession of Bhairab's sons and of defendant No. 1; (6) that neither the plaintiff nor their vendor were ever recognized as co-sharers by defendant No. 1 or Bhairab's sons; (7) that Bhairab's sons or defendant No. 1 did not know even that the plaintiffs' vendor was a co-sharer. On these findings the learned Munsiff dismissed the plaintiffs' suit holding that the title of the plaintiffs' vendor and of the plaintiffs was extinguished by adverse possession. On appeal by the plaintiffs the learned Subordinate Judge has not reversed the above findings of fact arrived at by the trial Court. He has, however, dismissed the plaintiff's claim so far as the *Bastu* portion of the plaint land is concerned. As regards the remaining portion of the disputed land, the lower Appellate Court has decreed the plaintiffs' claim. Hence the present appeal by defendant No. 1.

The only point urged in support of the appeal is that on the findings of fact arrived at by the trial Court which have not been reversed by the lower Appellate Court, the lower Appellate Court should have dismissed the plaintiffs' claim *in toto*. As has been already stated the learned Subordinate Judge who heard the appeal has dismissed the plaintiffs' claim so far as the *Bastu* portion of the disputed land is concerned, on the ground that the plaintiffs' title to that portion of the disputed land was extinguished by adverse possession. As regards the remaining portion of the disputed land, the learned Judge was of opinion that the plaintiffs' vendor being a co-sharer was in constructive possession through the other co-sharers, namely, defendant No. 1 and his vendors. Now as regards the plaintiffs' claim with regard to the western and southern bank and all the trees on those banks, it is very difficult to understand how the learned Judge could distinguish this part of the plaintiffs claim from the claim as regards the *Bastu* portion of the disputed land. The plaintiffs' specific case in the plaint was that so far as these banks and all the palm trees are concerned, the plaintiffs' vendor was in exclusive possession and not in joint possession with defendant No. 1 or his vendors. The learned Judge no doubt has observed that this exclusive possession as stated in para. 2 of the plaint with regard to these banks and the palm trees on those banks has not been proved. But the plaintiffs having failed to prove the specific case they made in the plaint, they cannot fall back upon theory of constructive possession. So far as the tank is concerned, the plaintiffs' case was that their vendor was in joint possession with defendant No. 1 and his vendors. But in my opinion the facts which have been found in the present case go to show that there had been ouster of the plaintiff and his vendor more than 12 years ago and that the plaintiffs' title was extinguished by adverse possession for more than 12 years long before the institution of the suit.

It appears that after the death of Kailash, Bhairab entered into possession of the eight annas share of Kailash in his own right as an heir of Kailash. Bhairab never recognized the plaintiff's vendor or the plaintiff as his co-sharers. In fact he asserted his own right to the remaining eight annas share of the property by inheri-

tance to the exclusion of the persons claiming under gift from Kailash. Bhairab's sons after the death of Bhairab never recognized the title of the plaintiffs' vendor, as their co-sharer. In fact, as the learned Judge has pointed out for the last 30 years the plaintiffs' vendor was never in possession of any portion of the suit land or of any share thereof. The learned Subordinate Judge appears to have relied on a decision of this Court in *Biswa Nath* v. *Rabija Khatun* (1), for the view which he has taken in this matter. In that case Mukerji, J., observed as follows:

"As a general proposition the entry of one co-tenant in the absence of clear proof to the contrary, enures for the benefit of all. The law makes a presumption that the relation between co-tenants is amicable rather than hostile and regards acts of one co-tenant as being in subordination of the title of all the co-tenants, for by so regarding they may be made to promote the interest of all. This rule prevails not merely on behalf of those who are co-tenants when the entry was made, but, extends to all who afterwards acquire undivided interests in the property."

The learned Judge referring to the case of *Bhavrao* v. *Rakhmin* (2), also observed as follows:

"The case of *Bhavrao* v. *Rakhmin* (?), has also little bearing upon this question as it was a case where certain members of a joint Hindu family alienated by sale and mortgage specified plot of land, 'out of their share' giving boundaries of the plots and convenanting for title, and what was really decided was that the purchaser entered as owner and not as a co-sharer and being in such possession for over 12 years was able to defeat under Art. 144 the title of the co-parceners of the vendors or mortgagors."

From these observations it is clear that where a co-sharer enters into possession of the share of the other co-sharer not in his right as a co-tenant but in denial of such right of the co-tenant, it cannot be said that his possession would enure for the benefit of the other co-sharers whom he has excluded from the enjoyment of the property. It is true that the principal of possession between the co-owners is that every co-owner is a tenant-in-common and that the possession of a tenant-in-common is not adverse to that of his co-tenants, but a person cannot be a tenant-in-common with a person whom he never recognized as a co-tenant. So far as Bhairab is concerned, it is clear that when he entered into possession of Kailash's share he repudiated the title of the donees from Kailash as he entered into possession of that share by right of inheritance by setting up his own right of inheritance from Kailash. It does not appear also whether Kailash was even aware of this deed of gift in favour of these donees. It was not disputed before me that in the absence of such a gift Bhairab would be the heir of Kailash. It does not appear also that these donees ever possessed any portion of the disputed land at any time on the basis of the deed of gift or that they asserted their right on the basis of the gift. In these circumstances it cannot be said that Bhairab or his heirs were in possession of Kailash's share as co-sharers, because they never recognized the plaintiffs' vendor as a co-sharer. The sons of Bhairab had no knowledge even of the existence of these donees: see the case of *Mahendra Nath Biswas* v. *Charu Chandra Bose* (3). In this case another peculiar fact is that defendant No. 1 purchased the 16 annas share of the property from the heirs of Bhairab more than 12 years ago. He is in possession of the entire property on the basis of his purchase for more than the statutory period. He is not the transferee of an undivided share. Bhairab's sons transferred the 16 annas share in the property setting up their exclusive possession to the property more than 12 years ago. Defendant No. 1 cannot, therefore, be said to have entered into the possession of the 16 annas share of the property as a co-sharer but in his own right as 16 annas owner of the property by purchase from the heirs of Bhairab who had already set up an exclusive title to this property.

Again

"sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in common is evidence from which an actual ouster of the other tenant-in-common may be presumed: see the case of *Chandbhai Mahomadbhai Vohra* v. *Hasanbhai Rahimtolla* (4)."

Under these circumstances I am of opinion that the learned Munsif was justified from the facts found by him and which have not been reversed by the lower Appellate Court, in coming to the conclusion that the title of the plaintiffs or of his vendor was extinguished by adverse possession. The result, therefore, is that this appeal is allowed and the judgment and decree of the lower Appellate Court are set aside and those of the trial Court restored with costs throughout.

D. *Appeal allowed.*

(1) 117 Ind. Cas. 593; A I R 1929 Cal. 250; 56 C 616; 33 C W N 46.
(2) 23 B 137.
(3) 107 Ind. Cas. 741; A I R 1928 Cal. 396.
(4) 64 Ind. Cas. 205; A I R 1922 Bom. 150; 46 B 213; 23 Bom. L R 1035.

RANGOON HIGH COURT

First Civil Appeal No. 113 of 1934
August 27, 1934
MYA BU, OFFG. C. J. AND BAGULEY, J.
MA E THA AND OTHERS—APPELLANTS
versus
MA THEIN KIN—RESPONDENT

Administration—Letters of administration, to whom granted—Burmese Buddhist Law—Desertion of wife for three years without communication—Divorce, if automatic—Burmese Buddhist wife living—Husband embracing Christianity—Divorce, if automatic—Subsequent marriage with another, if valid.

Letters of administration are to be granted to a person who, according to the law of inheritance is entitled to the whole or part of the property of the deceased.

According to Burmese Buddhist Law the desertion of the wife by the husband for three years during which the latter does not communicate with the wife or send means of subsistence to her would automatically bring about a divorce between the husband and wife after the expiration of that period.

Where a Burmese Buddhist husband changes his religion into Christianity, there is no automatic divorce with his wife with whom he had married as a Burmese Buddhist, so that his subsequent marriage with another woman is invalid.

F. A. against an order of the District Court, Amherst, in C. S. No. 11-A of 1934.

Mr. *Eunoose*, for the Appellants.

Mr. *P. B. Sen*, for the Respondent.

Mya Bu, Offg. C. J.—The order under appeal as it stands cannot be supported. By this order the Additional District Judge of Amherst granted the application of the respondent, Ma Thein Kin, for letters of administration to the estate of the late U Aung Dun, who died on November 15, 1933. U Aung Dun was a Burman retired Police Officer who, until March 4, 1923, was a Buddhist. On March 4, 1923, he became a convert to Christianity. Before his conversion he had a grown-up family by his Burmese Buddhist wife, Ma E. Tha. At the time of his conversion he had seven children by Ma E Tha, the youngest of whom was 19 years of age at the time of U Aung Dun's death.

The basis of the respondent's claim to letters of administration, as stated in her application, is that she is the widow of U Aung Dun, to whom she was married according to Christian rites in November 1930, she herself being a Christian. The application was opposed by the appellants, Ma E Tha and her children on the ground that they were the only heirs of U Aung Dun, deceased. It was alleged by the respondent that U Aung Dun and Ma E Tha had been divorced, but on the evidence and materials on the record this allegation is very clearly controverted.

The question therefore arose, namely, whether U Aung Dun and Ma E Tha had been divorced and whether the alleged marriage between B Aung Dun and the respondent was valid or not. The learned trial Judge refused to decide these questions, and being of the opinion that *prima facie* the respondent was the widow of U Aung Dun, proceeded to grant letters of administration to her. It is common ground that this refusal to decide the questions arising in the case is erroneous, because letters of administration are to be granted to a person who, according to the law of inheritance, is entitled to the whole or part of the property of the deceased and in considering whether the respondent was in law entitled to the whole or part of the deceased's property, it is necessary to consider whether there was a subsisting marriage between Ma E Tha and the respondent at the time of the alleged marriage of U Aung Dun and the respondent, because it cannot be disputed that according to Christian Law of marriage a marrige solomnised during the subsistence of a previous marriage cannot be valid.

A certain amount of evidence was led by both parties, and according to such evidence the only possible conclusion that can become to is that U Aung Dun left Ma E Tha in or about December 1929. At that time U Aung Dun had been a Christian for nearly six years, and consequently the Burmese Buddhist Law of divorce could not operate in his favour. According to Burmese Buddhist law the desertion of the wife by the husband for three years during which the latter would not communicate with the wife or send means of subsistance to her would automatically bring about a divorce between the husband and wife after the expiration of that period. In the present case this rule would not operate on account of the religion of U Aung Dun during the period in question. Besides, U Aung Dun's desertion had not lasted three years at the time of the alleged marriage between U Aung Dun and the respondent, and therefore in any event, there was no possibility of a divorce on account of desertion having taken place between U Aung Dun and Ma E Tha at the time of the alleged marriage of U Aung Dun and the respondent.

That the marriage tie between U Aung Dun and Ma E Tha had not been severed was clearly before the parties when they entered into union in November 1930, because U Aung Dun when he first went

to seek solemnisation of the marriage, Saya Su, a Pastor of Moulmein, the gentleman very rightly pointed out to U Aung Dun that his proposed marriage with the respondent could not be lawfully solemnised, In spite of this advice, U Aung Dun and the respondent sought the good offices of U Po Sin, a Pastor at Kamawet, a good distance away from Moulmein, to whom U Aung Dun gave the formal notice in which he alleged nine years' separation from his Buddhist wife. Apart from the fact that this statement was not tantamount to an allegation of a divorce having taken place between U Aung Dun and this wife, the Pastor knew at the time that he solemnised the marriage that Saya Su had already refused to solemnise that marriage. In spite of this U Po Sin solemnised the marriage and issued a marriage certificate. Needless to say, U Po Sin's action was improper. He not only conducted the ceremony of marriage between two persons who could not be legally married on account of the impediment on one of them, but, also solemnised a marriage which, owing to the subsistence of a valid prior marriage, was obviously void. This action of U Po Sin was highly objectionable, if not criminal, and is certainly unworthy of member of the Christian clergy.

Upon the materials on the record it is therefore obvious that the marriage between U Aung Dun and the respondent was not valid and that Ma E Tha was U Aung Dun's widow at the time of his death. For these reasons the respondent must be held to be in law not a person entitled to either the whole or part of the property of U Aung Dun, and the grant of letters of administration to the respondent was erroneous and must be set aside.

It is pointed out by the respondent's learned Advocate that the wording of the application of the respondent leaves room for the possibility of there being a document left by U Aung Dun under which certain benefits were granted to her, and that if that document amounts to a will she should be granted letters of administration with the will annexed, upon a proper application being filed. Therefore the present judgment, it must be understood, does not deal with that aspect of the case, and if the respondent can hereafter prove the existence of a will in her favour, her rights to letters of administration with probate of the will annexed may be considered because such rights will not depend upon the validity of the marriage upon which she relies in the present proceedings. This appeal is allowed and the respondent's application for letters of administration is dismissed with costs, Advocate's fee in this Court three gold *mohurs*.

Baguley, J.—I agree. I might, however, add a quotation from *Maung Kyaik* v. *Ma Gyi* (1), at p. 494*

"But it is manifest that a man cannot be suffered to put off his status as he puts off his clothes, and to get rid of the consequences of his actions while holding one status by merely professing his preference for another."

Aung Dun had a wife whom he had married as a Burman Buddhist. By changing his religion into Christianity there was no automatic divorce, and while he still had a lawful wife in that way, the fact that he professed the Christian religion prevented him from taking another wife.

D. *Appeal allowed.*

(1) (1897-1901) 2 U B R 488.

*Page of 2 U. B. R.—[*Ed.*]

CALCUTTA HIGH COURT

Civil Appeal No. 465 of 1932

August 21, 1934

MUKERJI, AG. C. J. AND MITTER, J.

KRISHNA CHANDRA BHOUMICK—JUDGMENT-DEBTOR—APPELLANT

versus

PABNA DHANABHANDAR Co., LTD.—DECREE-HOLDER—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 19—Set-off—Executing Court, if can entertain claim to set-off—Decree for costs of trial Court vacated by High Court—Dismissal of appeal to Privy Council—Execution of Privy Council decree for costs—Judgment-debtor, if can set-off costs realized by decree-holder in trial Court—Insolvency—Mutual dealings between creditor and insolvent—Account of what is due should be taken—Set-off—Mutual dealings, whether include claim for unliquidated damages.

An executing Court can entertain a claim to set-off and although a case does not come within the strict terms of O. XXI, r. 19, Civil Procedure Code, the Court can, in the exercise of its inherent power, give effect to such a claim.

Where the High Court vacates a decree for costs passed by the trial Court and the appeal to the Privy Council is dismissed with costs, the judgment-debtor is entitled, in execution of the decree for costs of the Privy Council, to set-off the costs realized before three years by the decree-holder in execution of the trial Court's decree.

Where there are mutual dealings between an insolvent and a creditor, an account has to be taken of what is due from the one to the other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other.

The term 'mutual dealing' has been given by the decisions a very extended meaning. It includes not only the case where a person owes a debt to the insolvent but also where there is a claim for un-

liquidated damages. Damages for breach of covenant can be set off under the said provisions against a claim for rent.

C. A. from the original order of the Sub-Judge, Pabna, dated September 27, 1932.

Messrs. *Atul Chandra Gupta*, *Dinesh Chandra Roy* and *Nagendra Nath Bose*, for the Appellant.

Mr. *Krishna Kamal Maitra*, for the Respondents.

Mitter, J.—This appeal is on behalf of the judgment-debtor whose objection under s. 47, Civil Procedure Code, has been rejected by the learned Subordinate Judge of Pabna. The appellant purchased on June 26, 1924, at a revenue sale, a *zamindary* which belonged to the Pakrasis. The Pabna Dhanabhandar Co., Ltd., which had not then gone into liquidation, had, before the revenue sale, advanced money to the Pakrasis on a mortgage of the said *zamindary*. At the date of the revenue sale and at all material times the position of the respondent company was that of a mortgagee. The appellant paid the whole of the purchase money which remained in deposit in the Pabna Collectorate.

The respondent Company instituted on July 7, 1925, a suit to set aside the revenue sale. To the said suit the appellant was defendant No. 1 and the Pakrasis defendants Nos. 2 to 11. The learned Subordinate Judge decreed the suit with costs against the appellant, which costs was assessed at Rs. 989-11-0. The appellant before us preferred an appeal to this Court which was dismissed on May 23, 1928, subject to the modification that the decree for costs against the appellant was set aside. An appeal was taken to His Majesty in Council by the appellant but it was dismissed and the appellant was directed to pay to the respondent £247-16*s*.-3*d*. as costs. The net result was that the revenue sale was declared invalid, the decree for costs passed against the appellant by the Subordinate Judge was vacated and the appellant was directed to pay £247-16*s*.-3*d*. as cost incurred by the respondent in England in resisting the appeal to His Majesty in Council. Shortly after obtaining the decree from the Subordinate Judge the respondent Company applied for executing the decree for costs passed by the Subordinate Judge. The appellant moved this Court for stay. The material portion of the order passed on February 18, 1927, by this Court on the said application is in these terms:

"The opposite party will be entitled to execute this decree for costs as against the petitioner before us to be recovered out of the money now in deposit in the Collectorate, which the petitioner paid as purchase money for the sele of the property which has not been set aside, the money being now held to the credits of the petitioner."

The respondent company accordingly withdrew on July 12, 1927, from the said deposit a sum of money sufficient to cover their decree for costs, giving security for the due preformance of the decree that may be passed by this Court. The appellant also paid revenue and cess amounting to Rs. 543-5-6 that fell due from the date of his purchase at the revenue sale. The respondent Company has since gone into liquidation. The said Company represented by the Liquidator applied on May 30, 1932, for execution of the decree for costs awarded by His Majesty in Council. The appellant preferred objections under s. 47 of the Code and of the many objections he preferred, only one is now for consideration before us, namely whether he is entitled to claim a deduction of the sum of money recovered on account of the decree for costs awarded by the Subordinate Judge, which decree was ultimately reversed, and of the sum of money paid by him on account of revenue and cess with interest. The Subordinate Judge overruled this claim assigning two reasons for his decision. He held that the appellant ought to have filed an application for restoration as soon as the High Court set aside the decree for costs passed by the Subordinate Judge and his claim was barred by limitation. He further held that the fact that the respondent Company had gone into liquidation had introduced a complication and to allow the claim of the appellant would be to give him a preference.

The appellant has urged before us that both the grounds mentioned by the Subordinate Judge are erroneous. The Advocate for the respondent, besides supporting the reasons of the Subordinate Judge, has urged before us a further ground, namely that the claim of the appellant is in substance a claim to a set-off which, he says, an executing Court cannot entertain. We consider the last point urged by him to be of no substance. If an order for restoration had been passed the executing Court would have been bound to give the appellant credit for the sum of money recovered by the respondent in execution of the Subordinate Judge's decree under O. XXI, r. 18, of the Code. The Legislature has recognized the principle that an Executing Court can entertain a claim to set-off (O. XXI, r. 19), and

although the case before us does not come within the strict terms of O. XXI, r. 19, we are of opinion that on general principles and in the exercise of its inherent power such a Court can give effect to such a claim. We do not also consider that the winding up of the respondent Company has any effect on the claim of the appellant and that if he is otherwise entitled to have credit for the moneys paid by or recovered from him, the fact that the Company has gone into liquidation would not stand in his way.

Long before the making of statutory provisions on the subject it was the practice in bankruptcy where there was debtor and creditor account between the bankrupt and another person to take the account between them and to adjust the balance, provided that the debts were connected with each other: see *Young* v. *Bank of Bengal* (1). The statutory provisions on the subject extended the same rule to cases where the debts were unconnected with each other. This statutory extension is that where there are mutual dealings between an insolvent and a creditor an account has to be taken of what is due from the one to other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other. These provisions are based on manifest justice otherwise the Receiver in insolvency would be able to recover the full amount due to the insolvent leaving the other person to take a *pro rata* dividend only. Section 46, Provincial Insolvency Act, and s. 47, Presidency Towns Insolvency Act deal with this matter in the way indicated above. In *In re Daintry Ex parte Mant* (2), it was argued that the trustee in bankruptcy could recover 20 shillings in the pound from Messrs. Mant and say that Messrs. Mant must be content with a dividend on the debt due to them from the bankrupt, but Lindley, M. R. repelled the contention as unarguable. The term 'mutual dealings' has been given by the decisions a very extended meaning. It includes not only the case where a person owes a debt to the insolvent but also where there is a claim for unliquidated damages. Damages for breach of covenant can be set-off under the said provisions against a claim for rent and in the law reports diverse other cases can be found: see *Mersey Steel & Iron Co., Ltd.* v. *Naylor Benzon & Co.* (3), *Tilley* v. *Bowman, Ltd.*, (4), and *Reference under Presidency Small Cause Courts Act* (5). Section 229, Companies Act, makes these principles applicable to a Company in liquidation. The only exception to these rules is the case of a contributory. A share-holder of a Limited Company, who is also a creditor of the same in the event of the Company being wound-up, is not entitled to set-off the debt due to him against the calls, nor set-off against the calls a dividend which may come to him thereafter: *In re Overrend Gurney & Co. Grissel's case* (6). We are accordingly of opinion that the second ground assigned by the Subordinate Judge for overruling the claim of the appellant cannot be sustained.

The rejection of his claim on the ground of limitation cannot also, in our opinion, be sustained. The ownership of the money in deposit in the Collectorate, from which the respondent withdrew a sum of money to satisfy his decree for costs was not set at rest till the decision of the Judicial Committee. If the sale had been affirmed the surplus would have belonged not to the appellant but to the Pakrasis. If the decree setting aside the sale stood confirmed then and then only the said surplus would have belonged to the appellant and could have been regarded as his money. During the pendency of the appeals or before filing them the appellant could not have withdrawn the same without seriously imperilling his appeals. If after the decree of the High Court he had made the application to get the money back from the respondent, his position would not have been happier. We think that in the circumstances of this case the right to apply accrued to the appellant under Art. 181, Limitation Act, when the Judicial Committee disposed of his appeal. We accordingly hold that the appellant is entitled to set-off against the respondent's claim the sum of Rs. 989-11-0 which the respondent took out of the surplus sale proceeds.

The claim for the sum of money paid by the appellant on account of revenue and cess stands on a different footing. The respondent who was a mortgagee was not under a liability to pay the

(1) 1 M I A 87; 1 Sar. 97; 1 Moo. P C 150.
(2) (1900) 1 Q B 546; 69 L J Q B 207; 7 Manson 107; 82 L T 239.
(3) (1884) 9 A C 434 53 L J Q B 49; 32 W R 989; 51 L T 637.
(4) (1910) 1 K B 745; 79 L J K B 547; 54 S J 342; 17 Manson 97; 102 L T 318.
(5) 28 M 240.
(6) (1866) 1 Ch. A 528; 35 L J Ch. 752; 14 W R 1015; 14 L T 843.

same. The liability is an eventual liability of the Pakrasis. We accordingly modify the order passed by the Subordinate Judge and allow the appellant credit for the aforesaid sum of Rs. 989-11-0 only. The parties to bear their respective costs throughout.

Mukerjee, Ag. C. J.—I entirely agree.

N. *Order modified.*

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Transfer Application No. 225 of 1934

December 12, 1934

RUPCHAND, A. J. C.

GHULAMALI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Two complaints—One against, and other by, accused—Parties same—Complaint of accused dismissed—Whether ground for transfer of complaint against him.

Interest or bias is not to be inferred from the opinions formed on evidence judicially recorded, and a Magistrate is not, therefore, disqualified to try the second case, merely because he has expressed his opinion on the first case tried by him. *Crown* v. *Kamil* (1), *Crown* v. *Methram Dhanibux* (2) and *Walidad* v. *Nizam-ud-din* (3), relied on.

Where two complaints were filed before the same Magistrate, one by the accused and the other against him, in both of which the parties were the same and the complaint filed by the accused was dismissed:

Held, that it was no ground for transfer of the case against him.

Mr. *Chandiram Thanwerdas*, for the Applicant.

Mr. *C. M. Lobo*, for the Crown.

Order.—The facts giving rise to this application for transfer are somewhat as follows; The applicant Ghulamali filed a complaint in the Court of the Resident Magistrate, Hala, stating that he was a carpenter by profession and belonged to an average respectable family, that the accused, Kaisrichand, who was a money lender, had a decree against the father of the applicant Ghulamali for Rs. 200 payable by instalments of Rs. 10 every month; that as Ghulamali wanted to purchase building materials at Karachi, he asked for a loan from Kaisrichand on a pledge of certain ornaments; that Kaisrichand requested Ghulamali to leave the ornaments with him (Kaisrichand) for a day to enable him to get them valued so as to enable him to advance the money asked for; and that on the following day when Ghulamali went for the money, Kaisrichand refused to advance the money and said that he had appropriated the ornaments towards the debt due by the father of Ghulamali. Ghulamali therefore asked that the accused be dealt with under ss. 406 and 420, Penal Code.

Two days later Kaisrichand filed a complaint against Ghulamali for theft alleging that he had sent for Ghulamali to repair a cup-board that during the temporary absence of Kaisrichand, Ghulamali had stolen some of the contents of the cup-board; and that when this was discovered, Ghulamali and his father had taken time to pay a sum of Rs. 500 which was less than the value of the stolen property; but in the meantime Ghulamali had filed a false complaint against him (Kaisrichand) under ss. 406 and 420, Penal Code. The case of Ghulamali against Kaisrichand was proceeded with first, and the learned Magistrate came to the conclusion that it was a false case. The case of Kaisrichand has not yet been proceeded with. But I am told that a preliminary inquiry had been held by the Police under the direction of the Magistrate and that case is now ripe for hearing. Ghulamali has applied for transfer of the case filed by Kaisrichand against him alleging that as the Magistrate has prejudged the present case in dealing with the case filed by him against Kaisrichand, he should not try it. Ground No. 3 of the grounds of transfer reads as follows:

"That the Resident Magistrate has mentioned the facts of this case in his discharge order in the case filed by the applicant and has expressed an opinion therein prejudicial to the applicant."

In *Crown* v. *Kamil* (1), a Bench of this Court has held that interest or bias is not to be inferred from the opinions formed on evidence judicially recorded, and a Magistrate is not therefore disqualified to try the second case, merely because he has expressed his opinion on the first case tried by him. That case was much stronger than the present, because, the two counter-complaints had arisen out of the same transaction, and the Magistrate in dealing with one of the counter-complaints had expressed a decided opinion not on the facts, but as to the credibility of certain witnesses. The above case was referred to with approval in *Crown* v. *Methram Dhanibux* (2), although in that case in consequence of certain other irregularities committed by the trying Magistrate, the order of transfer

(1) 1 S L R 37; 9 Cr. L J 275.
(2) 15 Ind. Cas. 804; 5 S L R 261; 13 Cr. L J 532.

passed by the District Magistrate was not quashed. In *Walidad* v. *Nizam-ud-din* (3), a similar view has been taken and it has been held that the mere fact that the complaint of one party is dismissed and that he is apprehensive of a conviction is by itself no good ground for transfer.

Ghulamali has appeared in person. I have carefully gone through the record to see if there is any sufficient ground for apprehension in the mind of Ghulamali that he would not get justice at the hands of the learned Magistrate. But I can find none. The learned Magistrate has dismissed the complaint of Ghulamali on the merits, holding that his witnesses are false and all that he has said about the present complaint consists of one single line in which the learned Magistrate has said that Ghulamali's complaint is a counter-blast. But that does not mean that the learned Magistrate has prejudged the case of Kaisrichand or that he is not prepared to hold that Kaisrichand's own case is also false. I accordingly dismiss the application for transfer.

D. *Application dismissed.*

(3) 111 Ind. Cas 854; A I R 1929 Lah 48; 29 Cr. L J 934.

LAHORE HIGH COURT

Civil Reference No. 29 of 1932

June 29, 1934

ADDISON AND SALE, JJ.

ASSESSMENT OF INCOME-TAX, L. N. GADODIA & CO., *In the matter of*

Income Tax Act (XI of 1922), s. 10—Assessee carrying on business in piece-goods—Dacoity—Loss of sum—Held no deduction could be allowed.

An assessee carried on business in piece-goods and for that purpose accepted deposits from various people and paid interest on those deposits, the money being used in the business. No money-lending business was carried on. A sum of Rs. 14,440 was lost in cash as a result of dacoity on the assessee's firm by an employee with the assistance of and in collusion with others. The assessee claimed deduction of this amount not under s. 10 (2), Income Tax Act, but under s. 10 (1):

Held, that the loss was a loss of capital and no allowance could be made for it. *Gresham Life Assurance Society* v. *Styles* (1), *Ramaswami Chettiar* v. *Commissioner of Income Tax, Madras* (2), referred to.

C. R. from the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi.

Messrs. *Kishan Dayal* and *Asa Ram Aggarwal* for Mr. *Jagan Nath Aggarwal*, for the Commissioner of Income-tax.

Judgment.—On an application under s. 66 (2). Income Tax Act, a reference was made by the Commissioner of Income-tax to this Court on September 5, 1932, for a decision of the following question of law:

"Whether the sum of Rs. 14,440 lost in cash as a result of dacoity on the assessee's firm by an employee with the assistance of and in collusion with others, is a deduction which can be set off in computing the profits of the firm ?"

This case has a long history. The reference was sent back by this Court with a direction to state specifically the facts on which it was made that is to say, the Commissioner was directed to report whether the facts mentioned in para. 2 of the petition and the affidavit of the assessee were correct and in what respect. The following remarks also occur in the order of this Court:

"It appears that the Commissioner, the Assistant Commissioner and the Income-tax Officer have all proceeded on the assumption that the assessee carried on business of import and sale of piece-goods. The learned Commissioner did not deal with the objections of the assessee to the effect that he did money-lending and banking business as well, and the learned Counsel who has appeared for him before us is not prepared to make a statement as to the correctness or otherwise of the facts mentioned by the assessee in question No. 2 which he had asked the Commissioner to refer to this Court. In our opinion the facts stated in this question are vital for a correct answer to the reference and the Commissioner should have dealt with them in more detail."

The Commissioner of Income-tax has again reported the facts which are as follows: Since the year 1923-24 the assessee's sources of income chargeable to income-tax have never been noted to be more than import and sale of piece-goods, commission agency, interest on securities, dividends and property. There is no suggestion whatever on the record that the assessee was at any time engaged in money-lending business as well. When the assessment for the year 1931-32 was under consideration, the assessee claimed a deduction of Rs. 14,440 on account of loss of cash by a dacoity, the circumstances surrounding which were described by the assessee as follows:

"At 9 P. M. on July 6, 1930, certain persons along with Bishambar Dayal, an employee of the assessee, entered the office where the cashier and the *munim* were counting and totalling the realizations from the business of the day and were engaged in their daily routine work incidental to the business of the assessee. The intruders at the point of their pistols demanded money, currency notes, etc., with the cashier and they were compelled to do so 'From the facts given,' the account continues: 'It is clear that the assessee was deprived of his money as a result of political commotion and the crime was perpetrated by Bishambar Dayal in collusion with and with the assistance of other persons."

The petition of the assessee continues as follows: The above circumstances give rise to the following inferences:

"(a) That the assessee suffered this loss during his usual business hours in business premises. (b) That the employees were engaged in work incidental to the business of the assessee. (c) That the accident occurred on account of some negligence of the cashier and the *munim* and was done through the agency of Bishambar Dayal. (d) That the loss consisted of realizations of the day for the business transacted."

For these reasons, it was claimed that the loss suffered by the assessee was a loss incidental to the business and should be allowed for in computing the income-tax. In the opening lines of this petition, it was stated that the assessee was a firm carrying on business of piece-goods, banking, financing, etc., at Kucha Natwan., Delhi, and other places. On this the Income-tax Officer had noted: "No banking, financing pertains to assessee's own branches." Having considered this memorandum, the Income-tax Officer disallowed the claim, stating that it was not a case of embezzlement or of loss of stock-in-trade, but it was clearly a loss of capital. There was an appeal to the Assistant Commissioner of Income-tax on the following grounds: (1) That the learned Income-tax Officer should have computed the profits and gains of the assessee in accordance with reasonable business methods. (2) That he should have held that the loss of the sum of Rs. 14,440 was a loss of his stock-in-trade. (3) That he should have held that this loss accrued to the assessee through the agency of Bishamber Dayal and on account of neglect on the part of the *munim* and the cashier of the assessee. (4) That he was wrong in holding that the loss was a loss of capital.

There was no allegation that the assessee claimed the loss as a money-lender or banker. The Assistant Commissioner dismissed the appeal and said that the stock-in-trade of the assessee was not cash, but piece-goods and various other articles of Indian manufacture. This was a definite finding of fact which apparently was not disputed by the assessee when he put in his application under s. 66 (2), Income Tax Act, asking the Commissioner to state a case on the questions involved for a decision of this Court. The Commissioner has remarked that at no stage of the proceedings before the Income-tax Authorities did the assessee contend that the loss had occurred in connection with his business as money-lender or banker. The same findings were repeated by the Commissioner in the statement of the case to this Court and it was only when the Commissioner sent his draft statement of the case to the assessee that the latter put in an affidavit alleging that he carried on business in money-lending as well. The Commissioner refused to accept this affidavit as it was fresh evidence and had not been produced before the Income-tax Authorities. He informed the assessee to this effect and forwarded the reference to this Court as it stood. This Court, however, sent back the case for further findings as already indicated. These further findings were directed to be as regards the question whether he carried on the business of a money-lender or banker.

On receipt of the direction of this Court, the Commissioner caused further inquiry to be made by the Income-tax Officer who made a report which is Appendix C. This report is based on an examination of the assessee's account and is to the effect that the assessee does not carry on money-lending business and that cash does not form the assessee's stock-in-trade. It has also been found that owing to the prominent social position and prosperous financial condition of the assessee he is entrusted with a lot of money by people to whom the assessee pays interest, the money apparently being employed in the business.

On these facts, it is clear that the allegation of the assessee that he carried on money-lending and banking business is false. The learned Counsel appearing for the assessee admitted that none of the allowance in sub-s. 2, s. 10, Income Tax Act, covered the present case. He relied simply and solely on sub-s. 1, s. 10, which is to the effect that the tax should be payable by the assessee under the head "business" in respect of the profits and gains of any business carried on by him. He admits that had the assessee been carrying the money in his own pocket, he could not have claimed a deduction, but he stated that as it was stolen from the office, it was legitimate deduction for the purpose of calculting the net profit accruing to the firm, at p. 121 of the Konstam's Law of Income-tax, Edn. 5, occurs the following passage:

"There are also specific prohibitions against the deduction, in computing profits of any loss not connected with or arising out of the trade or profession; in order to be deducted the loss must be in the nature of a commercial loss, and, therefore,

damages for personal injuries due to the neglience of the traders' servants, and penalties for breaches of the customs laws are not to be deducted, nor is a loss by defalcation or by excessive drawings on the part of a director; such payments are not necessarily incurred, nor do they form a necessary risk, in earning the profits."

It follows that this loss of Rs. 14,440 by armed dacoits cannot be deducted. It was not necessarily incurred nor did it form a necessary risk in earning the profits. It was not a loss in the nature of a commercial loss. In *Gresham Life Assurance Society* v. *Styles*, (1), Lord Halsbury said:

"The thing to be taxed is the amount of profits and gains. The word 'profits' I think is to be understood in its natural and proper sense, in a sense which no commercial man would misunderstand."

There is a decision of a Special Bench of the Madras High Court reported in *Ramaswami Chettiar* v. *Commissioner of Income-tax, Madras*, (2). Two of the Judges held that the loss incurred by theft of money due to a money-lending business and in the business premises should not be allowed for in computing the income-tax, where the theft was committed by persons who were not at the time of the offence employed as clerks or servants in the business of the assessee. The third Judge dissented. He apparently held that in a money-lending business cash might be looked upon as the stock-in-trade. At p. 910* of this report is given the following remark of Lord Herschell:

"The profit of a trade or business is the surplus by which the receipts from trade or business exceeded the expenditure necessary for the purpose of earning those receipts"

It cannot be said that this was expenditure necessary for the purpose of earning the receipts of the business carried on by the assessee. This is the case of an assessee who carries on business in piece-goods and for that purpose accepts deposits from various people and pays interest on those deposits, the money being used in the business. No money-lending business is carried on, so that, if there is any force in the contention that money would be the stock-in-trade of such a business, it does not arise in the present case. It is certainly not the stock-in-trade of the business described, nor was it expenditure necessary for carrying on the business or for the purpose of earning the receipts. The loss was clearly a loss of capital and no allowance can be made for it, while it was not claimed that it fell within any of the allowances given in s. 10 (2) of the Act.

For the reasons given, we would answer the question stated in the negative. The assessee will pay the costs of the Commissioner of Income-tax, Counsel's fee Rs. 100.

D. *Reference answered.*

(1) (1892) A C 309; 62 L J Q B 41; 56 J P 709; 41 W R 270; 67 L T 479.

(2) 127 Ind. Cas, 611; A I R 1930 Mad. 808; 53 M 901; (1930) M W N 759; 59 M L J 403; 32 L W 287; Ind. Rul. (1930) Mad. 995 (F B.)

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RANGOON HIGH COURT

Special Second Civil Appeal No. 192 of 1934

September 6, 1934

DUNKLEY, J.

A. R. P. R. M. MEYAPPA CHETTYAR—APPELLANT

versus

L. V. VENKATACHELLAM CHETTYAR—RESPONDENT

Arbitration—Award—Parties acting on some terms—One of them who received benefit, whether can repudiate it—Part of award found invalid—Party acting on invalid part—Whether estopped from contending that it is invalid—Practice—Appellate Court deciding that decision of trial Court was wrong on legal issue—Suit should be remanded for trial on remaining issues—Decree should not differ from prayer in plaint—Pleadings.

Where both the parties have already acted on some of the terms of the award and one of them has already received some benefit under the award, he cannot be allowed to repudiate it afterward on the ground that the award is illegal.

If part of an award is found to be invalid as being in excess of the arbitrator's powers and is separable from the rest, the remainder of the award being good, can be maintained and acted upon, while the excessive part of the award can be declared to be unenforcible. But if a party has taken advantage of the invalid part of the award he is estopped from setting up that that clause of the award is illegal.

Where an Appellate Court decides that the decision of the trial Court is wrong on a legal issue, it should remand the case for trial on the remaining issue and it should not decide an issue of fact itself in the absence evidence on it.

It is wrong for a Judge to pass a decree which is entirely different from the prayer in the plaint. [p. 999, col. 1.]

S. S. C. A. against the decree of the District Court, Pyapon, dated June 6, 1934.

Mr. *E. Hay*, for the Appellant.

Mr. *F. S. Doctor*, for the Respondent.

Judgment.—The plaintiff-respondent, L. V. V. Chettyar, and the defendant-appellant, A. R. P. R. M. M. Chettyar, were concerned on opposite sides, either directly or indirectly, in several civil cases before the Courts of the Pyapon District. They decided to refer their disputes to

the arbitration of three other Chettyars, and these Chettyars made an award. Admittedly some of the terms of this award have been acted upon by both parties. One of the terms was that a certain holding of paddy land, which had been attached by L. V. V. Chettyar in a suit in the Sub-Divisional Court of Kyaiklat and had been purchased at a Court auction by a person named Chinnaya, should be purchased outright by L. V. V. Chettyar from Chinnaya and then should be transferred by L. V. V. Chettyar to A. R. P. R. M. M. Chettyar, the latter paying to L. V. V. Chettyar a sum of Rs. 1,500, as consideration for the sale of this land, and it was laid down in the award that interest should be chargeable on this sum of Rs. 1,500 from the date of the award until it was paid. This term of the award was never carried into effect into by the appellant completing the purchase of this land from the respondent, and in consequence the respondent brought a suit in the Sub-Divisional Court of Kyaiklat. The suit was framed as a suit for money. The respondent averred that he had obtained a conveyance of this land from Chinnaya, that the appellant had actually received the rental paddy of the current year therefor, and that in consequence the appellant was due to pay him the sum of Rs. 1,500 plus the accrued interest.

It is clear that the suit as brought was not properly framed, and this matter was put in issue in para. 6 of the written statement of the appellant where it is stated: "The defendant submits that in any case the suit as framed does not lie." The suit was a suit for specfic performance of this clause of the award and was therefore a suit brought under Chap. II read with s. 30, Specific Relief Act. There should have been an averment in the plaint to the effect that the plaintiff-respondent was ready and willing to execute a conveyance of the land in suit in favour of the defendant-appellant on the latter paying to him the price as settled in the award of the arbitrators, and the prayer should have been a prayer for a decree ordering the appellant to pay the amount due on the respondent's executing a proper conveyance of the land in his favour. However the suit in the Sub-Divisional Court was dismissed on the ground that the award was void, and the learned Sub-Divisional Judge did not come to any finding on the issues of fact or on the issue regarding the maintainability of the suit. He held that, as this agreement to refer to arbitration was made in connection with pending litigation and was made without reference to the Court, the agreement to refer to arbitration was illegal under the provisions of Sch. II, Civil Procedure Code. The learned District Judge has however rightly held on appeal that as both the parties have already acted on some of the terms of the award and as the appellant has already received some benefit under the award, he cannot be allowed to repudiate it now on this ground, and this point has not been pressed before me on second appeal. It has, however, been urged before me that the clause of the arbitration award regarding the transfer of this holding of the land for a sum of Rs. 1,500 was outside the scope of the matters referred to the arbitrators for decision, that the arbitrators acted in excess of their authority in including this matter in their award, and that therefore in regard to his matter the award is unenforcible.

It has been urged that although the appellant may have acted upon other clauses of the award, yet it is still open to him to repudiate this particular clause which was in excess of the arbitrators' powers, and in regard to that matter the decision of their Lordships of the Privy Council in *Amir Begam* v. *Badruddin Husain* (1), is cited. It is no doubt correct that if part of an award is found to be invalid as being in excess of the arbitrator's powers and is separable from the rest, the remainder of the award being good, can be maintained and acted upon, while the excessive part of the award can be declared to be unenforcible. On behalf of the respondent it is however urged that this clause of the award is not in excess of the powers of the arbitrators, that, moreover, even if it be so in excess, the appellant has taken advantage thereof by accepting the rent of the land for the past agricultural season, and that by so doing he is now estopped from setting up that this clause of the award is invalid. No doubt, if it can be established by evidence that the appellant has received the rent of this land, as is suggested, then he would be estopped from contesting the validity of this clause of the award but on behalf of the appellant it is urged with considerable force that no question of

(1) 23 Ind. Cas. 625; A I R 1914 P C 105; 38 A 336; 17 O C 120; 18 O W N 765; 1 O L J 249; 12 A L J 537; 17 Bom. L R 413; (1914) M W N 472; 16 M L T 35; 27 M L J 181; 19 C L J 494 (P C).

estoppel arose from the pleadings in consequence of the defective nature of the respondent's plaint, and that therefore he has not had an opportunity of meeting the respondent's case on this point.

The original suit was dismissed by the learned Sub-Divisional Judge on the first issue, and in accordance with the ordinary practice, when the learned District Judge decided that the decision of the Sub-Divisional Court on this legal issue was wrong, he ought to have remanded the case to the Sub-Divisional Court for trial on the remaining issues, but instead of adopting this correct course, he came to the conclusion that as evidence in regard to the issues of fact had been recorded it was open to him to come to findings thereon, without remand, and he overcame the difficulty regarding the maintainability of the suit by granting a decree for the payment of a sum of Rs. 1,680-1-0 to the respondent conditioned on the respondent at the same time conveying the land in question to the appellant by registered deed. He was plainly wrong in deciding these issues of fact himself as the appellant had not yet led evidence thereon, and he was further wrong in passing a decree which was entirely different to the prayer in the plaint, and which could be made only in a suit properly constituted for that purpose. See *Chutterput Singh* v. *Maharaj Bahadur* (2). Learned Counsel for both parties in their argument before me have agreed that the plaint was wrongly framed, and that in the plaint a plea of estoppel ought to have been raised if the plaintiff-respondent relied thereon, and also the plaint ought to have contained an averment that the plaintiff-respondent is ready and willing to convey the land, and that the prayer should have been for payment of the purchase price by the appellant on the execution of a registered conveyance by the respondent. It is clear that the proper order for the learned District Judge to have passed on appeal was an order remanding the suit for hearing after an amended plaint had been filed and the issues re-cast, and granting permission to the plaintiff-respondent to amend his plaint for this purpose. This is the order which I now propose to pass in this second appeal, as it seems to me to be impossible to deal adequately with the questions in dispute between the parties in the suit as brought in the Sub-Divisional Court.

(2) 32 C 198; 32 I A 1; 9 C W N 225; 8 Sar. 713 (P C).

This appeal is therefore allowed, the judgment and decree of the District Court are set aside, and the suit is remanded to the Sub-Divisional Court of Kyaiklat for re-hearing on an amended plaint properly framed as a suit under Chap. II, Specific Relief Act, for the enforcement of this clause of the arbitrators' award. Permission is granted to the plaintiff-respondent to file such an amended plaint. The costs of this appeal shall be borne by the plaintiff-respondent in any event. The costs of the first appeal to the District Court shall follow the final decision in the suit. The appellant in the present appeal, A. R. P. R. M. M. Chettyar is entitled to a refund of the court-fee paid on his memorandum of appeal, and the appellant in the appeal to the District Court, L. V. V. Chettyar, is entitled to a refund of the court-fee paid on this memorandum of appeal to that Court.

D. *Appeal allowed.*

CALCUTTA HIGH COURT

Civil Rule No. 814 of 1934
August 16, 1934
MITTER AND EDGLEY, JJ.

Sm. SARALA DEBI—PETITIONER
versus
PRESIDENT, CALCUTTA IMPROVEMENT TRIBUNAL—OPPOSITE PARTY

Land Acquisition Act (I of 1894), s 32—Compensation—Money invested in securities 20 years before—Re-investment—President's discretion—How used.

It is not incumbent on the President of the Calcutta Improvement Tribunal under s. 32, Land Acquisition Act, to direct a re investment in land, the investment having been made so far back as 20 years in approved Government securities. The matter rests in his discretion but the discretion must be exercised on correct judicial principles. One of the elements which should be taken into account in the exercise of such discretion is, as to whether the parties who are vitally interested in the compensation money, have really asked for a re-investment in land. *Kamini Devi* v. *Pramatha Nath Mookerjee* (1), referred to.

C. R. from an order of the President, Calcutta Improvement Tribunal, Calcutta, dated May 10, 1934.

Messrs. *Charu Chunder Biswas*, *Bireswar Bagchi* and *Gopesh Chandra Chatterji*, for the Petitioner.

Mitter, J.—This is an application under s. 115, Civil Procedure Code, as well as under s. 107, Government of India Act, on behalf of one Sarala Debi against an order of the President of the Calcutta Improvement Tribunal dismissing her

application by which she objected to the re-investment of certain Government securities which were deposited under the provisions of s. 32, Land Acquisition Act, for the purchase of land. The proceeding originated with a notice which was given by the President on March 22, 1934, to the petitioner to the following effect:

"Whereas a sum of Rs. 33,210-15-6 was remitted to this Court by the Land Acquisition Collector, Calcutta, for deposit under s. 31, Land Acquisition Act, and whereas Government Promissory Notes for Rs 48,600 is now held in deposit to your credit in the above case, you are hereby required to show cause on the day of April 5, 1934, why the said sum should not be applied in whole or in part, in the purchase of lands in accordance with the provisions of s. 32 of the said Act. Failing such cause being shown the matter will be disposed of in your absence. Particulars are obtainable at this office of suitable lands for investment belonging to the Calcutta Improvement Trust, and of other lands offered by parties for sale."

On receipt of this notice the petitioner who is a Hindu widow and who has got the Hindu widow's estate in the lands which were acquired and compensation money in respect whereof was not paid to the petitioner but was deposited with the President of the Improvement Tribunal, raised an objection to the re-investment of the securities in the purchase of land. No notice was given to the immediate reversioner who was the petitioner's daughter and to the ultimate reversioners, namely her daughter's sons. The President of the Tribunal by the order which is the subject-matter of this rule refused the objections of the petitioner to the application of the Government securities in the purchase of lands. The learned President was of opinion that having regard to s. 32, Land Acquisition Act, he had no option but to direct a change in the investment. The President says this:

"The language of s. 32 is plain and imperative in directing the Court to invest the compensation money in land and the doing of that act is not made conditional on any action to be taken by any party. I am of opinion, therefore, that as suitable properties are available now, the Court must change the investment and apply the compensation money in the purchase of other land under like title and conditions of ownership as the land in respect of which such money has been deposited."

It seems to us that in issuing the notice dated March 2, 1934, the learned President was assuming jurisdiction under a wrong view of the law. It appears from the plain reading of the statute that it is not incumbent on the learned President of the Tribunal under that section to direct a re-investment in land, the investment having been made so far back as 20 years from now in approved Government securities. It becomes necessary to consider the language of the section for the proper construction which is to be put upon s. 32. Section 32 of the Act runs as follows:

"If any money shall be deposited in Court under sub-s. (2) of the last preceding section and it appears that the land in respect whereof the same was awarded belonged to any person who had no power to alienate the same, the Court shall (*a*) order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held, or (*b*) if such purchase cannot be effected forthwith; then in such Government or other approved securities as the Court shall think fit: and shall direct the payment of the interest or other proceeds arising from such investment to the person or persons who would for the time being have been entitled to the possession of the said land, and such money shall remain so deposited and invested until the same is applied: (*i*) in the purchase of such other lands as aforesaid; or (*ii*) in payment to any person or persons becoming absolutely entitled thereto."

We are concerned in the present case with s. 32 (*b*) for the purchase could not be effected at the time when the compensation money had been deposited. The former President of the Tribunal directed that the money should be invested in approved securities. The question that arises is as to whether having regard to cl. (1) (*b*) it can be said that as the President has said that the statute makes it obligatory on him to direct that the money be applied in the purchase of such other lands as aforesaid, that is in the manner provided for in cl. (*i*). We are of opinion that there is no such obligation, for the next clause which follows cl. (*i*), that is cl. (*ii*), runs as follows:

"Or in payment to person or persons becoming absolutely entitled thereto."

It shows that the President of the Tribunal might wait till the reversion falls in or any person or persons becoming absolutely entitled to the money. Two alternative cases are contemplated: the security be applied either (*i*) in the purchase of such other lands as said in cl. (*a*) or (*ii*) in payment to any person or persons becoming absolutely entitled to the money.

These two clauses show that a discretion is vested in the President of the Tribunal either to apply the money in the purchase of such other lands or to wait till the reversion falls in. A proper reading of s. 32 makes it clear that the view of the learned President that there is a statutory obligation for re-investment is wrong. The matter, it is true, rests in his discretion but the discretion must be exercised on correct judicial principle. One of the elements which should be taken into account in the exercise of such discretion is as to whether

the parties who are vitally interested in the compensation money have really asked for a re-investment in land. In the present case neither the lady, the applicant before us, nor the next reversioner, the daughter, nor the ultimate reversioners, the daughter's sons, have applied for a re-investment in land. We do not think that in the circumstances, having regard to the fact that it was considered wise by his predecessor-in-office that the money should remain at least for a period of twenty years in Government securities, it could be said that he was exercising proper discretion in directing them to be invested in land. The question as to whether suitable land is available or not is a question between the parties themselves. But as we have already said the learned President had no jurisdiction to issue notice to the petitioner in the way in which it has been done in this particular case. That is sufficient to entitle us to set aside his order and to entitle us to look to the facts of the case and to see if we would be properly exercising our discretion in directing a re-investment.

Having regard to the circumstances mentioned above, we do not think that it would be right to direct a re-investment in lands, and more particularly, having regard to the low state of the market with regard to the value of the land. Lands do not fetch now the same value as they used to do, say five or ten years ago. Mr. Biswas has contended broadly that according to the provisions of s. 32 (*b*) it would appear that the President of the Tribunal cannot take any action under cl. (*i*) unless he is moved by the party's interest; and his argument is based on the provisions of the English statute which are said to have been reproduced substantially in s. 32, Land Acquisition Act. We are referred in this connection to a decision of this Court in *Kamini Devi* v. *Pramatha Nath Mookerjee* (1) and our attention was drawn to a passage in page 40* of the said report where it is said:

"Now in the case before us, s. 69 of the Lands Clauses Consolidation Act, 1845, upon which s. 32, Land Acquisition Act, is modelled, provides (we need only quote so much of the section as is relevant to our present purpose) as follows"

Then begins the quotation:

"Now it is said that when one looks to the language of the clause it would appear that such money may be so applied as aforesaid upon an order of the Court of Chancery made on the petition of the party who would have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited; and until the money can be so applied, it may, upon the like order, be invested by the said Accountants-General in the purchase of three per centum consolidated or three per centum reduced bank annuities, or in Government or real securities, and the interest, dividends, and annual proceeds thereof paid to the party who would for the time being have been entitled to the rents and profits of the lands."

It is contended with reference to the compensation money that such money should be applied to the purchase of lands on the petition of the parties only as in England and it is desirable to look to the intention of the framers of the Land Acquisition Act when enacting s. 32 (*a*). It is difficult in the absence of an express provision in the statute to accede to this contention. But we are bound to observe that the President of the Tribunal should not exercise discretion unless he is moved by the parties who are vitally interested in the compensation money. The whole object was to preserve the money for the benefit of the eventual reversioners. It is only reasonable to suppose that the President should not ordinarily move unless the person interested come forward and ask for re-investment of the security in land.

We are told by Mr. Biswas that the practice which is followed by the President of the Tribunal is that a list is hung up of a large number of immovable properties belonging to the Improvement Trust and also private owners as being lands suitable for investment and after that the limited owners are asked to show cause why the money should not be re-invested in such lands. To adopt a practice of the kind adopted by the President of the Tribunal would lead to harmful results if the limited owners are not allowed opportunities to closely examine their advantages and disadvantages by the intended re-investment. With these observations this Rule must be made absolute and the order of the learned President dated June 9, 1934, must be set aside. We are of opinion that the moneys should lie where they are invested in Government or approved securities.

Edgley, J.—I agree.

D. *Rule made absolute.*

(1) 10 Ind. Cas. 491; 39 C 33; 13 C L J 597.

*Page of 39 C—[*Ed.*]

MADRAS HIGH COURT

Civil Revision Petitions Nos. 372, 408 to 410 of 1934

September 25, 1934

PAKENHAM WALSH, J.

MAHAGANAPATHI, MINOR, AND ANOTHER —PETITIONERS

versus

NATESA IYER AND OTHERS - RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 10- Stay of suit—Conditions—Entire subject-matter in issue in later suit must be in issue in prior suit—Hindu Law —Partition suit—Creditors are proper parties but decree for payment of their debts cannot be passed.

In order that a suit may be stayed under s. 10, Civil Procedure Code, pending the decision of a previously instituted suit in another Court, it is not sufficient that there should be one matter in issue in common in both the suits. The entire matter in issue in the subsequent suit must be in issue in the previous suit. *Murugesa Mudaliar* v. *Balasundarammal* (1), *Kota Sriramulu* v *Sreeramulu* (2), *Koberan Nambudri* v. *Koman Nair* (3), *Vel achamy* v. *Muthiah Chettiar* (4) and *Bepin Behary Mazumdar* v. *Jogindra Chandra Ghosh* (7), followed, *Ramachandram Pillai* v. *Neelambal Achi* (5) and *Jinnat Bibi* v. *Howrah Jute Mill Co.* (6), not followed.

Though creditors of a joint family are proper parties to a suit for partition of the joint family properties, there is no provision of law under which a decree could be passed in their favour for payment of their debts *Official Assignee of Madras* v. *Ramachandra Iyer* (8), distinguished.

C. R. P. under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the Orders of the Court of the District Munsif of Mannargudi, dated February 26, 1934, and made in I. A. Nos. 80, 81, 82 and 83 of 1934 in O. S. No. 338 of 1932, 372 of 1932, 11 of 1933 and 181 of 1933, respectively.

Mr. *S. Thiagaraja Ayyar*, for the Petitioner.

Messrs. *A. V. Viswanatha Sastri* and *S. Ramachandra Iyer*, for the Respondents.

Judgment.—These are Revision Petitions against the order of the District Munsif of Mannargudi refusing to stay the suits brought by the creditors of defendants Nos. 1, 2 and 3. In those suits the 1st defendant is the father; defendants Nos. 2 and 3 are the sons and the suits are filed to recover sums of money alleged to have been borrowed by the 1st defendant. These suits were filed at various times from December 1932 up to June 1933. In June 1932 the petitioners had filed a partition suit O. S. No. 138 of 1932 on the file of the District Munsif of Mannargudi and the plaintiffs in these money suits have been impleaded as defendants Nos. 4, 5, 6 and 7. For the sake of convenience it was arranged to try the suits together as there was a common issue as to whether the debts incurred by the father were for immoral purposes and not binding on the sons. But on a preliminary point the learned District Munsif held that he had no jurisdiction to try the partition suit as the amount involved was beyond his powers and he returned the same for presentation to the proper Court. Against these the petitioners filed a Civil Miscellaneous Appeal in the District Court, West Tanjore, which is still pending. They then applied to have the money suits filed by the creditors stayed and the Court refused to do so. It is argued before me that the Court is bound to do so under s. 10, Civil Procedure Code. An elaborate argument has been addressed before me to show that the reason given for the refusal by the lower Court to grant the stay is not correct. That reason may be briefly summed up as this that the only point which the District Court had to try was the question of jurisdiction and, therefore, it had no jurisdiction to try the rest of the suit, and the arguments urged before me are directed to show that the Appellate Court was seized of the whole suit. I do not think it is necessary to discuss these arguments because it seems to be perfectly clear that this is not a case where the entire matter in the subsequent suit is in issue in the previous suit. In a recent C. R. P. No. 926 of 1934 [*Murugesa Mudaliar* v. *Balasundrammal* (1)], I have fully discussed this matter and have held following the balance of the Madras authorities that it is not sufficient that there should be one matter in issue in common in both the suits. I will merely say here that the Madras cases in favour of this view are *Kota Sriramulu* v. *Sreeramulu* (2), *Koberen Nambudri* v. *Koman Nair* (3) and *Vellachamy* v. *Muthiah Chettiar* (4). The only Madras case quoted against it is *Ramachandram Pillai* v. *Neelambal Achi* (5), which is not sufficiently explicit to render it clear whether the case would have answered the test laid down by Venkatasubba Rao, J. in *Kota Sriramulu* v. *Sreeramulu* (2). As regards the

(1) 153 Ind. Cas. 769; 40 L W 715; 67 M L J 748; (1934) M W N 1350; A I R 1935 Mad. 24; 7 R M 373.

(2) 70 Ind. Cas. 682; 15 L W 646; A I R 1922 Mad 301; 31 M L T 360.

(3) 88 Ind Cas 421; 48 M L J 251; A I R 1925 Mad. 574.

(4) 103 Ind Cas. 274; A I R 1927 Mad 1132; 26 L W 241.

(5) 70 Ind. Cas. 5; A I R 1923 Mad. 88; 16 L W 607.

Calcutta decision quoted against the Madras view *Jinnat Bibi* v. *Howrah Jute Mills Co.* (6), this was the decision of a single Judge who failed to notice the earliar Calcutta decision in *Bepin Behary Mozumdar* v. *Jogindra Chandra Ghosh*, 36 Ind. Cas. 641 (7), which was relied on by Venkatasubba Rao, J. in *Kota Sriramulu* v. *Sreeramulu* (2), nor did he refer to any other cases on the point.

The only question, therefore, remaining is whether there are any issues in the later suits which are not involved in the earlier partition suit and clearly there are. Neither party has produced a copy of all the issues in all the suits, but I find, for instance, that in O. S. No. 338, there was failure of consideration raised as an issue. Apart from that the main issue in the later cases is whether the plaintiffs are entitled to relief, and if so, what: whereas there is nothing to show that they have asked for any relief in the partition suit. It is to my mind extremely doubtful whether even if they had asked for it, it could be granted. The only authority that has been quoted on this point is an *obiter dictum* in *Official Assignee of Madras* v. *Ramachandra Iyer* (8), by Ramesam, J. and was merely to the effect that the Official Receiver might intervene in a partition suit filed by the sons against the father and ask for a finding as to the nature of the debts and for a decree, provided the nature of the debts is not immoral or illegal. The Official Receiver is in an entirely different position from a creditor in a joint Hindu family because it is the Official Receiver's business to collect the debts due to the estate and he has no option but to do so. On the other hand a creditor is not compelled to collect his debts from a joint family if he does not wish to do so. I have been shown no decision which holds that a decree can be granted to the creditors of a joint family in a partition suit. They are no doubt proper parties but it has been held that even a decree-holder creditor is a proper party. Suppose his debt has been found to be subsisting how can he be given a fresh decree? As for the argument founded on the Civil Rules of Practice, these rules do not anywhere lay down that the Court should pass a decree in favour of the creditors in a partition suit or pay their debts in the suit. Paragraph 7 in Chap. III, relating to Partition Suits in Civil Rules of Practice, Vol. I (p. 213) says:

"If any debts or liabilities other than incumbrances, charges, or out-goings, on or out of immovable property, are outstanding, the same shall, unless the Court otherwise direct, be ascertained, and as far as practicable, discharged or provided for before any order or decree is made for the division or distribution of the joint property."

This does not mean that the Court has got to pay decrees in the creditors' favour or pay their debts as part of the suit, but only to see that they are provided if charged on the family properties, this charge is kept due and that other debts should be allotted to one member or other of the family or in some other way split up amongst them. Whatever may be the case if the family creditors ask in a partition suit, for the relief that their debts shall be paid in that suit (and as I said no such authority has been shown to me), there is certainly no authority to show that if they do not ask for that relief, it must be held that an issue has arisen that they have asked for the same. It is seriously sought to be argued that the commonest of all issues "to what relief is the plaintiff entitled" is not an issue for any "relief claimed" under s. 10. So far is this from being true that, on the other hand, the Court can grant no relief at all to a plaintiff who does not ask for it. It is one of the essential claims in every case even if not expressed in so many words, that the plaintiff is asking relief and if he says he doesn't want any relief, there is no alternative but to dismiss his suit. That being so, the whole matter in issue in the later suits is not in issue in the partition suit. These Revision Petitions, therefore, fail and are dismissed with costs as Rs. 15 (Pleader's fee) in each of these Civil Revision Petitions.

No orders are necessary on the Civil Miscellaneous Petitions.

A. *Revision dismissed.*

(6) 140 Ind. Cas. 155; A I R 1932 Cal. 751; 36 C W N 667; Ind. Rul. (1932) Cal. 692.

(7) 36 Ind. Cas. 641.

(8) 112 Ind. Cas. 541; 51 M 417; (1928) M W N 294; A I R 1928 Mad. 735; 28 L W 109; 55 M L J 175 (F B).

CALCUTTA HIGH COURT

Criminal Revision No. 474 of 1934

August 7, 1934

LORT-WILLIAMS AND KHUNDKAR, JJ.

ABDUL HAKIM—COMPLAINANT—PETITIONER

versus

FOZU MIA AND ANOTHER—OPPOSITE PARTIES

Criminal Procedure Code (Act V of 1898), s. 350 (1), proviso (a)—Applicability—Trial by Bench of

two Magistrates—Evidence recorded by one—Dissolution of the Bench—Case proceeded with by Magistrate taking evidence—S. 350 (1), does not apply—Interpretation of Statutes—Marginal note—When can be referred to.

Section 350, Criminal Procedure Code, refers to cases heard by a Magistrate sitting singly, who is succeeded by another Magistrate sitting singly. It contemplates cases in which the second Magistrate is a person other than the first Magistrate and in which the second Magistrate has not had any previous opportunity of hearing the witnesses Where two Magistrates have heard a case and one of them has recorded the depositions and on the dissolution of the Bench, the Magistrate who has recorded the deposition proceeds with the case, s. 350, Criminal Procedure Code, is not applicable and in such a case no re-trial can be claimed. *Queen-Empress* v. *Sri Ahobalamatam Jeer* (15), referred to.

Where a marginal note has been inserted by or under the authority of the legislature, it can be referred to for an exposition of the meaning of the section.

[Case-law referred to.]

Cr. R. from the order of the Honorary Magistrate, Alipore.

Mr. *Binayak Nath Banerjee*, for the Petitioner.

Messrs. *Joy Gopal Ghose* and *Anil Kumar Das Gupta*, for the Opposite Parties.

Lort-Williams, J.—In this case, a Rule was issued to show cause why an order made by B. C. Ghosh, Honorary Magistrate of Alipore in the District of 24-Parganas, under s. 350, Criminal Procedure Code, granting a new trial, should not be set aside. The order was upheld on revision by Mr. S. N. Ray, Additional District Magistrate of Alipore. The petitioner filed a complaint under s. 406, Indian Penal Code, before Mr. L. K. Sen, the Police Magistrate of Alipore, who transferred the case for disposal to the file of Messrs. B. Rahman and B. C. Ghose, two Honorary Magistrates constituting a Bench. Witnesses were examined and cross examined on both sides, and charges framed and the trial had reached the stage when a date had been fixed for arguments when the Bench was dissolved and the Magistrates were ordered to sit singly. Mr. Sen withdrew this case to his own file, and transferred it to the file of Mr. B. C. Ghose who had recorded the depositions.

Thereupon at the re-opening of the proceedings before Mr. B.C. Ghose, the accused demanded a new trial, under the provisions of s. 350 (1), proviso (*a*). The Magistrate held that he was bound to accede to the demand, and had no discretion to refuse to re-summon and re-hear all the witnesses. At the previous trial, the Pleader for the accused had stated verbally that he would not demand a new trial, otherwise it is possible that the case would have been disposed of by the Bench before it was dissolved. Some of the witnesses for the complainant have left Calcutta, and are not now available. The Magistrate observed that, as a result of his order, the complainant would undoubtedly suffer inconvenience, harassment and unnecessary expense, and would probably be prejudiced owing to his inability to produce some of his witnesses for re-examination. On the other hand, it seems reasonably clear that the accused could not have been prejudiced if their demand for a new trial had been refused. Mr. B. C. Ghose had been present throughout the whole trial, and as already stated, had actually recorded all the depositions.

Section 350, Criminal Procedure Code, does not in terms apply to a case like the present. It refers to cases heard by a Magistrate sitting singly, who is succeeded by another Magistrate sitting singly. Obviously, it contemplates cases in which the second Magistrate is a person other than the first Magistrate, and in which the second Magistrate has not had any previous opportunity of hearing the witnesses. The reasons for the provisions contained in the section are not present in a case like the present, especially in view of the fact that Mr. B. C Ghose recorded all the evidence given at the hearing before the Bench which consisted of himself and Mr. Rahaman. The section refers only to cases in which the whole or any part of the evidence has been recorded by the first Magistrate and he is succeeded by another Magistrate. Mr. Rahaman did not record any part of the evidence, the whole of it was recorded by Mr. Ghosh, and so far as he is concerned, he has not been succeeded by another Magistrate but by himself. If it were permitted to refer to the marginal note to assist one to interpret the section, it is clear that such reference would confirm the interpretation which I have put upon it, because the marginal note refers only to cases in which the evidence has been recorded partly by one Magistrate and partly by another. In *Balraj Kunwar* v. *Jagatpal Singh*, (1) at p. 436* Lord Macnaghten said that:

"It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the act. The contrary opinion originated in a mistake and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater

(1) 26 A 393; 31 I A 132; 8 Sar. 639; 8 C W N 699; 1 A L J 384; 7 O C 248 (P C).

*Page of 26 A.—[*Ed*].

authority than the marginal notes in an English act of Parliament."

The English rule as stated by Lord Macnaghten seems to be founded upon the assumption that the eye of Parliament has never rested on the marginal notes which are not always to be found on the parliament Roll. *A. G.* v. *Great Eastern Ry. Co.* (2) per Baggallay, L. J., at p. 461*, *Sutton* v. *Sutton*, (3), per Jessell, M. R., at p. 513†. But marginal notes have been referred to as part of a statute in the English Courts, when they have been found on the Parliament Roll. *R.* v. *Milverton (Inhabitants)* (4) and *Re Venour's Settled Estates, Venour* v. *Sellon* (5). Now-a-days, they are printed on the draft bill, so it cannot be said that the eye of Parliament has never rested on them. But the disposition of the English Courts is to disregard them. It appears, however, that in certain local and personal acts marginal notes may perhaps form part of the Act: *Re Woking M. C. Basingstoke Canal) Act* (6), per Phillimore, L. J., at p. 322‡. In India it has been held that marginal notes do not restrict the application of section, because they are not part of the enactment, *Dukhi Mullah* v. *Halway* (7), But the Judges in that case simply followed without discussion *Claydon* v. *Green* (8) and the other English cases to which I have referred. In *Junardeo Narain Singh* v. *Ram Sarup Roy* (9); *Emperor* v. *Alloomiya Husain* (10); *Kesava Chetty* v. *Secretary of State* (11) and *In re Natesa Mudaliar* (12) the Judges again followed these cases, without further discussion. In *Narayanasami* v. *Rangasami*, (13) it was decided that though the marginal notes ought not to be held to govern the clear text of a section, yet they can be taken as an indication of what the legislature meant.

The question was very fully discussed in *Ramsaran Das* v. *Bhagwat Prasad* (14) and a Full Bench of the Allahabad High Court following and adapting the *ratio nes decidendi* in the case of *Claydon* v. *Green* (8) held that the question whether a marginal note can be referred to for an exposition of the meaning of a section depends upon whether the note has been inserted by or under the authority of the Legislature. And King, J., while discussing the practice in the U. P. Legislative Council, asserted that in that Legislative Council at any rate, the marginal notes are treated as being part of the enactment, and are inserted with the assent and authority of the Legislature. With this judgment of King, J. I respectfully agree and in my opinion, Lord Macnaghten's statement was not intended to be an authoritative and final pronouncement upon this question, so far as all Indian statutes are concerned. Some day, the matter will have to be more fully considered, unless Government think fit to settle the point by inserting an appropriate section in the General Clauses Act. This course would remove all uncertainty and would save much time and trouble, and I recommend it for the attention of the Government.

However it is not necessary to have recourse to the marginal note in order to interpret s. 350, Criminal Procedure Code, and in my opinion and for the reasons which I have stated, the section has no application to the facts of this case. The somewhat similar facts in *Queen-Emperor* v. *Sri Ahobalamatam Jeer* (15) and the remarks of Sir Arthur Collins, C. J., though not precisely in point, are sufficiently pertinent to be cited in support of the view which I have formed. The result is that the order granting a new trial must be set aside, and the Magistrate is directed to proceed with the trial of the case from the point reached at the time when the Bench was dissolved.

Khundkar, J.—I agree.

D. *Order set aside.*

(2) (1879) 11 Ch. D 449.
(3) (1882) 22 Ch. D 511.
(4) (1836) 5 A & E 841; 1 N & P 179; 2 H & W 435; 6 L J (N S) M C 73; 44 R R 606.
(5) (1876) 2 Ch. D 522; 45 L J Ch. 409; 24 W R 752.
(6) (1914) 1 Ch. 300; 83 L J Ch. 201; 78 J P 81; 110 L L 49.
(7) 23 C 55.
(8) (1863) 3 C P 511; 37 L J C P 226; 16 WR 1126; 18 L T 607.
(9) 25 C 858; 2 C W N 577.
(10) 28 B 129; 5 Bom. L R 805,
(11) 51 Ind. Cas. 45; A I R 1919 Mad. 514; 42 M 451; 36 M L J 222.
(12) 99 Ind. Cas. 324; A I R 1927 Mad. 156; 28 Cr. L J 116; 50 M 733.
(13) 95 Ind. Cas. 731; A I R 1926 Mad. 749; 49 M 716; 50 M L J 517; 24 L W 235.
(14) 113 Ind. Cas 442; A I R 1929 All. 53; 51 A 411; (1929) A L J 230.
(15) 22 M 47.

*Page of (1879) 11 Ch. D.—[*Ed*].
†Page of (1882) 22 Ch. D.—[*Ed*].
‡Page of (1914) 1 Ch.—[*Ed*]

PESHAWAR JUDICIAL COMMISSIONER'S COURT

First Civil Appeal No 62-6 of 1934

November 20, 1934

MIDDLETON, J. C. AND MIR AHMAD, A. J. C.

MESSRS. ARJAN SINGH-BHAJAN SINGH —DEFENDANTS—APPELLANTS

versus

FIRM SURJAN SINGH ACHARAJ SINGH AND ANOTHER—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 34—Day-book entered after four months—Rough notes not available—Ledger from such day-book — Whether a document kept in regular course of business — Civil Procedure Code (Act V of 1908), O. XXX, r. 1—Suit by partners—Partners, if can bring suit for firm's benefit—Their locus standi, if can be questioned by third party—Practice—New plea—Fresh evidence necessary—Whether can be raised in appeal

A day book, which has been entered after four months from the happening of an event and the rough notes of which are not available, is not a document which can be said to have been kept in the regular course of business. These remarks apply *a fortiori* to the ledger which is prepared from such a day book.

Partners can bring a suit for the benefit of the firm, and although they may be prosecuting the litigation on their own responsibility, the benefit goes to the concern, and it is no business of third parties to question their *locus standi*. *Kapurji Magniram* v. *Pannaji Devichand* (1), relied on. [p. 1009, col. 1.]

Where plea was not taken in the lower Court, nor was it raised in the grounds of appeal, but it had been submitted as an additional ground of appeal :

Held, that the appellants could not raise this new point on appeal for deciding which it was necessary to take evidence.

F. C. A. from an order of the Sub-Judge, First Class, Peshawar, dated November 23, 1933.

Sardar *Raja Singh*, for the Appellants.

Messrs. *Jaggan Nath* and *Hukam Chand*, for the Respondents.

Judgment.—These three appeals arise out a transaction which took place at Peshawar on July 30, 1931, Messrs. Surjan Singh-Acharaj Singh of Peshawar sold 2,040 *karakuli* skins to a firm known as Mian Ghulam Mahbub-Muhammad Umar for Rs. 30,000. The latter drew a cheque in favour of the vendors on the Imperial Bank of India of the value of Rs. 23,570.

Messrs. Arjan Singh-Bhajan Singh had obtained a decree against Messrs. Ziauddin Zainlabdin for Rs. 24,161-7-3. Messrs. Narain Singh-Harbans Singh had been given a decree for Rs. 4,125-15-3 against firm Ziauddin Nasiruddin, and Messrs. Attar Singh-Ram Singh had in their favour a decree for Rs. 2,595-12-3 against the same firm.

Messrs. Arjan Singh-Bhajan Singh obtained an order from the Court of the Senior Sub-Judge, Peshawar, in which they were executing their decree against Ziauddin Zainulabdin. It was to the effect that the money due from Messrs. Ghulam Habib Muhammad Umar should not be paid by the Bank to Messrs. Surjan Singh-Acharaj Singh ; in other words, the sum was attached in execution of the decree. The allegation of the decree-holders was that the skins sold did not belong to the sellers, but in fact belonged to the firm Ziauddin Zainulabdin. The other two decree-holders applied also to join, alleging that Ziauddin Zainulabdin and Ziauddin Nasiruddin were one and the same concern.

Messrs. Surjan Singh-Acharaj Singh objected to the attachment of the money but the Senior Sub-Judge rejected those objections. As a result, they have brought three suits under O. XXI, r. 63, Civil Procedure Code, against the three decree-holders referred to above and their judgment-debtors for a declaration that the goods sold to Messrs. Ghulam Mahbub-Muhammad Umar belong to them and that they were entitled to receive the purchase money. They were heard by the Judicial E. A. C. (Sub Judge, First Class), Peshawar, who decreed the claim in all three suits. Arjan Singh-Bhajan appealed to this Court. The other two defendants preferred their appeals to the District Court, because they lay to that Court. They were transferred to this Court so that all the three connected cases may be heard and disposed of together. The judgment will deal with all three of them.

The allegation in the plaint was that the firm Surjan Singh-Acharaj Singh, was a partner in the firm Suraj Singh-Sohan Singh working at Kabul. Acharaj Ram and Sant Ram were the other partners in this firm. The plaintiffs alleged that the goods were purchased by the latter firm and sent to Peshawar where they were sold as described above. The plaintiffs claimed the skins to be their own property and repudiated the allegation of the defendants that in fact they belonged to Ziauddin Zainulabdin or Ziauddin Nasiruddin. The defence is very clearly and succinctly summarised in para. 5 of the pleas of Arjan Singh-Bhajan Singh (p. 4 of the Paper Book.) The relevant portion is as follows :

"The skins of which the value was attached be-

longed to defendant No. 2, the judgment-debtors of defendant No. 1. It is simply wrong to say that plaintiffs were the owners of the said skins They had no concern whatsoever with the value of the said property as against defendant No. 2 or the decree-holder of defendant No. 2. The property belonged to defendant No. 2 and by the mere fact that the skins noted above were sent to Peshawar for sale through the branch of the plaintiffs' firm in Kabul, known as Suraj Singh-Sohan Singh, the plaintiffs cannot become the owners of those skins."

We may make it clear that defendant No. 1 is the replying defendant and defendant No. 2 is the firm Ziauddin Zainulbdin. Now a close examination of this plea clearly shows that the defence did not deny the fact that the goods were sent by the Kabul branch to Peshawar and were sold by the Peshawar firm to Messrs. Ghulam Mahbub-Muhammad Umar. The only point raised was that originally the skins were given to the Kabul branch by the judgment-debtors of defendant No. 1. An issue was framed in the following terms.

"Were the skins the property of plaintiffs and sold to the firm Mian Ghulam Mahbub Muhammad Umar, and therefore not liable to attachment and sale in execution of the decree of defendant No. 1 against defendant No. 2 ?"

The evidence produced by the plaintiffs may be divided into three different groups. They produced two letters and two telegrams which passed between the two firms at Peshawar and Kabul. They led oral evidence in support of the allegation that the goods were bought at Kabul and disposed of at Peshawar as the property of the plaintiffs. They further produced their account books at Kabul and Peshawar to show that the bargains had been incorporated in them. The defendants, on the other hand, adduced the evidence of certain witnesses who alleged that the skins were dealt with by the plaintiffs as the property of Messrs. Ziauddin Zainulabdin that Ziauddin Zainulabdin did exist, as a firm, that their trademark was "ZZ" and that the skins carried this mark. They also filed in Court a letter alleged to have been written by Lutufulla from Makhad to Surjan Singh and Sohan Singh. This letter refers to some skins which had been sent from Andkhoi, and which carried the mark "ZZ." The learned trial Judge believed the oral evidence of the plaintiffs and holding their documentary evidence to be genuine, accepted their case. He rejected the evidence of the defendants on the ground that their witnessses were biassed and that the document was written by Lutufulla, who admittedly had once been their agent.

We now proceed to examine the evidence in more detail in order to decide whether the trial Judge was right in accepting that of the plaintiffs in preference to that of the defendants. The two letters are dated July 24, 1931, and July 27, 1931, respectively. Both of them have been written by Santram from Kabul to the firm at Peshawar. In the first letter it is said that ten bundles of skins will be purchased from Zaman Khan and sent to Peshawar in two days' time, and in the second it is stated that the bundles had arrived, were purchased and would be sent next morning by a lorry. Then comes the telegram dated July 28, 1931, from Santram to Surjan Singh Acharaj Singh intimating the despatch of the ten bundles. On the 29th a telegram is sent from Peshawar to Sohan Singh at Kabul that the ten bundles had been received. We know that the sale took place on July 30, 1931, which is proved by the statement of Haji Abdul Shakur, broker. In support of these documents Mahmud Jan, a resident of Peshawar who has been taking contracts in the British Legation at Kabul, has been produced. He was at Kabul in July 1931, and he has sworn that he was present when the skins were purchased by Surjan Singh Sohan Singh from one Zaman Khan. He gives detail of the purchase and states that some money was also paid in his presence. Acharaj Singh and Sant Ram have also gone into the witness-box and proved the documents referred to above. They have produced the account books of Kabul and also the day-book of Peshawar. As regards the books at Kabul, Sant Ram has admitted that he always used to write the books himself, and whenever he was absent from Kabul, the clerk made rough notes on a copy book and on his return he posted the entries in the day-book. In his statement he alleged that he did not go out of Kabul for more than ten days at a time, but he was directed by the senior Sub-Judge to file copies of his passports. He did so and also showed in a tabular statement the dates of his arrival at Peshawar and departure therefrom in 1931-32. It is clear from a perusal of this document that he did use to stay away from Kabul for more than ten days at a time, and that in one case he stayed for about 4 months when he arrived

at Peshawar on October 18, 1931, and left it on February 12, 1932.

We have carefully listened to the argument of the learned Counsel for appellants. So far as the facts are concerned, he has not been able to urge very serious objections against the two documents and the telegram. The letters he classifies as admissions in their own favour by the plaintiffs, and as regards the telegrams, he thinks that it does not necessarily mean that they were sent by the persons by whom they are supposed to have been delivered at the Telegraph Office. He has not been able to offer any serious criticism with respect to Mahmudjan, but he has been able to show from the facts given above that the cash book kept at Kabul has not been posted in the regular course of business.

After giving the matter our very careful consideration, we think that the whole case hinges on the statement of Mahmud Jan. We have already said in the beginning of this judgment that the despatch of the goods from Kabul to Peshawar is not questioned by the defendants. The plaintiffs had only to prove that they had actually purchased the goods for themselves at Kabul and we think that they have been able to prove it by producing this independent witness, Mahmud Jan. The remaining evidence therefore becomes redundant, if we believe that Mahmud Jan is telling the truth. The letters and the telegrams may be used as corroborative pieces of evidence, and there is nothing to show that in fact they are fabrications. The letters were written in the usual course of business and no law has been quoted by the learned Counsel in support of his allegation that they could not be admitted in evidence. One telegram is in reply to the other and when read with the letters, no ambiguity remains with regard to the sender and the recipient of the messages, and it is idle on the part of the learned counsel to argue that these telegrams do not provide a satisfactory link in the chain of plaintiffs' evidence. But with regard to the books, we agree with the learned Counsel and are not prepared to accept them under s. 34, Evidence Act. A day-book, which has been entered after four months in February, 1931, and the rough notes of which are admittedly not available, is not a document which can be held to have been kept in the regular course of business. These remarks apply *a fortiori* to the ledger which is prepared from such a day-book. We therefore disagree with the lower Court so far as this portion of the plaintiff's evidence is concerned, but we agree with him that the remaining evidence is sufficient, when combined with the possession of the skins, to discharge the burden placed on the plaintiffs and to make out a *prima facie* case in favour of their ownership of the goods in dispute.

We have next to see whether the defendants have met the case so made out. A glance through the evidence of the witnesses shows that they are all connected with the defendants, and it is interesting to notice that one Hardit Singh claims to have shown the goods to a Jew purchaser a week after their arrival, while we have it definitely proved on the record that they were sold to Mian Ghulam Mahbub Muhammed Umar on July 30, *i. e.* the day next to their arrival in Peshawar. The letter from Lutufulla has to be ruled out without hesitation. Lutufulla had no occasion to write a letter from Makhad, which is in the Punjab, when he was not doing work for any person. Again, there is no postmark on this envelope although it is supposed to have come through post. An attempt has been made to create some sort of postmark on the envelope. It is so faint that the learned Counsel for the appellants had to suggest that the seal was affixed at the back of the envelope and that the ink came through to the front. The back portion of the envelope is torn and therefore the suggested seal is not there. But on a close scrutiny we find that although the ink is said to have come through from behind, there is no mark of it on the back side of the paper in front of which the seal exists. It is incredible that the seal should have been so forcibly struck that the ink should have gone through the envelope and the letter, and permeating through the paper created an impression on the front, and yet left the letter and the back of the paper quite clean. This is enough to show that it is not a genuine document. We hold on the merits that the plaintiffs have proved that the skins in question belonged to them and that the defendants have not been able to rebut the case.

The learned Counsel took two legal objections on appeal. He urged that the plaintiffs consisted of a joint Hindu family and that they had not brought the suit in the proper form prescribed for suits by members of a co-parcenary. This plea was not taken in the lower Court; nor was it raised in the grounds of appeal. It has been submitted as an additional ground of appeal to this Court. There is nothing

on the record to show that the plaintiffs do constitute a joint Hindu family, and we are not prepared to allow the appellants to raise this new point on appeal for deciding which it is necessary to take evidence. The second point taken by the learned Counsel was that the plaintiffs had no *locus standi* to bring the suit. The goods belonged to the Kabul firm and that firm should have instituted the proceedings. We do not see any substance in this allegation too. The plaintiff firm are partners with Acharaj Ram-Sant Ram in the Kabul firm. It is an admitted principle of law that partners can bring a suit for the benefit of the firm, and although they may be prosecuting the litigation on their own responsibility, the benefit goes to the concern, and it is no business of third parties to question their *locus standi*. If any authority be needed for this proposition, we quote *Kapurji Magniram* v. *Pannaji Devichand*, (1). For the reasons given above, we dismiss the appeals with costs. Pleader's fee at 1½ per cent.

D. *Appeals dismissed.*

(1) 113 Ind. Cas. 341; A I R 1929 Bom. 177; 53 B 110; 30 Bom. L R 1560.

LAHORE HIGH COURT

First Civil Appeal No. 586 of 1932

June 14, 1934

ADDISON AND BECKETT, JJ.

PRABH DIYAL—PLAINTIFF—APPELLANT

versus

M. MUHAMMAD NAWAZ SHAH—DEFENDANT—RESPONDENT

Punjab Court of Wards Act (II of 1903), s. 43—Ward of Court—Disability removed except in respect of joint property of his and another ward—Capacity to enter into fresh contract—Debt incurred during minority, if can be ratified.

Where the effect of a notification was to remove the legal incapacity of a ward of Court except in respect of any property which he owned jointly with another who continued to be under superintendence :

Held, that the former person was not thenceforth a ward of Court and was capable of entering into a fresh contract after the removal of the disability, but that he was not in a position to ratify any debt incurred during his minority.

F. C. A. from a decree of the Senior Sub-Judge, Multan, dated March 17, 1932.

Mr. *Badri Das*, for the Appellant.

Dr. *Shuja-ud-din* and Malik *Muhammad Amin*, for the Respondent.

Judgment.—Prabh Diyal sues Muhammad Niwaz Shah on the strength of an acknowledgment executed by the latter on June 10, 1927. According to this acknowledgment, Muhammad Niwaz Shah had taken a loan of Rs. 3,710 in cash, and had made himself responsible for the payment of Rs. 200 due on a decree outstanding against his maternal uncle and agent Ghulam Ali. Adding interest at the rate of six pies per rupee per mensem, the plaintiff seeks to recover a sum of Rs. 6,290-10-0.

There is a two-fold defence. In the first place, it is contended that the defendant was still a ward within the meaning of s. 3 (*d*), Punjab Court of Wards Act, 1903, when the acknowledgment was written and that he was accordingly not competent to enter into any contract involving pecuniary liability. In the second place, it is alleged that no money was paid and that the entry was merely made to cover an earlier liability incurred when he was admittedly under the Court of Wards. It is not disputed that such an acknowledgment would be invalid. The trial Court has accepted the defence on both these points, and has dismissed the suit with costs. The plaintiff has appealed.

The defendant's estate had already been placed under the Court of Wards in the lifetime of his father. His father died when he was still a minor and he was then placed under the Court of Wards on account of his minority. Part of the land was held jointly with a cousin named Bakar Shah, who was also under the Court of Wards. On January 15, 1925, the person and property of Muhammad Niwaz Shah were released from the superintendence of the Court of Wards with the exception of the land which he owned jointly with Bakar Shah. The question is whether this exception was sufficient to continue his status as a ward. According to s. 3 (*d*), Court of Wards Act, a ward means any person in respect of the whole or any part of whose property the Court of Wards has assumed superintendence but does not include a joint proprietor the superintendence of whose property has been assumed under s. 8, provides that the Court of Wards may assume superintendence of the property of a joint proprietor when the other joint proprietor is placed under superintendence. In the present instance the Court of Wards had not assumed superintendence over the joint property of Muhammad Niwaz Shah under this section, although it would appear from the connected correspondence that it was intended that the effect should be the same. From this the lower Court has concluded that Muhammad Niwaz Shah continued to

be a ward after his person and separate property had been released. In arriving at this decision, however, the learned Subordinate Judge appears to have overlooked the provisions of s. 46, which seems to be intended to meet such a situation. This provides that the Court of Wards may retain superintendence over joint property when any of the proprietors cease to be under any legal incapacity and that in such cases the proprietor who has ceased to be disqualified shall not be deemed to be a ward for the purposes of the Act. The effect of the notification of 1925 was to remove the legal incapacity of Muhammad Niwaz Shah except in respect of any property which he owned jointly with Bakar Shah, who continued to be under superintendence; and s. 46 makes it clear that this fact alone would not be sufficient to make Muhammad Niwaz Shah a ward.

The defendant was thus capable of entering into a fresh contract in 1925 but it is admitted that he was not in a position to ratify any debt incurred during his minority. On this question we have the evidence of Muhammad Niwaz Shah himself and we agree with the lower Court that it represents what actually occurred. According to the defendant, he borrowed a small sum of money and took some grain at a time when he was still under the influence of his mother and considered that the allowance made to him by the manager of his estate was inadequate. On attaining majority he executed the acknowledgment in question under fear of involving his mother, who had signed the earlier entry along with him.

It is admitted that the plaintiff was in partnership with Ram Chand at the time when the earlier debt is said to have been incurred and the matter could easily have been cleared up if account books of that period had been produced. Ram Chand has appeared as a witness and has given an entirely unconvincing story to explain why the books have not been produced. The defendant has thus been deprived of the only documentary evidence which could be forthcoming in order to test his story. Moreover, there are suspicious circumstances with regard to the later transaction. The sum mentioned in the later entry is a very large sum to have been taken in cash to a place where neither of the parties belong. The defendant was a young man just emerging from minority and his statement is one which we believe to be correct. In these circumstances the only sum which the plaintiff is entitled to recover is the sum of Rs. 200 for which he made himself responsible in respect of the decree against his uncle. We set aside the decree of the lower Court and grant the plaintiff a decree for the recovery of Rs. 200 from the defendant, with interest at 6 per cent. per annum from June 10, 1927, upto the date of realisation. To this extent only the appeal is accepted. The defendant will receive half his costs from the plaintiff in both the Courts.

N *Decree modified.*

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Transfer Application No. 177 of 1934

December 12, 1934

RUPCHAND, A. J. C.

Musammat SATBHARI—APPLICANT

versus

MUHAMMAD SIDIK—OPPONENT

Criminal Procedure Code (Act V of 1898), s. 526—Accused and his witnesses residing at considerable distance, whether a ground for transfer—For accused to appear in certain place risky and inconvenient—Held, case should be transferred.

The fact that an accused person and his defence witnesses reside at a considerable distance from where they are being tried is ordinarily no ground for transfer; but where it is highly inconvenient and risky for the applicant to appear either as an accused or as a witness in certain place, the case should be transferred from that place.

Mr. *B. P. Samtani*, for the Applicant.

Mr. *C. M. Lobo*, for the Crown.

Order.—This is an application by *Musammat* Satbhari for transfer of a case pending against her and seven other persons in the Court of the Second Class Magistrate, Shahdad, U. S. F.

The main ground on which I am prepared to transfer the case is that of convenience. Of the eight accused seven are said to be residents of Nawabshah District and their witnesses are residents of Nawabshah. The eighth accused is said by them to be a fictitious person and this may or may not be true. The complaint against them is one under s. 498 read with s. 109, Penal Code, and the woman who is said to have been enticed away is *Musammat* Satbhari herself. How and why the Magistrate should have issued process against is another matter. There is no application for quashing the proceedings against her and, therefore, I express no opinion upon that point. It will perhaps be easier for the complainant and his witnesses to go to Nawabshah than for the accused to go

to Shahdad Kot. Now the fact that an accused person and his defence witnesses reside at a considerable distance from where they are being tried is ordinarily no ground for transfer; the circumstances of this case are peculiar. After the death of Karim Bux who was the husband of *Musammat* Satbhari, one Esmail claimed to have married her and asked for a *Jirga*. The prayer of Ismail was refused as per certified copy of the order filed. This is another complaint against her and her relatives by the complainant who claims to have married her subsequently. I do not wish to go into the merits of the allegations made in this complaint or the defence set up but I do think that it will be highly inconvenient and risky for her to appear either as an accused person or as a witness in the Larkana District.

The learned Public Prosecutor does not oppose the transfer. I accordingly direct that this case be transferred to the District Magistrate, Nawabshah, who will either try the case himself or transfer it for trial to some other competent Magistrate under him.

D. *Application allowed.*

LAHORE HIGH COURT

Miscellaneous First Civil Appeal No. 2045 of 1930

March 28, 1934

JAI LAL, J.

PANNA LAL AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

BASANTA MAL AND OTHERS—RESPONDENTS

Execution—Restitution in favour of judgment-debtor—Surety failing to pay back certain amount—Suit finally decided in favour of decree-holder—Credit to judgment-debtor to the extent of lost amount.

In execution proceedings the judgment-debtors had paid the full decretal amount to the decree-holder and when restitution thereof was directed owing to the decree having been set aside, they recovered a certain amount by sale of the *sarai* belonging to one of the sureties of the decree-holder, but he was subsequently deprived of that *sarai* on the ground that the surety had no interest in it. In the meantime the suit was remanded and finally decided in favour for the decree-holder. In the final execution proceedings, the judgment-debtor claimed credit for this lost amount :

Held, that whatever might be the equities between the surety and the decree-holder or the judgment-debtor, the judgment-debtor having paid the full decretal amount to the decree-holder originally must be deemed to have failed to recover it in the restitution proceedings to the extent of the lost amount. The decree-holder, therefore, must give credit for this amount to the judgment-debtor. *Mehr Chand* v. *Milkhi Ram* (1), distinguished.

M. F. C. A. from an order of the Senior Sub-Judge, Kangra, dated August 13, 1930.

Mr. *Nawal Kishore*, for the Appellants.

Mr. *Mehr Chand Mahajan*, for the Respondents.

Referring Order

Tek Chand, J.—After Counsel for the appellants had finished his address and Mr. Mehr Chand had commenced his arguments, my attention was drawn to the fact that the question of law involved in this case is the subject of a reference to a Full Bench in *Mehr Chand* v. *Milkhi Ram* (1). The hearing must therefore be adjourned till the Full Bench has disposed of the reference. I think it desirable, however, to set out here the facts which are necessary for the disposal of this case, as these are scattered over several records and have been ascertained after spending considerable time. These facts are no longer in dispute and are admitted by both Counsel.

In a suit for dissolution of partnership, a decree was passed in 1919 by the Subordinate Judge, Kulu, in favour of Salig Ram against Tulsi Ram. In execution of this decree the judgment-debtor Tulsi Ram deposited Rs. 18,000 in Court. The decree-holder Salig Ram was allowed to withdraw this amount, on furnishing security by three sureties each binding himself to refund Rs. 6,000 with interest at 6 per cent. per annum, in the event of the appeal, which Tulsi Ram had preferred to this Court against the decree of the Senior Subordinate Judge, being accepted. In accordance with this order three persons, Basanta Mal, Laungu Mal and Shiv Dayal executed security bonds for refund of Rs. 6,000 each with interest at the rate above mentioned. The appeal against the original decree remained pending in this Court for some years and was eventually accepted, the decree of the trial Court having been set aside and the case remanded for fresh decision.

Soon after the High Court had accepted the appeal, the judgment-debtor Tulsi Ram applied under s. 144, Civil Procedure Code, to the executing Court for restitution of the sun of Rs. 18,000, which he had paid in execution of the decree together with interest due thereon. In this application he prayed that if the amount could be rea-

(1) 138 Ind. Cas. 47; A I R 1932 Lah. 401; 13 Lah. 618; Ind. Rul. (1932) Lah. 396; 33 P L R 649.

lised from Salig Ram it should be recovered from the three sureties in terms of the bonds executed by them. This application was granted and the sureties were called upon to pay. Of them Basanta Mal and Laungu Mal made payments in full and were discharged from their bonds. The third surety, Shiv Dayal, failed to pay. The principal sum and interest by him found to be Rs. 9,079 and for this sum execution was taken against him by sale and attachment of his property. In execution proceedings Rs. 6,042-4-0 only was realised, partly in cash and partly by sale of immovable properties which were believed to belong to Shiv Dayal. One of the properties sold by the Court to realise the amount due by Shiv Dayal was a *sarai* at Kulu which was purchased for Rs. 1,700 by the sons of Tulsi Ram, who had died meanwhile. This sale took place on October 8, 1927, and was duly confirmed by the Court and a sale certificate granted to the auction purchasers on Juue 23, 1928.

From what has been stated above it will be clear, that out of the amount which Salig Ram and his sureties had to refund to Tulsi Ram under s. 144, a sum of Rs. 3,036-12-0 (Rs. 9,079 minus Rs. 6,042-4-0) remained unpaid, the balance having been adjusted by repayment in cash and sale of properties, one of which was the *sarai* valued at Rs. 1,700.

In the meantime, the original suit for dissolution of partnership, which was being re-tried by the Senior Subordinate Judge in accordance with the remand order passed by the High Court, was decided on March 22, 1928, when a decree of Rs. 12,463 was passed in favour of Salig Ram against the sons of Tulsi Ram. The decree-holder Salig Ram instead of executing this decree himself assigned Rs. 9,000 out of the decretal amount to his uncle Basanta Mal, authorising him to take out execution for that sum. Shortly afterwards Salig Ram made another assignment for Rs. 1,500 out of the remaining decretal amount, in favour of one Janardhan. On the basis of these assignments Basant Mal and Janardhan applied for execution of the decree against the sons of Tulsi Ram.

In the meantime a suit had been instituted by Basanta Mal against the sons of Tulsi Ram and Shiv Dayal for a declaration that the *sarai* which had been sold to the sons of Tulsi Ram for Rs. 1,700 in the Court auction held in restitution proceedings against Shiv Dayal, surety for Salig Ram, was *wakf* property and that Shiv Dayal had no saleable interest in it. This suit was decreed on April 3, 1930, on the finding that the *sarai* did not belong to Shiv Dayal but had been dedicated to the public, and that the auction sale was invalid. This decree was affirmed by the District Judge on July 17, 1930.

In the execution proceedings which had been started by Basanta Mal and Janardhan, as assignee from the decree-holder Salig Ram, against the judgment-debtors (sons of Tulsi Ram), the aforesaid assignees claimed that the sum due on the decree was Rs. 9,426-4-0 which had been arrived at as follows:

Rs. 12,463-0-0	Decretal amount.
less Rs. 3,036-12-0	The amount which the decree-holder Salig Ram and his surety Shiv Dayal had failed to refund to the judgment-debtor Tulsi Ram in the restitution proceedings.
Rs. 9,426-4-0	

The judgment-debtors (sons of Tulsi Ram) claimed a further set off for Rs. 1,700, the price of the *sarai* which had been sold to them in Court auction held in the restitution proceedings on the assumption that it was the property of Shiv Dayal surety for the decree-holder, but which sale had been set aside in the declaratory suit brought by Basanta Mal, uncle of Shiv Dayal. They accordingly contended that the decree could be executed for Rs. 7,726-4-0 (Rs. 9,426-4-0 minus Rs. 1,700) only. The executing Court has refused to allow this set off and the judgment-debtors have appealed.

For the appellants Mr. Nawal Kishore relied on *Asad Ullah Khan* v. *Karam Chand* (2) and *Radha Kishun Lal* v. *Kashi Lal* (3). For the respondents Mr. Mehr Chand has urged that the authority of *Asad Ullah Khan* v. *Karam Chand* (2) has been considerably shaken, if not altogether destroyed, by the decision in *Habib-ud-din* v. *Hatim Mirza* (4). He has also relied on *Ram Saroop* v. *Dalpat Rai* (5). As stated already, the question whether *Asad Ullah Khan* v. *Karam Chand* (2) is still good law is the subject of a reference to a Full Bench in Civil Appeal No. 2128 of 1930 [*Mehar*

(2) 76 Ind. Cas. 605; A I R 1924 Lah. 115; 4 Lah 354; 6 Lah. L J 67.

(3) 76 Ind. Cas 927; A I R 1924 Pat. 273; 2 Pat. 829; 1 Pat. L R 358; (1923) Pat. 342; 5 P L T 345

(4) 86 Ind. Cas. 622; A I R 1925 Lah. 467; 6 Lah. 283; 1 Lah. Cas. 552.

(5) 58 Ind. Cas. 105; A I R 1921 All. 377; 43 A 60.

Chand v. *Milkhi Ram* (1)] and I understand the Full Bench is sitting next week to dispose of the reference. In these circumstances, it is not desirable for me, sitting in Single Bench, to proceed with a decision of the point. The hearing is adjourned. A fresh date, after the opinon of the Full Bench has been pronounced, will be fixed.

Jai Lal, J.—The full facts of this case are mentioned in the order of Tek Chand, J., dated March 10, 1932. The Full Bench of this Court has held that ordinarily an auction purchaser is entitled to recover from the decree-holder the amount paid by him for immovable property purchased at an auction sale held in execution of a decree if he is subsequently deprived of the property on the ground that the judgment-debtor had no saleable interest in it. In the present case, however, the question does not directly arise principally because the person who had the property attached and sold himself was the auction purchaser. It is, therefore, doubtful whether the rule laid down in the Full Bench judgment directly governs the present case. The question, however, can be looked at, and ought to be looked at from another point of view which is that the judgment-debtors, the sons of Tulsi Ram, had paid the full decretal amount to the decree-holder and when restitution thereof was directed owing to the decree have been set aside, they recovered Rs. 1,700 by sale of the *sarai* belonging to Shiv Dayal, one of the sureties of the decree-holder, but have subsequently been deprived of that *sarai* on the ground that Shiv Dayal, the surety had no interest in it. The net result is that Shiv Dayal the surety, has been unable to return Rs. 1,700 out of the amount which he had guaranteed to return to the sons of Tulsi Ram. Whatever therefore may be the equities between Shiv Dayal and the decree-holder or the judgment-debtor, the judgment-debtor having paid the full decretal amount to the decree-holder originally must be deemed to have failed to recover it in the restitution proceedings to the extent of Rs. 1,700. The decree-holder therefore must give credit for this amount to the sons of Tulsi Ram. I accordingly accept this appeal with costs and direct that a further set off of Rs. 1,700 be given to the sons of Tulsi Ram.

D. *Appeal allowed.*

MADRAS HIGH COURT

Civil Revision Petition No. 538 of 1933

September 17, 1934

PAKENHAM WALSH, J.

POTTA REDDI—PETITIONER

versus

KARUPPA GOUNDAN AND OTHERS—RESPONDENTS

Execution—Sale—Adjournment of sale on giving up objections to sale proclamation—Estoppel of judgment-debtor against raising those objections again—Revision—Omission to decide question of estoppel—Revision to prevent prolonging of litigation—Civil Procedure Code (Act V of 1908), s. 115.

Where the properties of a judgment-debtor are proclaimed for sale and he gets an adjournment of the sale by giving up his objections to the sale proclamation, he is estopped from raising those objections again.

The High Court has power to interfere in revision under its general powers of superintendence to prevent an inquiry which would not only prolong the litigation unnecessarily but would also lead to a determination of the rights of the parties upon an improper basis. Where the Court declined to decide a question of estoppel which clearly arose on the pleadings and appointed a Commissioner for local inquiry:

Held, the High Court had power to interfere in revision and set aside the order appointing a Commissioner. *Ramji Ram* v. *Ramasre Rant* (2), referred to.

C. R. P. under ss. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Coimbatore, dated February 27, 1933, and made in E. A. No. 119 of 1933 in E. A. No. 724 of 1932 in E. P. No. 63 of 1931 in O. S. No. 156 of 1929.

Mr. *K. V. Ramachandra Ayyar*, for the Petitioner.

Mr. *T. V. Ramanathan*, for the Respondents.

Judgment.—The decree-holder in the case filed an E. P. No. 63 of 1931 to bring the properties to sale. The sale was posted to December 16, 1931, and by consent of parties adjourned to March 16, 1932. The judgment-debtors in spite of notice took no part in the sale proclamation and came forward objecting to the property being sold in certain lots and other matters of this sort. By a consent order the sale was adjourned to June 29, 1932. The order on the petition runs as follows:—"This is not pressed. Sales adjourned. Objection to sale proclamation given up." This order is dated March 23, 1932. The sale was again adjourned to September 28, 1932, and even afterwards adjourned from day to day. An application for adjournment is put in on October 5, 1932, and refused. The sale was concluded on October 10, 1932. An application to set aside the sale was put in

under O. XXI, r. 90, in which the objections to the sale application given up on a former occasion are repeated. There was a prayer to examine witnesses as to the value of the property or in the alternative, to depute a Commissioner. In the reply to the petition it was distinctly urged that the judgment-debtors were estopped by their conduct from raising these objections to the sale proclamation. The learned Subordinate Judge without giving any decision on the question of estoppel or any reasons for his order, simply passed an order as follows:—

"It is desirable to appoint a Commissioner and one will be appointed. Rs. 75, fees by March 3, 1933." Against this order the revision petition has been filed.

I think the order cannot be maintained. In the first place the question of estoppel clearly arose for decision and the lower Court did not decide it, thereby refusing to exercise a jurisdiction which it was bound to exercise. The estoppel is to my mind in this case perfectly clear. The judgment-debtors had got an adjournment from March 23, to June 29, 1932, by expressly giving up their objections to the sale proclamation. It is immaterial, therefore, whether the sale proclamation is an administrative act as held by this Court or a judicial act as held by some other High Courts; because a party can by his conduct towards another party estop himself from rights which he might have otherwise exercised in Court proceedings. In *Arunachalam* v. *Arunachalam* (1), (a Privy Council case) at p. 25* their Lordships say:

"It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed."

Here the case is much stronger. The judgment-debtors have got an adjournment of the sale by giving up their objections to the sale proclamation. Therefore, they are estopped from raising those objections again.

As to the power of the Court to interfere in revision in such a matter, *Ramji Ram* v. *Ramasre Rant*, 83 Ind. Cas. 124 (2), is an authority and it was also a case where the lower Court had issued a commission. It was there laid down that the High Court shall interfere in revision under its general powers of superintendence to prevent an inquiry which would not only prolong the litigation unnecessarily but would also lead to a determination of the rights of the parties upon an improper basis. As said above the lower Court has refused to exercise its jurisdiction in deciding the preliminary point raised as to whether the judgment-debtors were estopped from questioning the correctness of the proclamation order. That alone is a clear ground for revision. I am also satisfied that the issue of this Commission is, as in *Ramji Ram* v. *Ramasre Rant*, 83 Ind. Cas. 124 (2), under the circumstances a waste of public time and money and the order appointing a Commissioner must be set aside. The Court will deal with the petition on its other merits taking into consideration any other ground raised for setting aside the sale. The petitioner will have his costs here and in the lower Court.

A. *Order accordingly.*

(1) 12 M 19; 15 I A 171; 5 Sar. 265; 12 Ind. Jur. 371 (P C).

(2) 83 Ind. Cas. 124; (1924) Pat. 217; A I R 1924 Pat. 761.

*Page of 12 M.—[Ed.]

NAGPUR JUDICIAL COMMISSIONER'S COURT

Criminal Revision No. 54 of 1935

March 11, 1935

SUBHEDAR, A. J. C.

EMPEROR—PROSECUTOR

versus

BALLI—ACCUSED

Penal Code (Act XLV of 1860), ss. 307, 326—Essentials for conviction under s. 307—Doctor's testimony that injuries inflicted were not sufficient in the ordinary course to cause death—Conviction under s. 307 is wrong.

To sustain a conviction under s. 307, Penal Code, it is necessary that there must be an act done under such circumstances that death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of things; and if the act complained of is not of that description, the assailant cannot be convicted of an attempt to murder under s. 307, Penal Code. Where the doctor who treated the injured does not say that the injuries inflicted by the accused were sufficient in the ordinary course to cause her death, the principle of deducing intention from the nature of the injuries and their natural and probable consequences is misapplied and a conviction under s. 307 is not sustainable. The conviction must be altered to one under s. 326 and a sentence of 18 months' rigorous imprisonment cannot be considered to be so grossly inadequate as to require enhancement. *Jhagru Gond* v. *Emperor* (1), *Reg.* v. *Francis Cassidy* (2), *Jiwan Das* v. *Emperor* (3), and *Emperor* v. *Martu Vithoba Prabhu* (4), relied on. *Empress* v. *Phagya* (5), referred to.

Case referred by the Sessions Judge,

Chhindwara, on January 24, 1935, under s. 436, Criminal Procedure Code.

Order.—In Criminal Case No. 240 of 1934 Mr. Vishwanath Prasad, Magistrate of the First Class, exercising powers under s. 30 of the Criminal Procedure Code, convicted Balli, a youth of about 18 years of age, of an offence under s. 307, Indian Penal Code, for attempting to murder his mother-in-law, *Musammat* Jhela, and sentenced him to 18 months' rigorous imprisonment.

The facts found by the learned Magistrate are shortly these. *Musammat* Jhela's only daughter, *Musammat* Chindi, has been married to Balli. *Musammat* Jhela, however, did not send her daughter to her husband's house with the result that extreme ill-feelings ensued between her and her son-in-law, Balli. *Musammat* Jhela herself attributes the case of the ill-feelings to her unwillingness to execute a will of her property in favour of Balli as proposed by him. On account of this hostility between Balli and his mother-in-law, the former had attacked her, in 1932, with a knife for which he was convicted of an offence under s. 324, Indian Penal Code, but was released on probation of good conduct under the provisions of s. 562 of the Criminal Procedure Code.

On September 25, 1934, Balli again committed an assault upon his mother-in-law with an axe causing, according to Dr. Dass (P. W. No. 6), the following four injuries:—

"1. One incised wound 5" long, 1" broad in centre, ¼th" broad in upper end and 1-8th" broad in lower and 3-4th" deep with a concavity directed anterior on the right Parotid and temporal region about their middle part. This was probably due to some sharp instrument.

2. One incised wound 3" × 1" × 1" obliquely directed from above downwards from right to left on the left scapular region about its middle part. This was also due to some sharp instrument.

3. One incised wound 1" × ½" × 1-8th" on the middle and upper part of left forearm due to sharp instrument.

4. A fracture of the middle part of left radius under wound No. 3."

The old woman was admitted as an in-door patient in the hospital and in due course of time recovered. Balli's appeal against his conviction was rejected by the Sessions Judge, who has made the present reference under s. 438 of the Criminal Procedure Code, for enhancement of the sentence passed upon Balli from 18 months to 5 years' rigorous imprisonment' as in his opinion, Balli was very leniently dealt with by the trying Magistrate.

In showing cause againt the recommendation of the Sessions Judge, the District Magistrate states that "Balli accused being a lad of 18 years hardly deserves a more severe sentence than 18 months" in view of "the fact that he rightly felt resentment at his mother-in-law's conduct, in not sending away his wife which made him impetuous and furious." Balli was unrepresented at the hearing of the reference but having carefully gone through the record of the case I am definitely of opinion that his conviction under s. 307, Indian Penal Code, was itself wrong and that he ought to have been convicted of an offence under s. 326, Indian Penal Code.

Dr. Dass (P. W. No. 6) does not state in his evidence that the four injuries, which he noticed on *Musammat* Jhela, were ordinarily capable of causing her death in the natural and ordinary course of events. Towards the end of para. 8 of his judgment the trying Magistrate records the curious finding that Balli's "action amounted to an attempt which was a little short of murder". The learned Sessions Judge is more definite and says, in para. 3 of his judgment, that "from the nature of the injuries there can be no question that Balli's intention was to kill *Musammat* Jhela; and it is only by mere chance that she has escaped". The best person to describe the exact nature of the injuries and their natural effect was, however, the Medical Officer who examined *Musammat* Jhela and treated her. When he does not say that the injuries inflicted by Balli upon his mother-in-law were sufficient in the ordinary course to cause her death, the principle of deducing intention from the nature of the injuries and their natural and probable consequences as laid down in *Jhagru Gond* v. *Emperor* (1), appear to have been misapplied to the present case and "Balli's intention to kill *Musammat* Jhela" wrongly inferred. In the absence then of any evidence to show that the intention of Bali in inflicting the injuries was to kill

(1) 1 N L R 134 at p 136.

his mother-in-law, his conviction under s. 307, Indian Penal Code, was, in my opinion, not justified.

To sustain a conviction under s. 307, Indian Penal Code, it is necessary that there must be an act done under such circumstances that death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of things; and if the act complained of is not of that description, the assailant cannot be convicted of an attempt to murder under s. 307, Indian Penal Code, *Reg* v. *Francis Cassidy* (2), and *Jiwan Das* v. *King-Emperor* (3). In *Emperor* v. *Martu Vithoba Prabhu* (4), it was held that the only act, which can fall within the purview of s. 307, Indian Penal Code, is an act which by itself must be ordinarily capable of causing death in the natural and ordinary course of events. There a person who struck his wife on her neck with an axe causing an incised would was convicted only under s. 324, Indian Penal Code, the Court observing:—

"Although a hatchet is a dangerous weapon, a blow with it is not, in our opinion, an act ordinarily capable of causing death in the natural and ordinary course of events. On the contrary, we should say that whether a blow with a hatchet is or is not capable of causing such a result must depend upon the particular nature of the blow inflicted. It seems to us, therefore, that this is a case where the accused's criminal liability must be limited to the act which he in fact did, and cannot be extended so as to embrace the consequences of another act which he might have done but did not do".

For the reasons given above, I alter the conviction of the prisoner Bali from one under s. 307 to one under s. 326, Indian Penal Code. Under these circumstances the sentence of 18 months' rigorous imprisonment passed upon him is, in my opinion, not so grossly inadequate as to require enhancement: *Empress* v. *Phagya* (5). Let the records be returned.

N. *Conviction altered.*

(2) 4 B H C R 17 at p 21 Cr.
(3) 30 P R 1904 Cr.
(4) 21 Ind. Cas. 881; 15 Bom, L R 991 at p 993.
(5) 9 C P L R 4 Cr.

MADRAS HIGH COURT

Civil Revision Petition No. 837 of 1933
September 28, 1934
PAKENHAM WALSH, J.

GOLLA LAKSHMIAH NAIDU—
PETITIONER
versus
GOLLA KRISHNASWAMI NAIDU AND ANOTHER—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. VI, r. 17 —Amendment of plaint—Suit to declare right to worship for particular year—Expiry of year before trial—Amendment of plaint for declaration of right to worship by turns—Permissibility.

Order VI, r. 17, Civil Procedure Code of 1908 is considerably wider than the corresponding section of the old Code and Court is given very wide power or discretion to allow amendments especially to avoid multiplicity of suits.

The plaintiff filed a suit for a declaration that they were *golla mirasidars* of a temple and that in pursuance of an agreement they were entitled to enjoy the said office according to turns from July 1, 1931, to June 30, 1932, and for possession of the office. The suit did not come up for trial till March 1933. The plaintiff, therefre, prayed for amending the plaint by adding a prayer for a declaration that they were entitled to get possession during alternate years:

Held, that the case was one in which an amendment ought to be allowed. *Ramasaran Mandeav* v. *Mahabir Saha* (1), distinguished. *Charan Das* v. *Amir Khan* (2), referred to.

Petition under s. 115 of Act V of 1908 and s. 107, of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Tirupathi, dated June 1, 1933, and made in I. A. No. 199 of 1933 in O. S. No. 402 of 1931.

Mr. *B. C. Seshachala Ayyar*, for the Petitioner.

Mr. *K. Kuppuswami*, for the Respondents.

Judgment.—The plaintiffs sued for a declaration that they are *Golla Mirasi*-holders of the Sri Kothandaramaswami Temple and that by a registered agreement, dated August 22, 1906, between them and the defendant they were entitled to take yearly turns in holding office. They also sued to recover possession of the key of the temple and to fill this office for the year beginning with July 1, 1931.

The suit was filed in November 1931 and did not come up for hearing till March 1933, apparently for no fault of the plaintiffs. By that time the year for which they were entitled to possession had elapsed. The defendant urged that they must be, therefore, non-suited as a mere prayer for declaration without possession could not be granted. The plaintiffs

asked to amend their plaint by claiming the relief they were entitled to, *viz.*, to get possession during alternate years. This amendment was allowed by the Court and against the order allowing it the present revision petition is filed.

The argument of the petitioner is that the amendment enlarges the scope of the suit. It may be noted here that it was contended for the plaintiffs even at the time of the amendment that the suit was maintainable even as it stood without amendment; and the lower Court wisely, I think, said it was unnecessary to decide this point. The plaint as it was orginally framed runs:—

"The plaintiffs, therefore, pray for a declaration that they are the *Golla Mirasi*-holders of Sri Kothandaramaswami Temple, that in pursuance of the agreement dated August 22, 1906, they are entitled to enjoy the said office according to turns from July 1, 1931, to June 30, 1932, and that after establishing their right in a Court of Law they are entitled to have the defendant removed from the *Udigam Mirasi* office and to get possession of the keys through the process of the Court."

It will be observed that there is a direct prayer for a declaration that they are entitled to enjoy the said office according to turns from July 1, 1931, to June 30, 1932. No doubt it is not stated that the turns are alternate yearly ones but that is the reasonable inference and the whole claim is based on a registered agreement which is filed. It is difficult, therefore, to say positively that a decree given in accordance with this request would not enable them to recover possession of the property in alternate years. In any case it appears to me to be a suit where the amendment ought to be allowed. It has been asked for before the trial and it is impossible to see how the defendant would be prejudiced by it. The only case quoted by the other side in *Ramasaran Mandev* v. *Mahabir Saha* (1). There the whole case was sought to be altered at the time of the argument in the Privy Council. Order VI, r. 17, is considerably wider than the corresponding section of the old code and the Court is given very wide power or discretion to allow amendments especially to avoid multiplicity of suits. The only result of refusing the amendment would be to drive the plaintiffs to a fresh suit, while the title remains the same. In *Charan Das* v. *Amir Khan* (2), an amendment for the first time granted in Second Appeal was not interfered with by the Lordships of the Privy Council. I do not see sufficient reason to interfere with the discretion exercised by the lower Court in allowing this amendment. The Revision Petition fails and is dismissed. Costs to abide the result of the suit.

A. *Petition dismissed.*

(1) 100 Ind. Cas. 56; 52 M L J 402; 25 A L J 74; (1927) M W N 69; A I R 1927 P C 18; 8 P L T 98; 38 M L T 74; 31 C W N 409; 25 L W 635; 45 C L J 313; 29 Bom. L R 796; 6 Pat. 323 (P. C.)

(2) 57 Ind. Cas. 606; 48 C 110; 39 M L J 195; 28 M L T 149; 2 U P L R (P C) 124; 18 A L J 1095; 22 Bom. L R 1370; 47 I A 255; 13 L W 49; 25 C W N 289; 3 P W R 1921 (P. C.)

CALCUTTA HIGH COURT

Civil Appeal No. 2493 of 1931

June 7, 1934

NASIM ALI, J.

HARIMOHAN—APPELLANT

versus

DULU MIYA—RESPONDENT

Contract Act (IX of 1872), s. 65—Specific Relief Act (I of 1877), s. 41—Fraud—Minor—No misrepresentation on part of minor when executing bond—Held, on facts that no fraud was committed and plaintiff was not entitled to return of his money.

Fraud operating to deceive must be found as a fact and whether in any particular case there was such fraud must depend on its own circumstances. It must be shown to the satisfaction of the Court by the party who alleges fraud that he was deceived into action by the fraud. Where it has not been found that, at the time when the minor executed the bond and received the money, he was aware that his minority was extended under the law nor has it been proved that he held himself out as being of age or that the plaintiff was deceived by any misrepresentation on his part, there is no fraud or misrepresentation on the part of the minor and the plaintiff is not entitled to return of his money either under s. 65, Contract Act, or under s. 41, Specific Relief Act:

Held, in the above case that even if it is permissible to maintain that the power to give equitable relief is more extensive in India than in England, in other words, that Courts in British India can give equitable relief apart from cases which do not come either under s. 65, Contract Act, or s. 41, Specific Relief Act, the plaintiff cannot get any relief in view of the findings of fact which have been arrived at

[English and Indian case-law reviewed.]

C. A. from appellate decree of the First Additional Sub-Judge, Noakhali, dated May 23, 1931.

Mr. *Atulchandra Gupta* and *Jitendrakumar Sen Gupta* for the Appellant.

Mr. *Shyamaprasanna Deb*, for the Respondent.

Judgment.—This is an appeal by the plaintiff in a suit for recovery of money on a mortgage bond. The substantial defence of the defendant was that he was a minor at the time of the loan and as such plaintiff was not entitled to any relief. The

Courts below have found that defendant No. 1 executed the mortgage bond and borrowed the money. It has been further found by the Courts below that defendant No. 1 was a minor at the time when the bond was executed and the money was advanced. The Courts below have also found that there had been no fraudulent misrepresentation on the part of defendant No. 1 about his age at the time when he executed the bond. On these findings the Courts below have dismissed the suit: Hence the present appeal by the plaintiff.

The first point urged on behalf of the appellant is that the finding of the lower Appellate Court, that there had been no fraud by the minor, is wrong inasmuch as it was the duty of the defendant to disclose to the plaintiff at the time of the transaction that his minority was extended by the appointment of a guardian under the Guardians and Wards Act. Reliance was placed on a decision of this Court in *Surendra Nath Roy* v. *Krishna Sakhi Dasi* 9 Ind. Cas. 110 (1), in support of this contention in *Dhurmo Dass Ghose* v. *Brahmo Dutt* (2), Jenkins, J., held that fraud operating to deceive must be found as a fact and whether in any particular case there was such fraud must depend on its own circumstances. It must be shown to the satisfaction of the Court by the party who alleges fraud that he was deceived into action by this fraud. In the present case, it has not been found that plaintiff was not aware of the minority of the defendant at the time of the transaction. On the other hand the finding of the lower Appellate Court is that from the circumstances of the case it was the duty of the creditor to have inquired about the minor at the time when the money was advanced. It has not been found also that at the time when the minor executed the bond and received the money he was aware that his minority was extended under the law. It has not been proved in this case that the defendant held himself out as being of age or that the plaintiff was deceived by any misrepresentation on the part of defendant No. 1. Under these circumstances the Courts below were right in holding that there had been no fraud or misrepresentation on the part of defendant No. 1. The next point urged in support of the appeal is that on the facts found by the Court below they should have held that the defendant was bound to make restitution to the plaintiff of the benefit received by him. It is argued that, as the minor received the money under the bond which is void, he is bound to return the money which he received from the plaintiff. It is now well-settled that a plaintiff cannot base his claim for restitution under s. 65, Contract Act; see the case of *Mohori Bibi* v. *Dharmodass Ghose* (3), *Motilal Mansukhram* v. *Maneklal Dayabhai* (4), and *Punjabhai* v. *Bhagwandas Kishandas* (5). The plaintiff is not also entitled to get any compensation under s. 41, Specific Relief Act. Section 41 embodies the equitable principle that he who seek equity must do equity:

"But a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which as against that person the legislature has declared to be void. *Thurstan* v. *Nottingham Permanent Benefit Building Society* (6)"

This law has been affirmed by the House of Lords in *Nottingham Permanent Benefit Building Society* v. *Thurstan* (7), and by the Privy Council in *Mohori Bibi* v. *Dharmodass Ghose* (3). It was, however, argued on the authority of the latter decision *Surendra Nath Roy* v. *Krishna Sakhi Dasi* (1), that in a proper case the Court in the exercise of its discretion might require the minor to return the money advanced to him, under the provisions of s. 41, Specific Relief Act. In that case, however, the minor sought the equity. In the present case the minor does not invoke the aid of the equitable jurisdiction of the Court. Plaintiff, therefore, in my opinion, is not entitled to get any compensation under s. 41, Specific Relief Act. It was however, contended that defendant No. 1 was liable for damages in tort. But there can be no liability in tort in this case as the Courts below have negatived fraud on his part. Further you cannot convert a contract into a tort to enable you to sue an infant. *Jennings* v. *Rundall* (8), *R Leslie, Limited* v. *Sheill* (9). If the tort

(1) 9 Ind. Cas. 110; 15 C W N 239; 13 C L J 228.

(2) 25 C 616; 2 C W N 330.

(3) 30 C 539; 30 I A 114; 8 Sar. 374; 5 Bom. L R 421; 7 C W N 441 (P C).

(4) 59 Ind Cas. 245; A I R 1921 Bom. 147; 45 B 225; 12 L W 202; (1920) M W N 519; 39 M L J 319; 28 M L T 205.

(5) 117 Ind. Cas 518; A I R 1929 Bom. 89; 53 B 309; 31 Bom L R 83.

(6) (1902) 1 Ch. 1; 71 L J Ch. 83; 50 W R 179; 86 L T 35; 18 T L R 135.

(7) (1903) A C 6; 72 L J Ch 134; 67 J P 129; 51 W R 273.

(8) (1799) 8 Term 335.

(9) (1914) 3 K B 607; 83 L J K B 1145; 30 T L R 460; 58 S J 453; 111 L T 106.

is directly connected with the contract and is the means of effecting it and is a parcel of the same transaction, the minor is not liable in tort: see the case of *Khan Gul* v. *Lakha Singh* (10).

It is, however, contended by the appellant, on the authority of the above decision of the Full Bench of the Lahore High Court that the doctrine of restitution is not confined to cases under s. 41. It was contended that there was no warrant either in principle or in equity for the general rule that the relief should never be granted in a case where the infant happened to be a defendant. Shadi Lal, C. J., relied for this proposition on two cases: *Stocks* v. *Wilson* (11), and *Cowern* v. *Nield* (12). So far as the first case is concerned, it appears that the ground of the decision in that case was the English doctrine of following property. The decision of Shadi Lal, C. J., therefore, goes beyond the English doctrine. So far as the second case is concerned it would appear, from an examination of that case that the decision in that case ultimately rested on the principle that if there had been an independent tort, the action would succeed. Reliance was also placed upon a decision of the Madras High Court in *Appaswami Ayyangar* v. *Narayanaswami Ayyar* (13). In that case, however, the minor was the plaintiff. Consequently the provisions of s. 41, Specfic Relief Act, were directly attracted. On the other hand, Lord Sumner in the case of *R. Leslie, Limited* v. *Sheill* (9), observed as follows:

"So long ago as *Johnson* v. *Pye* (14) it was decided that although an infant may be liable in tort, generally he is not answerable for a tort directly connected with a contract which as an infant he would be entitled to avoid. One cannot make an infant liable for the breach of a contract by changing the form of action to one *ex delicto* .. . In the case of an infant it was held for a similar reason that he could not be made liable for a fraudulent representation that he was of full age whereby the plaintiff was induced to contract with him.. .. If the action should be maintainable all the pleas of infancy would be taken away for such affirmations are in every contract .....It was thought necessary to safeguard the weakness of infants at large even though here and there a juvenile knave slipped through .... I think that the whole current of decisions down to 1913 apart from *dicta* which are inconclusive went to show that when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains or to release the party deceived from obligations or acts in law induced by the fraud but scrupulously stopped short of enforcing against him a contractual obligation entered into while he was an infant even by means of a fraud. This applies even to *In re King Ex parte Unity Joint Stock Mutual Banking Association* (15). Restitution stopped where repayment began.....The money was paid over in order to be used as the defendant's own and he has so used it and I suppose spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud noting but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to re-pay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present any more than a Court of Law would have done so."

The principle of this decision was applied by the Judicial Committee to a case from the Straits Settlement where the minor mortgaged his property; see the case of *Muhammad Syedal Ariffin* v. *Yeoh Ooi Gark* (16). There cannot be any doubt, therefore, that defendant No. 1 cannot be compelled to refund the money which he obtained on the basis of the void contract. It may, however, be pointed out that in all these cases it was proved that the minor obtained the money by a fraudulent misrepresentation about his age. So far as the present case is concerned, I have already pointed out that the plaintiff has failed to show that there had been any fraud on the part of defendant No. 1. Reliance is also placed upon another equitable principle, namely, that no man can take advantage of his own fraud and consequently it was argued that the defendant was bound to return the money which he obtained from the plaintiff. In fact that is the principle on which Shadi Lal, C. J., proceeded in *Khan Gul* v. *Lakha Singh* (10). The same principle appears to have been applied in *Dhurmo Dass Ghose* v. *Brahmo Dutt* (2). Jenkins, J., in that case observed as follows:

"It is unquestionably within the power of the Court administering equitable principles to deprive a fraudulent minor of the benefits flowing from the plea of infancy but one who invokes the aid of that power must come to the Court with clean hands and must further establish to the satisfaction of the Court that a fraud was practised on him by the minor and that he was deceived into action by that fraud."

(10) 111 Ind. Cas. 175; A I R 1928 Lah. 609; 9 Lah. 701; 10 Lah. L J 413; 30 P L R 69 (F B).

(11) (1913) 2 K B 235; 82 L J K B 598; 108 L T 834; 20 Manson 129; 29 T L R 352.

(12) (1912) 2 K B 419; 81 L J K B 865; 106 L T 984; 56 S J 552; 28 T L R 423.

(13) 129 Ind. Cas. 51; A I R 1930 Mad. 945; 54 M L J 12; (1930) M W N 891; 32 L W 963; Ind. Rul. (1931) Mad. 195; 60 M L J 117.

(14) (1676) 1 Sid 258.

(15) (1858) 3 De & J 63; 27 L J B K 3?; 6 W R 640; 4 Jur. (N S) 1257.

(16) 39 Ind. Cas. 401; A I R 1916 P C 242; 43 I A 256; 21 C W N 257; (1917) M W N 162; 19 Bom. L R 157; (1916) 2 A C 575; 86 L J P C 15; 115 L T 564; 32 T L R 678 (P C).

It has been already pointed out that the plaintiff in this case has failed to show that really defendant No. 1 committed any fraud or that he has come to Court with clean hands. Under these circumstances even if it is permissible, in spite of the observation of the Judicial Committee in *Muhammad Syedal Ariffin* v. *Yeoh Ooi* (16), to maintain that the power to give equitable relief is more extensive in India than in England as has been held by the Lahore High Court in *Khan Gul* v *Lakha Singh* (10), or in other words that Courts in British India can give equitable relief apart from cases which do not come either under s. 65, Contract Act or s. 41, Specific Relief Act, plaintiff in the present case cannot get any relief in view of the findings of fact which have been arrived at by the Courts below. The Courts below, in my opinion, were, therefore, right in dismissing the plaintiff's suit. The appeal is accordingly dismissed. There will be, however, no order for costs.

D. *Appeal dismissed.*

LAHORE HIGH COURT

Second Civil Appeal No. 709 of 1931
May 18, 1934

ABDUL RASHID, J.

LAJPAT RAI—DEFENDANT—APPELLANT
versus
KARAM CHAND AND OTHERS—PLAINTIFF AND DEFENDANT—RESPONDENTS

Custom (Punjab)—Adoption—Onus —Latest riwaj-i-am *against adoption—Burden of proof*—Riwaj-i-am *of two years—Which prevails—Custom in same tribe, if varies according to localities — Adoption amongst Sainis of village Sharif Chak, Pathankot* Tahsil *in* 1928.

Where the entries in the latest *riwaj-i-am* are against adoption, the onus lies heavily on the adopted son to prove that the custom of adoption existed amongst the Sainis of village Sharif Chak in *Tahsil* Pathankot in 1928 when he is alleged to have been adopted.

[Case-law referred to.]

Where the adoption takes place in 1928, the entries in the *riwaj-i-ams* of 1913 must govern the case and not those of the *riwaj-i-am* of 1865.

It is well established that different customs may prevail in the same tribe in different localities, and that custom cannot be extended by means of analogy.

Held, that it has not been established that the custom of adoption existed amongst the Sainis of village Sharif Chak in the Pathankot *Tahsil* in 1928 and even if a custom of adoption amongst the Sainis of Pathankot *Tahsil* be held to have existed, only a person who was below seven years of age or in any case had not yet attained the age of puberty could be validly adopted.

S. C. A. from the decree of the District Judge, Gurdaspur, dated February 14, 1931.

Mr. *M. C. Mahajan* for the Appellant.

Mr. *J. L. Kapur* for Mr. *J. N. Aggarwal*, for the Respondents.

Judgment.—This appeal arises out of suit brought by the plaintiff Karam Chand against Rattan Chand, defendant No. 1 and Lajpat Rai, defendant No. 2, for a declaration to the effect that the adoption of defendant No. 2 by defendant No. 1 was void, and that it shall not affect his reversionary rights on the death of defendant No. 1. The parties are Sainis of village Sharif Chak situated in *Tahsil* Pathankot, district Gurdaspur. The alleged adoption took place on July 12, 1928, when Rattan Chand gave a feast to the entire brotherhood and announced that he had adopted Lajpat Rai. This was followed by the execution of a formal deed of adoption by Rattan Chand on the August 11. Shortly afterwards Rattan Chand repudiated this adoption. Rattan Chand, defendant No. 1, supported the claim of the plaintiff, and stated that he was suffering from an acute attack of fever at the time he made the adoption in question, and that he was not in full possession of his senses when he was prevailed upon to execute the deed dated August 11. Lajpat Raj, the contesting defendant, pleaded, *inter alia*, that defendant No. 1, had adopted him after performing all the necessary ceremonies, that the custom of adoption existed among the Sainis and that the plaintiff was precluded from challenging the validity of the adoption as he took active part in the ceremonies connected with the adoption. The main contest between the parties centred round two points: (1) whether the adoption in question was valid according to the custom governing the parties, and (2) whether an adoption did in fact take place. The trial Court held that the factum of adoption had been conclusively established, and that though the custom of adoption may be said to be a dying custom among the Sainis as among many other important tribes in the Gurdaspur district, it could not be said that the custom had entirely disappeared at the time when the adoption in question took place. On these findings the suit of the plaintiff was dismissed. The plaintiff preferred an appeal and the learned District Judge held that the adoption did in fact take place and a feast was given by Rattan Chand to the whole brotherhood to give publicity to the adoption. On the question of custom, the lower Appellate Court found that amongst the

Sainis of Pathankot *Tahsil* the custom of adoption did not exist in 1928, and in any case as defendant Nos. 2 was 22 years of age at the time of the adoption, his adoption was opposed to the custom that prevailed even before 1928. The appeal was, therefore, accepted and the plaintiff's claim was decreed. Lajpat Rai, defendant, has now preferred a second appeal to this Court on the strength of the certificate granted to him by the learned District Judge.

The earliest available record of the custom of adoprion in *Tahsil* Pathankot consists of the entries in the *Riwaj-i-am* of the district of Gurdaspur compiled at the settlement of 1865. According to the *Riwaj-i-am* a sonless Saini proprietor in the Pathankot *Tahsil* could adopt from amongst his collaterals a child of tender age who may not be more than seven years old. So far as the *Tahsils* of Shakargarh and Batala were concerned, there was no restriction with regard to the age of the person to be adopted. In the Gurdaspur *Tahsil* a boy could be adopted only if his age at the time of adoption did not exceed five years. It must be remembered that in spite of the fact that the custom of adoption prevailed amongst the Sainis of the *tahsils* of Batala, Gurdaspur and Shakargarh generally, the custom was different so far as the age of the adoptee was concerned. The entries in the *Riwaj-i-am* of 1865 were reported in the *Riwaj-i-am* compiled in 1893. The existence of the custom among the Sainis was not denied, but it was mentioned in the *Riwaj-i-am* that the adoptee must be an agnate of an age less than five or eight years, and that in any case he must be adopted before he attained the age of puberty. It was further mentioned that the Muhammadan Gujars of *Tahsil* Gurdaspur and Mughals and Sayyeds of *Tahsil* Batala stated that there was no custom of adoption amongst them.

Coming to the *Riwaj-i-am* of 1913, we find that the Sainis of Pathankot stated that the custom of adoption did not exist among them. The same reply was also give by Muhammadan Rajputs, Gujars, Sayyeds, Hindus and Muhammadan *jats* and Labanas. In the Appendix E at pp. 76 to 79 a large number of instances of adoption were given but not a single instance of adoption from among Saini of Pathankot *Tahsil* finds a place amongst these numerous instances. In view of these entries in the latest *Riwaj-i-am* the onus lay heavily on the appellant to prove that the custom of adoption existed amongst the Sainis of village Sharif Chak in *Tahsil* Pathankot in 1928 when he is alleged to have been adopted by Rattan Chand.

It was contended that the presumption of correctness regarding the question of custom in the circumstances of this case attaches to the *Riwaj-i-ams* of 1865 and 1893, and the onus of proving that the custom which existed in 1865 and 1893 had been abrogated or given up by the Sainis of the Pathankot *Tahsil* ought to have been placed in the plaintiff. Reliance was placed in this connection on *Pholo* v. *Nauwardhan* (1) and *Fazali Husain* v. *Tafazil Husain* (2). The soundness of the view taked in *Pholo* v. *Nauwardhan* (1), has been considerably shaken by the observations made in *Sardar Shah* v. *Sardar Begam* (3), and *Bhag Singh* v. *Jai Singh* (4), *Fazali Husain* v. *Tafazil Husain* (2) is distinguishable as in that case succession had opened out before 1910, and it was observed that the entries made in the subsequent *Riwaj-i-ams* of 1911 and 1912 might have some evidentiary value, but this value would be very low as the custom to be ascertained was that existing in 1910 and not in subsequent years. Reliance was, therefore, placed on the entries in the *Riwaj-i-ams* of 1865 and 1892. In the present instances the adoption took place in 1928, and obviously the entries in the *Riwaj-i ams* of 1913 must govern the case.

The learned District Judge has written a very careful and exhaustive judgment, and as I find myself in agreement with his conclusions, it is unnecessary to discuss the evidence in any great detail. The documentary evidence consists of eight instances. Five of these instances relate to the Sainis of Shakargarh *Tahsil*, while two instances concern the Sainis of Gurdaspur *Tahsil*. The appellant cannot derive any assistance from those instances as the question for determination is whether the custom of adoption exists amongst the Sainis of Pathankot *Tahsil*. It was contended by the learned Counsel for the appellant that the evidence produced by the plaintiff shows that the custom regarding adoption in the Gurdaspur district was a

(1) 84 Ind. Cas. 507; A I R 1925 Lah. 206; 5 Lah 409.

(2) 136 Ind. Cas 515; A I R 1932 Lah. 222; 13 Lah. 410; 33 P L R 105; Ind. Rul. (1932) Lah. 225.

(3) 113 Ind. Cas. 44; A I R 1928 Lah. 893; 10 Lah 531.

(4) 116 Ind. Cas. 903; A I R 1929 Lah. 318; 10 Lah 694; 30 P L R 750.

tribal custom and was not a local custom. A large number of witnesses produced by the plaintiff deposed that no custom of adoption prevailed amongst the Sainis of Gurdaspur district and in cross-examination they stated that the same custom prevailed throughout the district. The Learned Counsel urged that in view of the admission made in cross-examination by the witnesses for the plaintiff, if it were found that the custom of adoption existed in Sharkargarh and Gurdaspur *Tahsils* it must be held that such custom prevailed in *Tahsil* Pathankot also. I cannot uphold this contention. All the witnesses for the plaintiff deny the existence of the custom in *Tahsil* Pathankot, and their depositions to the effect that the custom does not prevail in any of the *Tahsils* of the Gurdaspur district cannot be taken to mean that if the custom prevails in Gurdaspur and Shakargarh *Tahsils*, it prevails in Pathankot *Tahsil* also. It is well established that different customs may prevail in that same tribe in different localities, and that custom cannot be extended by means of analogy. The eighth instance (Ex. D 16) relates to Kalesar village, Pathankot *Tahsil*. The facts with respect to this instance are that one Hira died in 1904 and on his death his widow *Musammat* Premi succeded to his estate. In 1916 *Musammat* Premi gifted the land to Behari, alleging that he was the adopted son of her husband. Behari has appeared as a witness and has stated that though his adoptive mother gifted certain land to him in 1916, yet subsequently he gave a portion of it to his brother. This instance is not of any great value because if Hira had adopted Behari then the land ought to have been mutated in the name of Behari in 1904 and the widow would not have been entitled to a life estate till 1916. This exhausts the documentary evidence produced by the appellant and I am of the opinion that by the production of this evidence he has not succeeded in discharging the onus that lay heavily on him. The oral evidence produced by both the parties is far too vague and inconclusive to be of any assistance in the determination of the question of custom involved in this case. I, therefore, hold that it has not been established that the custom of adoption did exist amongst the Sainis of village Sharif Chak in the Pathankot *Tahsil* in 1928.

In all the instances of adoption proved by the defendant, the adoptees were adopted while they were infants, and there is not a single instance in which a grown-up man may have been adopted. It was observed in *Budh Singh* v. *Mula Singh* (5), that restrictions in the *Riwaj-i am* with respect to the age of the adoptee were of a recommendatory and not of a mandatory nature. In that case, however, the instances produced by the parties did not contain any mention of the age of the adoptees. In the present case there is not a single instance in which the age of the adoptee has not been prominently mentioned. The restrictions regarding the age of the adoption have been repeated in all the three settlements, and I am, therefore, of the opinion that if a custom of adoption amongst the Sainis of Pathankot *Tahsil* be held to have existed, only a person who was below seven years of age or in any case had not yet attained the age of puberty, could be validly adopted.

The learned District Judge has remarked that the parties are agreed that this is not a case of adoption under Hindu Law. Moreover, it has not been established that all the ingredients of a valid adoption under Hindu Law were fulfilled in the present instance. The appellant Lajpat Rai never resided with his adoptive father either before the adoption or afterwards. The adoption was repudiated by Rattan Chand only two months after it had taken place and there is no evidence that even during those two months Lajpat Rai was treated as an adopted son by Rattan Chand.

For the reasons given above, I affirm the judgment and the decree of the learned District Judge, and dismiss this appeal with costs.

D. *Appeal dismissed.*

(5) 40 P R 1905; 18 P L R 1905; 46 P W R 1905.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Revision Petition No. 166 of 1934

February 12, 1935

MIDDLETON, J. C. AND MIR AHMAD, A. J. C.

ABDULLAH KHAN—PETITIONER

versus

BAHRAM KHAN—RESPONDENT

Civil Procedure Code (Act V of 1908), Sch. II; paras. 14, 15, 21, s. 104 (f)—Power of Appellate Court to go into question indicated by para. 14 or para. 15—Decree in terms of award—Whether should bear same

date as order filing award — Arbitrator—Private inquiries made but award based on documentary evidence—Award, if vitiated — Interpretation of Statutes—Title and preamble—Enacting part not ambiguous—Whether can be restricted by title and preamble—Transfer of Property Act (Amendment) Supplementary Act (XXI of 1929), s. 10—Whether in force in North-West Frontier Province—Award —Statement in award creating new right in party— Award, if compulsorily registrable—Registration Act (XVI of 1908), s. 7 (1) (c).

The words of the first part of para. 21, Sch. II, Civil Procedure Code, clearly imply that proof of the existence of any ground such as is mentioned or referred to in para. 14 or para. 15 is a bar which prevents the Court from ordering that the award be filed. Hence it cannot be held that proof in respect of these grounds should be taken after the order for filing. It follows that s. 104 (*f*) of the Code empowers the Appellate Court not only to go into the question of the existence of the reference and of the award, but also to go into questions such as are indicated by para. 14 or para. 15. There is nothing in the Code which necessitates the decree bearing the same date as the order filing the award, and one effect of these provisions is that it settles the date for the purpose of limitation of appeal; another effect is that if the trial Court disobeys the direction given in cl. (1) of para. 21 and pronounces judgment in excess of or not in accordance with the award, there will be a remedy by an appeal from the decree as distinct from the appeal against the filing. [p. 1024, col. 2.]

Although it is true that an arbitrator cannot import his own knowledge into a case, or base his decision upon information obtained otherwise than from the evidence submitted to him by the parties, unless permitted to do so by the terms of reference, yet when there is a concurrent finding that the private inquiries made by the arbitrator did not affect the award and the award itself shows that the arbitrators were not impressed even by the oral evidence which was given before them on behalf of the parties and based their award purely on documentary evidence and upon two statements made upon oath, it cannot be held, that the private inquries affected the form or substance of the award in any way and in such a case no interference in revision is called for. [p. 1025, col. 1.]

The title and preamble of a statute may be relied upon as aids to the understanding of the meaning thereof, or for determining the general object and intention of the legislature in passing the enactment. They may legitimately be consulted for the purpose of solving any ambiguity, or for fixing the meaning of words which may have more than one meaning, or for keeping the effect of the Act within its real scope, but with the important proviso that this can only be done when the enacting part is open to doubt in any of these respects. When the language, object and the scope of the Act are not open to doubt, the enacting part cannot be restricted, extended or modified by reference either to the title or preamble. There is no authority for the suggestion that the preamble of an Act is exhaustive; it cannot be questioned that there are many Acts wherein a particular mischief or inconvenience is recited in the preamble, but in which the provisions extend far beyond that particular mischief or inconvenience. The evil recited may be the chief motive for the legislation, but the remedy may consistently and wisely be extended beyond the cure of that evil. [p. 1025, col. 2; p. 1026, col. 1.]

The general rule is that an amending Act, unless otherwise stated, is territorially co-extensive with the Act which it amends, and Act XXI of 1929 does not provide any exception to the general rule. As s. 10 of Act XXI of 1929 amends the Registration Act which is in force in North-West Frontier Province, s. 10 of Act XXI of 1929 is also in force in North-West Frontier Province. [p 1026, col. 1.]

A mere statement of fact by a party to an instrument would obviously have no effect upon legal relations, but a similar statement in an award by arbitrators regarding a point in dispute between the parties does affect the legal relationship; in the first case it is a mere admission of an undisputed fact; in the second case, it is a decision and a finding upon a fact which is disputed. Where a clause in an award creates a new right in a party, it is a declaration within the meaning of s. 17 (1) (c), Registration Act and the award is compulsorily registrable. [p. 1026, col. 2.]

C. R. P. of the order and decree of the District Judge, Peshawar, dated January 6, 1931, whereby the order passed on the basis of an award by the Sub-Judge, First Class, Charsadda, dated November 24, 1933.

Sardar *Raja Singh*, for the Petitioner.

Mr. *Saaduddin*, K. B. for the Respondent.

Judgment.—In this case an award was made on a reference to arbitration without the intervention of the Court, and the respondent applied for the filing of the award in Court under the provisions of para. 20 of Sch. II, Civil Procedure Code. By a single order under para. 21 the trial Court, after considering objections made by the petitioner, ordered the award to be filed and pronounced judgment in accordance with the award and also passed a decree in accordance therewith. The petitioner appealed unsuccessfully and now comes up in revision.

The petitioner's objections to the order filing the award and granting the decree which have been repeated in arguments before us are :—

(1) That the award was compulsorily registerable, and not having been registered, could not be considered or incorporated in a decree.

(2) That one of the arbitrators was guilty of misconduct vitiating the award in that he made inquiries into the matters at issue between the parties.

A third objection regarding the amount of stamp upon the petition for filing the award, though made in both the lower Courts, has been dropped in revision; another objection entered in the grounds of the revision petition concerning alleged misconduct of the arbitrators, apart from the making of a private inquiry, has not been argued before us.

Before considering these objections, we

must deal with a point of preliminary nature, taken on behalf of the respondent, which concerns theconstruction to be placed upon para. 21 of the Schedule. The paragraph is divided into two parts, the first laying down that the trial Court must be satisfied that the matter has been referred to arbitration and that the award has been made, and also that no ground such as is mentioned in para. 14 or para. 15 is proved before the Court should order the award to be filed. This part further directs that once an order filing the award is passed, the Court shall proceed to pronounce judgment according to the award. The second part merely lays down that a decree shall follow and that no appeal shall lie therefrom except in so far as it is in excess of, or not in accordance with, the award. Section 104 (*f*) Civil Procedure Code, provides for an appeal against an order filing an award in arbitration without the intervention of the Court Counsel argues that the provisions allowing an appeal against the order filing the award disallowing an appeal against the decree, which follows it and is in accordance with it, are inconsistent unless different considerations arise in deciding whether an award should be filed and in deciding whether a decree should be passed in accordance therewith. He suggests that the Court is only empowered to determine whether there has been a reference to arbitration and whether there has been an award before directing it to be filed, and that thereafter the Court should go into any proof which may be preferred in respect of grounds referred to in paras. 14 and 15. According to the view put forward by him, there should be two separate orders, one directing the award to be filed and the second pronouncing judgment, whilst between these two orders there should be consideration of any proof which may be offered regarding alleged invalidity of the award on grounds such as those in paras. 14 and 15.

In our opinion the amalgamation of the order filing the award and pronouncing judgment does not affect this point. The matter came before the Punjab Chief Court in *Ramditti* v *Amar Singh* (1) the majority of the Judges held that s. 104 (*f*) having clearly given a right of appeal, the later provision in para. 21 (2) of Sch. II did not cancel that provision. They held that the two provisions were not antagonistic and that if the order filing the award was set aside on appeal, there would be no award on which judgment and decree could be based. They further held that the absence of any ground such as is mentioned or referred to in para. 14 or para. 15 of Sch. II is a condition precedent to passing an order filing the award. Rattigan, J., however, in dissenting judgment held that the two provisions of the Code were in direct conflicting and that the allowing of an appeal from the order filing the award was tantamount to allowing an appeal from the decree based on the award. We are in agreement with Counsel when he says that interpretation of ambiguous portions of the law should be made where possible so as to avoid inconsistency, but we are firmly of the opinion that his suggested solution in the present case is not tenable ; the words of the first part of para. 21 clearly imply that proof of the existence of any ground such as is mentioned or referred to in para. 14 or para. 15 is a bar which prevents the Court from ordering that the award be filed ; hence it is impossible to hold that proof in respect of these grounds should be taken after the order for filing. It follows then that s. 104(*f*) of the Code empowers the Appellate Court not only to go into the question of the existence of the reference and of the award, but also to go into questions such as are indicated by para. 14 or para. 15. We do not consider that this interpretation leads to any inconsisteney. There is nothing in the Code which necessitates the decree bearing the same date as the order filing the award, and one effect of the provisions which have been discussed is that it settles the date for the purpose of limitation of appeal ; another effect is that if the trial Court disobeys the direction given in cl. (1) of the para. 91 and pronounces judgment in excess of or not in accordance with the award, there will be a remedy by an appeal from the decree as distinct from the appeal against the filing. We hold then that an appeal was competent in respect of grounds mentioned in para. 14 and para. 15, and in this particular case, an appeal was competent :—

(1) on account of the allegation regarding non-registration which was apparent upon the face of the award and falls under para. 14 (*c*), and

(2) in respect of the objection regarding misconduct of an arbitrator which falls under para. 15 (*a*).

(1) 10 Ind. Cas. 512; 172 P L R 1911; 103 P W R 1911; 123 P R 1911.

The second of these points does not need prolonged discussion. Counsel for the petitioner has cited *Abdul Hamid* v. *Muhammad Afzal* (2) and *Ganga Sahai* v. *Badleo Singh*, 65 Ind. Cas. 779 (3) in support of his contention that private inquiries by one of the arbitrators will vitiate the award. These rulings, however, as well as similar rulings of other High Courts in India really lay down the modified principle that an arbitrator cannot import his own knowledge into a case, or base his decision upon information obtained otherwise than from the evidence submitted to him by the parties, unless permitted to do so by the terms of reference. In the present case there is a concurrent finding of the Courts below that the private inquiries made by the arbitrator did not affect the award. In fact the award itself shows that the arbitrators were not impressed even by the oral evidence which was given before them on behalf of the parties and based their award purely on documentary evidence and upon two statements made upon oath. In these circumstances we are unable to consider that the private inquiries affected the form or substance of the award in any way, and see no reason for interference upon this ground.

We now come to the most important point in the case, namely, whether the award was compulsorily registrable and could, therefore, not be considered or filed by the trial Court. The lower Appellate Court mentioned an amendment in s. 17 (2) (*vi*) of the Registration Act, but discussed the question as though it were governed by s. 17 (1) (*b*) without referring to s. 17 (1) (*e*). Section 17 (1) (*e*) was added and s. 17 (2) (*vi*) was amended by the Transfer of Property (Amendment) Supplementary Act XXI of 1929 and it is upon s. 17 (1) (*e*) that Counsel for the petitioner bases his contention. In the first place he is met by the argument that Act XXI of 1929 is not in force in this Province.

The Transfer of Property Act, 1882, has never been applied to this Province; that Act was amended by the Transfer of Property (Amendment) Act, 1929 (XX of 1929) which received the assent of the Governor-General upon October 1, 1929. Act XXI of 1929 received the assent of the Governor-General on October 4, 1929, and as its title implies, was enacted in connection with the enactment of Act XX of 1929. An examination of its provisions shows that it does not amend either the Transfer of Property Act, 1882, or Act XX of 1929 in any respect; it does, however, amend many other Acts including the Indian Registration Act. It is argued that Act XXI being supplementary to Act XX, which amended an Act not applying to this Province, cannot itself apply to this Province.

Learned Counsel for the respondent urges that all Acts include a preamble and a title, the former giving reasons of the Legislature for the enactment and the latter determining its scope, and adds that in all substantive Acts the extent of the operation is also given. He lays down that a clause defining the extent of operation is never omitted except in Amending Acts in which it is unnecessary, as the extent of operation will be found in the Acts (which are amended thereby). He suggets the word "supplementary" has never been applied to an Act either in Great Britain or India prior to the passage of Act XXI of 1929. He quotes Stout's Judicial Dictionary for the proposition that a deed described as being "supplementary" to another deed takes effect as though it had been endorsed upon that original deed. By analogy he suggests that a "supplementary" Act takes effect as though it were part of the Act which it supplements. By this line of argument he wishes us to conclude that Act XXI of 1929 is territorially limited in the same way as Act XX of 1929 and, therefore, in the same way as the Transfer of Property Act of 1882.

We are in agreement with the general proposition that the title and preamble of a statute may be relied upon as aids to the understanding of the meaning thereof, or for determining the general object and intention of the Legislature in passing the enactment. We do not negative the proposition that the title and preamble may legitimately be consulted for the purpose of solving any ambiguity, or for fixing the meaning of words which may have more than one, or for keeping the effect of the Act within its real scope, but with the important proviso that this can only be done when the enacting part is open to doubt in any of these respects.

We are, however, clear that when the language, object and the scope of the Act are not open to doubt, the enacting part cannot be restricted, extended or modified by reference either to the title or preamble. We can find no authority for the suggestion that the preamble of an Act is ex-

(2) 101 Ind. Cas 153; A I R 1927 Lah. 425; 8 Lah. 329; 9 Lah. L J 218; 28 P L R 425.
(3) 65 Ind. Cas. 779; 20 A L J 117.

haustive: it cannot be questioned that there are many Acts wherein a particular mischief or inconvenience is recited in the preamble, but in which the provisions extend far beyond that particular mischief or inconvenience. The evil recited may be the chief motive for the legislation, but the remedy may consistenly and wisely be extended beyond the cure of that evil.

In Act XXI of 1929, s. 10 is an enacting section in which we can find no ambiguity and hence in construing that section we do not need to refer either to the title or to the preamble.

Neither are we impressed by the analogy of the use of the word "supplementary" when applied to deeds. We have already pointed out that Act XXI of 1929 does not amend a single provision either of Act XX of 1929, or of the Transfer of Property Act of 1882, which Acts are not in force in this Province, but that on the contrary, it does amend numerous Acts which are in force in this Province. The general rule undoubtedly is that an Amending Act, unless otherwise stated, is territorially coextensive with the Act which it amends. We can find no reason for thinking that Act XXI of 1929 provides any exception to this general rule. Section 10 thereof amends the Indian Registration Act, the Indian Registration Act is in force in this Province, and hence we are satisfied that s. 10 of Act XXI of 1929 is also in force in this Province. Section 10 adds s. 17 (1) (*e*) to the Registration Act, the relevant portion of which is as follows:—

"Any award which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards to or in immovable property shall be registered."

Learned Counsel for the petitioner has argued that the award in the present case is one both creating and declaring rights and interests of this nature. The dispute referred to the arbitrators concerned the ownership of 16 *mianas*. The award sets forth that except during the last 2½ years the respondent has always held possession of these *mianas* and is evidently the owner thereof; it, however, lays down that on account of the disputes which have arisen and in order to satisfy the other party, he should pay Rs. 300 to the petitioner within one year, failing which the petitioner shall be deemed to be the owner of three out of the 16 *mianas*. Both the Courts below have regarded this as being a mere statement of the fact of previous ownership of the respondent and as involving no change of ownership or possession.

Learned Counsel for the respondent has urged that the word "declare" in s. 17 (1) (*e*) must be limited in its meaning by the principle of *ejusdem generis* and must be taken as implying a definite change of legal relation to the property. The doctrine on which he relies is mentioned on page 35 of the second edition of D. F. Mulla's Commentary on the Indian Registration Act.

A mere statement of fact by a party to an instrument would obviously have no effect upon legal relations, but a similar statement in an award by arbitrators regarding a point in dispute between the parties does affect the legal relationship; in the first case, it is a mere admission of an undisputed fact in the second case, it is a decision and a finding upon a fact which is disputed. The statement in the award that the 16 *mianas* do belong to the respondent may in the future constitute a title deed for the respondent. We need not labour the point further and it must be held to be a "declaration" of the nature referred to in s. 17 (1) (*e*). There is also the further clause in the award which must be considered, by which unless the respondent pays Rs. 300 to the petitioner, the latter will become owner of three of the *mianas*. This clause creates a new right in favour of the petitioner which is apparently of the value of Rs. 300, a right in the nature of a mortgage with a limited period for redemption. Learned Counsel for the respondent has sought to evade consideration of this clause by suggesting that it is not the "operative" part of the award, a form of words which we do not find convincing.

We thus come to the findings that the award in this case was one which is compulsorily registerable under s. 17 (1) (*e*) of the Indian Registration Act which has been applied to this Province by the enactment of Act XXI of 1929. Accordingly we find that the trial Court was debarred by s. 49 of the Indian Registration Act from ordering the award to be filed and thereby causing it to affect the immovable property to which it refers. The Courts below have, therefore, committed a material irregularity. We accept the petition for revision and set aside the order directing the award to be filed in Court, and grant

costs in favour of the petitioner-defendant throughout.

N. *Petition accepted.*

CALCUTTA HIGH COURT

Civil Appeal No. 2131 of 1931
May 31, 1934
NASIM ALI, J.

PURNA CHANDRA CHAUDHURY—DEFENDANT—APPELLANT
versus
SAROJINI CHAUDHURANI—PLAINTIFF—RESPONDENT

Contract Act (IX of 1872), s. 16—Pardanashin lady—No domination of will—Held, relationship was not unequal—Pardanashin *lady intelligent—Relations to assist her—Held, there was independent advice—Plea of unfair transaction must be specifically raised in plaint—Subsequent events should not be considered while considering whether transaction is fair or not—Practice—Duty of Court—Plaintiff's case rejected—Court, if can proceed on equitable grounds to grant relief without considering risk taken by defendant.*

Where the relationship of the transferee with the transferor, who is a *pardanashin* lady was not such as would enable him to dominate the will of the transferor and the *pardanashin* lady was intelligent and was not difficult for her to understand the transaction and the nature and effect of the transaction upon her interest in the property and further she had her father, brother and intelligent neighbours to assist her in the matter:

Held, that it could not be said that the relation between the parties at the time of the transaction was such as to suggest that they were not on equal terms and it could not also be said that she had no independent advice.

If a transaction is attacked on the ground that the transaction was not a fair transaction at all, the party attacking ought to make a specific case in the plaint and ought to join an issue on the point in order to enable the other party to show that the transaction was not an unfair one.

Whether the transaction is one that should be set aside as inequitable would depend upon the circumstances at the time when it was made and not upon subsequent events. *Ganga Bakhsh* v. *Jagat Bahadur Singh* (3), relied on.

The Court is not justified in rejecting practically the whole of the plaintiff's case as made out in the plaint and then proceeding to give her some relief on equitable grounds without taking into consideration the risk which the defendant was taking in this transaction.

O. A. from the appellate decree of the Sub-Judge, Dinajpur, dated April 20, 1931.

Messrs. *S. C. Basak* and *Gopendra Nath Das*, for the Appellant.

Messrs. *Rajendra Chandra Guha*, *Nalini Kumar Mukherjee* and *Mahendra Kumar Ghose*, for the Respondent.

Judgment.—This is an appeal by the defendant in a suit for a declaration that the *darpatni patta* granted by the plaintiff to the defendant is invalid and inoperative and for a permanent injunction restraining the defendant from taking possession of the property leased out by the *darpatni patta*. The plaintiff's case briefly stated is as follows: Jadab Chandra Chowdhuri, the plaintiff's husband, died in 1323 B. S. leaving two widows, the plaintiff and Indurekha and a daughter by Indurekha who has been married to one Ghanashyam. Indurekha subsequently died, consequently the plaintiff became the 16 annas *malik* of the property left by her husband. One of the preperties left by her husband is *Jalkar* which was acquired by the plaintiff's husband on payment of Rs. 1,000 as *Nazar* on an annual rental of Rs. 180. After the death of the plaintiff's husband the plaintiff and her co-wife Indurekha were in possession of all the properties left by her husband. Ghanashyam managed these properties after the death of the plaintiff's husband. After the death of Indurekha in 1332 B. S. Ghanashyam went to Gaya to perform her *sradh*. At that time the plaintiff was in her father's house. During the absence of Ghanashyam the defendant, who is a cousin of her late husband, proposed to the plaintiff that he should be made her *Ammukhtear* to realize the income from the *Jalkar*.

The plaintiff at first suggested that the matter should be postponed till the return of Ghanashyam as her father was insane and unfit to advise her in the matter. The defendant, however, told the plaintiff that the matter did not admit of any delay and that there was no harm in giving him an *Ammnkhternama* as she would thereby get rents without any trouble. The plaintiff being an ignorant, illiterate *pardanashin* woman ultimately agreed to the proposal. The defendant thereupon brought the plaintiff to Dinajpur on the second Aghrayan and took her to the house of a stranger, produced a document previously prepared and took her thumb impression thereon. The plaintiff did not receive any consideration for the lease. The defendant then took her back to her father's village and left her at her father's house. The plaintiff's son-in-law Ghanashyam, on his return from Gaya, came to see her and the plaintiff related the whole thing to him. Thereupon he became anxious to know the nature of the document and went to the defendant and demanded to see the document. The defendant however refused to shew him the document. Thereafter Ghanashyam came to Dinajpur

and took a copy of the document from the Registrar's office. The plaintiff then came to know that the defendant, in order to get the whole of her valuable property, had practised a fraud upon her and had got a *darpatni* lease fraudulently executed by her.

The plaintiff never agreed to settle the *Jalkar* in *darpatni* right with the defendant at an annual rental of Rs. 200 with a *salami* of Rs. 425. The *darpatni patta* was never read over and explained to her. The plaintiff had not any opportunity of consulting her well wishers and near relations. She did not receive a single pice as *nazar* for the *darpatni* lease. The defendant taking advantage of the ignorance and helpless condition of the plaintiff got fraudulently the *darpatni* lease registered by undue influence. The recitals in the *patta* about the plaintiff's ill-feeling with her son-in-law and about her being deprived of the income of her husband's property left by her husband were falsely made in order to secure the *darpatni* lease of the plaintiff's valuable property at a nominal rent. The *darpatni* lease is therefore absolutely void and the plaintiff is in possession of the property as before. The plaintiff is therefore entitled to get a declaration from the Court that the *darpatni patta* is null and void.

The defence of the defendant in substance is that the plaintiff has executed the *darpatni* of her own free will on receipt of a *salami* of Rs. 425, that the *darpatni* lease was for a consideration and was not obtained by fraud, misrepresentation or undue influence, that as a matter of fact the plaintiff on the death of her husband lived for some time in her husband's house and during that time Ghanashyam gradually got hold of her entire property left by her husband, and in 1916 B. S. during the minority of the plaintiff got certain *kobalas* of certain Jotee executed in favour of his son, that the plaintiff being unable to stay on there on account of the oppressions of Ghanashyam and her mother-in-law Indurekha left her husband's house and came to live at her father's house, that Ghanashyam never gave anything to the plaintiff for her maintenance. It was alleged by the defendant that as the plaintiff was getting no income from her husband's property, and as she was completely dispossessed of her husband's estate, she of her own accord, in consultation with her father and near relations, granted the *darpatni* lease, and that Ghanashyam finding that the *darpatni* lease would be binding against his sons, that is the reversionary heirs, had got the suit instituted. The defendant also pleaded that the *selami* mentioned in the *darpatni patta* was paid to the plaintiff before the Registrar and that the document was read over and explained to her before execution.

The learned Munsif who tried the suit found that at the time of the lease the plaintiff was not on good terms with Ghanashyam, and that she was really kept out of possession of the property left by her husband, that Bhabananda, the plaintiff's father, was insane, and that the document was never explained to her before execution. The learned Munsif also found that the plaintiff did not know the difference between a *darpatni* lease and an *ammukhternama* and that it was doubtful whether the *selami* money which was brought before the Sub-Registrar and paid to her in the presence of the Sub-Registrar actually remained with her. The learned Munsif further held that even if the consideration had been paid, it was an unfair bargain. He accordingly decreed the suit.

On appeal by the defendant to the lower Appelate Court the learned Judge has found that there was no talk about an *ammukhtearnama*, that no influence was acquired or abused by the defendant Purna, that no confidence was reposed in or betrayed by him, that the plaintiff contracted to grant the defendant *darpatni* lease and that she accordingly executed the *patta* with full knowledge and understanding of what she was about to do and that she had it registered. The learned Judge has further found that she was not living in her husband's house but was living with her father who was maintaining her with great difficulty and that it was natural for the plaintiff and her father to dispose of some property to relieve the plaintiff from the distress to a certain extent to fight Ghanashyam who had usurped the whole inheritance. The learned Judge was also of opinion that though there was no direct evidence that the plaintiff had independent and disinterested advice in the matter, she had her father, brother and intelligent neighbours to assist her and as she was in need of money, she was willing to part with a portion of the property to get some money in cash and something like an annuity. The learned Judge however, was not satisfied that the bargain was fair. He was also of opinion that it was the duty of the defendant to disclose the real income of the

property at the time when the terms of the lease were settled. In this view of the matter the learned Judge allowed the appeal in part and passed the following decree:

"That on the plaintiff's paying into the lower Court to the credit of the defendant Rs. 425 within a month from date with interest at 6 per cent. per annum from 2nd Aghrayan 1332 B S to the date of the payment the decree will stand good. In default it will be regarded as reversed and the suit dismissed. As both sides are to blame there will be no costs to either side in any Court"

Hence the present appeal by the defendant. There is, however, no cross-objection by the plaintiff. The learned Advocate for the appellant contends that on the facts found by the lower Appellate Court it should have dismissed the plaintiff's suit. In my judgment this contention must prevail. From what has been stated above it is clear that the allegations in the plaint on which the plaintiff claimed relief had been disbelieved by the lower appellate Court. The effect of the finding of the lower Appellate Court is that the plaintiff understood the transaction and that she had full knowledge of the nature and effect of the document she executed in favour of the defendant. In other words the judgment of the lower appellate Court clearly shows that the disposition made by the plaintiff was substantially understood and that it was really her mental act as the execution of the document was her physical act. It was contended by the learned Advocate for the respondent on the authority of the decision of the Judicial Committee in *Tara Kumari* v. *Chandra Mauleshwar Proshad Singh* (1), that it was the duty of the defendant to disclose to the plaintiff the real income of the property at the time when the *salami* and the rent were settled and if knowledge had been kept from her by the defendant the transaction should not stand as equity and good conscience had always been the pillars of administration of justice in India. The learned Advocate for the respondent drew my attention to the following passage in the above decision:

"If knowledge had been kept from her by the creditor, if there was any ground for suspicion that he was over-reaching her, if she had no independent advice, and the relations between them were such as to suggest that they were not on equal terms, it would be impossible for a Court to affirm with any certainty that had she known the full truth, as she was entitled to know it, she would have completed the transaction. It would only be upon this hypothesis that the lady could be held bound by the mortgages though not by the accounts. It is no doubt impossible to lay down any hard and fast rule for such cases, each must depend upon its own facts and the dividing line may often be difficult to draw There is no doubt, their Lordships think as to the principle to be applied. They are not merely deductions from the law as to undue influence which finds a place in s. 16, Contract Act, as has been suggested by Counsel for the respondent. They are founded upon the wider basis of equity and good conscience which have always been pillars of the administration of justice in India."

The facts of the case which was before their Lordships would go to show that the person who obtained the document (that is the mortgagee) from the *pardanashin* lady was her creditor, that the accounts upon which the mortgage was based had not been explained to her and that various items were included in the mortgage for which the lady was not at all liable. In this case it was suggested by the plaintiff that the defendant was a relation of the plaintiff and that taking advantage of her relationship, the defendant went to the plaintiff and proposed to save her from the clutches of Ghanashyam, and as the plaintiff had no good feeling towards Ghanashyam, she readily accepted the proposal. The learned Judge, however, has recorded the following finding in this connection;

"In 1314 B. S. or thereabout Jadab and his cousin, Purna, who were joint in property, divided the joint property. Thereafter and before Jadab's death there were disputes among them. Some time before his death Jadab removed from the ancestral home in Bonhara to Balahar where Indurekha's father lived. Sarojini was about 26-27 years of age at the time of the trial. It is her deposition that Purna did not look after her after her husband's death. She was a mere child when Purna and Jadab separated. It does not appear that there was any association between her and Purna and they knew one another by appearance before the proposal about the disputed transaction."

From this finding of the learned Judge it is clear that the relationship of the defendant with the plaintiff was not such as would enable him to dominate the will of the plaintiff. Under such circumstances it cannot be said that the relation between the parties at the time of the transaction was such as to suggest that they were not on equal terms. It was, however contended by the learned Advocate for the respondent that in this case the plaintiff had no independent advice. The learned Judge has however negatived the plaintiff's case on this point. The following observations were made by their Lordships of the Judicial Committee in *Kali Baksh*

(1) 134 Ind. Cas. 1076; A I R 1931 P C 303; 58 I A 450; 8 O W N 1053; 34 L W 821; 54 C L J 431; Ind. Rul. (1932) P C 1; (1931) A L J 1143; 35 C W N 165; 62 M L J 60; (1932) M W N 136; 34 Bom. L R 222; 11 Pat. 237; 13 P L T 311 (P C).

Singh v. *Ram Gopal Singh* (2), in this connection:

"The possession of independent advice, or the absence of it is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended and deliberately and of her own free will carried out the transaction. If she did, the issue is solved and the transaction is upheld; but if upon a review of the facts—which include the nature of the thing done and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand. Their Lordships, as already mentioned, have fully in view the fact that the lady was a *pardanashin* lady, but the evidence as to her strength of will and business capacity, and the fact that the deed as granted is not in the circumstances of her life in any way an unnatural disposition of part of her property, go far, taken together with the evidence in this case, to convince them that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it. In short, their Lordships' view is that if independent outside advice which is an essentially different thing from independent outside control had been obtained, the lady would have acted just as she did. Much as their Lordships support and approve of the protection given by law to a *pardanashin* lady they cannot transmute such a legal protection into a legal disability."

In this case the learned Judge has found that the plaintiff's deposition shows that she is intelligent and it was not difficult for her to understand the transaction and the nature and effect of the transaction upon her interest in the property. Further as has already been pointed out she had her father, brother and intelligent neighbours to assist her in the matter. There is, therefore, no force in this contention of the learned Advocate for the respondent. It was next urged that the learned Judge has found that the bargain was not a fair bargain and consequently on equitable grounds, the transaction should not stand. It appears, however, that this ground was not made a specific ground of attack in the plaint. No specific issue was joined on this point though it appears to have been argued in the Courts below. The learned Judge's finding on this point is as follows:

"I am, however, not satisfied that the bargain was fair. According to the collection papers produced by Ghanashyam the aggregate of the rentals payable in 1332 B. S. by the tenants in the fishery was Rs. 624—the amount realized in 1331 B. S. was Rs. 324—and that in 1332 B S. was Rs. 290. Much reliance cannot be placed upon these papers as no tenant was cited to corroborate them and in his deposition Ghanashyam did not say anything more about them except that those papers were in his hand-writing. But it is in defendant's deposition that according to the enquiry made by him the profits from the fishery amounted to Rs. 300 to Rs. 310 after deducting the overhead rent. Making allowance for the collection charges at 10 per cent the net profit would come up to Rs. 270 to Rs. 315 a year. A sum of Rs. 425 as premium and an annuity of Rs. 20 is a very inadequate consideration for the transfer of such a property even when the transferor is out of possesson."

Now it appears that this property was acquired by the plaintiff's husband on payment of *salami* of Rs. 1,000. The *salami* paid for the *darpatni* was Rs. 425. The capitalised value of the annuity of Rs. 20 would be about Rs. 400. Consequently she was getting about Rs. 825 by this transaction. Further she was a Hindu widow, and the lessee evidently took some risk in taking a permanent lease from her. She was also out of possession. In these circumstances it cannot be said that the bargain was an unconscionable bargain particularly in view of the fact that she was willing to sell this fishery to one Hazi Muhammad and she agreed to an offer of Rs. 300 as price. In fact there is no evidence or suggestion anywhere in this case to show that any other person was willing to offer more favourable terms than what the defendant did. If she really wanted to attack this transaction on the ground that even in the circumstances which then existed the transaction was not a fair transaction at all, she ought to have made a specific case in the plaint and ought to have joined an issue on the point in order to enable the defendant to show that the transaction was not an unfair one. Whether the transaction was one that should be set aside as inequitable would depend upon the circumstances at the time when it was made and not upon subsequent events: see *Ganga Bakhsh* v. *Jagat Bahadur Singh* (3). In my judgment the lower Appellate Court was not justified in rejecting practically the whole of the plaintiff's case as made out in the plaint and then in proceeding to give her some relief on equitable grounds without taking into consideration the risk which the defendant was taking in this transaction.

It was also urged by the learned Advocate for the respondent that it was the duty of the respondent to disclose to the plaintiff the real income of the fishery at the time when the *darpatni patta* was executed. The law does not lay down

(2) 21 Ind. Cas. 985; 36 A 81; 41 I A 23; 18 C W N 282; 16 O C 378; (1914) M W N 112; 12 A L J 115; 15 M L T 130; 19 C L J 172; 1 O L J 67; 26 M L J 121; 16 Bom. L R 147 (P C).

(3) 23 C 15; 22 I A 153; 5 Sar. 643 (P C).

any statutory duty on the lessee. It was however argued that as the plaintiff was a *pardanahin* lady it was the duty of the defendant to disclose the facts to her, but it would appear from the deposition of the plaintiff herself that she was fully aware of the income of the property at the time she ageed to grant the *darpatni* lease. Consequently it cannot be said that the defendant had taken any undue advantage of the position of the plaintiff. In these circumstances there cannot be any doubt that there was no fraud or misrepresentation or undue influence in this case. The learned Judge's own finding would go to show that the defendant had succeeded in showing that the plaintiff was fully aware of the nature of the transaction, that she received the *salami* for the lease, and that her deposition shows that she had no regard for truth. The learned Judge has further observed :

"Her going over to Ghanashyam's side within a short time after the completion of the deed is not difficult to understand. Ghanashyam deposed that after his return from Gaya he paid the plaintiff Rs. 100 and gave her some cloth. That was sufficient inducement to her as she has no regard for truth and had nothing to lose, but had something to gain by changing sides Ghanashyam was in urgent need of propitiating the plaintiff, of the *patta* questioned the legality of the purchases by his sons also."

It appears to me that this is really Ghanashyam who is fighting this case in the name of the plaintiff. In these circumstances this is not a fit case in which it can be said that the transaction is an unconscionable one, or that the defendant has obtained any undue advantage by this transaction over the plaintiff. The result therefore is that this appeal is allowed and the plaintiff's suit is dismissed. In view of the facts and circumstances of the present case, however, the parties will bear their own costs throughout. Leave to appeal under cl. 15, Letters Patent, has been asked for in this case and is refused.

D. *Appeal allowed.*

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1171 of 1931
February 22, 1935
SULAIMAN, C. J. AND BENNET, J.
RAM CHARAN AND ANOTHER—DEFENDANTS—APPELLANTS
versus
GAJADHAR AND ANOTHER—PLAINTIFFS—RESPONDENTS

Abadi—Parti *land—Ancestor of tenant planting tree—Tenant cutting it down—Custom—Burden of proof—Custom not proved—Right of* zemindar *to tree.*

It is usual that in cases where the tenant cuts down a tree planted by his ancestor on a *parti* land in *abadi*, there is evidence of custom and a finding of custom, and it lies on the defendants (tenants) to plead and prove a custom by which they could be entitled to take the wood of this tree. In the absence of any proof of custom, *prima facie* the presumption is in favour of the *zemindar*. The *zamindar* is the owner of the soil of a *parti* land and presumably the tree which is grown on that *parti* land and attached to the soil is transferable with a transfer of land and therefore, the tree goes with the land and must be regarded as pertaining to the land. In the absence, therefore, of a pleading and proof that the defendants had a right to cut the tree, it must be held that the defendants had no such right. *Jagdip Narain Singh* v. *Jokhan Ahir* (3) and *Ram Sarup* v. *Jagan Nath* (4), followed, *Gobardhan Pandey* v. *Debi Bux Kurmi* (5), doubted. *Ram Nath* v. *Mata Sahai* (1), distinguished.

S. C. A. from a decree of the Additional Subordinate Judge, Allahabad, dated May 22, 1931, confirming a decree of the Munsif, East Allahabad, dated April 25, 1930.

Messrs. *A. K. Khan* and *K. N. Sinha*, for the Appellants.

Messrs. *G. P. Bhargava* and *Deo Narain Singh*, for the Respondents.

Judgment.—This is a second appeal by the defendants against concurring decrees of the two lower Courts awarding the plaintiffs Rs. 75 damages for the cutting down of a *neem* tree in *parti* land in the village site by the defendants. The plaint set out that the tree was owned and possessed by all the *zamindars* of the village and that the defendants cut it down without any right. The written statement alleged that the tree was planted by the father of the defendant No. 1 close to his house which was now used as a cattle-shed and was still in the possession of the defendants, and that the tree was planted more than 40 years ago, and that the defendants required wood for the construction of their house and therefore got the tree cut down. The written statement did not clearly say that the tree was planted with the permission of the *zamindars*. Further it did not say that there was any custom in the village by which the defendants-tenants were entitled to the wood of trees planted by them on *parti* land in the village *abadi*. The sole issue framed was whether the plaintiff is the owner of the tree in suit and to what sum the plaintiff is entitled. The lower Court found that the plaintiff did not know who planted the

trees, that the trees were planted by the ancestor of the defendant in *parti* land of the *abadi*, that there was no evidence of the custom that the defendants were mere trespassers, and therefore the suit was decreed. The lower Appellate Court found that there was no permission of the *zamindar* pleaded nor proved and it upheld the decree regarding the defendants as trespassers.

The defendants have appealed to this Court on the ground that they had a legal right to take the wood of this tree. The defendants rely on the ruling reported in *Ram Nath* v. *Mata Sahai*, 72 Ind. Cas. 108 (1), of Mr. Justice Daniels, in which he dealt with other matters and at p. 109* he stated:—

"It is next argued that in the absence of proof of special custom Jagannath though in possession of the trees, had no right to transfer them. The lower Court relies on the ruling in *Jaleswar Sahu* v. *Raj Mangal* (2), and I agree with the lower Court that whatever views may formerly have been held, the presumption now is that a tenant has a right to cut and sell trees planted by him."

The judgment shows that the suit related to the possession of certain trees and of a house in the *abadi*. The reasons given by the learned Judge are vague and the ruling to which he refers relates to the case of trees planted on what had been an occupancy holding. That ruling in *Jaleswar Sahu* v. *Raj Mangal* (2) does not apply, in our opinion, to the case of trees planted on *parti* land in the *abadi*. On behalf of the plaintiffs reliance is placed on the case of *Jagdip Narain Singh* v. *Jokhan Ahir*, 5 Ind. Cas. 256 (3), in which Sir John Stanley and Mr. Justice Piggott held that trees planted in a grove outside the occupancy holding of a tenant could not be sold by the tenant and in the case of *Ram Sarup* v. *Jagan Nath*, 25 Ind. Cas. 152 (4) the late Mr. Justice Sunder Lal held that a tenant had no right to sell trees planted on the waste land in a village. We consider that these two latter rulings should be followed. For the plaintiffs reliance was also placed on the case of *Gobardhan Pandey* v. *Debi Bux Kurmi* (5). This was the ruling by a learned Single Judge, Mr. Justice Boys and in regard to trees planted on *parti* land in the *abadi*, he held that the criterion was where a person who has planted the trees gives or gives up something in return for the permission to plant the trees and that in the absence of other special considerations, the tree becomes the property of the person who plants it but where he gives nothing, the property in the tree becomes as that of a *zamindar*. We do not think that this is a general criterion which we should follow, as it is not apparent from where the doctrine of consideration is derived but the case does not apply to the present suit, because in the present suit there was no previous permission to plant.

It is usual that in cases like the present there is evidence of custom and a finding of custom, and we consider that it lay on the defendants to plead and prove a custom by which they could be entitled to take the wood of this tree. In the absence of any proof of custom, we consider that *prima facie* the presumption is in favour of the *zamindar*. The *zamindar* is the owner of the soil of a *parti* land and presumably the tree which is grown on that *parti* land and attached to the soil is transferable with a transfer of land and presumably therefore the tree goes with the land and must be regarded as pertaining to the land. In the absence therefore of a pleading and proof that the defendants had a right to cut the tree, we hold that the defendants had no such right. We accordingly consider that the decision of the lower Courts is correct and we dismiss this second appeal with costs.

D. *Appeal dismissed.*

(1) 72 Ind. Cas 108 at p. 109; A I R 1923 All. 417; 9 O & A L R 479; L R 5 A 40 Rev.
(2) 63 Ind. Cas. 437; 43 A 606; 19 A L J 616.
(3) 5 Ind. Cas. 256.
(4) 25 Ind. Cas. 152.
(5) 114 Ind. Cas. 750; A I R 1929 All. 146; 13 R D 60.

*Page of 72 Ind. Cas.—[*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT

Civil Reference No. 230 of 1934
November 19, 1934
NIYOGI, A. J. C.

SUKHLAL MODHI BANIYA—PLAINTIFF
versus
DAMROO GANESH AND ANOTHER—DEFENDANTS

C. P. Debt Conciliation Act (II of 1933), s. 15 (2)—Applicability of—Debtor producing certificate after filing of plaint but before decree—Creditor, if can be subjected to penalty in regard to costs and interest.

Section 15 (2), C. P. Debt Conciliation Act, comes into operation not only when the certificate is granted before the institution of the suit but also

when it is granted during the pendency of the suit. Consequently, under s. 15 (2) the plaintiff creditor is liable to be subjected to penalty in regard to costs of the suit and interest on the debt even in case in which the certificate is produced by the debtor after the filing of the plaint but during the pendency of the suit, that is before the decree is passed.

Ref. made by the Small Cause Court Judge of the Khurai *Tahsil* in the Saugor District, dated March 21, 1934.

Order.—This is a civil reference made by the Judge of the Small Cause Court, Khurai, under s. 46 (1) of the Civil Procedure Code. The question referred for the opinion of this Court is as follows:—

"Whether or not a creditor, who has failed to amicably settle his debts under the C. P. Debts Conciliation Act, by rejecting the reasonable offers of a fair settlement by the Board, is liable to be punished by applying the penal clauses of s. 15 of the Act if he had already entered his plaint for the debt or debts, before his rejecting the offer."

Section 15 (2) of the C. P. Debt Conciliation Act (No. II of 1933) runs as follows:—

"Where any creditor sues in a Civil Court for the recovery of a debt in respect of which a certificate has been granted under sub-s. (1), the Court shall, notwithstanding the provisions of any law for the time being in force, not allow the plaintiff any costs in such suit, or any interest on the debt after the date of such certificate in excess of simple interest at six per cent. per annum on the amount due on the date of such certificate."

The question on which the decision of this Court is sought is as to the meaning of the word "sues" occurring in sub-s. (2) of s. 15. Although at first sight the term "sues" appears to have been used in the sense of instituting a suit by filing a plaint, on a true construction of the word in view of the other relevant parts of the enactment, it would be evident that the word is used in a comprehensive sense so as to include the entire suit until the passing of the decree. If the certificate is granted under s. 15 (1) before the suit is instituted, (that is plaint is filed), there is no difficulty. The doubt arises only when the proceedings before the Debt Conciliation Board are started either at the instance of the debtor or the creditor after the institution of the suit in Civil Court. The power of the Civil Court to entertain a suit in respect of any matter pending before the Debt Conciliation Board is taken away by s. 16 of the Act. That section comes into operation at the time the plaint is filed to recover a certain debt in respect of which proceedings are already initiated before the Board. The contingency of the proceedings before the Debt Conciliation Board being started after the institution of a suit in a Civil Court is provided for in s. 21 of the Act, which runs as follows:—

"When an application has been made to a Board under s 4, any suit or other proceedings then pending before a Civil Court in respect of any debt for the settlement of which application has been made shall be suspended until the Board has dismissed the application or an agreement registered under sub-s (2) of s. 12 has ceased to subsist."

This section withdraws from the Civil Court its jurisdiction to deal with the matter until two events occur, (1) dismissal of the application under s. 4 of the Act, or (2) until the agreement registered under sub-s. (2) of s. 12 has ceased to subsist.

2. Now, s. 4 of the Act gives a right to a debtor or a creditor to apply to the Debt Conciliation Board to effect a settlement between a debtor and his creditor or creditors. This application may result in an amicable settlement in which case it would be reduced to writing in the form of an agreement under sub-s. (1) of s. 12 and be registered under sub-s. (2) with the result that it takes effect as if it were a decree of a Civil Court. This agreement has the effect of a decree and any amount due, under it, is recoverable as an arrear of land revenue by the Deputy Commissioner at the instance of the creditor. When the Deputy Commissioner fails to recover it, he has to certify that it is irrecoverable and thereupon the agreement shall cease to subsist. Although the agreement ceases to subsist, it has still the force of a decree of a Civil Court under sub-s. (3) of s. 12. It is, however, unnecessary to pursue this aspect of the law further as it is not relevant for the purpose in view.

If on the application made under s. 4 of the Act no amicable settlement is arrived at, the Board has to dismiss the application as provided in s. 14 of the Act; but while dismissing the application the Board may, if it is of opinion that the debtor made a fair offer of settlement, grant the debtor a certificate in respect of the debts owed by him to such creditor. (Section 15 (1).)

Referring to s. 21 of the Act, it would be clear that the Civil Courts' power is suspended until the Board has dismissed the application. In other words, the Court's jurisdiction would revive after the dismissal of the application and the Court will have to take into consideration the certificate granted by the Board. The creditor's suit in the Civil Court

is resuscitated after the Board has dismissed the application, and since the Board's certificate is already granted before the revival of the suit, the Civil Court is bound by sub-s. (2) of s. 15 to refuse the plaintiff his costs of the suit and any interest after the date of such certificate in excess of simple interest at 6 per cent per annum on the amount due on the date of such certificate.

Section 15 (2), therefore, comes into operation not only when the certificate is granted before the institution of the suit but also when it is granted during the pendency of the suit. This interpretation is quite in consonance with the meaning of a suit which applies to any proceeding in a Court of justice in which the plaintiff pursues the remedy which the law affords him for the redress of an injury or the recovery of a right. When the plaintiff sues for a relief his suit does not terminate with the filing of the plaint but continues until the decree is passed. The suit is a continuous act and the plaintiff would be deemed to be suing until his prayer for relief is granted or refused.

For the foregoing reasons my decision is that under s. 15 (2) the plaintiff-creditor is liable to be subjected to penatly in regard to costs of the suit and interest on the debt even in a case in which the certificate is produced by the debtor after the filing of the plaint but during the pendency of the suit, that is before the decree is passed.

N. *Order accordingly.*

ALLAHABAD HIGH COURT

Miscellaneous Case No. 307 of 1934

January 28, 1935

SULAIMAN, C. J. AND BENNET, J.

In re THE CHARGEABILITY OF STAMP

Stamp Act (II of 1899), Sch. I, Art. 57, Exemption (e) —Supurddar *acknowledging receipt of attached property from* amin, *and agreeing to produce same whenever demanded, or on failure, agreeing to be personally liable—Document, whether liable to duty.*

A bond executed by way of security to account for property received by vitue thereof, even though executed by a surety, is a security bond within the meaning of Art. 57, Sch. I, Stamp Act.

The terms of the document executed by *supurddar* were that the *supurddar* acknowledged having received the attached property from the *amin* and agreed to produce the same whenever demanded by the Court or the *amin* and further agreed that in case of failure, the Court would be at liberty to realise the price thereof from his person and property:

Held, that the bond was security bond within the meaning of Art. 57, Stamp Act, but Exemption (e) under that Article exempted it from the payment of stamp duty.

Mr. *Muhammad Ismail* (Government Advocate), for the Crown.

Order.—This is a reference by the Munsif of Ghaziabad under O. XLVI, r. 1 of a question of law which arose before him when executing a decree. A simple money decree had been put in execution and certain movable property of the judgment-debtor was ordered to be attached. The *amin* went to the spot and attached the property and handed over the same tc a *supurddar* who executed a document which is the subject-matter of consideration. On report to the Court, the Court approved of the arrangement made by the *amin*.

There is no question before us as to the legal liability of the *supurddar* to restore the goods placed in his custody. The only question is whether the document executed by him was chargeable with stamp duty.

The terms of the document were that the *supurddar* acknowledged having received the attached property from the *amin* and agreed to produce the same whenever demanded by the Court or the *amin* and further agreed that in case of failure the Court would be at liberty to realise the price thereof from his person and property. The question before us is whether this document is exempt from duty or whether it is chargeable with duty as an agreement or as a security bond.

As the *supurddar* was not paid any remuneration for his offering to take charge of the property there may be some difficulty in holding that the document amounted to an agreement. But there can be no doubt that the language brings it within the scope of the definition of security bond as given in Sch. I, Art. 57 of the Indian Stamp Act. A bond executed by way of security to account for property received by virtue thereof, even though executed by a surety, is a security bond within the meaning of that Article. But Exemption (e) under that Article exempts from the payment of stamp duty any instrument executed by a surety for an officer of Government to secure the due accounting for property received by virtue thereof. The point for consideration is whether this document comes under this exemption. Under O. XXI, r. 43, where property to be attached is movable property in the possession of the judgment-debtor, attachment is to be made by actual seizure and the attaching Officer is to keep

the property in his own custody or in that of one of his subordinates and "shall be responsible for the due custody thereof"; therefore, the legal responsibility for the due custody of the attached property lies on the attaching Officer. Rules 122 and 123 provide for the approval or permission of the Court as to the arrangement made by the attaching Officer, which when approved would exonerate the attaching Officer personally. Nevertheless the *supurddar* who keeps the property in his own custody on behalf of the *amin* is really a surety for the *amin* and undertakes to restore the goods or pay their price if not produced before the Court. The position of the *supurddar* was therefore that of a surety for the *amin* undertaking duly to account for the property received from the *amin* by virtue of the document executed by the *supurddar* and is covered by Exemption (e).

The learned Advocate for the Secretary of State relies on the Full Bench case of *Shakir Husin* v. *Chandu Lal* (1) but that case in no way helps him because it was laid down there that although the *amin* ceases to be liable after the Court has approved of the arrangement or given him permission to make the arrangement, the *supurddar* was liable as a surety under s. 145, Civil Procedure Code. It follows that the position of the *supurddar* as surety for the *amin* undertaking to produce the goods was accepted by the Bench and his liability as a surety was actually enforced.

We are, therefore, of opinion, that the *supurdnama* in question was not liable to duty because it was exempted under Exemption (e) to Art. 147. This is our answer to the reference.

D. *Reference answered.*

(1) 134 Ind. Cas. 836; (1931) A L J 865; A I R 1931 All. 567; Ind. Rul. (1931) All. 852.

LAHORE HIGH COURT

First Civil Appeal No. 1318 of 1928
June 28, 1934
DALIP SINGH AND BECKETT, JJ.
H. D. HIRAMANACK AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
BALKISHEN AND OTHERS—DEFENDANTS—RESPONDENTS

Tort—Negligence — Injury by faulty structure of building—Responsibility for safe upkeep—Plaintiffs to prove special circumstances making owner liable.

The general rule in cases of injury due to the aulty structure of a building is that the person esponsible to the general public for the safe upkeep of the building is the occupier rather than the owner, when the owner himself is not in possession. It is for the plaintiffs to show that there were some special circumstances which render the owners liable rather than the lessees *Bai Menghibai* v. *Doongersey Lakhmi Das* (1), relied on.

To make the owner liable he must have been aware at the time of leasing out of the property that the property was in a condition imminently dangerous to the occupiers of the adjoining property. *Todd* v. *Flight* (1), *Cavaller* v. *Pope* (3) and *Cunard and Wife* v. *Antifyre Ltd.* (4), relied on. [p. 1037, col 1.]

F. C. A. from a decree of the First Class Sub-Judge, Lahore, dated December 17, 1927.

Messrs. *Jai Gopal Sethi* and *M. L. Sethi*, for the Appellants.

Messrs. *Dev Raj Sawhney* and *Basant Krishen*, for the Respondents.

Beckett, J.—The plaintiffs Mr. and Mrs. Hiramanak, were living in quarters at the top of a building belonging to the defendants, commonly known as the Mul Chand Buildings. The roof of this building is divided into different portions, assigned to the occupants of the quarters below. On the night of May 30, 1925, Mr. and Mrs. Hiramanak were sleeping on their portion of the roof when a dust storm arose. There was a *barsati* or open shed with a corrugated iron covering on the adjacent portion. This portion was dislodged by the wind and fell upon the plaintiffs, causing injuries. Mr. and Mrs. Hiramanak now sue the defendants for the recovery of damages, assessed principally upon the after effects of these injuries, alleging that the accident was due to the faulty structure of the *barsati* which had been negligently constructed by the defendants and was not strong enough to withstand an ordinary dust storm. Their suit has been dismissed by the trial Court, with costs, and they have appealed.

Before discussing the evidence produced by the plaintiffs to connect the accident with the negligence of the defendants, it will be as well to discuss the nature of the responsibility which the plaintiffs seek to lay upon the defendants as owners of the Mul Chand Buildings, since this will, to some extent, affect the nature of the evidence which it is necessary to consider. The plaint itself makes little or no attempt to bring out the exact nature of this liability. From the course of arguments before us, however, it would appear that the plaintiffs are putting forward a two fold claim. In the first place, Mr. Hiramanak alleges that he had directly leased his own quarters from the defendants' and on the

strength of this contract he seeks to impute to them a contractual responsibility for keeping the adjoining portion of the building in proper order. Secondly, both plaintiffs claim to have a case in tort on the general principle that the owner of a building is bound to see that it is in safe condition before leasing it out and that the defendants can, therefore, be held responsible for any loss caused by structural defects in the portion of the building adjoining that occupied by Mr. and Mrs. Hiramanak.

The former claim need not detain us long since there is no satisfactory evidence that Mr. Hiramanak was a tenant of the defendants at the time of the accident. It is admitted that the Central Bank of India was formerly a tenant of the whole building, which consisted of office premises below and staff quarters above. Mr. Hiramanak came to Lahore as an employee of the Bank at the end of April 1925. According to Mr. Hiramanak's statement, he asked the Agent of the Bank to arrange with the defendants for a lease of the quarters now in question, and this was arranged. The Agent of the Bank, Mr. Thakar, has not been produced as a witness, and no explanation has been given for the failure to produce him. On the other hand, the defendants say that they simply continued to let out the premises to the Bank as staff quarters in the same way as before; and this statement is confirmed by the fact that the Bank accepted and paid a bill sent to it for the period up to the end of May. It is true that the Bank subsequently repudiated this liability, stating that there had been a mistake: but this repudiation did not occur until sometime after the accident when the question of liability for the injuries would have arisen. While it is possible that there may have been some misunderstanding, it is clear that Mr. Hiramanak has completely failed to prove the existence of the alleged contract between himself and the defendants, which is not even put forward in the plaint, and is only mentioned in vague terms in the replication, put in after the defendants had denied that there was any privity of contract between themselves and the plaintiffs.

We are thus left with the case in tort, which seems to be the real foundation of the case as set out in the plaint. The plaintiffs are confronted with the initial legal difficulty. It is admitted that the portion of the building which included the *barsati* was let out by the defendants to the Central Bank: and the general rule in cases of this nature is that the person responsible to the general public for the safe upkeep of the building is the occupier rather than the owner, when the owner himself is not in possession. The respective liabilities of the owner and occupier have been exhaustively discussed in *Bai Menghibai* v. *Doongersey Lakhmi Das* (1), where the following passage occurs:

"The question, then, is whether the lessor or the lessee is liable to the plaintiff. The general rule laid down as deducible from the English case-law is that the owner or the landlord can never be liable for injuries suffered through neglect to keep the demised property in order, except upon the grounds (1) of misfeasance and (2) of breach of contract; that is to say, that unless it can be shown that at the time of the original leasing, or, if the term is short, on the renewal of each of such terms, the building was let in a ruinous or unsafe condition, he can never be liable for the consequences of such condition unless he has undertaken by special contract to repair."

It is thus for the plaintiffs to show that there were some special circumstance in the present case which rendered the defendants liable rather than the lessees, that is, the Central Bank. Here again, the case is twofold. In the first place, an attempt has been made to show that the defendants were under a contractual obligation to keep the building in the proper state of repairs. No evidence has been produced to prove the terms on which the Bank came into the premises. There is thus no direct evidence of any such term in the contract between the defendants and the Bank. It was, however, been suggested that such a term may be inferred from the conduct of the parties. On this point, the only evidence is a letter from the defendants from which it might be gathered that they were prepared to repair a dangerous arch in the portion which Mr. Hiramanak claims to have rented from the Bank direct, and Mr. Hiramanak's own assertion that the Bank used to carry out repairs in the rest of the building. Since Mr. Hiramanak had only come to Lahore about a month before the accident, it is unlikely that he would be in a position to have any direct knowledge on this point, and better evidence could easily have been produced. It is not even clear that the repairs to the arches were ever carried out by the defendants; and it would be impossible to hold on this slender evidence that the defendants had ever made themselves contractually liable for the general upkeep of the building as opposed to the execution of special repairs.

(1) 43 Ind. Cas. 273; A I R 1917 Bom. 46; 19 Bom. L R 887.

The next line of attack is the contention that the defendants were guilty of a definite act of misfeasance in leasing out a potentially dangerous building to the Bank and that it is accordingly they who should be held responsible rather than the Bank itself. The leading case on a landlord's responsibility in this respect is *Todd* v. *Flight* (2). In that case, the chimneys of a house fell upon the plaintiffs, and these chimneys were known by the defendant owner to be ruinous and in danger of falling at the time of the demise. It was held that, inasmuch as the chimneys were known to the owner to be ruinous and in danger of falling at the time when he let the house, he was guilty, of the alleged wrongful non-repair that led to the damage; and that the fall which appeared to have been due to the laws of nature, could not be attributed to any default of the lessee. On these facts the owner was held liable.

If the plaintiffs' claim can be justified at all, it could only be justified on this principle. In other words, the defendants must have been aware at the time of leasing out the property that the property was in a condition imminently dangerous to the occupiers of the adjoining property. So far as the danger was merely to persons occupying the demised property the case would fall within the ambit of *Cavaller* v. *Pope* (3), and the owner could not be made liable in the absence of a direct contract between the parties. The plaintiffs, however, relied on *Cunard and Wife* v. *Antifyre, Ltd.* (4), which deals with premises belonging to the same landlord, but occupied by tenants in separate flats.

The plaintiffs' evidence as to the state of *barsati* will now be examined in the light of these decisions. According to their witnesses the corrugated roofing of the shed had been joined to the rafters only by nails not by proper bolts, and there was an absence of proper means for securing the wood-work together, with the result that the roofing was liable to fly off in a gale of wind, such as is liable to occur several times a year in Lahore. The evidence on this point is not very strong, since the expert witnesses only examined the shed sometime after the accident, and the evidence to connect its condition at that time with its state before the accident is only given by two witnesses, neither of whom had any reason for examining the structure very closely. One of these witnesses had been previously making use of the *barsati*, and he admits that he had never thought of complaining that it was dangerous.

Even if we accept this evidence at its face value, however, I am doubtful whether it is sufficient to attract the operation of the rule in *Todd* v. *Flight* (2). There is nothing to show that the defendants were aware that the method of fixing the roof of the *barsati* was not sufficient to withstand the strength of an ordinary dust storm any more than the tenant who occupied it. It appears to have withstood a number of several dust storms for years past and it is in evidence that the roofing of a number of other *barsatis* blew off on the night in question. Besides this, the *barsati* was constructed by the father of the defendants, who has since died, so that the actual misfeasance, if any, would appear to be his. There is nothing on the record to show how the defendants can be made liable for this act of their father, and it becomes more unlikely that they were aware of the faulty nature of the structure.

I am of opinion that the plaintiffs have failed to show any obligation on the part of the defendants for the removal of structural defects in the *barsati* such as would render them liable to an action in tort. This makes it unnecessary to consider whether the defendants can also be held to be responsible for the after-effects which are said to have followed upon the injuries received by the plaintiffs, and I would affirm the decree of the lower Court dismissing their suit. At the same time, the case is one of some complexity, and I would leave the parties to bear their own costs in appeal.

Dalip Singh, J.—I agree.

D. *Suit dismissed.*

(2) (1861) 9 O B (N S) 377; 30 L J C P 21; 9 W R 145; 7 Jur. (N S) 291; 3 L T 325.

(3) (1905) A C 428; 73 L J K B 609; 22 T L R 648; 95 L T 65.

(4) (1933) 1 K B 551.

ALLAHABAD HIGH COURT

Second Civil Appeal No. 2 of 1934

February 4, 1935

NIAMAT-ULLAH, J.

DWARKA PRASAD AND ANOTHER —APPELLANTS

versus

Musammat SUNDER—RESPONDENT

Provincial Insolvency Act (V of 1920), ss. 4, 56(3) proviso—Property sold—Receiver claiming it as insolvent's—Delivery of possession to purchaser, when can be given—Decision on question of title—Necessity of.

The house in dispute was claimed by the Receiver as the property of the insolvents. The appellants denied the title of the insolvents and claimed to be the owners of the house in dispute. They preferred an objection in the Insolvency Court putting forward their claim and denying the right of the insolvents. The appellants' objection was dismissed for non-appearance. The Receiver subsequently sold the house to the respondent, who applied to the Insolvency Court for delivery of possession of the house to her. The appellants objected to any delivery of possession being made. In their objection they reiterated their title to the house and repudiated that of the insolvents. The insolvency Judge summarily dismissed the objection on the ground that a similar objection had been previously dismissed :

Held, that before the question of title is decided either by a decree in a separate suit or by an order under s. 4, Insolvency Act, the appellants could not be dispossessed from the property which, to all appearance, they claimed in perfect good faith to be their own and the fact that the appellant had not pressed his objection on a certain occasion did not justify the Insolvency Court in treating the property as belonging to the insolvent.

S. C. A. from an order of the District Judge of Farrukhbad, dated November 4, 1933.

Mr. *B. Malik*, for the Applicants.

Mr. *Babu Ram Avasthi*, for the Opposite Party.

Judgment.—This is an appeal from an order passed by the learned District Judge, Farrukhabad, in circumstances which are somewhat peculiar. The order appealed from was passed in appeal from the order of the Subordinate Judge sitting as an Insolvency Judge. Murli and Shahzada were adjudged insolvent by the Insolvency Court at Cawnpore, and a Receiver was appointed to take charge of their assets. The house, which is now in dispute, is situate in Farrukhabad, and was claimed by the Receiver as the property of the insolvents. The appellants in this Court deny the title of the insolvents and claim to be the owners of the house in dispute. They preferred an objection in the Insolvency Court at Cawnpore putting forward their claim and denying the right of the insolvents. The application and the order of the Court thereon could not be traced. The appellants allege that the only order which the Court passed was "File without consideration" The respondent, on the other hand, alleges that the objection was dismissed in default of appearance. The judgment of the lower Appellate Court also assumes this fact. An application filed by the appellants at a certain stage of proceedings likewise mentioned that the objection had been dismissed in default. It is safe to assume, for the purpose of this appeal, that the appellants' objection above referred to was dismissed for non-appearance.

The appellants then instituted a regular suit in the Court of the Munsif, Farrukhabad, within whose jurisdiction the house in dispute lies, for a declaration of their right. The Receiver, among others, was impleaded as a party. The suit did not proceed to trial, as it was withdrawn with liberty to bring a fresh suit. No fresh suit, however, has since been instituted.

The Receiver subsequently sold the house to the respondent, *Musammat* Sunder, who applied to the Insolvency Court at Cawnpore for delivery of possession of the house to her. That Court sent a *rubkar* to the Judge of the Insolvency Court at Farrukhabad for delivery of possession, as prayed by the purchaser. The appellants objected to any delivery of possession being made. In their objection they reiterated their title to the house and repudiated that of the insolvents, questioning the Receiver's power to transfer it and the Court's power to award possession in that summary manner. They emphasised that they had all along been in possession and could not be ousted in the manner desired by the purchaser. The Insolvency Judge (Subordinate Judge), Farukhabad summarily dismissed the objection on the ground that a similar objection had been previously dismissed. This refers to the appellants' objection in the Insolvency Court at Cawnpore which, as above-mentioned, was dismissed for non-appearance. From the order of the Insolvency Judge, Farrukhabad, an appeal was preferred to the District Judge, Farrukhabad, who upheld it on grounds which, in my opinion, cannot be sustained. He assumed that the house in dispute was "attached" property, that the objection to attachment was dismissed under O. XXI, r. 58, Civil Procedure Code and that the regular suit instituted by them in the Court of the Munsif, Kanauj, was one under O. XXI, r. 63, Civil Procedure Code. The learned Judge expresses the opinion that the dismissal of objection for non-appearance became final, as it has not so far been set aside by a decree passed in a suit under O. XXI, r. 63, Civil Procedure Code. The consequence according to the learned Judge, is that the appellants must quietly submit to possession being delivered to the purchaser from the Receiver. The learned Judge does not seem to have applied his

mind to the further question whether it is open to an Insolvency Court, without coming to a decision under s. 4 of the Act, to deliver possession of property sold by the Receiver, which property is in possession of third persons. The Subordinate Judge and the District Judge of Farrukhabad have treated the case as if it were one of transfer of a decree for execution from a Court at Cawnpore to a Court at Farrukhabad and that they were Courts executing the decree. The learned Advocate for the respondent, who presented his case in such light as was possible, has not been able to draw my attention to any provision in the Insolvency Act which justifies the adoption of this procedure by way of analogy which was quite fanciful.

Section 4, Provincial Insolvency Act, undoubtedly empowers the Insolvency Court to decide all questions of title which may arise in any case of insolvency or which the Court may deem it expedient or necessary to decide. Under s. 28 the property of the insolvent is vested in the Receiver on the order of adjudication being passed; but in relation to third persons a Receiver has no more right than the insolvent himself, nor can the Insolvency Court allow the Receiver to ride roughshod over rights of persons who do not derive any right to the property in dispute from the Receiver but adversely to him. Section 56, which provides for the appointment of Receivers, empowers the Court to remove from possession any person in whose possession or custody the insolvent's property is, but there is an important proviso appended to that section which lays down

"that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove."

In my opinion, the mere fact that the respondent purchased the house in dispute from the Receiver does not entitle him to dispossess the appellants. She cannot have better right than that of the Receiver himself in this respect. The Receiver has no better right than the insolvents, as already stated. The Court has no authority to remove the appellants from possession of the property, as the insolvents have not been shown to have a present right to remove them. It was open to the Insolvency Court to decide the question of title between the Receiver and the appellants under s. 4 of the Insolvency Act and if in those proceedings the title had been found to be with the insolvents, now represented by the Receiver, the proviso to s. 56 might have been applicable and the Court might then have the power to treat it as the property of the insolvents and remove the appellants from possession. The Court has not taken proceedings under s. 4, and the title is in controversy. The appellants are in possession, a fact which has not been disputed. Indeed, it is clear from the order of the Insolvency Court at Cawnpore, which required the Insolvency Court at Farrukhabad to deliver possession to the purchaser by removing the appellants.

The view that the appellants are precluded from asserting their title, because their objection in the Insolvency Court at Cawnpore was dismissed for non-appearance and they did not have it set aside, cannot be sustained. It is based on O. IX, r. 9, Civil Procedure Code, under which if a suit is dismissed in the absence of the plaintiff but in the presence of the defendant, no further suit can lie, the only remedy of the plaintiff being to have the order of dismissal set aside. The lower Courts treat the appellants' objection as a plaint in a suit and the order of dismissal for non-appearance to have the same effect as the dismissal of a suit for non-appearance of the plaintiff. There is no warrant for such a view. The appellants were not bound to object in the Insolvency Court. They could have retained possession of the house and ignored the insolvency proceedings and the action of the Receiver. If they had taken up that attitude, it would have been incumbent on the purchaser from the Receiver to vindicate her right and obtain a decree for possession against the appellants. On the latter taking the initiative in the matter, the Insolvency Court should have taken action under s. 4 and decided the disputed question of title once for all. An opportunity for adopting that procedure occurred when the Insolvency Court was apprised of the fact that a certain house, alleged to belong to the Receiver, is claimed by third persons. It could then have taken proceedings under s. 4, even though the objection was not pressed or was allowed to be dismissed for non-appearance. In the absence of an authoritative adjudication of the rights of the contesting parties, the Insolvency Court was not justified in treating the property as belonging to the insolvents only because the ap-

pellants had not pressed their objection on a certain occasion. It may even now be open to the Insolvency Court at Cawnpore, subject to any objection which may be taken by the appellants, to take proceedings under s. 4. But before the question of title is decided either by a decree in a separate suit or by an order under s. 4, Insolvency Act, the appellants cannot be dispossessed from the property which, to all appearance, they claim in perfect good faith to be their own.

In my opinion, the objection of the appellants, made in the Court of the Insolvency Judge (Subordinate Judge), Farrukhabad, protesting against possession being delivered to the respondent and against their own ejectment was unanswerable and should have been allowed. Accordingly I allow this appeal, set aside the order of both the Courts below and allow the appellants' objection with costs. They shall not be disturbed, except in due course of law.

D. *Appeal allowed.*

LAHORE HIGH COURT

First Civil Appeal No. 436 of 1929
June 12, 1934

BHIDE AND DIN MUHAMMAD, JJ.

GHANAYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MEHTAB AND OTHERS—DEFENDANTS—RESPONDENTS

Evidence Act (I of 1872), s. 35—Entry, meaning of—Opinion of public officer from allegations made before him in inquiry under s. 202, Criminal Procedure Code (Act V of 1898), or under O. XXVI, Civil Procedure Code (Act V of 1908)—Admissibility of.

The words "an entry" in s. 35, Evidence Act, are not intended to apply to the opinions of public officers based on or inferences drawn from the allegations made before them in the course of inquiries conducted under s. 202, Criminal Procedure Code or under O. XXVI, Civil Procedure Code, but are confined only to such statements of facts in issue or relevant facts as are made by the public officers concerned, in the course of their official duty and are required to be entered in any book, register or record intended for the purpose. This section is apparently an exception. Such opinions cannot be considered sufficient to prove the truth of the assertions made therein without the test of cross-examination. *Jagdat* v. *Sheopal* (1) *Baldeo Das* v *Gobind Das* (2), dissented from. *Ghulam Rasul Khan* v. *Secretary of State* (3), relied on.

F. C. A. from the decree of the Senior Sub-Judge, Hoshiarpur, dated November 6, 1928.

Mr. *Sundar Das* and Dewan *Gullu Ram*, for the Appellants.

Messrs. *Shamair Chand* and *Mehr Chand* for the Respondents.

Din Muhammad, J.—In this case the three appellants are members of the proprietary body of village Saloh while the forty-four respondents are some of the tenants residing there. On August 25, 1927, the plaintiff instituted this suit in their representative capacity under O. I, r. 8, Civil Procedure Code, on behalf of the whole proprietary body claiming Rs. 6,000 from the defendants. Their allegations were that out of the total area of 22,857 *kanals*, 4 *marlas* of land, which is described in the revenue papers as *khad*, *ban* and *banjar*, they have reserved 12,295 *kanals*, 11 *marlas* of land for their personal use and what remained was left as a common pasture land. In 1922, however, the defendants devastated their reserved grass on which a Criminal case under s. 447, Penal Code, was lodged against them. This case was dismissed on the ground that under the terms of the *Wajib-ul-arz* the tenants and non-proprietors of the village had right to graze their cattle in the whole of the *shamilat* land. They again filed a suit against some of the occupancy tenants and on June 8, 1927, obtained a decree specifying 2,999 *kanals*, 16 *marlas* for pasturage and prohibiting the tenants from trespassing into the remaining area of the *shamilat* land. On these allegations the plaintiffs assessed the value of the damage done by the defendants at Rs. 2,000, a year and claimed damages for a period of three years only prior to the institution of the suit.

The defendants traversed these pleas and denied that any area was actually reserved by the proprietors for their personal use or could be so reserved by them under conditions of the *Wajib-ul-arz*. They also refuted the plaintiffs' allegations relating to the devastation of the reserved grass and pleaded that they had been exercising their right in good faith in the whole of the village *shamilat*. They further added that the plaintiffs have not been able to state which of the tenants did the damage, if any, and in which portion of the land in dispute and how much damage was caused by them individually. The learned Subordinate Judge, after going through the evidence produced by the parties, came to the conclusion that the *Wajib-ul-arz* conferred on the tenants and non-proprietors of the village unfettered rights to graze their cattle in the whole of the *shamilat* and that the plaintiffs

had failed to prove that any particular area of the village area was reserved by the proprietors of the village for their exclusive use or that any damage had been done by the defendants. On this ground he dismissed the suit and from this decree the plaintiffs have preferred the present appeal.

The learned Counsel for the appellants has, in the first place, relied on the oral testimony of the witnesses produced by the plaintiffs, but a perusal of their statements would show that it does not help them in the least. Soondhi, P. W. No. 1, has stated that tenants and proprietors, in fact all the inhabitants of the village, had destroyed the *rakh* (reserved grass). Nizum-ud-din, P. W. No. 2, has made a vague statement holding all tenants responsible for this damage Anant Ram *Patwari*, P. W. No. 3, has admitted that there is no mention of any *rakh* in the revenue papers. Suraj, P. W. No. 4, who is alleged to have been appointed as a watchman in the *rakh* has stated that all the tenants in a body destroyed the *rakh*. Harnam Singh, P. W. No. 5, has merely stated that there used to be a *rakh* five or six years ago, but it was devastated by the the tenants. Diwan Singh, P. W. No. 6 and Tulsi Ram, P. W. No. 9, have not referred to any devastation at all. Prabhu, P. W. No. 7, has professed ignorance of the existence of any *rakh* whatsoever. Kanshi, P. W. No. 8, Pirthu, P. W. No. 10 and Lachhman, P. W. No. 11 have proved certain *bahi* entries relating to the alleged sales of grass in the jungle. Udham Singh *Lambardar*, P. W. No. 12, himself a proprietor in the village, has stated that the non-proprietors destroyed the *rakh*. Sohan Singh, P. W. No. 13, is one of the three plaintiffs and has appeared as a witness for himself. He has admitted that there are 500 houses of tenants and non-proprietors in the village and about 300 men belonging to the Gujjar tribe were present at the time the *rakh* was destroyed and since then the defendants have not allowed them to reserve any grass. On this evidence, I am afraid it cannot at all be urged that the plaintiffs have succeeded in establishing that they had any right to reserve any portion of the *shamilat* for their exclusive use or that any specified portion had been so reserved or that the forty-four respondents now before us had been responsible for any damages done to the plaintiffs' grass.

The learned Counsel has further relied on two documents one of which is a report dated August 18, 1922, submitted by Mian Amir Singh, Tahsildar, presumably under s. 202, Criminal Procedure Code, to the Court of the Additional District Magistrate in a Criminal case under s. 447, Penal Code, and the other is a report dated May 15, 1924, presented by Lala Gurdial in the capacity of Local Commissioner to the Court of the Subordinate Judge at Hoshiarpur in a civil case between the proprietors and the tenants of this village. These two gentlemen have not been examined as witnesses in the case and only the certified copies of their reports have been placed on the record. It is however contended on the authority of *Jagdat* v. *Sheopal* (1) and *Baldeo Das* v. *Gobind Das* (2), that these documents, are admissible in evidence under s. 35, Evidence Act. It is no doubt true that in *Jagdat* v. *Sheopal* (1), Hasan, J., admitted in evidence a report of a Qanungo made under the orders of a Magistrate acting under s. 202, Criminal Procedure Code, on the ground that it was an entry by a public servant in the discharge of his official duty and in *Baldeo Das* v. *Govind Das* (2), a Bench of the Allahabad High Court held that on the question of the ownership of a certain temple the report of a *Kotwal* who in 1840 had made an inquiry into the ownership of the temple at the instance of the Political Agent was relevant evidence as it was a public record of a public inquiry. But it appears from the report of the judgments cited above that the point was not discussed and these reports were admitted into evidence as a mere matter of course. With all respect, therefore, I hesitate to follow these authorities as, in my humble judgment, the language used in s. 35, Evidence Act, cannot be strained to such an extent as to admit the reports now before us under the provisions of law contained therein. This section runs as follows:

"An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact."

Now, as I read the section the words "an entry" as used here are not intend-

(1) 104 Ind. Cas. 287; A I R 1927 Oudh 323; 1 Luck. Cas. 259.

(2) 23 Ind. Cas. 18; A I R 1914 All. 59; 36 A 161; 12 A L J 179.

ed to apply to the opinions of public officers based on or inferences drawn from the allegations made before them in the course of inquiries conducted under s. 202, Criminal Procedure Code or under O. XXVI, Civil Procedure Code but is confined only to such statements of facts in issue or relevant facts as are made by the public officers concerned in the course of their official duty and are required to be entered in any book, register or record intended for the purpose. This section is apparently an exception to the general rule of evidence and is based on certain principles deduced from the English Law and although the Indian Law has extended the English Law to some extent the extension introduced, in my view, does not make it so wide as to admit mere opinions recorded in this manner. Powell in his Principles and Practice of the Law of Evidence, Edn. 10, describes the English rule of evidence as obtained from the authoritative pronouncements of some of the eminent English Judges in the following terms:

"It is important to observe that whenever it is the duty of a public official either at common law or by statute to record certain facts in any book which is intended to be kept as a register to be referred to even after the book is admissible in evidence to prove not only that such official made those entries but also that the facts which he recorded in that book are true .....And this rule extends to every public document whether a register or not which is made for the purpose of the public making use of it and being able to refer to it .. The principle is that it should be a public inquiry, a public document and made by a public officer in the discharge of his public duty. It would be otherwise if the documents were prepared only for a temporary purpose. The mere fact that a document intended for a temporary purpose is found after a long lapse of years in the archives of a Government Office does not constitute it of the authority of a register."

Taylor in his famous commentaries on the Law of Evidence has observed that public documents are entitled to this extraordinary degree of confidence partly because they are required by the law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office or at least under that of official duty by accredited agents appointed for that purpose.

In the light of these observations I am of opinion that it will not be possible to hold that either of the two reports intended to be relied on by the learned Counsel fulfils all the conditions laid down above. The Legislature could never have intended to admit as evidence, without their authenticity being confirmed by the usual test of truth, mere conclusions arrived at by the inquiring or investigating officers from the statements made before them during the course of their inquiry or investigation. If once the broad proposition as laid down by the two judgments cited by the learned Counsel were admitted to be good law alarming results are bound to follow. Even in the case of judgments the Legislature has laid down several conditions which should be satisfied before they can be considered relevant in any subsequent case. It would appear most illogical then if mere reports submitted by Local Commissioners or investigating officers during the course of the trial of those suits in which such judgments are delivered will be held admissible under s. 35 and be considered sufficient to prove the truth of the assertions made therein without the test of cross-examination, As observed by their Lordships of the Privy Council in *Ghulam Rasul Khan* v. *Secretary of State* (3):

"statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorized agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community."

Unless, therefore, a document is of such a public nature as is contemplated in this observation it will not be admissible under s. 35, Evidence Act. With due deference, therefore, to the learned Judges responsible for the decisions relied on by the appellants I am constrained to hold that the two reports now before us cannot be admitted in evidence. But even if they were, I agree with the learned Subordinate Judge, who has fully discussed them in his judgment, that they do not serve the purpose for which they were intended to be used. I would, therefore, maintain the decree of the Court below and dismiss the appeal with costs throughout.

Bhide, J.—I agree.

D. *Appeal dismissed.*

(3) 86 Ind. Cas. 654; A I R 1925 P C 170; 52 I A 201; 6 Lah. 269; 23 A L J 639; 2 O W N 646; 22 L W 299; 30 C W N 101; 50 M L J 120 (P C).

ALLAHABAD HIGH COURT
Special Bench
Miscellaneous Case No. 65 of 1934
January 21, 1935
THOM, IQBAL AHMAD AND ALLSOP, JJ.
In the matter of AN ADVOCATE, CAWNPORE

Practice—Person appearing before Judge as accused—Whether raises presumption that Judge has hostile feelings towards him—Bar Council—Findings by—High Court, if bound to accept them—Legal practitioner—Counsel's duty towards client and Court—Whether can make serious allegation in written statement against party on advice of client—Pleadings.

Per *Thom, J.*—Because an accused person appears before a Judge in his Court it is ludicrous to suggest that that Judge should be presumed to entertain towards him any feeling of hostility or that the Judge, impelled by malice, would pursue the party into his private life and use his influence to prejudice the party and undermine his interests or defeat his legitimate intentions. [p. 1044, col. 2.]

Usually the High Court will accept, especially when there is no objection preferred by the Government Advocate, the finding of the Bar Council. The High Court, however, is not bound to accept it. [p. 1047, col 1.]

No Counsel is entitled to frame a serious charge against a party to a litigation unless he is in possession of admissible and relevant evidence upon which, if accepted, Counsel could reasonably ask the Court to hold the allegations true. It may well be that the evidence in support of the allegations is untrue and it is certainly not the duty of a Counsel in the ordinary course to test the truth of the witnesses whom he intends to put into the witness-box but at the conclusion of the evidence which he has led he should be in a position to submit as a reasonable proposition to the Court that the evidence which he has led, if accepted, establishes the allegations for which he had made himself responsible. If he is not in possession of such evidence to support them he is not entitled to make grave and serious allegations. [*ibid.*]

Per *Iqbal Ahmad, J.*—It is imperative in the interest of administration of justice that too rigid a test of the conduct of an Advocate in the matter of drafting pleadings should not be emphasized and that the test should be such as not to deter a Counsel from fearlessly placing before the Court such allegations as their clients instruct them to make, so long as those allegations do not appear manifestly reckless and unfounded. It is no doubt the duty of Counsel to use their own judgment, experience and discretion and not to make irrelevant or unduly insulting allegations in the pleadings but it is equally their duty to embody the case of their clients in the pleadings fearlessly provided the instructions received from clients justify the case embodied in the pleadings. While on the one hand a Counsel is expected to be careful and not reckless in drafting the pleadings he cannot, on the other hand, assume the role of a Judge and refuse to embody allegations that his client instructs him to make unless and until he has examined the evidence on the subject. A Counsel is in one sense the mouthpiece of his client, but he does not guarantee or pledge himself for his client's veracity. [p. 1050, col. 2; p. 1051, col. 1.]

Per *Allsop, J.*—On the one hand Counsel must look to the interests of his client and not be deterred by fear or favour from making any allegations which in those interests it is necessary for him to make. On the other hand, he cannot take shelter behind his client and claim to be an entirely irresponsible instrument in his client's hands. There remains in him a duty and an obligation to his fellow citizens and he is certainly not entitled to make scandalous and serious allegations against those fellow citizens unless he has some basis upon which the allegations can be grounded.

Held, that no action was to be taken against the Advocate, in the circumstances. [p. 1051, col. 1.]

Mr. *B. S. Darbari*, for the Applicant.

Mr. *Muhammad Ismail*, for the Crown.

Thom, J.—On January 24, 1934, notice was ordered by this Court to go to Mr. C. to show cause why he should not be proceeded against for professional misconduct.

For some reasons or other notice did not go to Mr. C. but the matter of the conduct was referred for enquiry to the Bar Council. The Hon'ble the Chief Justice appointed a Committee consisting of Mr. P. L. Banerji, Dr. N. C. Vaish and Mr. Murli Manohar, to enquire into Mr. C's conduct. Mr. C's conduct in connection with a certain case had been adversely commented on by the learned Judge who directed that notice should go to him on January 24, 1934.

The facts may be briefly stated. They are fully set out in the report of the Bar Council Committee. Mr. W. C. de Noronha, a citizen of Cawnpore died upon November 23, 1932. After his death an application for letters of administration with a copy of the will of the deceased, dated November 20, 1932, was made on May 2, 1933, in the High Court by Mr. W. C. de Noronha, a son of the deceased. One Mrs. Peters, who, it appears, had nursed Mr. Noronha through the long illness that preceded his death entered a caveat upon July 17, 1933. Mrs. Peters opposed the grant of letters of administration to the applicant, filed a written statement in support of her allegations against the grant of letters of administration. It is unnecessary at this stage to go into the history of this written statement. The learned Judge before whom the application was made did not consider that the written statement complied with the provisions of the Code of Civil Procedure and he directed that a proper written statement be filed by Counsel for Mrs. Peters. In compliance with the direction of the learned Judge a written statement was filed upon November 24, 1933. In this statement there are certain charges made against the sons and son-in-law of the late Mr. Noronha and against Mr. Lyde

who was then Joint Magistrate in Cawnpore and Mr. Bhasin, an Advocate practising in Cawnpore. These allegations have been grouped under four heads: (1) Conspiracy, (2) Forgery, (3) Undue influence, and (4) Murder. In their report the Bar Council Committee stated

"There can be no doubt that allegations of conspiracy, forgery, and murder were made against the sons and son-in-law of the late Mr. Noronha and that further undue influence was alleged against Mr. L. G. Lyde, Joint Magistrate of Cawnpore, and forgery against Mr. Bhasin, an Advocate of Cawnpore."

I do not consider it necessary to deal with the evidence upon which the charges of undue influence against the sons and sons-in-law of the late Mr. Noronha were based. In my opinion Mr. C, who was Mrs. Peter's legal adviser, and who accepts now full responsibility for the charges made in the written statement, had undoubtedly in his possession sufficient materials to entitle him to make allegations of undue influence against the sons and sons-in-law of the late Mr. Noronha. This Court is not asked at this stage to decide whether that evidence is sufficient to establish the allegation of undue influence, but, to my mind, there is no doubt whatever that Mr. C. was in possession of information which entitled him to make an allegation of undue influence against the sons and sons-in-law of Mr. Noronha. The charge of undue influence against the Joint Magistrate and the charge of murder against the sons and sons-in-law of the late Mr. Noronha and the charge of forgery against Mr. Bhasin stand, however, in my judgment, in a different position.

It is not disputed that on November 20, 1932, the Joint Magistrate went to the house of the late Mr. Noronha, that he remained in the house for a number of hours and that, before he left, it was announced that Mr. Noronha had executed a will. Mr. C maintains that he was entitled to make the charge of undue influence against the Joint Magistrate on the following facts, *viz*: firstly, Mr. Noronha had been an accused person shortly before the execution of the will on November 20, in the Joint Magistrate's Court; secondly, he was on terms of friendship with Mr. Noronha's sons; thirdly, he remained for a long time in the house of the late Mr. Noronha on the date upon which the will is alleged to have been executed; fourthly, subsequent to the execution of the will, he returned to the sons of Mr. Noronha the keys, the Bible and the despatch case, which he had taken from Mr. Noronha's house on November 20, 1932, and which he had upon that date or upon the following day deposited with the Chartered Bank in Cawnpore. These facts, which are not in dispute, constituted in Mr. C's view sufficient grounds upon which to prefer a charge of undue influence upon a judicial officer. Having given this matter my fullest consideration I am unable to agree. It has been assumed that there was some hostility on the part of Mr. Lyde towards Mr. Noronha because Mr. Noronha had been an accused person in his Court. I refuse to give judicial approval to the theory that a Judge must be presumed to entertain feelings of hostility to persons who appear before him either as civil litigants or accused in his Court. If that theory had any support in fact, then His Majesty's Judges would probably constitute the most hostile section of the human race. Because an accused person appears before a Judge in his Court, it is ludicrous to suggest that that Judge should be presumed to entertain towards him any feeling of hostility or that the Judge, impelled by malice, would pursue the party into his private life and use his influence to prejudice the party and undermine his interests or defeat his legitimate intentions.

It is true that Mr. Lyde remained for some considerable time in the house of the late Mr. Noronha on November 20, 1932, during which period the will was executed. There does not appear, however, to have been any attempt on the part of the Joint Magistrate to conceal what he was doing whilst in Mr. Noronha's house. According to the evidence which was in the possession of Mr. C. the Joint Magistrate sent for the Civil Surgeon in order that it might be ascertained whether Mr. Noronha was in a fit state to execute a will. According to the evidence of Mr. C's own witnesses, two of them at least, if their statements be true, were actually in the room when the Joint Magistrate and Mr. Bhasin were endeavouring to take down at Mr. Noronha's dictation, the will which is alleged to have been executed on that date. It is a matter of admission that Mr. Noronha was then in a very weak state. His death occurred three days later and it is well-known to those who have experience in the framing of wills, that to take the instructions from a man who is upon the point of death, who is in a

very weak condition and who has a large amount of property, is a task which cannot be completed within a short period, Mr. C himself knew that when Mr. Noronha's earlier will was executed in Simla on September 30, 1930, when Mr. Noronha was in full possession of his senses and faculties and when he was suffering from no incapacity, it took him four or five hours to convey the instructions in regard to the execution of the will.

It is a matter of admission that after the alleged execution of the will the Joint Magistrate removed from the house the keys, the Bible and the despatch box already referred to. If he had been acting in concert with the sons, he would not have removed these articles. Not only does he remove them but he deposits them at the Chartered Bank and he does it with the knowledge of the District Judge. According to Mr. C the despatch box was supposed to contain the will and the trust deed, which were executed on September 30, 1930, under which the sons of Mr. Noronha took no part of Mr. Noronha's estate. It is true that upon a subsequent date the keys and the despatch box and the Bible were returned to Mr. Noronha's sons. The Joint Magistrate, however, did not act in this matter *ex proprio motu*; he acted under the direction of the District Judge. The District Judge held that he had no jurisdiction in the matter and suggested that these articles should be returned to those who were Mr. Noronha's legal representatives and who took his estate under the will which was executed on November 20, 1932

Now upon these facts I find it impossible to hold that any responsible Counsel was entitled solemnly to asseverate in a written statement that this judicial officer had been guilty of the offence of bringing undue influence to bear upon a weak and feeble old man who was on the point of death. Undoubtedly Mr. Lyde's conduct throughout quite legitmately could have been made the ground of cross-examination. If he had been cross-examined upon his conduct on November 2 , 1932, I have not the slightest doubt that he would have been able to give a satisfactory explanation of the facts. Counsel would have been entitled to cross-examine, but I am clearly of the view that Counsel was not entitled to frame against him so grave and so serious a charge upon the information which was in his possession.

With regard to the charge of murder, the position of Mr. C is weaker still. It is quite clear from the information which has been laid before us during the hearing of this matter that Mr. C himself entertained grave doubts as to the propriety of framing a charge of murder. So far as I am able to judge from the information before us, the only two persons who ever stated that Dr. Noronha and Dr. D'Silva murdered the late Mr. Noronha are Mrs. Peters and Mr. C himself. Mrs. Peters obviously could not speak of her own knowledge of what took place on the night before Mr. Noronha died. Her suggestion is that under the guise of an operation Dr. Noronha and Dr. D'Silva murdered the late Mr. Noronha. She was not present at the house at the time. Neither was Mr. C and when they make allegations of murder therefore they make them upon the evidence of witnesses who were able to speak of their own knowledge as to what took place upon November 22—the day before Mr. Noronha died. Only two witnesses give first-hand information upon this matter, firstly Mr. Bhagwan Din Misra, and, secondly, a nurse Miss Sarah Thomas. In his statement to Mr. C., Bhagwan Din Misra does not in terms state that he was present when any operation was performed. It is a fair inference from the expression which he does use, however, that he was present. The matter is, however, not free from doubt. He does say that an operation was performed and that shortly afterwards Mr. Noronha became unconscious and that he never recovered consciousness. Miss Sarah Thomas states that she was nurse in attendance upon Mr. Noronha and that Dr. Noronha and Dr. D'Silva performed an operation upon the late Mr. Noronha the night before he died. In her statement to Mr. C, she does not suggest that these two doctors murdered Mr. Noronha.

There are two significant facts which tell very heavily against Mr. C. One is that he did not ask either Mr. Bhagwan Din Misra or Miss Sarah Thomas if they were present when the alleged operation is said to have been performed. The second is that he did not ask either of these witnesses what was the nature of the operation which was performed. From Mr. C's statement to us it appears clear that he had entertained the suspicion, having taken the statements of these two witnesses that murder had been committed. Eventually he did make a charge of murder in the written statement. Before making it he did not consider it worth while to elucidate

the matters to which I have refefred. Before he framed the most serious charge which can be brought against any citizen, he did not think it worth while to send for these witnesses and ask them if they were present when the operation was performed and what was the nature of the operation. Mr. C explains that it was in the interests of the sons of Mr. Noronha that Mr. Noronha should die before he revoked the will which he is alleged to have executed on November 20, and he further states that according to the information which he had, Mr. Noronha was likely to revoke the deed which he had executed upon that date. That may well be so, but upon so slender a foundation he is not entitled to prefer a charge of murder, and I must frankly say that I am amazed that any responsible Counsel could have, upon this flimsy evidence, framed so serious a charge.

Allegations of forgery were made in the written statement. These allegations were made against the sons and sons-in-law of Mr. Noronha and against Mr. Bhasin, who was present when the will was alleged to have been executed. There is no doubt now that a document, which purported to be a will, was executed on November 20, 1932. It is further within our knowledge that upon that date Mr. Noronha was in such a weak state that he was unable to affix his usual signature to the will and that instead of his signature his thumb mark appears thereon. The only evidence or information upon which the charge of forgery was framed appears to have been a story that shortly after Mr. Noronha died his thumbs were found to be black, and further, that one of Mr. Noronha's sons was seen to have two foolscap pages which were blank but had thumb marks affixed to them shortly before Mr. Noronha died. Upon that evidence I am clearly of the view that Mr. C was not entitled to prefer a charge of forgery against a brother practitioner or indeed against any one. In the course of their report the Bar Council Committee referred to a decision of a Full Bench of the Allahabad High Court in *In re Dwarka Prasad* (1) and the Committee appear to have accepted the statement of the law in that case. The passage referred to by the Committee is as follows:

"Members of the legal profession are under no duty to their clients to make grave and scandalous charges either against Judges or the opposite parties on the mere wish of their clients. They are not puppets compelled to obey the dictates of their clients where matters of good faith and honourable conduct are concerned. They are responsible to the Court for the fair and honest conduct of a case. They are not mere agents of the man who pays them, but are acting in the administration of justice, and in matters of this kind they are bound to exercise an independent judgment and to conduct themselves with a sense of personal responsibility. If they fail to act with reasonable care and caution, they are unfit to enjoy the privileges conferred upon them by law and serious breaches must be visited with punishment."

So far as it goes, with respect, this appears to me to be a statement of the law which is unchallengable. It is an axiom which no one will challenge that in the conduct of a case a Counsel ought to act with caution and with circumspection. Mr. C, however, in support of his position referred to another Full Bench decision of this Court reported in *In the matter of Vakil* (2) and relied especially upon a passage in the judgment of the learned Chief Justice which is as follows:

"A Counsel is entitled to accept the instructions of the client subject to this, that as a matter of prudence and for one's own reputation, it is not well to associate oneself with reckless charges of fraud and criminality or to indulge in abuse; and Counsel should explain to clients that these charges, if unproved, gravely injure the case, and prejudice the Judge. Counsel is not supposed to go hunting here, there and everywhere to test by extraneous circumstances the veracity of his client. It cannot be done nor is it the practice to do it."

In my judgment this statement of the law in no way conflicts with the earlier statement contained in the decision in the case reported in *In re Dwarka Prasad* (1). Most assuredly a Counsel is not expected to conduct an inquiry into the statements made by his client. But when the client makes a statement upon facts which cannot possibly be within his own knowledge, then it is undoubtedly the duty of Counsel before he makes an allegation based on the information supplied by the client in a written statement to discover if there is evidence in support of this allegation. He is entitled to accept his client's statement of facts so far as these facts may be within the knowledge of the client. But if his client desires him to frame serious and grave charges in a written statement then undoubtedly it is the duty of the Counsel before he does so to satisfy himself that there is reasonable evidence forthcoming in support of these allegations. It is somewhat difficult to lay down a general rule which will operate fairly in

(1) 81 Ind. Cas. 177; A I R 1924 All. 253; 25 Cr. L J 889; 46 A 121; 21 A L J 893 (F B).

(2) 88 Ind. Cas 179; A I R 1925 All. 641; 47 A 729; 23 A L J 469; L R 6 A 403; 26 Cr. L J 1091 (F B).

every case, but I think this at least may be stated: no Counsel is entitled to frame a serious charge against a party to a litigation unless he is in possession of admissible and relevant evidence upon which, if accepted, Counsel could reasonably ask the Court to hold the allegations true. It may well be that the evidence in support of the allegations is untrue and it is certainly not the duty of a Counsel in the ordinary course to test the truth of the witnesses whom he intends to put into the witness box but at the conclusion of the evidence which he has led, he should be in a position to submit as a reasonable proposition to the Court that the evidence which he has led, if accepted, establishes the allegations for which he had made himself responsible. If he is not in possession of such evidence to support them, he is not entitled to make grave and serious allegations, such as are contained in the written statement which was filed by Mr. C on behalf of Mrs. Peters. The Bar Council Committee upon a consideration of the information which was in Mr. C's possession when he framed the charges already referred to concluded by stating:

"We are of opinion that Mr. C did not act recklessly and without sufficient care. On the contrary we are of opinion that having regard to the circumstances of the case and the instructions of his client he was justified in approving the written statement and that he could not consistently with his duty to his client and in her interests do otherwise."

So far as the charges of undue influence against the Joint Magistrate, forgery against Mr. Bhasin and murder against the sons and sons-in-law of the late Mr. Noronha are concerned, I am unable to agree with the conclusion of the Committee. Without reservation, and without qualification I must say that in my judgment the finding of the Bar Council Committee upon these charges is not justified. I am aware that usually this Court will accept, especially when there is no objection preferred by the learned Government Advocate, the finding of the Bar Council. This Court, however, is not bound by and in my view, in this case the Court ought not to accept the finding of the Bar Council so far as that finding relates to the three charges mentioned above. Having given the matter my fullest consideration I am of opinion that as Counsel for Mrs. Peters in her opposition to the application to the letters of administration upon the will of the late Mr. Noronha, Mr. C did not act with that caution, circumspection and propriety with which he should have acted, especially having in view the very serious charges which were contained in the written statement which he filed. In my judgment Mr. C has not acted in this matter consistently with his duty to the Court and in consonance with the high traditions of the legal profession.

The Bar Council Committee hold that Mr. C has not been guilty of professional misconduct. I do not agree with that finding. I understand that my learned brothers are in agreement that in any event no punitive order should be passed. On this question I do not propose to dissent and having stated my view on the matter, I do not suggest in the circumstances that this Court should take any action against Mr. C.

Iqbal Ahmad, J.—I regret I am unable to agree with the observations made by my learned brother who is presiding over this Bench as, after giving the matter my best consideration, I have come to the conclusion that the finding recorded by the Bar Tribunal "that Mr. C did not act recklessly and without sufficient care" is perfectly correct. Indeed having regard to the circumstances of the case, to which reference shall presently be made, I have no hesitation in holding that Mr. C was justified in drafting the written statements on behalf of his client in the terms that he did, and that consistently with his duty to his client he could not do otherwise. The charge against Mr. C was that in the written statement drafted by him in testamentary suit No. 2 of 1933, on behalf of the objector Mrs. Peters, he made accusations of conspiracy, forgery and murder against the petitioner and certain others and the charge of undue influence against Mr. Lyde, the City Magistrate of Cawnpore, and the charge of forgery against Mr. Bhasin, an Advocate of Cawnpore, without satisfying himself that there was any evidence to support the charges, and he was thereby guilty of professional misconduct.

In order to appreciate the finding recorded by the Bar Tribunal that the charge was not brought home to Mr. C, it is necessary to state the facts in some detail. One Mr. W. C. de Noronha, a prominent citizen of Cawnpore, died on November 23, 1932, leaving properties worth about Rs. 10 lakhs. Mr. Noronha was at the time of his death an old man of over 70 years of age and was suffering from diabetes and it appears from the statement of Major

Clyde, the then Civil Surgeon of Cawnpore that he had two carbuncles and his condition was grave more than two weeks before his death. It is common ground that the relations of Mr. Noronha with his sons were very bad since 1924 and the sons were living separately from the father. In this connection it may be pointed out that in the family Bible there are entries about the four surviving sons to the effect that they were disowned by Mr. Noronha "as most unfaithful and ungrateful". Mrs. Peters on whose instructions the written statements, the subject of charge, were prepared by Mr. C is proved to have been on terms of great intimacy with the late Mr. Noronha for several years, and she used to visit Mr. Noronha during his last illness till November 14, 1932, and was looking after and nursing him in his illness. It is admitted that the sons came to live in the house of Mr. Noronha on November 14, 1932, and continued to live in the house till the date of his death. The sons prevented Mrs. Peters from entering the house since they came to live there. We also find that on November 19, 1932, the sons or the sons-in-law of Mr. Noronha took possession of his keys and when Mr. Noronha came to know of this fact, he was upset, and desired that the Collector should come to his house. The parties in the testamentary case were at variance as to the reasons why Mr. Noronha desired to see the Collector but, for the purposes of the present case, it is immaterial to deal with the merits of the respective contentions of the parties on the point.

It is admitted on all hands that on November 20, 1932, Mr. Lyde came to the house of Mr. Noronha at about 12 noon and stayed there till about 7 P. M. and it is alleged that during this interval a will was prepared by Mr. Bhasin, Advocate, on instructions received from the late Mr. Noronha and was faired out and signed by Mr. Noronha and attested by witnesses. The genuineness and validity of this will was challenged by Mrs. Peters in the testamentary suit referred to above. Mr. Lyde took with him the attache case and the Bible from the house of Mr. Noronha and deposited the same in some bank. There is no evidence before us as regards the events that took place on November 21. On November 22, one Major Tee who was a friend of Mr. Noronha visited him and it appears from his statement, that has been exhibited in the case, that during the course of the conversation that he had with Mr. Noronha the latter told Major Tee that he had never executed any will on the date on which he was alleged to have done so. One of the sons of the late Mr. Noronha filed an application for letters of administration with a copy of the will of the deceased dated November 20, on May 2, 1933, in this Court. A caveat was entered by Mrs. Peters and on August 17, 1933, a written statement was filed on her behalf. The written statement is very brief and is divided into 8 paragraphs. We are not concerned with paras. 1 to 7 of the written statement. It is stated in para. 8 that:

"the affidavit dated July 31, 1933, contains all true facts in controversy and it may be treated as a part of my written statement."

The affidavit referred to in this paragraph is the affidavit of Mrs. Peters and in that affidavit the charges of conspiracy, forgery, murder and undue influence are set forth in great detail. The learned Judge who heard the testamentary case was of the opinion that the written statement and the affidavit were "hopeless for the purposes for which they are filed."

The learned Judge accordingly granted leave to Counsel for Mrs. Peters to amend the written statement or to entirely re-draft it if he so wished. Several amended and additional written statements were thereafter filed on behalf of Mrs. Peters, and Mr. C takes full responsibility with respect to having drafted the same.

The question that we have to consider is whether Mr. C did act recklessly and without sufficient care in drafting the written statements mentioned above and whether he was guilty of professional misconduct in having drafted the written statements in accordance with the instructions given to him by his client. It is not disputed that the written statements were completely in accordance with the instructions given to Mr. C by Mrs. Peters. The question therefore remains whether Mr. C did recklessly and without taking sufficient care embody the allegations of conspiracy, etc., in the written statements and was thereby guilty of professional misconduct. After having considered the facts of the case, I have no hesitation in answering the question in the negative.

It is abundantly proved from the materials, to which detailed reference has been made by the Bar Tribunal in its finding, that Mr. Noronha had got a will prepared at Simla in 1930 by Mr. Bevan

Petman, a Barrister of Lahore, and that he had by that will devised the major portion of his properties for charities and had bequeathed two houses and a sum of Rs. 50,000 and a further allowance of Rs. 100 for life to Mrs. Peters. In the course of his submissions Mr. C suggested that that will was probably in the attache case and was removed by the sons, and I am not prepared to say that the suggestion is without force. There is also some evidence to show that along with the will Mr. Noronha executed a deed of trust for putting into immediate operation the clauses of the will as regards the bequest in favour of charity, so as to set at rest all objections to the validity of the will because of its non-registration. It is worthy of note that no portion of the property was devised by this will in favour of the sons. The disputed will of November 20, 1932, no doubt, also purported to devise properties of considerable value for charities, but the suggestion on behalf of Mrs. Peters in the testamentary suit was—and there was considerable force in the suggestion—that the provision as to that charitable gift was illusory and designed to leave the entire estate of the deceased to the sons as the provision to charity was void.

It is also in evidence that the late Mr. Noronha was an accused in a case under s. 679, Penal Code, that was pending in the Court of Mr. Lyde till November 17, 1932. That case was compromised on that date. We further find from the affidavit filed by Mrs. Peters in this Court in the testamentary suit that one of the sons and a son-in law of Mr. Noronha performed an operation on Mr. Noronha on November 22, and Mr. Noronha died the next morning. The following undisputed facts were therefore before Mr. C before he drafted the written statements: (1) Mr. Noronha was displeased with his sons and had turned them out of his house and disowned them so far back as in the year 1924. (2) In the year 1930 he had executed a will with all due publicity bequeathing the major portion of his property for charity and had also by the same will devised two houses and a sum of Rs. 50,000 to Mrs. Peters and had totally disinherited the sons. (3) There is absolutely no suggestion and much less any evidence of any reconciliation between the father and the sons prior to November 14, 1932. (4) The sons either effected an entry in the house of Mr. Noronha contrary to his wishes or came to live in the house with his consent on November 14, 1932. (5) From the time that the sons came to live in the house of Mr. Noronha, Mrs. Peters was not allowed to enter the house. (6) There is no evidence to show what led to Mr. Noronha to change his mind between November 14 and November 20 - the date on which the will is alleged to have been executed. (7) The will is alleged to have been executed at a time when a Magistrate of Cawnpore, before whom only three days before the alleged execution of the will, the testator figured as an accused in a case under s. 379, Penal Code, was present. (8) There is no explanation as to why Mr. Lyde had to remain in the house of Mr. Noronha for about 7 or 8 hours. (9) No attempt was made to deposit the will in the office of the District Judge, Cawnpore, during the lifetime of Mr. Noronha. (10) Even the ordinary precaution, that is usually taken when the testator is in such a weak state of health as Mr. Noronha was, of getting the will registered, was not taken. (11) A respectable man like Major Tee had given a statement in writing to Mr. C that the testator denied having executed a will in favour of the sons. (12) One day before the death of Mr. Noronha an operation was performed by one of the sons who was one of the legatees under the will and the testator did not survive the operation for more than 12 hours. (13) The operation was performed on a patient who was suffering from chronic diabetes without taking the Civil Surgeon into confidence, who, it is admitted, was treating the patient during his last illness. (14) After the death of Mr. Noronha his thumb was found besmeared with ink.

The facts noted above speak for themselves and comment is superfluous. Apart from these facts Mr. C had the statements in writing of Bhagwan Din Misra, the record-keeper, in Mr. Noronha's firm, and of Ghani, a personal servant of Mr. Noronha, and of Miss Thomas who was a nurse in attendance on Mr. Noronha during the relevant period, and these statements did support the charges of conspiracy, etc., embodied in the affidavits of Mrs. Peters. Over and above these statements there were the affidavits of Mrs. Peters clearly formulating the charges of conspiracy, etc., mentioned above. In view of the facts and materials noted above, Mr. C was, in my judgment, not only justified, but clearly in duty bound to make the allegations that are embodied in the written statements. The measure of the responsibility of a

Counsel in drafting pleadings is set out in the Full Bench decision reported in *In the matter of Vakil* (2). It was observed in that case that:

"A client who consults a Counsel and who requires a plaint or written statement to be drafted, instructs the Counsel as to the facts of the desired document. It unfortunately does not always happen that those facts are true, but from the Counsel's point of view that is not a material matter, and indeed if one looks at pleadings in cases generally, it is obvious that a plaint and the written statement cannot both be true because an issue or issues arise out of the denials of the truth of the averments on one side or the other and that enables the case to be fought upon clear lines A Counsel is entitled to accept the instructions of the client subject to this, that, as a matter of prudence and for one's own reputation, it is not well to associate oneself with reckless charges of fraud and criminality or to indulge in abuse; and Counsel should explain to clients that these charges, if unproved, gravely injure the case, and prejudice the Judge. Counsel is not supposed to go hunting here, there and everywhere to test by extraneous circumstances the veracity of his client. It cannot be done, nor is it the practice to do it. Counsel have to depend upon the statement that the client makes, the penalty being that, if the client is not telling the truth, he may probably lose the case. In those circumstances the rule is that the client is entitled to have the particular document drafted according to the instructions given."

In the case before us Mr. C went beyond the standard laid down by their Lordships in the case quoted above. He insisted on the statements of the personal attendants and of certain subordinates of Mr. Noronha being supplied to him before he consented to draw up the written statements. He took the trouble of going to Calcutta for the purpose of recording the statement of Major Tee. Mr. C read out all those statements to us and coupled with the facts stated above, those statements supplemented by the affidavits of Mrs. Peters did, in my judgment, afford complete justification for the charges of conspiracy, forgery, undue influence and murder "in law" embodied in the written statements. The fact that the will of November 20, 1932, was not executed till about 3 days before the death of the testator and was in favour of the sons who had been disowned by the testator as "ungrateful" itself laid that document open to grave suspicions. The testator was at the time of the execution of the will admittedly extremely weak and almost at the point of death. He must have been, because of the carbuncle, in great physical and mental distress. The City Magistrate of Cawnpore before whom only three days before the testator was an accused in a theft case was present all through the time that the will is alleged to have been drafted, faired out and executed. In view of these facts Mrs. Peters insisted that the charge of undue influence should be embodied in the written statement, and I am not prepared to hold that Mr. C could, as a responsible Counsel, refuse to comply with the instructions of his client in the matter.

Similarly there were materials that did justify the charge of forgery. The fact of the non-registration of the will coupled with the assertion that the thumb of Mr. Noronha was found besmeared with ink at the time of his death did constitute ample material for the charge of forgery. Again the charge of murder "in law" could not be characterized as reckless in the circumstances of the present case. It may be that there was no such evidence before Mr. C as could bring the charge of murder home to the sons of Mr. Noronha if they were prosecuted in a Criminal Court on that charge. But I cannot overlook the fact that the written statement was being filed in a probate case and it may be that the allegation about murder "in law" did not amount to more than this that the sons by performing an operation did precipitate the death of the testator and, as such, could not take benefit under the will. In this connection reference may be made to the decision in *Hall, In re*; *Hall* v. *Knight* (3).

In my judgment the Full Bench decision in *In re Dwarka Prasad* (1), has no application to the case before us. That was not a case in which this Court was concerned with pleadings drafted by a Counsel. In that case a Junior Counsel made "disgraceful charge of unfairness against the Magistrate," who was trying the case. The charge against the Magistrate appears to have been made by the Counsel concerned on his own responsibility. The observations of their Lordships who decided that Full Bench case must, therefore, be taken with reference to the facts of the case before their Lordships and cannot govern the case before us.

I consider it imperative in the interest of administration of justice that too rigid a test of the conduct of an Advocate in the matter of drafting pleadings should not be emphasized and that the test should be such as not to deter a Counsel from fearlessly placing before the Court such allegations as their clients instruct them to make, so long as those allegations do

(3) (1914) P 1; 83 L J P 1; 109 L T 587; 58 S J 30; 30 T L R 1.

not appear manifestly reckless and unfounded. It is no doubt the duty of Counsel to use their own judgment, experience and discretion and not to make irrelevant or unduly insulting allegations in the pleadings but it is equally their duty to embody the case of their clients in the pleadings fearlessly, provided the instructions received from clients justify the case embodied in the pleadings. While on the one hand a Counsel is expected to be careful and not reckless in drafting the pleadings, he cannot, on the other hand, assume the role of a Judge and refuse to embody allegations that his client instructs him to make unless and until he has examined the evidence on the subject. A Counsel is in one sense the mouthpiece of his client, but he does not guarantee or pledge himself for his client's veracity. When I apply these tests to the present case, I cannot but accept the finding recorded by the Bar Tribunal without any reservation.

Before parting with this case I may note that as a matter of practice, this Court attaches greatest weight to the findings on questions of fact recorded by the Bar Tribunal and that in this case even the Government Advocate did not take objections to the findings of the Tribunal.

Allsop, J.—My learned brothers are agreed that no further action need be taken against Mr. C. The only question, therefore, which remains to be considered is whether his action in this matter as Counsel for Mrs. Peters can be unreservedly approved. There seems to be no doubt at all about the law upon this question. On the one hand, Counsel must look to the interests of his client and not be deterred by fear or favour from making any allegations which in those interests it is necessary for him to make. On the other hand, he cannot take shelter behind his client and claim to be an entirely irresponsible instrument in his client's hands. There remains in him a duty and an obligation to his fellow citizens and he is certainly not entitled to make scandalous and serious allegations against those fellow citizens unless he has some basis upon which the allegations can be grounded.

In the present case I understand that the question at issue about the validity of the will is still the subject of an appeal in this Court and I should, therefore, prefer to say nothing which may have a bearing upon the issue to be decided when the appeal is heard. I think it is sufficient for me to consider the allegation of murder which was made in the written statement which was put in by Mr. C on behalf of his client. I am not quite sure even now, after hearing the arguments, that Mr. C is really fully aware of the seriousness of the allegation that he made. It is surely no light matter to accuse a son of having hastened the death of his own father with the motive that that father should not be in a position to vary or repudiate a will which he had made. I have to consider in this case what ground or basis Mr. C had for his terrible charge which he made against Mr. Noronha's son and against a son-in-law. There was before him the evidence of two witnesses, one a nurse and the other a personal servant. The statements made by these persons were merely these that Mr. Noronha's son and son-in-law, who were both medical practitioners, had performed an operation upon Mr. Noronha and that next morning Mr. Noronha was dead.

The only other matter which might give rise to an inference was that it was possible that it was to the interests of these two persons that the will which was alleged to have been made should not be repudiated or in any manner varied. It is not even quite certain, as far as I can see, that it was to the interests of the son or the sons-in-law that the will should not be varied or repudiated. There has been a mention of a previous will and an alleged deed of trust but I do not think that there is any evidence anywhere that either of these documents was properly executed. In so far as the previous will related to a charitable bequest, there can be no doubt whatsoever that it had no validity. If the will had been executed and was a valid will, it might have resulted in the passing of a sum of Rs. 50,000 to Mrs. Peters but the remainder of the property which consists of several lakhs would have passed in any case to the sons and possibly to any daughters who might be living.

In the will which was sought to be proved there was also a charitable bequest and although that bequest apparently had no validity, it cannot be said that there was any very much greater benefit to the sons under the latter will than under the former one. At any rate, there was not so much difference that one could reasonably conclude that two respectable medical

practitioners, namely, the son and the son-in-law of Mr. Noronha would commit a murder in order that the prior will should not have effect or that Mr. Noronha might make another will in more or less the same terms. It seems to me that there was no justification at all for the conclusion that so serious a crime had been committed and I must note that no attempt was made to call in the Police to establish that a criminal offence had been committed.

In considering the terms of the allegation I must mention that the charge was that a legal murder had been committed. I am prepared to consider that perhaps Mr. C, when he made the allegations, really meant to say that there had been some action which morally might amount to a murder and that he did not really intend to assert that a criminal offence had been committed. But taking the matter at its best it cannot be doubted that there was at least a hint and more probably an allegation that these two persons had deliberately hastened the death of Mr. Noronha with the object of material gain to themselves.

Mr. C in my opinion was under an obligation before he made a charge of this kind to be satisfied that there was some real basis for it. The mere fact that an operation had been performed and that Mr. Noronha died the next morning could not possibly give rise to any collusion that the operation was an improper one performed with the purpose of causing death.

There is no real evidence whatsoever in support of this charge. Mr. C did not even take the trouble to enquire from the witnesses whose statements were before him what the nature of the operation was. He knew also that Mr. Noronha had been under the treatment of the Civil Surgeon, a respectable medical officer who could have no interest one way or the other in disputes between Mr. Noronha's sons and Mrs. Peters. It does not appear that he ever enquired from the Civil Surgeon whether any operation had been performed or what its nature was or whether it was an operation which hastened the death of the patient.

I do not propose, as I have already said, to consider the charges of undue influence against the Joint Magistrate Mr. Lyde and of forgery against an Advocate Mr. Bhasin. I may only say that *prima facie* it appears to me that there was very little basis for any charges of this kind. In my opinion, Mr. C was extremely reckless in framing the charges which he did. I give this opinion because I hope that he will not be set up in the light in which appears in this case as a pattern and an exemplar by the Advocates practising in this Court and in the District Courts of this Province.

D. *Order accordingly.*

CALCUTTA HIGH COURT

Civil Rule No. 493 of 1934

August 20, 1934

MITTER, J.

MANNILAL ANANDJI—PLAINTIFF—PETITIONER

versus

B. N. RY., LTD.—DEFENDANTS—OPPOSITE PARTIES

Railways Act (IX of 1890), s. 72 (1) (2)—Liability of Railway Administration—Whether as bailee or insurer or carrier—Misconduct—Rain water entering wagon by great force of wind—Whether amounts to misconduct—Railway Company does not insure against negligence of consignor.

In India the liability of a Railway Administration is not that of a common carrier. It is not an insurer. Its liability is that of a bailee as defined in the Contract Act. If there is no negligence there is no liability. Whatever the term 'misconduct' may imply, the word implies something more than negligence. If rain water enters a wagon by the great force of wind the omission of the Railway Company to provide absolutely water-tight doors, such as would not permit even a drop of water to enter, would not amount to misconduct. To insist on such a high standard would be to make an Indian Railway Administration virtually an insurer and not a bailee *Jamunadas* v. *E. I. Ry. Co* (5), explained and doubted.

[Case-law referred to.]

A Railway Company does not insure against the negligence of the consignor. It is the duty of the consignor to have his goods properly packed, such as would be damaged unless properly packed! This is even so where the responsibility of a carrier is much more than that of a Railway Administration. *London and North Western Ry Co.* v. *Richard Hudson & Sons, Ltd.* (6), referred to.

C. R. from judgment of Small Cause Court Judge, Sealdah, dated December 22, 1933.

Messrs. *J. D. Lewis* and *Mahendra Kumar Ghose*, for the Petitioner.

Messrs. *S. C. Brahmachari* and *Sudhir Kumar Khastgir*, for the Opposite Parties.

Order.—This Rule is on behalf of the plaintiff whose claim for damages against the B. N. Ry. Co. has been dismissed by the learned Small Cause Court Judge of Sealdah. The plaintiff is a dealer in *biri*. His agent booked consignments of *biri* leaves from Amgaon to Shalimar under invoice No. 16, dated September 17, 1930, and from

Gondia to the same station under invoice No. 47 dated October 28, 1930. On arrival of the goods at Shalimar it was found that 8 bags of the first and 6 bags of the second consignment had been damaged by wettage. The Railway Officers estimated without prejudice the damage at 20 per cent. and the plaintiff took delivery. The plaintiff has now claimed damages. For both the consignments the plaintiff's agent executed risk notes in Form B approved by the Governor-General in Council which would make the Railway Administration liable for "loss, destruction, deterioration or damage" only if the plaintiff proved misconduct on the part of the Railway Administration's servants. For the consignment booked from Amgaon the plaintiff's agent also executed a risk note in From A, the goods being not packed according to the requirements of the defendant, namely they were not packed in double gunny bags of the required quality.

In the plaint the plaintiff made specific allegations that the goods had been damaged by the undue delay in transit and by the carriage in non-waterproof wagons with wooden roofs. In one paragraph of the plaint however there is a general statement that the Railway Company's servants had been guilty of negligence and misconduct, no particulars being given. The defendant Company ought to have asked for particulars about the misconduct pleaded which they neglected to do. The learned Small Cause Court Judge has recorded findings to the effect that there was no undue delay in transit and that it was not proved that the wagons which according to the admission of the defendant Company had corrugated iron roofs, were defective. He also held that the plaintiff had failed to prove wilful neglect on the part of the Railway Company's servants. How the last finding is material I fail to see. The form of risk note *B* was amended in 1924, when the word misconduct was substituted for the words wilful neglect. He did not record an express finding on the question as to whether there was any misconduct on the part of the Railway Company's servants. He, however, found that the Railway Company had proved satisfactorily that its servants had taken due care and precaution in respect of the consignments and that damages that occurred cannot be attributed to any neglect on their part.

One would have thought that after the said findings it was a bold step for the plaintiff to move further in the matter. Realising that he could not further hope to succeed on the specific allegations made in the plaint, the plaintiff turns round and presents his case on a new line altogether, which has only been rendered possible by the Railway Company neglecting to ask for particulars about the misconduct pleaded. He says now that the servants of the Railway Administration had been guilty of breach of standing orders and points out two of them to be found in Ex. 4. The first is that during the monsoon (which according to the instructions of the Railway Company is to be taken to last from June to December) goods liable to damage are not to be loaded against the sides of flap doors of wagons but well away and the second is that wagons with corrugated iron roof should not be loaded with damageable commodities and urges that breach of standing orders by itself is misconduct. As I have stated that on the plaint this case the defendant opposite party was not called upon to meet, but I would not rest my judgment on the said ground. Assuming that mere breach of standing orders would amount to misconduct for which there is some authority, see *Secretary of State for India* v. *Dhokalmal* (1) and *Bengal Nagpar Ry. Co.* v. *Moolji Sicka & Co.* (2), the findings of the learned Small Cause Court Judge exclude the case of misconduct. It is not necessary for me in this case to define the word misconduct or to decide if there is a distinction between "misconduct" as used in Risk Note B in currency in India and the word "wilful misconduct" used in England in such cases. On this point there is a divergence of opinion: see *Bengal Nagpur Railway Company* v. *Moolji Sicka and Company* (3) and *M. & S. M. Railway Co., Ltd.* v. *Sunderjee Kalidas* (4).

In India the liability of a Railway Administration is not that of a common carrier. It is not an insurer. Its liability is that of a bailee as defined in the Contract Act. If there is no negligence there is

(1) 134 Ind. Cas. 940; A I R 1931 Cal. 734; 54 C L J 154; 35 C W N 1250; Ind. Rul. (1931) Cal. 910.

(2) 134 Ind. Cas. 1268; A I R 1932 Cal. 70; 54 C L J 314; Ind. Rul. (1932) Cal. 52.

(3) 129 Ind. Cas. 769; A I R 1930 Cal. 815; 52 C L J 235; 35 C W N 133; 58 C 586; Ind. Rul. (1931) Cal 241.

(4) 147 Ind. Cas. 752; A I R 1933 Cal. 742; 57 C L J 281; 60 C 996; 6 R C 356.

no liability. Whatever the term misconduct may imply, it is quite apparent from a comparison of cl. (1) with cl. (2) of s. 72, Railways Act, that the word implies something more than negligence. The risk notes approved by the Governor-General in Council as their terms show are intended to reduce and limit the responsibility which Railway Administrations would otherwise have under sub-s. (1) of s. 72. The finding that there was no negligence on the part of the opposite party necessarily excludes the case of misconduct. There is documentary evidence that in respect of at least the consignment booked at Gondia the agent of the plaintiff admitted that the wagon was in good condition (Ex. G). There is no evidence that the goods had been loaded against the sides or flap doors as all the evidence that has been placed before me is inconclusive. That evidence is that when the wagons were opened at Shalimar some bags fell out. The bags of *biri* leaves are huge and comparatively light. It may as well be that some of them had slided to the sides by reason of the jerks and other causes due to motion. Exhibits Q and Q-2, the only documents on which the learned Advocate of the petitioners could lay his hands on, show that the opinion of some of the Railway servants was that rain had "beaten in". If rain water enters a wagon by the great force of winds I do not see how the omission of the Railway Company to provide absolutely water-tight doors, such as would not permit even a drop of water to enter would amount to misconduct. If that is the proposition intended to be laid down in *Jamnadas* v. *E. I. Ry. Co.* (5) I must respectfully dissent from it. To insist on such a high standard would be to make an Indian Railway Administration virtually an insurer and not a bailee, whose responsibility is defined in ss. 151 and 152, Contract Act.

With regard to the consignment booked at Amgaon there is a further difficulty that bars the success of the plaintiff. His agent admitted that the consignment had not proper and adequate covering and on that footing executed a risk note in Form A. A Railway Company does not insure against the negligence of the consignor. It is the duty of the consignor to have his goods properly packed, such as would be damaged unless properly packed. This is even so where the responsibility of a carrier is much more than that of an Railway Administration; see Lord Dunedin in *London and North Western Ry. Co.* v. *Richard Hudson & Sons, Ltd.* (6), at 335* Disney's Carriage by Railway, Edition 7, p. 64. For these reasons I would discharge the Rule with costs one gold *mohur*.

D. *Rule discharged.*

(5) 148 Ind. Cas. 396; A I R 1933 Pat. 630; 6 R P 454.

(6) (1920) A C 324; 122 L T 530; 89 L J K B 323

*Page of (1920) A. C.—[*Ed.*]

ALLAHABAD HIGH COURT
Special Bench

Civil Miscellaneous Case No. 451 of 1934.

October 29, 1934

THOM, BENNET AND IQBAL AHMAD, JJ.

In the matter of AN ADVOCATE, HIGH COURT, ALLAHABAD

Practice—Bar Council—Findings by—Importance given by High Court.

The High Court usually attaches great weight to the finding of fact of a Committee of the Bar Tribunal.

Order.—Several charges in which Mr. R., Advocate, was charged with professional misconduct were remitted by the High Court to the Bar Council for investigation. The Bar Council held an enquiry and have now reported that in their opinion upon the evidence led before them the charges have been unsubstantiated. This is a finding of fact and to findings of fact of a committee of the Bar Tribunal the High Court usually attaches great weight. One of us is not satisfied that the findings of fact of the Bar Council in the present case are absolutely correct, but we are in agreement that there being no objections to the findings those findings should be accepted by this Court.

In the result we accept the findings of the Bar Council. Let the papers be filed.

D. *Order accordingly.*

CALCUTTA HIGH COURT

Civil Appeal No. 1707 of 1932

August 24, 1934

MUKERJI, ACTG. C. J. AND S. K. GHOSE, J.

HEM CHANDRA DAS CHAUDHURY AND OTHERS—APPELLANTS

versus

SECRETARY OF STATE AND OTHERS—DEFENDANTS—RESPONDENTS

Bengal Cess Act (IX of 1880), s. 4—Kabuliyat—Ijardar *entitled to exclude anybody else from dealing with land in manner he himself is entitled to do*—Ijardar, *whether in use and occupation—What he pays under* kabuliyat *is rent.*

Where under the terms of the *kabuliyats* the *ijardars* are entitled to exclude anybody else from dealing with the lands in the particular manner in which he himself is entitled to do under his *kabuliyat*, in that sense, a limited sense though it be, the *ijardar* is in use and occupation, being allowed by his *kabuliyat* to let in or exclude anybody he likes for sale of the particular commodities to which his *kabuliyat* referred, collecting such tolls as his *kabuliyat* permitted and using perhaps such portion of the land covered by the boundaries on which those particular commodities used to be sold. What the *ijardar* has to pay under his *kabuliyat* is "rent" within the meaning of s. 4 of the Cess Act. *Secretary of State* v *Sati Prosad Garga* (2), applied.

A. from appellate decree of the Additional District Judge, Noakhali, dated April 1, 1932.

Messrs. *Atul Chandra Gupta* and *Nagendra Nath Bose*, for the Appellant.

Messrs. *Sarat Chandra Basak*, *Rupendra Kumar Mitter* and *Bijan Kumar Murkherji*, for the Respondents.

Judgment.—This appeal arises out of a suit which was instituted by the plaintiffs for a declaration that the assessment of cess by the Cess Revaluation Officer on the income from the stalls of a certain market or *hat* of which the plaintiffs are tenure-holders was illegal and *ultra vires*, and also for refund of the amount of cess which they had paid under protest. The Courts below have dismissed the suit.

The plaintiffs are tenure-holders in respect of the lands on which the market or *hat* holds its sittings. The exact particulars are not available, but, as far as may be gathered, there are some stalls and also some open space on which the dealers come and sit and do their work. The *hat* meets two days in the week. The plaintiffs have taken *kabuliyats* from several *ijardars* who under the terms thereof collect tolls from the stall-keepers and dealers of various descriptions and out of the sums so collected pay certain sums as *jamas* per year to the plaintiffs. The *jamas* just mentioned have been treated as "rent" and the annual value being found on the basis thereof the re-assessment has been made. We are told that prior to the re-assessment cesses had to be paid on the annual value calculated on the basis of the rents of such tenants as were actually on the land and also on the average of such *raiyati* rents as might be held to be realisable from the portion of the land which was untenanted. The market or *hat* was also in existence at the time.

Reading s. 4, Cess Act (Bengal Act IX of 1880) it is found that the annual value means the total rent which is payable, or if no rent is actually payable, would on a reasonable assessment be payable during the year by cultivaing *raiyats* or by other persons in actual use and occupation. There are several difficulties in interpreting this definition, but they need not concern us here because the point in controversy is a limited one. It has been formulated by the Subordinate Judge in these words:

"Whether the *ijardars* in the present case are in use and occupation of the lands and whether the amounts paid by them can be treated as rent within the meaning of s. 4, Cess Act."

It is not urged on either side that this enunciation of the proposition, which is for our consideration, is not correct. In para. 4 of the plaint the plaintiffs have averred that the lands are non-agricultural and non-leasable and are in the *khas* possession of the plaintiffs, that in the *hat* which is held every Thursday and Sunday various commodities are sold, that there is no permanently allotted space for the sale of the same, that temporary stalls are made and dealers do their business, that tolls are collected by the *ijardars* who in accordance with their agreements pay some moneys to the plaintiffs, and that under the agreements the profits and losses belong to the *ijardars*. Under each of the *kabuliyats* which are all for a period of a year, the right to collect tolls for some particular commodities only is granted, and it is stipulated that besides those commodities, tolls on no others would be realisable by the grantee, and a lump sum being fixed, it is made payable in five *kists*. The *kabuliyat* is described as of a temporary *ijardari* settlement. The lands concerned in all the *kabuliyats* are the same, the boundaries in each *kabuliyat* covering the entire land on which the market or *hat* stands.

To the above should be added certain facts which have been found by the Court of Appeal below. In the settlement the lands are recorded as being in the *khas* possession of the plaintiffs and no interest as of the *ijardars* has been recorded; there

are no fixed plots or places for the several commodities which form the subject-matter of any particular *kabuliyat*, though certain lands are set apart for the sale of each kind of article; there are different *mahals* in the hat corresponding to the different commodities, specified commodities being sold in defined places set apart for the purpose and any particular commodity being sold in a particular place for a long period irrespective of the persons who might be *ijardars* or stall-keepers. On the pleadings and facts found as above, the question that has to be determined is whether the *ijardars* can be said to be in use and occupation of the lands and whether the amounts payable by them under *kabuliyats* can be treated as rents within the meaning of s. 4 of the Act. The question will have to be decided not merely by reference to the words and expressions used in the *kabuliyats* but on an appreciation of a right, if any, created thereby.

The authority strongly relied on behalf of the plaintiffs, as appellants, is the Full Bench decision of this Court in *Secretary of State* v. *Karuna Kanta Chowdhury* (1). On a careful perusal of the decisions in that case it seems to us that there are certain points of difference between that case and the present one. These points are notably two: First that in that case the assessment was made on the basis of the profits which the *ijardar*, in whom the right to hold a *mela* was vested, made from the stall-keepers, whereas in the present case the assessment has been made on the basis of the amount which the *ijardars* pay to the plaintiffs: and second that in that case the lands were already in the occupation of occupancy-*raiyats* and so the *ijardars*, who under a *kabuliyat* obtained the right to hold the *mela* for a certain time were not, in fact in use and occupation of the lands and could not in fact be put in use and occupation thereof by the landlords, whereas in the present case that element is entirely absent. It was held in that case what the profits which the *ijardars* realized from the stall keepers were not profits paid by the tenant to the landlord, nor profits paid for use and occupation. In the present case under the terms of the *kabuliyats* the *ijardars* are entitled to exclude anybody else from dealing with the lands in the particular manner in which he himself is entitled to do under his *kabuliyat*. In that sense a limited sense though it be, the *ijardar* was in use and occupation being allowed by his *kabuliyat* to let in or exclude anybody he liked for sale of the particular commodities to which his *kabuliyat* referred collecting such tolls as his *kabuliyat* permitted and using perhaps such portion of the land covered by the boundaries on which those particular commodities used to be sold. In our judgment, therefore, what the *ijardar* has to pay under his *kabuliyat* is "rent" within the meaning of s. 4 of the Act.

We think the Courts below were right in applying to this case the view taken in *Secretary of State* v. *Sati Prosad Garga* (2), the effect of the *kabuliyat* in that case being what we consider to be the effect of the *kabuliyats* in the present case. The appeal is accordingly dismissed with costs.

D. *Appeal dismissed.*

(1) 35 C 82; 6 Cr. L J 342.

(2) 115 Ind. Cas. 165; A I R 1929 Cal. 197; 55 C 1328.

ALLAHABAD HIGH COURT

Second Civil Appeal No. 593 of 1932
January 15, 1935
HARRIES, J.

TIKA RAM JOSHI—DEFENDANT—APPELLANT
versus
Lala RAM LAL SAH AND OTHERS—PLAINTIFFS—RESPONDENTS

Easements Act (V of 1882), s. 18—Right of privacy—Whether a question of fact—Customary right of privacy — Infringement of — What plaintiff must show—Premises already overlooked—Opening of further apertures overlooking premises—Whether can be said to be not actionable.

Whether such a custom as a right of privacy exists and the nature and limits of such a custom, if it does exist, are questions of fact and the findings of the lower Appellate Court, if based on admissible and relevant evidence are conclusive.

To succeed in an action to restrain any interference with a right of privacy, a plaintiff must shew not only that such a right of privacy exists by custom in the district in which the premises are situated but also that he has in fact enjoyed such a right and that it has been substantially or materially affected by the acts of the defendant. *Gokal Prasad* v. *Radho* (1), relied on.

It cannot be laid down as a rule that where premises are already overlooked, the opening of further apertures overlooking such premises cannot be actionable. Each case depends on its own peculiar facts.

S. C, A. from the decision of the District Judge of Kumaun, dated February 12, 1932.

Dr. *K. N. Katju*, Messrs. *B. L. Dave* and *R. K. Dave*, for the Appellant.

Mr. *Panna Lal*, for the Opposite Parties.

Judgment.—In this case the plaintiffs claimed an injunction to compel the de-

fendant to close up certain apertures which he had opened in a side wall of his premises over-looking a house owned and occupied by them and to restrain him from opening any such apertures in the future. The learned Munsif who tried the case decreed the claim, but on appeal the decree was modified. The learned District Judge refused to grant any injunction but ordered that certain windows should be rendered in such a condition as to make it impossible for anyone in the defendant's premises to see through them into the plaintiffs' premises. Against this decision the defendant has appealed to this Court contending that the opening of the apertures in question does not amount to an infringement of the plaintiffs' rights. The plaintiffs being also dissatisfied with this decision have filed a cross-objection claiming that the decree of the learned Munsif should be restored.

The facts of the case are simple and are not in dispute. The respondents, the plaintiffs in the suit, are the owners in possession of a dwelling house bearing the Municipal number 12 in Lala Bazar in the town of Almora. This house has been occupied by the family of the plaintiffs for many years and the ladies of the household have been in the past and are at present *pardanishin* ladies. Shortly before action was brought, the defendant-appellant purchased a house —Municipal No. 10—which is situate near the respondents' dwelling house and proceeded to demolish part of it and re-build the same. During this reconstruction the appellant without the respondents' consent opened windows and a doorway which, it is alleged, overlooked the respondents' dwelling house and the latter contended that the opening of such apertures amounted to an infringement of or interference with their right of privacy. It has been found that the doorway referred to can in no way be objectionable and the contest in the lower Appellate Court was confined solely to the windows. That Court has found that a view of a part of the plaintiffs' premises known as the "*pakholia*" can be obtained from three of these windows, whilst no objection can be taken to the fourth window. It must be conceded that the findings are binding on this Court in second appeal, but it has been strenuously argued that in spite of such findings the lower Appellate Court was wrong in law in granting to the respondents any relief. The respondents, on the other hand, have argued that having regard to these findings the lower Appellate Court should have ordered the three windows in question to be bricked or walled up and granted an injunction restraining the appellant from making any such aperture in the future.

The '*pakholia*" which is overlooked by these three windows is used by the ladies of the respondents' household for the performance of their household duties and personal ablutions. It is not a yard or courtyard in the centre of the respondents' house but is situated at the back of it. The side walls of this yard are the walls of the adjoining houses and it is separated from the fields at the rear of the premises by a wall which is described as shoulder or neck high. Having regard to the use made of this "*pakholia*" by the ladies of the household, the presence of these windows is obviously objectionable, but the appellant is entitled to make such windows unless the making of them infringes or interferes with the respondents' legal rights. On the other hand, if the respondents have a right of privacy, such a right must be protected by appropriate and suitable relief.

It is first contended before me that the respondents have no right of privacy. That such a right can exist is beyond dispute. Such right is a customary easement and may be acquired in virtue of a local custom: see s. 18, Indian Easements Act, 1882. It is conceded that by local custom a right of privacy does exist in the cities and plains of these Provinces, but it is argued that no such custom exists in the towns and villages situated in the hills. Whether such a custom exists and the nature and limits of such a custom, if it does exist, are questions of fact and the findings of the lower Appellate Court, if based on admissible and relevant evidence, are conclusive. In the judgment of the lower Appellate Court the findings as to the existence of such a custom and its nature and limits were vague and far from clear. I, therefore, framed certain issues with a view to obtaining certain and definite findings on these points and such findings have now been returned to this Court. In my judgment these findings conclude the matter and entitle the respondents to a considerable measure of protection.

The learned District Judge has found that in Almora there does exist a customary right of privacy of a limited nature. He has found as a fact that occupiers of houses in Almora are entitled by custom to claim that their women-folk should not come

under full observation from windows of neighbouring houses when engaged in their household duties and personal ablutions. The "*pakholia*" which is overlooked by the windows in question is a place where the ladies of the respondents' household do perform such tasks and, therefore, the respondents are *prima facie* entitled by custom to claim that such part of their premises shall not be observed from windows of adjoining premises. There was abundant evidence before the lower Appellate Court of the existence of such a custom and consequently the finding cannot be challenged on second appeal.

It was contended, however, by the appellant that even if such a custom existed, the respondents had in fact never enjoyed any privacy and that in any event the opening of the windows in question did not amount to a substantial or material interference with such rights as they possessed.

To succeed in an action to restrain any interference with a right of privacy, a plaintiff must shew not only that such a right of privacy exists by custom in the district in which the premises are situated, but also that he has in fact enjoyed such a right and that it has been substantially or materially affected by the acts of the defendant. See *Gokal Prasad* v. *Radho* (1), and per Edge, C. J. at p. 386*.

In the present case the appellant denies that the respondents have ever enjoyed or do enjoy such rights of privacy as are customary in Almora by reason of the fact that the "*pakholia*" in question has been and is overlooked from the roofs of adjoining or neighbouring houses. It is, however, found as a fact by the lower Appellate Court that the respondents do in fact enjoy the rights of privacy customary in Almora. It is impossible for me to say that there is no evidence to support this finding. A large number of witnesses were called and the premises viewed by the learned District Judge who heard the appeal in the first instance and by his successor to whom the issues previously referred to were forwarded. That being so, the finding is conclusive and cannot be challenged in this Court.

It is further contended, however, that even assuming that the respondents have in fact enjoyed and do enjoy the rights of privacy customary in the district, the opening of the windows in question cannot give rise to a cause of action.

(1) 10 A 358 at p 387; A W N 1888, 135.

*Page of 10 A.—[*Ed.*].

To give rise to a right of action for infringement of a right of privacy, the act complained of must amount to a substantial or material interference with such a right [see *Gokal Prasad* v. *Radho* (1)], and it is argued that where a house is already overlooked the opening of further apertures overlooking such premises cannot amount to a substantial or material interference with the right of privacy of the occupier of such premises.

The lower Appellate Court has found as a fact that the opening of the windows in question does amount to such an interference with the respondents' rights, but it is urged that there is no evidence to support such a finding and that authority binding upon the lower Appellate Court and this Court makes such a finding impossible and that effect cannot be given to it.

The appellant has strenuously contended that I am bound by the decision of a Bench of this Court in the unreported case of *Bhagwan Das* v. *Abdul Rahman*, decided on January 17, 1908.

In that case the plaintiffs sought an injunction to restrain the defendants from making certain apertures in a wall overlooking their premises and to compel them to remove a certain door frame which had already been erected. It was established to the satisfaction of the lower Appellate Court that the plaintiffs' premises were already overlooked from adjoining houses and it was held that the opening of the apertures complained of did not amount to a substantial or material interference with the plaintiffs' rights. In fact the Court held that what had been done and what was proposed to be done would virtually increase and not diminish the privacy enjoyed by the plaintiffs.

On second appeal Knox, J., however, in *Abdul Rahman* v. *Bhagwan Das* (2), held that the opening of the apertures in question did amount to a substantial or material interference with the plaintiffs' rights and granted an injunction. In his judgment he pointed out that windows were far more objectionable than roofs as ladies could see persons on a roof and withdraw, whereas they might be observed unknown to themselves by a person looking through a window. Observers on a roof would themselves be inevitably observed, whereas the existence of an observer at a window might well be unknown to those observed.

On appeal to a Bench of this Court this

29 A 582; 4 A L J 445; A W N 1907, 183.

decision was reversed, the Court holding that the learned Judge was bound by the findings of fact of the lower Appellate Court. It is contended before me that the effect of this decision is that the opening of windows overlooking other premises cannot be restrained if such other premises are already overlooked from any parts of adjoining or neighbouring premises such as roofs. In my judgment this contention is not sound and is in direct conflict with the judgment of Edge, C. J. in *Gokal Prasad* v. *Radho* (1). It is pointed out in this latter case that each case must be decided on its particular facts and in my judgment the unreported case of *Bhagwan Das* v. *Abdul Rahman*, is a decision which must be confined to the facts of that particular case which were exceptional and peculiar. In my view, that case does not lay down a rule that where premises are already overlooked, the opening of further apertures overlooking such premises cannot be actionable. In that case what was complained of actually increased rather than diminished the plaintiffs' rights and that being so, it was impossible to say that there had been any substantial or material interference with such rights.

For the above reasons it cannot be said that the lower Appellate Court could not in the present case find that there had been a substantial interference with the respondents' rights, and that being so, such a finding is binding upon me.

The respondents have, therefore, succeeded in establishing a right of privacy and an actionable infringement of such a right and consequently they are entitled to some degree of protection. The lower Appellate Court set aside the injunctions granted by the trial Court but ordered that the two windows on the fourth floor should be screwed up and always have opaque glass and be maintained in that condition and one window on the third floor should be so altered as to prevent the respondents' "*pakholia*" being visible from it. In my judgment this order amply protects the respondents and gives them all that they can justly claim. Their right of privacy must be protected and safe-guarded, but if this can be done without undue harshness to the appellant, such a course should be adopted. To order the windows in question to be bricked up would not give the respondents any greater privacy and by depriving the appellant of light would involve unnecessary hardship on him. In my view the decree of the lower Appellate Court is adequate and I, therefore, dismiss the appeal and cross-objection and affirm that decree. The appellant must pay the costs of this appeal, but all costs occasioned to either the appellant or respondents by reason of the cross-objection must be borne by the respondents.

Leave to appeal under Letters Patent is granted.

D. *Appeal dismissed.*

MADRAS HIGH COURT

Appeal Against Order No. 26 of 1933

September 7, 1934

CURGENVEN AND PANDRANG ROW, JJ.

CHIDAMBARAM CHETTIAR —APPELLANT

versus

AYYAPPA CHETTIAR—RESPONDENT

Arbitration—Reference to decide disputes, after going through the accounts—Accounts found unreliable—Power of arbitrators to proceed on other available materials—Non-production of accounts—Presumption—Assets not revealed—Power to direct payment of a share of value of assets—Arbitrators selected for personal knowledge—Use of personal knowledge not illegal—Civil Procedure Code (Act V of 1908), Sch. II, r. 20.

Disputes between two brothers relating to the division of their family properties were referred to arbitrators and the arbitrators were requested to make a division after looking into the accounts and taking the statements of the parties. The arbitrators found that the accounts were not reliable, made an estimate of the assets of the family from other available sources, and directed the defendant who was in possession of the assets and who maintained the accounts to pay half value of the estimated assets to the plaintiff. It was contended that the procedure adopted was illegal:

Held, that the arbitrators did not become powerless to decide the matter when they found the accounts to be unreliable. Their powers to make use of such material as was available in order to reach a conclusion so long as what they did was not in breach of the terms of the reference, were not less than the powers which a Court would possess in similar circumstances, and the procedure adopted by them was not illegal.

Where a party to a partition suit suppresses his accounts or has falsified them, the Court will make unfavourable presumptions against him. *Gray* v. *Haif* (1), and *Kodali Kristnayya* v. *Kodali Guravayya* (2), referred to.

Where the defendant has suppressed his accounts and the arbitrators have no means of ascertaining the exact nature of the oustandings, they will be justified in directing the defendant to pay the plaintiff's share of the estimated value of the outstandings without dividing the assets between them.

Where an arbitrator has been selected because of his personal knowledge of the matter in dispute, it would not be misconduct on his part to use his personal knowledge in coming to a certain decision, although in such cases it is desirable that he should tell the parties what his personal knowledge is and give them an opportunity to prove that his view is wrong. *Daulat Singh Bapusingh Raul* v.

Ratna Anand Singh (3), *Mahomed Nawaz Khan* v. *Alam Khan* (4), referred to.

Where the parties have not been prejudiced by use of the arbitrators' personal knowledge, the Court will not interfere with their award. *Mercer* v. *Reid* (5), referred to.

A. against the order of the Court of the Subordinate Judge of Devakottah dated December 6, 1932, and made in O. S. No. 109 of 1929.

Mr. *V. Ramaswami Ayyar*, for the Appellant.

Messrs. *S. Srinivasa Ayyangar*, *V. Rajagopala Ayyar* and *T. V. Ramaih*, for the Respondent.

Judgment.—This is an appeal by the defendant against the order of the Subordinate Judge of Devakotta directing the filing of an award on a matter referred to arbitration without the intervention of the Court under r. 20 of sch. II of the Civil Procedure Code. The plaintiff and the defendant are brothers and belong to the Nattukottai Chetti community. In 1903 their father divided from his other brothers, receiving certain sums of money and some immovable and movable property. In 1917 the father died. Up to the time of his death he was managing the business, which consisted in money lending and the property together with the younger son, the defendant. After his death it was managed by the defendant. In 1922, the brothers attempted to make a division by means of an arbitration which is said to have awarded the plaintiff Rs. 12,000 but this fell through. On December 31, 1928, the brothers executed the *muchilaka* Ex. I to three arbitrators, requesting them to make a division of the family property, particularised as cash, headquarter's account, Virudapatti shop account Moulmein shop account, jewels, house, immovable and movable properties, "after looking into the accounts and taking the statements of parties." The arbitrators' award is dated April 3, 1929. After summarising the family history it deals with the three branches for which separate accounts purport to have been kept, Moulmein, Virudupatti and the headquarters or the *Vur kadai* at Kandamur. The finding in each case is that the accounts of his management produced by the defendant are not correct and that no fair conclusions can be derived from them. Except, therefore, for certain limited purpose, the arbitrators felt themselves compelled to proceed upon a footing independent of the accounts. Briefly they have ascertained what funds the family possessed in 1903 and they have then made an estimate of what it may be supposed to have possessed at the time of the arbitration after allowing for drawings, losses and other charges. We will revert later on in more detail to the method adopted in making this calculation. The result was that they found the family had started in 1903 with about half a lakh of rupees and that the assets might be estimated at 1½ lakhs in 1929. The share awarded to the plaintiff was, therefore, Rs. 75,000 the defendant being declared sole possessor of all outstandings. This related only to the business assets and not to the immovable property or jewels of which no actual division was made, the arbitrators merely declaring each party entitled to a half share.

At the trial the defendant attacked the award on a variety of grounds. Some of these have now been given up, as for instance, that the reference was procured by undue influence and that the award was passed after notice of revocation was given by the defendant. Before us the grounds of attack may be summarised as follows:

1. The arbitrators exceeded their powers (*a*) by ignoring the accounts and by adopting an unauthorised and inappropriate method of computation;

(*b*) by making use of their personal knowledge and information;

(2) they made a mistake regarding to certain calculation of interest which vitiates the award;

(3) they exhibited partially for the plaintiff and prejudice against the defendant; and

(4) they omitted to make a complete division of the assets.

The last of these criticisms would relate to para. (*a*) of r. 14 of Sch. II, Civil Procedure Code, the remainder, it is said, amount to misconduct on the part of the arbitrators.

The arbitrators deal with the three series of accouuts in paras. 2 and 3 of their award. The defendant was in control of the Moulmein shop from 1906 to 1911, when it was closed. After examining the accounts the arbitrators found that they had not been kept properly according to the practice of the Chetties, that the defendant failed to give them a satisfactory explanation and that they were unable to rely upon them. Nevertheless, they accepted the defendant's statement that this business closed with a loss of Rs. 9,258 over and above the loss of the share capi-

tal of Rs. 7,000 and they made allowance for this loss, together with 9 per cent. compound interest, in a sum of Rs. 97,778. The Virudupatti shop was opened in 1911 and had not been closed at the time of the arbitration. It was conducted throughout by the defendant. Here, too, the accounts appeared to be incorrect and defective and the defendant was unable to produce a proper balance sheet. It also appeared that he was appropriating the partnership funds to his own purposes. Similar remarks are made about the third set of accounts, those kept at Kandanur. They do not appear to have been written properly for a very long time and when the defendant produced a balance sheet it was found not to tally with them. The arbitrators concluded that the accounts had been falsified in order to defraud the plaintiff. Thus the general result is that the arbitrators found the accounts throughout untrustworthy and useless as a basis for a fair division of the assets. It is not of course for us to say that they were wrong in rejecting these accounts. It has been argued that they should have relied on the accounts so far as they go, supplementing them by information obtained from the parties. Without ourselves undertaking an inquiry into the merits of these accounts, it is impossible for us to say that even to this extent they deserve attention or that merely by examining the plaintiff and the defendant the defects in them could have been rectified. We must take it accordingly that the arbitrators were justified in rejecting the accounts *in toto*, except in so far as the award says that they were used, as for instance, in allowing for the family drawings. What course were they then to pursue? It has been suggested that they should have professed their inability to comply with the terms of the reference and done nothing more. We do not think that they were so reduced to impotence. Their powers to make use of such material as well was available, in order to reach a conclusion, so long as what they did was not in breach of the terms of the reference, were not less than the powers which a Court would possess in similar circumstances. If a defendant either suppresses his accounts or has falsified them, the Court will presume everything most unfavourable to him consistent with the established facts (*vide Gray* v. *Haif* (1). A case of this Court in which such a presumption was made is *Kodali Kristnayya* v. *Kodali Guravayya* (2). The 1st defendant in that case was the manager of a Hindu family and it lay upon him to prove the assets available at the date of partition. It was found that he was suppressing evidence of the extent of the joint family money-lending business, and on the principle that any reasonable presumption might be drawn against him a computation was made of the profits which he had been in a position to make. The arbitrators in this case have adopted a very similar course, and short of throwing up their commission it appears to have been the only course open to them. As we have already said, they have taken the assests as they stood in 1903 and have enhanced them by adding compound interest at the rate of 9 per cent per annum. This rate has been adopted not because it is the prevailing rate at which Nattukotai Chetties lend money. It is in fact very much below the normal rates, which rise as high as 24 per cent. But allowance had to be made for bad debts and for other losses, for money lying idle, and for ordinary living expenses. On the other hand the losses sustained in the Moulmein business, drawing by the two brothers and by the common vilasam, and some other specific expenses have been deducted from the amounts so found. The net result as we have said, is that the amount available for division is estimated at $1\frac{1}{2}$ lakhs. If there is anything in this finding of an arbitrary or speculative character, the defendant has only himself to thank for this failure to maintain and produce proper accounts. We do not think that the sum awarded to the plaintiff is an unreasonable amount, even if it lay upon us to criticise the merits of the award. In twenty-five years the assets may well have increased to this amount. The further objection made before us that the arbitrators were wrong in awarding the plaintiff a sum of money and that they should have restricted themselves to dividing the outstandings loses sight of the fact that there were no means of ascertaining what the outstandings were and what they actually amounted to.

The next criticism is that the arbitrators exceeded their powers by making use of their personal knowledge and information. The charge is based upon a passage in the award which runs as follow:

(1) (1856) 52 E R 567.

(2) 70 Ind. Cas. 146; 14 L W 668; 41 M L J 503; (1921) M W N 742.

"To our knowledge and on information we do not find that both these parties and the common families incurred any heavy loss in any foreign places, and that any heavy expenses were incurred in the family. This is a big family."

The *muchilika*, it will be remembered, requires the arbitrators to pass their award after looking into the accounts and taking the statements of parties. There is no doubt that if the arbitrators used knowledge or information derived from other sources than those, if they failed to communicate to the parties what they so knew and if the party making objection was prejudiced, the award would be invalidated. These principles must of course be applied within reason. The three arbitrators were of the same village and community as the parties and must necessarily have been well acquainted not only with Nattukottai Chetty customs and procedure but also with the family circumstances and antecedents of the two brothers. They could not have been expected to bring to the enquiry minds as devoid of particular information as is required of a Court. We agree in the view taken by a Bench of the Bombay High Court, based, as it is on English authorities, that where an arbitrator has been selected because of his personal knowledge of the matter in dispute, it would not be misconduct on his part to use his personal knowledge in coming to a certain decision although in such cases it is desirable that he should tell the parties what his personal knowledge is and give an opportunity to them to adduce evidence sufficient to vary his views. (See *Daulat Singh Bapu Singh Raul* v. *Ratna Anand Singh* (3). In *Muhammad Nawaz Khan* v. *Alam Khan* (4) the Privy Council referred to the fact that the arbitrator was selected by reason of his knowledge of the circumstances of the family, so that a decision based upon that knowledge would not amount to misconduct. Considerations such as these will not of course justify the arbitrators in passing their award on such facts as that no loss had been incurred in foreign businesses or that family expenses had not been exceptionally high (the only two instances in which they confess to have acted upon their own information) if the facts were really in dispute and the parties were not apprised of their intention to use the information. As to this latter point the only arbitrator available for examination in Court, P. W. No. 2, has stated that they did not tell the parties what they knew about their family affairs, and though he has made a contrary statement in re-examination, we cannot agree with the lower Court in accepting it in preference to the earlier one. Further, however, the information used must relate to matter which were really open to question. Now as regards the losses incurred in foreign businesses, the only such business was that at Moulmein and as we have stated, the defendant's version as to the losses incurred there has been accepted. Then as regards heavy family expenses, such special expenses as the defendant claimed and as are shown in the accounts appear to have been allowed for. It was open to him to put in a claim about others, and the fact that he did not do so is in itself sufficient to show that there was nothing more to claim in respect of the two particular pieces of information referred to in the award. Both of these it may also be noted are of a negative character. Our finding, therefore, must be that the arbitrators had no need to rely upon any knowledge they might have possessed upon these matters because they would have been led to the same conclusion without it; and where a party is not prejudiced by such an error on the part of an arbitrator, the Court will not interfere *Mercer* v. *Reid* (5). We do not think that the award has been substantially affected by any knowledge or information possessed or obtained by the arbitrators and not communicated to the parties and we disallow the objection.

The alleged mistake with the regard to the calculation of interest has reference to a sum of Rs. 29,575-8 0 allowed in the defendant's favour for salary of the 2nd party, expenses for the mother's ceremony and on account of difference in the rate of interest. It has been suggested that the arbitrators intended to add interest at 9 per cent. to the plaintiff's drawings instead of $6\frac{3}{4}$ per cent shown in the accounts to make it correspond with the rate charged on the assets that this item would in itself amount to as much as Rs. 85,000 and that the error involved is so great as to amount to legal misconduct. Now in the first place the single arbitrator examined, who was in fact the arbitrator nominated by the defendant, was not put any question upon this point which perhaps he was in a position to explain satisfactorily. We cannot, therefore, accept the suggestion that a gross error has been committed by men of a class which is certainly adept in dealing with

(3) 97 Ind. Cas. 673; A I R 1926 Bom. 527.
(4) 18 C 414.
(5) 47 T L R 574.

account matters, unless no other view is possible. It is clear that there is no reason in the nature of the case why the two rates should be equal. The 9 per cent. allowed is not the actual but a hypothetical figure, adopted as roughly representing the presumed rate of increase in the assets. Whether therefore the *panchayatdars* ever intended to allow for the whole difference is doubtful. They may have meant only to make some allowance for the lower rate of interest charged on the drawings. Whatever be the correct explanation, it has not be shown either that the arbitrators unintentionally committed an error or they intentionally falsified the figure. No question of the consequences of such conduct therefore arises.

The charge of partiality preferred against the arbitrators is based mainly in the circumstances in which the award was drawn up. It is suggested that the documents were not written on April 3, which is the date they bear, but on the 4th at the earliest and that the arbitratiors deliberately evaded the receipt of registered notices from the defendant revoking the reference. What appears to have happened is that on the 3rd they orally announced what their award was going to be and as it involved payment by the defendant of a substantial sum, they may have had reason to suppose that he would resist it. They naturally did not want their labours to be fruitless and accordingly they got the award completed before his registered letters could reach them. They may even have found it advisable to remain out of the way of such objections after completing the award. In all this we can find no ground whatever for imputing bias against the defendant nor is there any other evidence worth the name to prove such bias.

The last objection relates to the omission of the arbitrators to divide the properties other than the outstandings Their award merely states that these other properties will be enjoyed by the two parties in equal shares. As regards this, the defendant made no objection to the award before the trial Court and in fact he has stated on more than one occasion that the jewels had already been divided. The plaintiff says that the defendant has all the jewels, while the house and the other immovable property possessed by the family seem in fact to be already separately enjoyed. The truth seems to be that the parties did not press before the arbitrators for the actual division of these items. In any case the division of the outstandings was a matter separable from the division of the other assets; so that under r. 14 of Sch. II it was open to the Court to file the award as a decree and not remit it for further action. There is no substance in this objection.

The result is that we think that the learned Subordinate Judge was right in directing that the award should be filed. We dismiss the appeal with costs.

A. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Second Civil Appeal No. 376 of 1933
March 13, 1935
ALLSOP, J.

Hakim MUHAMMAD MUSA—PLAINTIFF—APPELLANT

versus

Syed QASIM HUSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS

Estoppel—Estoppel by representation—What constitutes—Held, no estoppel arose—Evidence Act (I of 1872), s. 115.

For an estoppel by representation to come into operation, there must be a deception which has led the person claiming the estoppel to entertain a false belief about a question of fact and which has also led him on the faith of that belief to change his legal position Where the parties in the suit were also parties to the deed of sale and it has been held as a fact that the deed of sale was evidence of a transaction by which the parties intended to transfer certain other property but not the property in suit as the respondent was a party to that transaction, it cannot be said that he had been deceived about its true nature by the subsequent conduct of the other party.

S. C. A. from the decision of the First Subordinate Judge of Saharanpur, dated December 9, 1932.

Mr. *K. Masud Hasan*, for the Appellant.

Mr. *Akhtar Husain Khan*, for the Respondents.

Judgment.—This second appeal arises out of a suit for possession over certain property. It appears that the appellant executed a deed of sale on January 9, 1920, in favour of the defendants-respondents. It has been found as a fact by the learned Judge of the lower Appellate Court that that deed of sale was intended to transfer and did transfer only certain property. It so happened that the vendor also mentioned in the deed of sale that he was the owner of certain other property and it is in respect of that other property that the suit which has given rise to this appeal was instituted. The vendees applied for mutation of the register not only about the property

which is found to have been sold but also about this other disputed property which is the subject of the present appeal. Thereafter the appellant instituted the suit in order to recover possession over this property. One of the defences was that the property in dispute had been included in the deed of sale and had been transferred by it. This defence was negatived by the lower Appellate Court and the appeal before me has been argued on the assumption that this finding was right.

Another defence was that the appellant was estopped from alleging that the disputed property had not been sold. It appears that a sum of Rs. 90, part of the consideration for the sale was not paid at the time when the sale, took place. It was subsequently paid on February 17, 1921, and at that time the appellant executed what he describes as a receipt and what the other side claimed to be an agreement. In this document he admitted that the disputed property was sold by the deed of January 9, 1920. There was also an application made by the vendees, *i. e.*, the respondents for the partition of the property which they had purchased and when the question of their ownership arose in the partition proceedings the appellant did not raise any objection. It is argued that the appellant's admission in his receipt or agreement of February 17, 1921, and his failure to contest the claim of the respondents in the mutation proceedings when they obtained mutation without any protest on his part and in the partiton proceedings, all amount to estoppels by way of acquiescence. Reliance has been placed on the case of *Ram Sarup* v. *Ram Sarn* 96 Ind. Cas. 915 (1). That case was decided by the Lahore High Court and the decision depended in some measure upon the customary law of alienation of ancestral land in that province. The decision was based, it appears, on the provisions of s. 115 of the Indian Evidence Act, *i. e.*, the Court apparently intended to hold that there was an estoppel by judgment. The decision is no authority for the proposition which has been acted upon by the lower Appellate Court in the present case. It has not been suggested that the decision in the mutation case could operate as *res judicata*. It is obvious that the decision could have no such effect. What the learned Judge of the lower Appellate Court has held is that there has been an estoppel by representation. For such an estoppel to come into operation there must be a deception which has led the person claiming the estoppel to entertain a false belief about a question of fact and which has also led him on the faith of that belief to change his legal position. In the present case the parties were also parties to the deed of sale. It has been held as a fact which is not now contested that the deed of sale was evidence of a transaction by which the parties intended to transfer certain other property but not the property in suit. As the respondent was a party to that transaction, it is difficult to see how he could have been deceived about its true nature by the subsequent conduct of the other party. In the first place it cannot be said that he was deceived and in the second place it is not even alleged that he in any way changed his legal position at any time acting on the belief that he was the owner of the property. In these circumstances no estoppel can come into operation against the appellant.

A further argument has been raised that the partition proceedings prevent the Civil Courts from taking any action in this matter under the provisions of s. 233-K of the Land Revenue Act. The learned Judge of the lower Appellate Court has, however, pointed out that although an application for partition was made, the proceedings were afterwards quashed and no partition took place. The provisions of s. 233-K of the Land Revenue Act can, therefore, not come into operation. As it has been held that the property was not transferred by the deed of sale and as I consider that no estoppel and that the suit is not barred by s. 233-K of the Land Revenue Act, the plaintiff is entitled to a decree for possession. A decree will, therefore, be prepared in terms of the relief claimed and the respondents will pay the appellant's costs in all Courts.

D. *Order accordingly.*

(1) 96 Ind. Cas 915; A I R 1926 Lah. 650.

LAHORE HIGH COURT

First Civil Appeal No. 2580 of 1928

June 1, 1934

BHIDE AND DIN MUHAMMAD, JJ.

KARTAR SINGH AND OTHERS—APPELLANTS

versus

Musammat MEHR NISHAN AND ANOTHER—RESPONDENTS

Registration Act (XVI of 1908), ss. 17, 49—Agreement executed in 1879—Proof that the property was worth more than Rs 99—Unregistered document, if can be used for proving nature of possession—Transfer of Property Act (IV of 1882), s. 41—Transferee raking ou

khasra paimash *or police records of levy of punitive tax—Obligation under s. 41, if discharged—Evidence Act (I of 1872), s. 90—Document written by licensed stamp-vendor 55 years ago—Benefit of s. 90.*

In the absence of reliable evidence on the record to show that the value of the property covered by an agreement executed in 1879 was more than Rs. 99, it is very difficult to hold that, in those days when the value of the property was very small, the property covered by the agreement was worth more than Rs. 99

Unregistered documents can be used for determining the nature of the claimant's possession. *Qadar Bakhsh* v. *Mangha Mal* (3) and *Ata Mohamad* v. *Shankar Das* (4), relied on.

The *khasra paimash* is not a record of title but a mere record of survey and carries with it no presumption of correctness so far as the question of ownership is concerned. A Municipality is generally interested more in the assessment of tax than in the determination of ownership, and for its purposes an occupier is as good as an owner. Moreover, in the preparation of documents like *khasra paimash* a Municipality is concerned more with the measurements of the buildings with a view to safeguard its own interest against any encroachment on the public streets than in the ascertainment of the title of persons owning such buildings. In the same way the Police department when taking a census of the houses for the purposes of levying the punitive tax is merely interested in recording the names of the occupants from whom they could levy the contribution. The transferees cannot be said to have discharged their obligation under s. 41 by merely raking out of old records of the Municipality or that of the Police department. *Mohammad Suleman* v. *Sakina Bibi* (5), relied on.

Where a document itself is written 55 years ago by a licensed stamp-vendor and comes out from proper custody, the benefit of s. 90, Evidence Act, can be claimed.

F. C. A. from the decree of the Senior Sub-Judge, Rawalpindi, dated October 10, 1928.

Messrs. *S. N. Bali* and *Gobind Ram Khanna*, for the Appellants.

Messrs. *Muhammad Din Jan* and *Balkishen*, for the Respondents.

Din Muhammad, J.—One Mehr Bakhsh Darzi of Rawalpindi jointly owned with his three brothers some agricultural land and two small houses situated in the town of Rawalpindi. In 1879 he executed an ante nuptial agreement in favour of Mehr Nishan whom he later married and settled on her his whole share of the above-mentioned property in case she remained faithful to his bed. He died sometime after 1900 and before 1911, leaving him surviving his widow Mehr Nishan and his two sons, Karam Ilahi and Fazal Ilahi. It appears that Mehr Bakhsh had been occupying exclusively one of the two houses mentioned above and it remained in the possession of his family even after his death. In 1911 Sher, one of the surviving brothers of Mehr Bakhsh, brought a suit for possession by partition of two-thirds share of this house against the sons of Mehr Bakhsh on the ground that their fourth brother had died issueless and he had purchased the share of the third brother also. Fazal Ilahi and Karam Ilahi contested the suit and pleaded that the whole house was owned by their mother Mehr Nishan since 1879, and that she should be impleaded as a defendant as they had no title to the house. A similar application was put in by Mehr Nishan herself and consequently she was impleaded as a defendant in the case, along with her two sons. The matter was referred to arbitration and by mutual agreement before the arbitrators, it was decided that Sher may be given his two-thirds share by partition. An award followed on these terms in April 1912, leaving Mehr Nishan in the occupation of one-third of the house.

On September 6, 1924, Fazal Ilahi executed a mortgage without possession of the land as well as of the house left by Mehr Bakhsh in favour of Asa Singh, defendant No. 1, for a sum of Rs. 1,000. The default having been made by Fazal Ilahi in the payment of the mortgage money. Asa Singh brought a suit for the realization of his mortgage debt and obtained a decree against Fazal Ilahi on May 11, 1927. In execution of this decree he brought the house to sale on October 7, 1927, which was purchased by Kartar Singh, defendant No. 3. On December 20, 1927, Mehr Nishan brought the present suit against Asa Singh, Fazal Ilahi and Kartar Singh, on the allegation that she had been in exclusive possession of the house as owner since 1879 and as Fazal Ilahi had never lived with her since 1912 and had no transferable interest in the property, both the original mortgage and the subsequent sale did not affect her interest. She prayed for a declaration to the effect that she was the exclusive owner of the house. Both Asa Singh and Kartar Singh denied her allegations and further pleaded s. 41, Transfer of Property Act, as a bar to her suit. The learned Senior Subordinate Judge has dismissed her suit so far as the agricultural lands are concerned, but has granted her a decree in respect of the house. Both Asa Singh and Kartar Singh have preferred this appeal against that decree.

Mr. Bali, who has argued the appeal before us on behalf of the appellants, has contended that the document relied on by Mehr Nishan in support of her claim is

a forgery, that Mehr Bakhsh was shown as an owner of the house in the *khasra paimash* prepared by the Municipal Committee, Rawalpindi, in 1900, that in a register relating to the levy of punitive tax prepared in 1911, Fazal Ilahi is shown as the sole occupant of the house and that as Mehr Nishan has suffered Fazal Ilahi to deal with property as his own she cannot now defeat the claims of the transferees for value. He has further urged that the document in question is inadmissible in evidence for want of registration.

I will take up the last ground first. It is urged that, as the alleged agreement of 1879 purports to dispose of property of the value of Rs. 100 or more, it is compulsorily registrable. Now there is no reliable evidence on the record to show that the value of the property covered by this agreement was more than Rs. 99 in 1879 and, in the absence of any such clear proof, it will be very difficult to hold that, in those days when the value of the property was very small, the property covered by this agreement was worth more than Rs. 99. The learned Counsel for the plaintiff-respondent has contended that the document as it stands does not require registration as it does not create any such right as is contemplated by s. 17 (*b*), Registration Act, and has relied on *Sansar Singh* v. *Tiloka* (1) and *Bhan Singh* v. *Thakar Das* (2) in support of his contention. I do not however consider that it is necessary to determine whether those authorities lay down a rule of law which is applicable to the facts of the present case as, in my opinion, besides what I have indicated above, even if it were held that the document was compulsorily registrable, there is ample authority for the proposition that such unregistered documents can be used for determining the nature of the claimant's possession. Reference may be made among others to *Qadar Bakhsh* v. *Mangha Mal* (3) and *Ata Muhammad* v. *Shankar Das* (4).

Similarly, s. 41, Transfer of Property Act, is no bar to the plaintiffs' claim. Even if the principles of the Transfer of Property Act were applicable to the Punjab, there is no proof on the record that Fazal Ilahi had ever been made an ostensible owner of the house with the express or implied consent of Mehr Nishan or that the mortgagee or the auction-purchaser had, after taking reasonable care to ascertain that Fazal Ilahi had the power to make the transfer, acted in good faith. The learned Counsel for the appellants contends that the transferees consulted the Municipal records and the Police records and this was enough for the purposes of s. 41, Transfer of Property Act. The learned Senior Subordinate Judge has disbelieved this part of the story but, even if it were true, in my view the enquiry made will not amount to "reasonable care" and "good faith" within the meaning of s. 41, Transfer of Property Act. The *khasra paimash* is not a record of title but a mere record of survey and carries with it no presumption of correctness so far as the question of ownership is concerned. A Municipality is generally interested more in the assessment of tax than in the determination of ownership, and for its purposes an occupier is as good as an owner. Moreover, in the preparation of documents like *khasra paimash* a Municipality is concerned more with the measurements of the buildings with a view to safeguard its own interests against any encroachment on the public streets than in the ascertainment of the title of persons owning such buildings. In the same way the Police department when taking a census of the houses for the purposes of levying the punitive tax is merely interested in recording the names of the occupants from whom they could levy the contribution. It will further be seen that this entry relates to the year 1911 and it is significant that it was in this year that both Fazal Ilahi and Karam Ilahi had disclaimed any connection with the house and unequivocally admitted Mehr Nishan's title thereto in the partition suit brought by their uncle Sher. It cannot be reasonably argued, therefore, that the transferees discharged their obligation under s. 41, Transfer of Property Act, by merely raking out the old records of the Municipality relating to the year 1900 or that of the Police department of the year 1911. I am fortified in my conclusions by a judgment of the Allahabad High Court in *Muhammad Suleman* v. *Sakina Bibi* (5). In this case the learned Judges made the following remarks:

"Badullah was only the manager of the property,

(1) 51 P R 1898

(2) 89 P R 1908; 145 P W R 1908.

(3) 73 Ind. Cas. 889; A I R 1923 Lah. 495; 4 Lah. 249; 5 Lah. L J 175.

(4) 88 Ind. Cas. 872; A I R 1925 Lah. 491; 6 Lah. 319; 7 Lah. L J 594.

(5) 69 Ind. Cas. 701; A I R 1922 All. 392; 44 A 674; 20 A L J 654.

and, as pointed out in the case of *Jamna Das* v. *Uma Shankar* (6), the possession of a manager cannot be treated as sufficient evidence of ostensible ownership with the consent, express or implied, of the real proprietor, within the meaning of s 41, Transfer of Property Act. The entry of the name of Badullah in the house-tax register was only made for the purpose of assessment and collection of house tax and was not intended for registering title, and as their Lordships of the Privy Council say in *Merwanji Muncherji* v. *Secretary of State* (7), such an entry is not always enough to induce a person to think that the person whose name was entered was the proprietor and had a right to sell the property which was entered in his name."

In *Azima Bibi* v. *Shamalanand* (8) their Lordships of the Privy Council observed as follows:

"The appellants were *pardahnashin* ladies, and naturally left the management of the property in the hands of the males. There was nothing to show that the appellants had misled the respondent, either by word or by conduct to the belief that they had no proprietary interest in the property, and he made no inquiries in the matter from them as he might have done if he had any doubt in the matter."

Under the circumstances I feel no hesitation in holding that s. 41, Transfer of Property Act, does not help the appellants at all.

The argument that the document in question is a forgery is also devoid of force. It would appear from the document itself that it was written 55 years ago by a licensed stamp-vendor and as it came out from proper custody, it could claim the benefit of s. 90, Evidence Act. Moreover, in the previous suit, as already remarked, precisely the same allegations were made as are being made now on the strength of this document. It cannot therefore, be believed that this old lady fabricated the document in question merely for the purpose of the present suit. I would, therefore, maintain the decree of the Court below and dismiss this appeal with costs.

Bhide, J.—I agree.

N. *Appeal dismissed.*

(6) 25 Ind. Cas. 158; A I R 1914 All. 232; 36 A 303; 12 A L J 411.

(7) 30 Ind. Cas. 539; A I R 1915 P C 118; 42 I A 185; 39 B 664; 19 C W N 1056; (1915) M W N 535; 2 L W 701; 2) M L J 299; 13 A L J 1026 (P C.)

(8) 17 Ind. Cas. 758; 40 C 378; 17 C W N 121; 13 M L T 159; (1913) M W N 125; 11 A L J 169; 47 C L J 303; 15 Bom. L R 423; 25 M L J 55 (P C).

ALLAHABAD HIGH COURT

Second Civil Appeal No. 429 of 1933

March 27, 1935

GANGA NATH, J.

Musammat SHAH JAHAN BEGAM — DEFENDANT—APPELLANT

versus

Hafiz GHULAM RABBANI—PLAINTIFF — RESPONDENT

Civil Procedure Code (Act V of 1908), ss. 104 (2), 99, O. XLIII (m)—Order under O. XLIII (m) on appeal—Second appeal, if lies—Decree passed on compromise—Compromise not recorded—Decree, validity of.

No appeal lies from any order passed in appeal under O. XLIII (*m*), Civil Procedure Code.

The omission to record the compromise before passing the decree is not fatal to the validity of the decree. The defect is cured by s. 99, Civil Procedure Code.

S. C. A. from a decision of the Subordinate Judge, Agra, dated December 19, 1932.

Mr. *M.H. Faruqi*, for the Appellant.

Mr. *M. L. Chaturvedi*, for the Respondent.

Judgment.—This is a defendant's appeal and arises out of a suit brought against her by the plaintiff. The parties entered into a compromise on which a decree was passed. The trial Court's order was:

"The parties have come to terms. Suit is decreed in the terms of the compromise which shall be reproduced in the decree. Costs on parties."

Against this decree an appeal was filed under O. XLIII (*m*), Civil Procedure Code, by the defendant. The chief grounds taken by her in the memorandum of appeal were:

"(1) Because the learned Munsif was wrong in not recording the so-called compromise and in not enquiring whether the compromise was acceptable to the appellant and (2) because the so-called compromise was effected without consent of the appellant and was not binding on her".

The learned Subordinate Judge of Agra found that the trial Court had omitted to order the recording of the compromise but the compromise was made with the consent of the appellant. The learned Subordinate Judge was of the opinion that there was no reason to interfere with the decree of the trial Court. The compromise, as a matter of fact, was verified by the appellant's Counsel who had full authority to compromise the suit. The parties had taken one day's time for the compromise and the compromise was filed the next day. The appellant's son, who was living with the appellant, was looking after the case in the trial Court. The learned Subordinate Judge has observed:—

"From the evidence on the record it is clear that the appellant's case in the trial Court was managed

by her own son. The son and his mother (the appellant) live together in Agra. One whole day was taken by the parties to consider the compromise, before it was filed on the following day".

The learned Subordinate Judge was of the opinion that the technicality did not vitiate the compromise. The learned Subordinate Judge recorded a finding:—"I find, as a matter of fact that she entered into a compromise".

A preliminary objection has been taken by the learned Counsel for the respondent that no second appeal lies. As already stated, the appeal in the lower Court was under O. XLIII (*m*), Civil Procedure Code. The heading of the memorandum of appeal also shows that the appeal was filed under O. XLIII (*m*), Civil Procedure Code. Section 104 (2) Civil Procedure Code lays down that no appeal shall lie from any order passed in appeal under this section. It is, therefore, evident that no second appeal lies.

The learned Counsel for the appellant states that the matter may be considered on the revisional side. The question is whether the omission to record the compromise is fatal to the validity of the decree. The defect is cured by s. 99, Civil Procedure Code which lays down:—

'No decree shall be reversed or substantially varied nor shall any case be remanded in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court".

As already stated, it has been found by the lower Appellate Court that the compromise was entered into by the appellant. The omission to record the compromise does not affect the merits of the case or the jurisdiction of the Court. The defect, therefore, is cured by s. 99, Civil Procedure Code, and consequently, there is no reason for interference even on the revisional side. It is, therefore, ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed.

Permission to file a Letters Patent Appeal is rejected.

D. *Appeal dismissed.*

LAHORE HIGH COURT

Second Civil Appeal No. 1259 of 1927
June 19, 1934
ABDUL RASHID, J.

DHANI RAM AND OTHERS—DEFENDANTS—APPELLANTS
versus
LEGHA AND OTHERS—PLAINTIFFS—RESPONDENTS

Hindu Law—Gift—Possession, delivery of—Necessity of—Property capable of possession—Repudiation by donor soon after—Effect—Non-delivery, if makes gift invalid—Custom (Punjab)—Gift.

Where the donor has done everything in his power to complete a gift, then the non-delivery of actual possession does not necessarily invalidate the gift, but where the property is capable of physical possession and the donor has repudiated the gift soon after the execution of the deed of gift, the non-delivery of actual possession makes the gift invalid *Lila Kishen* v. *Hoaram* (1), relied on, *Kali Das* v. *Kanhaya Lall* (2), *Bhagwan Singh* v. *Kirpa Ram* (3) and *Sarwan Das* v. *Mansa Ram* (4), distinguished.

Under Hindu Law a gift is not valid unless it is accompanied by delivery of possession of the subject of the gift from donor to the donee. Mere registration of a deed of gift is not equivalent to delivery of possession. It is not, therefore, sufficient to pass the title of the property from the donor to the donee. In cases where physical possession cannot be delivered owing to the nature of the property, it is enough to validate a gift if the donor has done all he could do to complete the gift so as to entitle the donee to obtain possession.

S. C. A. from a decree of the District Judge, Hoshiarpur, dated February 7, 1927.

Mr. *M. C. Mahajan*, for the Appellants.

Messrs. *Salig Ram*, *Ramki Das* and *Daulat Ram*, for the Respondents.

Judgment.—On January 16, 1924, Legha, plaintiff, made a gift of 166 *kanals* 3 *marlas* of land and four houses in favour of Dhani Ram, defendant, by means of a registered deed. On January 21, the plaintiff made a report at the *thana* and also submitted an application to the revenue authorities to the effect that he had been induced to make a gift by means of undue influence, that the gift was in fact invalid, and that possession had not been transferred to the donee. On June 16, the plaintiff instituted the present suit for a declaration that he was in proprietary possession of 166 *kanals* 3 *marlas* of land together with four houses standing thereon, and that the deed of gift dated January 16, 1924, was null and void and ineffective as he had been made to excute the deed by means of fraud, misrepresentation and undue influence. It was also alleged in the plaint that the plaintiff had never parted with the possession of the property in dispute.

The defendant pleaded, *inter alia*, that he had been in possession of the property in suit since Rabi 1924, that the gift had been validly made in his favour in lieu of past and future services, and that the plaintiff was bound by the deed of gift dated January 16, 1924. The trial Court held that the gift had in fact been made, but that within four or five days of the execution of the deed of gift the plaintiff had changed his mind and had repudiated the gift. It also held

that possession of the gifted property had never been transferred to the defendant, and that therefore the gift remained incomplete. On these findings the plaintiff's suit was decreed with costs. The defendant preferred an appeal to the learned District Judge who held that the deed of gift was executed by the plaintiff under inducement which had the effect of undue influence upon the mind of the old man (plaintiff), that the gift was not completed by delivery of possession, that within a week of the execution the deed was effectively repudiated by the plaintiff, and that the defendant had taken forcible possession of the property in dispute after the institution of the present suit. In consequence the appeal of the defendant was dismissed. The defendant has preferred a second appeal to this Court.

The parties are agriculturists and it is common ground that they are governed by the Customary Law. It is laid down in para. 60 of Rattigan's Digest of Customary Law that a gift to be valid must ordinarily be followed by possession and must be free from undue influence. It was held in *Lila Kishen* v. *Hoaram* (1) that the primary rule of decision in a case of gift in the Punjab is custom and possession is ordinarily necessary to complete it, and that even under Hindu Law a gift which the donor repudiated immediately after and in which he did not do all in his power to perfect it and under which he did not give actual possession of the gifted property was not valid. Reliance was placed in this case on a ruling of their Lordships of the Privy Council reported as *Kali Das* v. *Kanhaya Lall* (2). In *Kali Das* v. *Kanhaya Lall* (2), the dispute as to the validity of the gift was not between the donee and the donor. On the contrary the person who disputed the gift claimed adversely to both of them. It was observed by their Lordships that the donor had done all that she could to complete the gift and that she was a party to the suit and admitted the gift to be complete. The true rule, therefore, as regards the necessity of possession according to the Privy Council ruling is that if the donor has done all he could do to perfect his contemplated gift, he cannot be compelled to do more. In the present case the donor was in a position to give the possession of the land to the donee, but it has been held by the learned District Judge that he refused to part with possession.

It appears that under Hindu Law also a gift is not valid unless it is accompanied by delivery or possession of the subject of the gift from the donor to the donee. Mere registration of a deed of gift is not equivalent to delivery of possession. It is not therefore sufficient to pass the title of the property from the donor to the donee. In cases, however, where physical possession cannot be delivered owing to the nature of the property it is enough to validate a gift if the donor has done all he could do to complete the gift so as to entitle the donee to obtain possession (Mulla's Hindu Law, para. 358). It was contended on behalf of the appellant that the delivery of possession is not essential where the gift is made by means of a registered deed and that the provisions of the Customary Law and the Hindu Law with respect to the delivery of possession have been abrogated by s. 123, Transfer of Property Act. Reliance was placed in this connection on *Bhagwan Singh* v. *Kirpa Ram* (3) and *Sarwan Das* v. *Mansa Ram* (4). These rulings, however, appear to me to be clearly distinguishable. It was observed in *Bhagwan Singh* v. *Kirpa Ram* (3), that under the Hindu law the delivery of possession was not necessary in order to validate a gift provided that there was acceptance on the part of the donee. The dispute as to the validity of the gift in the reported case was not between the donor and the donee and the donor never repudiated the gift.

The gifted land was situate in another district than the one in which the donor and the donee lived and it was therefore held that the fact that no mutation had been made with respect to the gift in dispute was of no consequence. The property in that case was in possession of tenants at the time of the gift In *Sarwan Das* v. *Mansa Ram* (4), the donee was a minor and was living with the donor in the same house which formed the subject-matter of the gift. These two cases therefore are of no assistance to the appellant. The *ratio decidendi* of all the cases appears to be that where the donor has done everything in his power to complete a gift, then the non-delivery of actual possession does not necessarily invalidate the gift, but where the property

(1) 45 P R 1901; 64 P L R 1901.
(2) 11Q 121; 11 I A 218; 4 Sar. 578; 8 Ind. Jur. 638 (P C).
(3) 89 Ind. Cas. 326; A I R 1925 Lah. 648; 1 Lah. Cas. 71.
(4) 119 Ind Cas. 271; A I R 1930 Lah. 145; Ind. Rul. (1929) Lah. 863; 11 Lah. L J 497.

is capable of physical posssesion and the donor has repudiated the gift soon after the execution of the deed of gift, the non-delivery of actual possession makes the gift invalid. In these circumstances it is unnecessary to deal with the question of undue influence. I need only remark that I agree with the finding of the learned District Judge in this respect.

For the reasons given above, I hold that the case has been correctly decided by the learned District Judge and dismiss this appeal with costs.

N. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Criminal Revision Applicaton No. 70 of 1935
April 3, 1935
KENDALL, J.
BHAGWAN DAS—APPLICANT
versus
EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 182, 211, 202 (1) proviso—Complainant not examined on oath—Magistrate, if can sanction prosecution under ss. 182, 211—Criminal Procedure Code (Act V of 1898), s. 202.

It is not permissible for the Magistrate to order an enquiry and to sanction the prosecution of the applicant under ss. 182 and 211 of the Penal Code where he has not examined him on oath. *In re Ningappa Rayappa Ghotadki* (1) and *Ram Sarup* v. *Emperor* (2), distinguished.

Cr. R. App. from an order of the Sessions Judge, Meerut, dated January 21, 1935.

Mr. *A. Sanyal*, for the Applicant.

The Assistant Government Advocate, for the Crown.

Judgment.—This application for revision arises out of the following circumstances. The applicant filed a complaint under s. 448, Indian Penal Code, against Lala Budh Prakash, an Honorary Magistrate, on October 29, 1934. The Magistrate in whose Court it was filed did not examine the complainant on oath, but ordered an enquiry by the Police, and on November 5, a report was received that the complaint was false and that proceedings ought to be taken to file a complaint under s. 182 of the Indian Penal Code. The Magistrate, therefore, issued notice to the complainant for his appearance to show cause against such a complaint on November 30. Without going into details, it may be said that the record shows that this notice was not served on the present applicant. The Magistrate, however, took up the case on November 30, and in the absence of the applicant, passed an order in which he directed a complaint to be made against the applicant under ss. 182 and 211 of the Indian Penal Code.

An appeal was filed by the applicant in the Court of the Sessions Judge, and several arguments were advanced against the legality of the Magistrate's order of complaint. The learned Judge dealt with the matter at some length, but he held that there was no legal defect in passing the order without a notice being served on the applicant, and he further held that the proceedings of the Magistrate were not vitiated by his omission to record the statement of the applicant on oath. The learned Judge remarked:

"Here again under the law, as it now stands, no such recording of the statement of the complainant is necessary. In a case like this what has happened is that the Magistrate has refused to take cognizance. It is only when he actually does take cognizance that the Magistrate is bound to take down the statement of the complainant on oath."

It will be seen that the Magistrate decided to take action against the applicant on the basis of a Police report, but it is clear from the wording of the present proviso to sub-s. (1) of s. 202 of the Criminal Procedure Code that he had no jurisdiction to direct an investigation by the Police until he had examined the complainant on oath. His omission to take this necessary step, therefore, vitiated the whole of the proceeding.

I have been referred on behalf of the applicant to a decision of a Bench of the Bombay High Court in the case of *In re Ningappa Rayappa Ghotadki* (1) in which it was held that it was not permissible for the Magistrate to sanction the prosecution of the applicant under ss. 182 and 211 of the Indian Penal Code, where he had not examined him on oath, and the same view was taken in 1901, by the Judicial Commissioner's Court in Oudh in the case of *Ram Sarup* v. *Emperor* (2). Both these decisions, it will be noted, are prior to the amendment to s. 202 of the Criminal Procedure Code, by which the proviso referred to above was introduced. I have no doubt, therefore, that the Magistrate's proceedings in directing a complaint to be made were without jurisdiction. I, therefore, allow the application, and set aside the order of the

(1) 81 Ind. Cas. 608; 48 B 360; A I R 1924 Bom. 321; 26 Bom. L R 183; 25 Cr. L J 960
(2) 4 O C 127.

Magistrate in which he directed that a complaint be made against the applicant.

D. *Application allowed.*

CALCUTTA HIGH COURT

Civil Appeal No. 18 of 1934

July 20, 1934

COSTELLO AND LORT-WILLIAMS, JJ.

LAL BEHARY DHUR AND ANOTHER — APPELLANTS

versus

ADMINISTRATOR-GENERAL, BENGAL AND OTHERS—RESPONDENTS

Hindu Law—Religious Endowment—Succession to shebaitship—*Laying down rule different from line of Hindu inheritance is invalid—Will—Construction — Benign construction should be used—Intention of testator should be given effect to.*

Rules laid down by the founder of a Hindu *debutter* for succession to the office of *shebait* are invalid, if they provide for the office to be held by some one among the heirs of the founder to the exclusion of others, in a succession differing from the line of Hindu inheritance.

A will contained, "I appoint my sons *K* and *R* to be the *shebaits* of the *Thacoors* and I direct that upon the death, retirement or refusal to act of any of them or any of the future *shebaits*, the then next eldest male lineal descendant of *K* or *R* shall act as a *shebait* in place of the deceased or retiring *shebait* or *shebait* refusing to act as such—it being my intention that the eldest for the time being in the male line of my said sons shall always remain as joint *shebait*, and in the event of the death or refusal to act of any *shebait*, the then next male member of the branch to which the *shebait* dying or refusing belonged shall act as a *shebait* in his place and stead :"

Held, that the testater wished to provide that *K* and *R* should be the first *shebaits*, and that upon the death, retirement or refusal to act of either of them or of any of the future *shebaits*, the then next eldest male lineal descendants of *K* and of *R* should be the joint *shebaits* representing *K* and *R*'s branches of the family respectively—and that there should be only two *shebaits* at any time.

Held, also that the provision in the will for the succession of the eldest in the male line was invalid, because it excluded some of the founder's heirs according to Hindu Law. Further, the testator did not intend to give to either *K* and *R* an estate of inheritance or an absolute estate, but at most only a life-interest, because he provided for the succession on their death, retirement or refusal, of persons who were not their heirs according to Hindu Law.

[Case-law referred to].

The attitude to be adopted in construing a Hindu will is that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used though that language be ungrammatical or untechnical, or mistaken as to name or description or in any other manner incorrect, provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows, but effect should be given to the intention of the testator.

Messrs. *W. W. K. Page* and *S. N. Banerjee* (*Jr.*), for the Appellants.

Messrs. *A. K. Roy* and *S. B. Shinha*, for the Administrator-General.

Mr. *N. C. Chatterjee*, for the Respondents.

Lort-Williams, J.—This is an appeal from a decision of Panckridge, J., upon an originating summons concerning the validity of certain dispositions in the will of Luckey Narain Dhur dated November 18, 1923. The testator died on March 26, 1927, leaving three sons, Ram Chunder, Kartick and Ganesh. Ram died on October 17, 1928, and Kartick on May 2, 1927.

Ram left four sons, Lal Behary, Bon Behary, Rash Behary and Banku Behary, and Kartick left one son Netye. All these are alive, and Ganesh has one son, Madan. On April 25, 1929, letters of administration *de bonis non* were granted to the Administrator-General, Bengal, who wishes to know who are the persons now entitled to act as *shebaits* of a religious endowment created by cls. 9 and 10 of the will. Clause 11 providss as follows:

"I appoint my sons Kartick Chunder Dhur and Ram Chunder Dhur to be the *shebaits* of the *Thacoors* and I direct that upon the death, retirement or refusal to act of any of them or any of the future *shebaits*, the then next eldest male lineal descendant of Kartick Chunder Dhur or Ram Chunder Dhur shall act as a *shebait* in place of the deceased or retiring *shebait* or *shebait* refusing to act as such—it being my intention that the eldest for the time being in the male line of my said sons Kartick Chunder Dhur and Ram Chunder Dhur shall always remain as joint *shebaits*, and in the event of the death or refusal to act of any *shebait*, the then naxt male member of the branch to which the *shebait* dying or refusing belonged shall act as a *shebait* in his place and stead."

The intentions of the testator are reasonably clear. He wished to provide that Kartick and Ram should be the first *shebaits*, and that upon the death, retirement or refusal to act of either of them, or of any of the future *shebaits*, the then next eldest male lineal descendants of Kartick and of Ram should be the joint *shebaits* representing Kartick's and Ram's branches of the family respectively—and that there should be only two *shebaits* at any time.

But it has been decided by a Full Bench of this Court in *Monohar Mukherjee* v. *Bhupendra Nath Mukerjee* (1), that *shebaitship* is a kind of property in the eye of Hindu Law and not merely a right to an office. That a person succeeding to the *shebaitship* is a grantee or donee of property, and his right to succeed to the office is subject to the rule of law laid down by the

(1) 141 Ind. Cas. 544; A I R 1932 Cal. 791; 37 C W N 29; 56 C L J 468; Ind. Rul. (1933) Cal. 115; 60 C 452.

Privy Council in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (2), that all estates of inheritance created by gift or will, so far as they are inconsistent with the general Hindu Law of inheritance are void as such.

According to Hindu Law no person can succeed under a gift or will as heir to estates described in the terms which in English Law would designate estates tail, and it follows that rules laid down by the founder of a Hindu *debutter* for succession to the office of *shebait* are invalid, if they provide for the office to be held by some one among the heirs of the founder to the exclusion of others, in a succession differing from the line of Hindu inheritance. The result is that the provision in this will for the succession of the eldest in the male line is invalid, because it excludes some of the founder's heirs according to Hindu Law. Further it is clear that the testator did not intend to give to either Kartick or Ram an estate of inheritance or an absolute state, but at most only a life interest, because he provided for the succession on their death, retirement or refusal, of persons who were not their heirs according to Hindu Law: *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (2), at pp. 66 and 76-78*: see also *Sreemutty Kristoromoney Dossee* v. *Maharajah Norendro Krishna Bahadoor* (3).

This disposses of the contention raised on behalf of Bon Behary, Rash Behary and Banku Behary, that they ought to succeed along with Lal Behary and Netye, as the immediate heirs of Ram and Kartick. The old rule of Hindu Law that a bequest cannot be made to an unborn person is not relevant to the present case, firstly because all persons claiming under the will were born during the life of the testator, and secondly because, in any case, the Hindu Disposition of Property Act, 1916, would have applied. There remains to be decided the questions whether the whole of the provisions of the clause fail, after the life interests given to Ram and Kartick, in which case Ganesh would succeed along with the heirs of Ram and Kartick, as joint heirs of the testator: or whether the clause can be construed as providing for independent gifts of life interests to Lal Behary and Netye, who happen to be the eldest male lineal descendants of Ram and Kartick. That is to say, whether the words 'eldest male lineal descendant can be construed so far as they affect Lal Behary and Netye, as words of description only, and not of inheritance. This question was discussed but not decided in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (2), where their Lordships said:

"It remains, however, to be considered whether the persons described as heirs in tail or heirs of inheritance not recognised by law are sufficiently designed to take successively by way of gift that which the will incorrectly assumes to give them as heirs, so that they may be regarded as a succession of donees for life, having the power and subject to the restrictions sought to be imposed by the will upon the successive heirs in tail."

In that case the bequests were (1) to Juttendro Mohun Tagore for life, then (2) to his eldest son born in the testator's lifetime for life, then (3) in strict settlement on his heirs in tail male, then (4) similar limitations for life and in tail male on the other sons of Juttendro Mohun Tagore, born in the testator's lifetime, then (5) limitation in tail male on the sons of Juttendro Mohun Tagore born after the testator's death, then (6) "after the failure or determination of the uses and estates hereinbefore limited" to Shooshendro Mohun Tagore for life, (7) like limitations for his sons and their sons, and (8) like limitations for the sons of Lullit Mohun Tagore, who was deceased at the date of the will, and their sons in tail male. Juttendro Mohun Tagore had no son born in the testator's lifetime, and in any case the subsequent limitations of inheritance were invalid because they offended against the rule of the Hindu Law of succession, to which I have already referred. The gift to Sourendro Mohun Tagore for life was invalid because the testator only intended it to be operative after the failure or determination of the prior estate created, and this must be construed as failure in fact, and not by reason of invalidity in law, On p. 78* their Lordships observed that:

"There is, however, another point of view in which the estates in tail male may be regarded, namely, as intended, at all events, to confer an estate for "life upon the first taker in existence when the will took effect. The intention of the testator to give at least a life estate to the first taker is clear, and if an estate in tail male stood first in the will, effect might perhaps be given to that intention. There was, however, no person in existence to take an estate in tail male at the "testator's death except Suttendro Mohun Tagore, (who was the grandson of Lullit Mohun Tagore) and the validity of his claim to a life interest in succession stands upon the same ground as that of Sourendra Mohun Tagore."

Their Lordships decided that a life in-

(2) (1872) I A Sup. Vol. 47; 9 B L R 377; 18 W R 359; 2 Suth. 692; 3 Sar. 82 (P C).

(3) 16 C 383; 16 I A 29; 5 Sar. 285; 13 Ind. Jur. 90 P C).

*Pages of I A Sup. Vol.—[*Ed*].

*Page I A. Sup. Vol.—[*Ed*.]

terest was created in Juttendro Mohun Tagore, and that the estates of inheritance and subsequent estates or interest attempted to be created by the will failed. It will be observed that the facts in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (2) which made it unnecessary for their Lordships to decide the question now in issue, are not to be found in the present case, which must therefore be distinguished. It becomes necessary therefore to attempt to apply to the facts of this case the observation of their Lordships to which I have referred, and to construe this will in such a way as to give effect so far as is legally possible, to the wishes and intention of the testator. The attitude to be adopted in construing a Hindu will is set out at pp. 64-70* of *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (2) and one general principle is

"that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical or mistaken as to name or description or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows."

Moreover, s. 87, Succession Act, provides that

"the intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible".

The decided cases are not of much assistance, In *Madhavrao Ganpatrao* v. *Balabhay Raghunath* (4), the bequest was of the income of certain property to *K*,

"and after her death in trust for the male heirs of the said *K*, share and share alike."

It was decided that this was an absolute gift of the property to *K's* sons which took effect after the determination of her life interest. The words "male heirs" did not connote a descendible quality of estate. In an Indian settlement they are not to be construed primarily as words of inheritance, denoting the character of an estate. *K's* sons took not by way of inheritance from her, but by virtue of a wholly independent gift to such persons as answered the description of male heirs at the date of her death. They took an absolute estate because there was nothing to suggest that such estate was limited to their life, and no descent was marked out after their death. In the present case, on the one hand the words

"it being my intention that the eldest for the time being in the male line of my said sons Kartick Chunder Dhur and Ram Chunder Dhur shall always remain as joint *shebaits*"

seems to indicate that the testator intended to create an estate of inheritance in tail male, but on the other hand the words

"I appoint my sons Kartick Chander Dhur and Ram Chunder Dhur to be the *shebaits* of the said *Thaccors* and I direct that upon the death, retirement or refusal to act of any of them or any of the future *shebaits* then then eldest male lineal descendant of Kartick Chunder Dhur of Ram Chunder Dhur shall act as a shabait in place of the deceased or retiring *shebait* or *shebait* refusing to act as such"

are not altogether appropriate to the creation of such an estate, and are capable of being construed as an intention to make an independent gift of the office for life to such person as happened to answer the description of 'eldest male lineal descendant" at the date of the death retirement, or refusal to act of Kartick or Ram. In *Kandarpa Mohan Gossain* v. *Akhoy Chandra Bose* (5), the words of bequest were:

"In default of such appointment by the said *Sm.* Surabala Dassi her spiritual guide Mahendra Nath Chatterji or in case of his death his eldest male heir, and in like default by the said Sarajubala, her spiritual guide Hari Mhan Gossain, or in case of his death his eldest male heir, jointly with the survivor of the said settlors, and after the death of both of the said settlors and in default of such appointment as aforesaid the said two spiritual guides or their or his eldest male heir shall act as joint *shebaits* of the said deities, and thenceforth the future *shebait* shall consist of the eldest male descendant of the said Mahendra Nath Chatterji and the said Hari Mohan Gossain, provided always that every *shebait* of the said deity shall have like power to nominate and appoint by deed or will his successor in office."

This was construed as providing for gifts to Mahendra Nath Chatterjee and Hari Mohan Gossain or alternatively, should they happen to be dead at the time when the gifts took effect, then to such persons as happened to be their eldest male heirs, by way of gift, and not by way of inheritance, and that if either Mahendra Nath Chatterji or Hari Mohan Gossain or their eldest male heirs has taken thus by way of gift, then subsequently the eldest male descendant of any of them could take only by way of inheritance,

This decision turned upon the particular words of the settlement in question, and is distinguishable from the present case. The gift to the eldest male heir was made dependent upon the question whether his predecessor happened to be dead at the time when the gift took effect. If was a

(4) 107 Ind. Cas. 119; A I R 1928 P C 33; 55 I A 74; 52 B 176; 30 Bom. L R 282; 47 C L J 198; 54 M L J 245; 27 L W 400; 1 L T 40 Bom. 86; 26 A L J 560; 32 C W N 925 (P C).

(5) 150 Ind. Cas. 179; A I R 1934 Cal. 379; 58 C L J 445; 38 C W N 156; 6 R C 785; 61 C 106.

* Page of I. A. Sup. V. R.—[*Ed.*]

gift to the predecessor and his eldest male heir in the alternative only, and not gift to each of them in succession. In *Sreemutty Kristoromoney Dossee* v. *Maharajh Norendro Krishna Bahadoor* (3) the words of bequest ran as follows:

"I give, devise and bequest the residue of my real and personal estate both joint and self-acquired unto my executors, in trust to pay the rents, profits and income thereof unto my said daughter during her lifetime, and after her death in trust to pay, assign and convey the residue of my estate real and personal to my half-brothers Rajas Nreependro Krishna Bahadur and Norendro Krishna Bahadur in equal moieties and to the heir or heirs male of their or either of their body, in failure of which in trust to give the same to the son or sons of my said daughter."

Their Lordships decided that these words could not mean that an absolute gift was intended to be made to the half-brothers, because "heirs male" obviously negatived an intention to give an estate descendible to heirs generally:

"The words must mean either that the estate of inheritance given to the brothers is a qualified one, or that the heirs male are to take somehow by way of direct gift from the testator."

Their Lordships further decided that the first of these two alternative constructions was the only possible one, because the plain and obvious sense of the words used indicated an intention to confer on them an estate of inheritance resembling an English estate in tail male. They rejected the first alternative because the words were "and" and not "or" heirs male. But they observed at p. 41* that if words of limitation had been attached to the words "heirs male", they would have tended to show that the "heirs" were objects of direct gift, because it would have been inappropriate to attach such words of limitation to the words "heirs male", if these were to be regarded themselves as words of limitation. On the whole I have come to the conclusion that cl. 11 can be construed as providing *inter alia* for independent gifts for life to Lal Behary and Netye as the persons who happened to answer the description of eldest male lineal descendants of Ram and Kartick at the times of their respective deaths, and they are the persons at present entitled to act as *shebaits*. Therefore the appeal is allowed and the cross-objections are dismissed. Costs of all parties will come out of the estate. The costs of the Administrator-General will be as between attorney and client.

Costello, J.—I agree.

D. *Appeal allowed.*

*Page of A I R 1928 P. C.—[*Ed.*]

LAHORE HIGH COURT

Second Civil Appeal No. 653 of 1928

June 1, 1931

BHIDE AND DIN MOHAMMAD, JJ.

NIHALU RAM CHELA RAM—PLAINTIFF—APPELLANT

versus

RADHU RAM HUKMI RAM—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 19- Acknowledgment containing words "dewne kite"—*Whether promise to pay within Contract Act (IX of 1872), s. 25—Extrinsic evidence to explain acknowledgment—Admissibility of—Evidence Act (I of 1872), s. 96—Practice—Evidence - Plaintiff wanting to explain certain acknowledgment after defendant's evidence—Court, if can refuse evidence material to decision.*

The words "1,019-11-6 *lekhe baki dewne kite*" in an acknowledgment can be reasonably construed as a promise to pay, within the meaning of s. 25, Contract Act. *Fateh Chand* v. *Ganga Singh* (2), and *Kanshi Ram Bansi Ram* v. *Arjan Das* (3), relied on.

According to Explanation I to s. 19, Limitation Act, it is not necessary that the writing itself should specify the exact nature of the property or right in respect of which liability is acknowledged and there is to be no bar to extrinsic evidence being admitted for the purpose. *Beti Maharani* v. *Collector of Etawah* (8), *Narayana Iyer* v. *Venkata Ramana Iyer* (9), relied on.

Where in a suit the question is whether certain letters written by the defendant are acknowledgments, the defendant admitting that they were written by him but professing ignorance as to whether they referred to the amount in dispute, and the plaintiff wants to give evidence to explain these letters, the Court should not refuse to record any evidence and then draw any adverse inference if it thinks fit to do so from the circumstances in which that evidence is given and in refusing to record evidence which is material for the decision of the case, the Court acts illegally.

S. C. A. from the decree of the District Judge, Dera Ghazi Khan, dated December 12, 1927.

Messrs. *J. N. Aggarwal* and *J. L. Kapur*, for the Appellant

Mr. *Nawal Kishore*, for the Respondent.

Bhide, J.—This second appeal arises out of a suit for recovey of Rs. 2,596 based on an account between the parties commencing from July 13, 1906. The suit has been dismissed by the Courts below as time-barred and from this decision plaintiff has appealed. The suit was instituted on April 12, 1926, and was *prima facie* barred by time, but the plaintiff relied on certain acknowledgments to bring the suit within time under s. 19, Limitation Act. The acknowledgments thus relied on in their chronological order were as follows:

Ex. P-4, dated 3rd *Kattak*, 1971	= (October 19, 1914).
Ex. P-5, dated 15th *Kattak*, 1972	= (October 31, 1915).
Ex. P-1 dated 26th *Poh*, 1975	= (January 9, 1919).
Ex. P-3, dated 29th *Asuj*, 1978	= (October 14, 1921).

Ex. P-2, dated 3rd *Baisakh*, 1980 —(April 15, 1923).

The first acknowledgment is alleged to have been made on October 19, 1914, *i. e.*, more than 8 years after the dealings commenced and it is conceded that this would not serve as a valid acknowledgment for the purposes of s. 19 except as regards two items of Rs. 600 and Rs. 1,000, which are said to have been advanced within six years of that date, *i. e*, on *Maghar* 20, 1965 (December 4, 1908) and *Jeth* 18, 1969 (May, 20, 1912) respectively. It is however urged that this acknowledgment of 1914 (Ex. P-4) in itself constituted a promise to pay within the meaning of s. 25, Contract Act, and could therefore furnish a fresh cause of action. The learned District Judge has refused to accept this contention on the authority of *Pala Mal* v. *Tulla Ram* (1), but that ruling has been lately dissented from in *Fateh Chand* v. *Ganga Singh* (2). In *Kanshi Ram Bansi Ram* v. *Arjan Das* (3), it was held by a Division Bench of this Court that the words "3,000 *rapaya babat nuqsan deyne*" expressed a definite promise to pay. The wording of Ex. P-4 is as follows:

"4,019-11-6 *lekhi baki dewne kite miti Katak 3 Sambat* 1971 *agat war karoni Akhar Lekhu Chode likhe Rupaya* 4,69-11-6."

The words "*dewne kite*" in the above acknowledgment appear to be equally strong if not stronger and in my opinion these words can be reasonably construed as a promise to pay. I therefore hold that the entry of 1914 (Ex. P-4) can form the basis of a fresh cause of action.

However even if Ex. P-4 can support a fresh cause of action, the plaintiff cannot get over the bar of limitation unless the subsequent acknowledgments which have been relied on, by the plaintiff, *viz.*, Exs. P-1 to P-3 and P-5, can serve the purpose. Now Ex. P-5 is an acknowledgment of the same balance as in Ex. P-4 with same interest. This acknowledgment was held inadmissible by the trial Court for want of proper stamp duty. This, however, would not matter for the other three documents (Exs. P-1 to P-3), will suffice to bring the suit within time, if they amount to valid acknowledgments within the meaning of s. 19, Limitation Act. These documents are letters alleged to have been addressed by the defendants to the plaintiffs. But Piara Ram, P. W. No. 6, partner of the defendant firm when questioned about them professed ignorance as to whether these letters referred to the accounts now in dispute. Chandar Bhan partner of the plaintiff firm wanted to go into the witness-box after Piara Ram's evidence was over (apparently to explain these letters) but the trial Court refused to allow him to do so, with the result that there is nothing on the record to show to which accounts the letters Exs. P-1 to P-3, relate, and whether they were in fact acknowledgments of any subsisting liability with respect to the amount now claimed. The plaintiffs urged in the grounds of appeal before the learned District Judge that the trial Court had erred in law in refusing to record the statement of Chandar Bhan but the learned District Judge did not apparently consider it necessary to go into this question as Exs. P-1 to P-3, do not themselves show that they are acknowledgments of any subsisting liability in respect of the account now in dispute and he was of opinion that no evidence *aliunda* was admissible to explain the letters.

The main points which now require decision in this appeal therefore are whether: (*i*) extrinsic evidence is admissible to prove that the letters Exs. P-1 to P-3, were acknowledgments of a subsisting liability in respect of the amount now claimed by the plaintiff, and (*ii*) if so, whether the learned Judge of the trial Court was right in refusing to allow Chandar Bhan to go into the witness-box. As regards the first point the learned District Judge has referred to *Venkata* v. *Parthasardhi* (4), *Kuthiravattat Nair* v. *Nanu Saski* (5) and *Achuthan* v. *Kunnambrath Alidei* (6), but all that these authorities show is that the writing relied on should itself amount to an acknowledgment of liability. The learned Counsel for the appellant strongly relied on *Mani Ram* v. *Rup Chand* (7), in which their Lordships of the Privy Council held that even an admission that there was a mutual open and current account at a particular time, amounted to a conditional acknowledgment of liability and implied a promise to pay in case the balance on that account was found to be in favour of the other party. In the present instance Ex. P-1 contains a statement as follows:

"We have come to know of the amount due to you with reference to the letter received by post. You

(1) 119 P R 1904.

(2) 115 Ind. Cas. 853; A I R 1929 Lah. 264; 10 L 748; 30 P L R 226.

(3) 137 Ind. Cas. 840; A I R 1932 Lah. 470; Ind. Rul. (1932) Lah. 369.

(4) 16 M 220; 3 M L J. 35.

(5) 26 M 34; 12 M L J 101.

(6) 91 Ind. Cas. 833; A I R 1925 Mad. 675; 21 L W 593 (1925) M W N 361.

(7) 33 C 1047; 33 I A 165; 4 C L J 94; 8 Bom. L. R 501; 10 C W N 874; 16 M L J 300; 1 M L T 199; 3 A L J 525; 2 N L R 130 (P. C.).

have charged interest therein. We have been now shown the amount to your account."

Exhibit P-2, says: "We have understood the account tendered by you. It is correct." Ex. P-3. says: "Your item was found to be correct."

If the plaintiff can produce satisfactory evidence to show that the accounts which were sent to the defendants with regard to which the above statements were made referred to the amount now in dispute, these documents would amount to valid acknowledgments under s. 19, Limitation Act. According to Explanation I to s. 19 it is not necessary that the writing itself should specify the exact nature of the property or right in respect of which liability is acknowledged and there seems to be no bar to extrinsic evidence being admitted for the purpose: *cf. Beti Maharani* v. *Collector of Etawah* (8), and *Narayana Iyer* v. *Venkata Ramana Iyer* (9), also s. 96, Evidence Act.

As regards the next point for decision, *viz.*, whether the learned Judge of the trial Court was right in refusing to allow the plaintiff to go into the witness-box, the only ground on which the refusal was based was apparently the fact, that the plaintiff first put the defendants into the witness-box and then wanted to go into the witness-box himself. The learned Judge thought that he was only trying to fill up the gaps in the evidence and he therefore refused to record his evidence. Though, it would have been undoubtedly more satisfactory if the plaintiff Chandar Bhan, had first gone into the witness-box and put forward his case in a straightfoward manner, I do not think the learned Judge of the trial Court was justified in law in refusing to record the evidence of Chandar Bhan. The learned Counsel for the respondents has not been able to cite any authority in support of the procedure adopted by the learned Judge and the order passed by him cannot I think be sustained. In my opinion, the learned Judge should have recorded the evidence and then drawn any adverse inference, if he thought fit to do so from the circumstances in which the evidence was given.

As the trial Court has illegally refused to record evidence which seems to be material for the decision of this appeal, there is no option, but to remand the case for this evidence being now recorded. I would accordingly remand the case under O. XLI, r. 27, Civil Procedure Code, (read with O. XLII, Civil Procedure Code), for the evidence of Chandar Bhan being recorded with roference to the documents Exs. P 1, P-2 and P-3. The defendants will also be entitled to produce evidence in rebuttal. The parties should appear before the trial Court on the June 18, for a date being fixed for recording the evidence and the defendants should file their lists of witnesses (if any) on that date. The report should be submitted to this Court before the August 31, and the case should be put up for hearing early in October.

Din Mohammad, J.—I agree.

D. *Case remanded.*

(8) 17 A 198; 22 I A 31; 6 Sar P C J 551 (P. C.).
(9) 25 M 220 (F. B.).

OUDH CHIEF COURT

First Civil Appeal No. 95 of 1933
April 26, 1935

SRIVASTAVA AND ZIA-UL-HASAN, JJ.

MOHAMMAD YAKUB KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat AZIZ-UN-NISA AND OTHERS—DEFENDANTS—RESPONDENTS

Oudh Estates Act (IV of 1925), s. 109—Scope of—Construction—Interpretation of Statutes—Language of Statute should not be departed from—Claim found against defendant No. 1, but dismissed due to finding on question of estoppel and s. 41, Transfer of Property Act, raised by defendants Nos. 2, 3—Issues not raised by defendant No. 7—Held, claim against defendant No. 1 could not be dismissed.

All that s. 109, Oudh Estates Act, provides is that the bequest shall take effect as if the death of the legatee had happened immediately after the death of the testator. In other words, in order to prevent a lapse it must be assumed that the legatee survived the testator. The section does not contain any provision that on such assumption being made the bequest is to take effect only in favour of the lineal descendants. To hold that in such a case the bequest is to take effect only in favour of certain heirs and not in favour of others will be putting a construction on the section for which no warrant can be found in the plain and clear language of it. [p. 1078, col. 1.]

It is not permissible to depart from the language of a Statute unless there are strong and adequate grounds for it. The functions of a Court of law are merely to interpret the Statute and not to legislate.

The operative part of an order said that the plaintiffs' claim failed by reason of the findings on issues Nos. 5 and 6. These issues dealt with the question of estoppel and s. 41 of the Transfer of Property Act. They were framed on the pleas raised by defendants Nos. 2 and 3. No plea of estoppel was raised by defendant No. 1 and there was nothing on the record to substantiate such a plea on her behalf. There was nothing to show that the defendant No. 1 has in any way changed her position to her detriment on account of any conduct or acquiescence on the part of the plaitiffs :

Held, that the plaintiffs' claim against defendant No. 1 could not be dismissed by reason of findings on issues Nos. 5 and 6.

F. C. A. against an order of the Sub-Judge of Rai Bareli, dated July 31, 1933.

Mr. *Naim Ullah*, for the Appellants.

Mr. *Radha Krishna*, for the Respondents.

Judgment.—This is an appeal by the plaintiffs against the judgment and decree, dated July 31, 1933, of the learned Subordinate Judge of Rae Bareli dismissing their claim for a declaration that they were the owners of a moiety share in the four annas share of Moti Bibi in the villages in suit and that the transfers made by defendant No. 1 did not affect their share.

One Abdul Hakim Khan was the *taluqdar* of Amawan estate in the Rae Bareli District. His name was entered in the Lists I and III prepared under s. 8 of the Oudh Estates Act. He executed a will, (Ex. 1), on February 21, 1873, by means of which he bequeathed a four annas share in the villages mentioned in the list attached to the plaint to his daughter Moti Bibi. Moti Bibi died on April 25, 1873, in the life-time of her father. On the death of Abdul Hakim which took place on February 23, 1878, disputes arose regarding succession to his estate and ultimately on August 30, 1890, it was decided by the late Court of the Judicial Commissioner of Oudh that *Musammat* Aziz-un-nissa who is defendant No. 1 in the present suit was entitled to the four annas share which had been bequeathed to her mother Moti Bibi.

The plaintiffs, who are the step-brothers of *Musammat* Aziz-un-nissa defendant No. 1 being the sons of her father by a different mother, instituted this suit on the allegation that the four annas share which had been bequeathed by Abdul Hakim to Moti Bibi devolved in equal shares on Moti Bibi's daughter Aziz-un-nissa and her husband Mohammad Yusuf and that they have succeeded to the two annas share of Mohammad Yusuf on the latter's death in February 1910. They also alleged that their father Mohammad Yusuf and after him the plaintiffs have been in joint possession with Aziz-un-nissa of the entire share and are still in such possession. They complained that Aziz-un-nissa has made certain transfers in respect of the entire share of Moti Bibi in some of the villages in suit in favour of defendants Nos. 2 and 3 and has also made a *wakf* in respect of the entire share of Moti Bibi in two of the villages in suit and thus cast a cloud on the title of the plaintiffs and has made it necessary for them to bring the present suit for declaration of their rights.

Aziz-un-nissa defendant No. 1 pleaded in her written statement that she succeeded to the entire share of Moti Bibi, that mutation of names was effected in her favour in respect of the entire four annas share in the estate and that she had been in exclusive possession of it though the collections were made on her behalf by the plaintiffs and their father. But the suit was contested mainly by the transferees defendants Nos. 2 and 3 who pleaded that the entire share bequeathed to Moti Bibi was inherited by defendant No. 1 alone and that the plaintiffs were, by their conduct, estopped from questioning the transfers made by defendant No. 1 in their favour. They also sought the protection of s. 41 of the Transfer of Property Act.

The learned Subordinate Judge held that the four annas share of Moti Bibi devolved on her personal heirs according to Muhammadan Law and that the plaintiffs were, therefore, entitled to $5\frac{1}{4}$ pies share only in the four annas share which had been bequeathed to Moti Bibi. He further found that the plaintiffs father and the plaintiffs had been in joint possession with defendant No. 1. As regards the transfers, he held that both defendants Nos. 2 and 3 were protected under s. 41 of the Transfer of Property Act and that the plaintiffs were also estopped by their conduct from questioning the transfers in favour of defendant No. 3. At the end he dismissed the plaintiffs' suit *in toto*.

The plaintiffs appealed against the entire decree and impleaded all the three defendants as respondents. Defendant No. 3 died during the pendency of the appeal. No steps having been taken to bring her legal representatives on the record within the prescribed time, the appeal has abated against her under this Court's order dated May 9, 1934. The learned Counsel for the plaintiffs-appellants has, therefore, confined his arguments in the appeal to his claim against defendants Nos. 1 and 2. Defendant No. 1 has not appeared to contest the appeal and it has been heard *ex parte* against her.

The first question arising for decision is as regards the succession to the property which had been bequeathed by Abdul

Hakim to Moti Bibi. Admittedly Abdul Hakim was a *taluqdar* who was subject to the provisions of the Oudh Estates Act. Section 19 of the Oudh Estates Act makes certain sections of the Indian Succession Act applicable to wills made by a *taluqdar*.' One of these sections is s. 96 of the Indian Succession Act (X of 1865) which corresponds to s. 109 of Act XXXIX of 1925. This section runs as follows:—

"Where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the life-time of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will."

It was conceded in the lower Court and is admitted before us that the provisions of this section govern the bequest made by Abdul Hakim in favour of Moti Bibi. The result, therefore, is that the bequest in favour of Moti Bibi did not lapse by reason of her predeceasing her father but it must be given effect to as if the legatee had died immediately after the death of the testator. It has been argued on behalf of the defendant-respondent that this provision is intended for the benefit of the lineal descendants of the legatee and, therefore, it must be held that the bequest devolved only on the lineal descendants and not on any other heirs of the legatee. We regret we are unable to accede to this argument. All that the section provides is that in such a case the bequest shall take effect as if the death of the legatee had happened immediately after the death of the testator. In other words, in order to prevent a lapse it must be assumed that the legatee survived the testator. The section does not contain any provision that on such assumption being made the bequest is to take effect only in favour of the lineal descendants. It is not permissible to depart from the language of the Statute unless there are strong and adequate grounds for it. The functions of a Court of law are merely to interpret the Statute and not to legislate. If we were to hold that in such a case the bequest is to take effect only in favour of certain heirs and not in favour of others, we will be putting a construction on the section for which no warrant can be found in the plain and clear language of it. We have, therefore, no hesitation in agreeing with the learned Subordinate Judge that according to the correct interpretation of s. 109 the bequest must be held to take effect in favour of all the heirs of Moti Bibi. The Counsel for the parties are agreed before us that Moti Bibi was not a person belonging to any of the classes specified in s. 14 of the Oudh Estates Act and, therefore, under s. 15 of that Act the devolution of the share bequeathed to Moti Bibi must be according to Muhammadan Law. The learned Counsel for the plaintiffs-appellants has not, therefore, contested the lower Court's finding that the plaintiffs are not entitled to anything more than 5¼ pies share in the four annas share of Moti Bibi. He has, however, contended that the learned Subordinate Judge has acted wrongly in not giving a decree to the plaintiffs in respect of this share against defendant No. 1. This contention in our opinion must succeed. The learned Subordinate Judge has given no reasons for dismissing the claim against defendant No. 1. His order dismissing the claim in its entirety seems to be due to a mere oversight. In the operative part of his order he says that the plaintiffs' claim fails by reason of his findings on Issues Nos. 5 and 6. These issues deal with the question of estoppel and s. 41 of the Transfer of Property Act. They were framed on the pleas raised by defendants Nos. 2 and 3. No plea of estoppel was raised by defendant No. 1 and there is nothing on the record to substantiate such a plea on her behalf. There is nothing to show that the defendant No. 1 has in any way changed her position to her detriment on account of any conduct or acquiescence on the part of the plaintiffs. We are, therefore, of opinion that the appeal must succeed as against defendant No. 1 and the plaintiffs should be given a declaration that they are entitled to 5¼ pies share in the four annas share bequeathed to Moti Bibi in villages entered at Nos. 3, 7, 9, 11, 12, 14 and 16 of the list attached to the plaint and that the plaintiffs' 5¼ pies share in villages Dasauti and Rukunpur (Items Nos. 7 and 9 of the list) is not affected by the deed of *wakf* executed by defendant No. 1.

The next line of attack of the learned Counsel for the appellants was directed against the finding of the lower Court that the defendant No. 2 was protected under s. 41 of the Transfer of Property Act. The defendant No. 2 holds a simple mortgage which was executed in favour of

her ancestor Ganga Bakhsh Singh by the defendant No. 1 on February 18, 1913. There can be no doubt and it is not seriously disputed that defendant No. 1 was an ostensible owner of the property transferred by her within the meaning of s. 41 of the Transfer of Property Act with the consent, express or implied, of the plaintiffs and their father. As already stated, she had obtained a decree from the Judicial Commissioner's Court as far back as August 30, 1890, in which she had been held entitled to the whole of the four annas share which had been bequeathed to Moti Bibi. Mutation of names was effected in her favour on the basis of this decree and her name continued to be recorded in the *khewat* as owner of the whole share during the last two settlements. The plaintiffs' father and after him the plaintiffs managed the property on her behalf but never before the institution of the present suit questioned her title or took any steps to have the *khewat* entries corrected. The plaintiffs' father jointly with defendant No. 1 made an application (Ex. B-11) for partition of Rasulpur, one of the villages which had been bequeathed to Moti Bibi in the Revenue Courts. In this application defendant No. 1 was described as having a four annas share. On the death of the plaintiffs' father the plaintiffs were substituted in his place and the partition was continued at their instance. These facts are in our opinion more than ample to show that defendant No. 1 was an ostensible owner with the express or implied consent of the plaintiffs.

The main contention of the appellants is that the mortgagee, ancestor of defendant No. 2, did not make proper inquiries into the title of defendant No. 1 before taking the mortgage. The evidence of D. W. No. 2, Mata Prasad, a servant of the defendants shows that Ganga Bakhsh before taking the mortgage consulted his legal adviser Mir Fida Husain deceased Vakil of Rae Bareli. Mir Fida Husain deputed the witness to make inquiries about the extent of the defendant's share in the villages proposed to be mortgaged. In pursuance of this the witness examined the *khewats* of all the villages. The witness has been believed by the trial Judge and there is no reason for us to disbelieve him. The story about Mir Fida Husain having been consulted seems very probable in view of the fact that the mortgage-deed (Ex. B-9) is scribed by his clerk. The decree of the trial Court (Ex. B-4) in the suit above referred to which was finally decided by the Judicial Commissioner's Court shows that the same Mir Fida Husain was a Counsel in that suit. He was therefore presumably aware about the title of defendant No. 1 to the entire four annas share having been upheld in that litigation. Under the circumstances we are inclined to agree with the lower Court that the evidence of inquiry given by the defendants must be accepted as sufficient. The *quantum* of inquiry must depend upon the circumstances of each case. In *Baidya Nath Dutt* v. *Alef Jan Bibi*, (A. I. R. 1923 Cal. 210) (1) it was held by a Bench of the Calcutta High Court that it is not enough to assert generally that inquiries should be made or that a prudent man should make inquiries; some specific circumstance should be pointed out as the starting point of an inquiry which might be expected to lead to some result. In the present case the *khewat* entries which had been examined by the mortgagee showed that mutation had been effected on the basis of the Civil Court decree. As already mentioned, presumably the lawyer who was consulted was fully cognizant of that litigation. Even if the mortgagee or his agent had pursued the inquiry further he would only have found that the highest Court in the Province had upheld the title of defendant No. 1 in respect of the entire share. There is no suggestion that the mortgagee did not act in good faith. We must, therefore, uphold the lower Court's finding that the defendant No 2 is entitled to the protection of s. 41 of the Transfer of Property Act.

The result, therefore, is that we allow the appeal against defendant No. 1 and modify the decree of the lower Court by granting the plaintiffs a declaration against her to the effect stated above. The appeal against defendant No. 2 is dismissed. The plaintiffs-appellants will pay the costs of defendant No. 2 in this Court and bear their own costs.

D. *Appeal allowed.*

(1) 70 Ind. Cas. 194; A I R 1923 Cal 240; 36 C L J 9.

LAHORE HIGH COURT

Second Civil Appeal No. 1776 of 1929
March 7, 1935

TEK CHAND AND SKEMP, JJ.

NOT RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat KISHAN DEVI—PLAINTIFF—RESPONDENT

Custom (Punjab)— Succession—Guar Brahmins *of Kharkhauda, District Rohtak—Non-ancestral property —Daughter is preferential heir to collaterals of eighth degree.*

Among *Gaur Brahmins* of Kharkhauda, District Rohtak, a daughter is a preferential heir to the non-ancestral property of her father as against collaterals of the eighth degree.

S. C. A, from the decree of the District Judge, Karnal, dated April 22, 1929, affirming that of the Subordinate Judge, First Class, Rohtak, dated December 11, 1928.

Mr. *Anant Ram Khosla*, for the Appellants.

Messrs. *Shamair Chand* and *Qabul Chand*, for the Respondent.

Tek Chand, J.—The dispute in this case relates to succession to the property of one Ramji Lal, a *Guar Brahmin* of Kharkhauda, District Rohtak. Ramji Lal died on February 23, 1925. He had a son Harphul who had pre-deceased him. On Ramji Lal's death mutation was sanctioned in favour of one Basdeo who claimed to be a son of Harphul. The present defendants, who are collaterals of Ramji Lal in the 8th degree instituted a suit for a declaration that Basdeo was not the son of Harphul and had no right to succeed to Ramji Lal's property. This suit was decreed on May 25, 1926, whereupon the Revenue Authorities cancelled the previous mutation in favour of Basdeo and entered the land in the names of the present defendants. In May 1927 *Musammat* Kishen Devi and certain other persons, with whom we are no longer concerned instituted the present suit against the defendants for possession of Ramji Lal's land. *Musammat* Kishen Devi is admittedly the daughter of Ramji Lal. In the plaint she alleged that the land in dispute was not ancestral of Ramji Lal and the defendants and that in any case as remote collaterals related in the 8th degree, they had no right to succeed in her presence. *Musammat* Kishen Devi based her claim both on Hindu Law and custom.

The defendants pleaded that the land was ancestral *qua* them. They denied that the parties were governed by Hindu Law and alleged that according to the custom prevailing in the tribe, a daughter did not include collaterals, howsoever remote, in succession to immovable property of a sonless proprietor whether ancestral or not.

The learned trial Judge found that the land had not been proved to be ancestral, that the parties were governed by custom and not Hindu Law and that the plaintiff on whom the onus lay, had succeeded in proving that she was a preferential heir to the non-ancestral property of her father. On these findings he decreed the suit. The defendants' appeal has been dismissed by the District Judge. He has, however, granted a certificate under s. 41 of the Punjab Courts Act for a Second Appeal to this Court on the question of custom involved.

The finding that the land is non-ancestrial *qua* the plaintiffs was not challenged before us as indeed it could not be, in view of the documentary evidence on the record.

Before us Counsel for the plaintiff-respondent re-agitated the question that the parties were governed by Hindu Law and not by custom, but after hearing him, I am of opinion that there is no force in his contention. The question was no doubt raised in the plaint and put in issue, but as already observed it was decided by the trial Judge against the plaintiffs. It does not appear to have been raised before the learned District Judge who decided the case in favour of the plaintiff on the ground that under custom she had a superior right to succeed. I hold that the plaintiff is not entitled to re-open this question on second appeal.

The sole question for determination is whether the decision of the lower Court on the question of custom is correct. In view of the Answers to Questions Nos. 56 and 57, as recorded in Joseph's Customary Law of the Rohtak District, there is no doubt that the onus was rightly placed on the plaintiff to prove that the daughters had a preferential right to succeed to the non-ancestral property of their father as against collaterals of the 8th degree. An examination of the documentary evidence on the record shows, that there are five clear and well proved instances of exclusion by daughters of collaterals of varying degrees. Three of these are supported by mutations one by a judicial decision, and one by remarks in a settlement pedigree-table. These instances are as follows:

(1). *Exhibit P 4* is a mutation sanctioned

in 1889 in respect of the property of one Trikha a *Gaur Brahmin* of the neighbouring village Hassangarh in favour of his daughter *Musammat* Sundar in preference to his collaterals of the fourth degree. No suit appears to have been brought by the collaterals in the Civil Court to contest this mutation.

(2) *Exhibit P. 5.* The property of Sham Lal, a *Gaur Brahmin* of Hassangarh was mutated on the death of his widow in the name of his daughter *Musammat* Dharmon to the exclusion of the collaterals of the 5th degree. This mutation was sanctioned in 1909 after summary inquiry by the Revenue Officer and it does not appear that the matter was taken to the Civil Court.

(3) *Exhibit P. 6.* The property of Bul Chand a *Gaur Brahmin* of *Mauza* Garhi Brahminan, was inherited by his daughters *Musammat* Bhagwan Devi and *Masammat* Bhagwati to the exclusion of his brother.

(4) *Exhibit P. 1*, is a copy of the judgment in a civil suit *in re Shib Dayal* v. *Shib Devi*, decided by the Munsif of Rohtak on November 7, 1905. The dispute related to the property of one Badri, a *Gaur Brahmin* of *Mauza* Bhatgaon in the Sonepat *Tahsil* of Rohtak District, the claimants being the daughter of Badri and his collaterals in the 8th degree. The case appears to have been hotly contested by the parties who produced considerable oral and documentary evidence. The Munsif in an exhaustive judgment found in favour of the daughter, and in support of his conclusion relied on a previously decided case from the same village, the parties to which were *Gaur Brahmins* and where the daughter was held to have a preferential right to succeed to the property of her sonless father as against collaterals in the 3rd dergee. The Munsif also referred to a number of other instances where daughters have succeeded. It appears that an appeal was filed by the collaterals against the decree of the Munsif, but was dismissed by the Divisional Judge.

(5) *Exhibit D 2.* This is an extract from the pedigree table of the proprietors of *Mauza* Kharkhauda which shows that one Bindra, a *Gaur Brahmin* being sonless, got his entire estate mutated in favour of his son-in-law Ram Chand whose descendants were in possession. This document is of importance as Bindra was a member of the family of Ramji Lal, whose property is in dispute in the case before us.

In addition to this, the witnesses produced by the plaintiff-respondents have deposed to six other instances in which daughters excluded collaterals in succession to non-ancestral property. There is no documentary evidence in support of these instances but the witnesses were not cross-examined at all in regard to their statements relating to this matter, and in at least two cases evidence was given by persons whose mothers had taken the property to the exclusion of their maternal grandfathers' collaterals.

The learned District Judge had also relied upon Ex. P 7, a judgment of *Sheikh* Abdul Haq, Subordinate Judge, Delhi, in *Badlu* v. *Umrao Kaur*, the parties to which were *Gaur Brahmins* of *Mauza* Haroli in the Delhi Province and the contest was between daughters and collaterals of the 9th and 10th degree. In that case the Subordinate Judge had decided in favour of the collaterals and his judgment was relied upon by the present plaintiff as an instance in support of their case. This judgment, however has since been reversed on appeal by a Division Bench of this Court, published as *Badlu* v. *Umrao Kuer* (1), Mr. Anant Ram Khosla for the defendant-appellants has strongly relied upon this case as an instance in his favour but it is important to note that the land in that case was ancestral *qua* the collaterals of the deceased. This case, therefore, helps neither party and must be left out of consideration.

As against this, all that the collaterals relied upon in the Court below, was the judgment of *Bhai* Umrao Singh, Subordinate Judge, dated October 31, 1907, in *Brahmin Datta* v. *Lachhmi* (Ex. D. 8). The degree in which the collaterals were related to the last male owner in that case is not stated in the judgment but it is clear that the land was ancestral. I do not think, therefore, that this instance is in point.

Counsel referred us to a decision of Rattigan J., in *Mukandi* v. *Bakhtawar Singh*, 19 Ind. Cas. 215 (2), the parties to which were *Gaur Brahmins* of Kharkhauda. The dispute there was between the daughters and collaterals of the 3rd degree and the property in dispute was ancestral. The main question argued before the learned Judge was whether the *Gaur Brahmins* of Kharkhauda were governed by custom or by Hindu Law and it was found that they were governed by custom. He consequently decided the

(1) 142 Ind. Cas. 281; A I R 1933 Lah. 473; Ind. Rul. (1933) Lah. 184; 34 P L R 351.

(2) 19 Ind. Cas. 215.

case in favour of the collaterals who according to the general custom had a preferential right to succeed to ancestral property as against the daughter of the last male holder. It will thus be seen that there is not a single proved instance of exclusion of a daughter from non-ancestral property of her sonless father.

It may be mentioned that the oral evidence of witnesses produced by both parties showed that Ramji Lal followed priestly functions and that he did not cultivate land with his own hands. It is also admitted that none of the plaintiff's lives in Kharkhauda. Some of them belong to Halalpur and others to Nahra. Both these villages are situate in *Tahsil* Sonepat, while Kharkhauda is in *Tahsil* Rohtak. It is clear, therefore, that the plaintiffs and the deceased were not members of a compact village community nor are they cultivators by profession.

In my opinion the Judges of the Courts below have correctly found that the plaintiff-respondent had succeeded in discharging the onus which lay on her to prove that a daughter was a preferential heir to the non-ancestral property of her father as against collaterals of the 8th degree. I would accordingly dismiss this appeal with costs.

Skemp, J.—I agree.

N. *Appeal dismissed.*

OUDH CHIEF COURT

Second Civil Appeal No. 3 of 1934
April 17, 1935
KING, C. J. AND NANAVUTTY, J.

THAKUR BAKHSH SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
Subedar ABHAIDAT SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS

Oudh Rent Act (XXII of 1886), ss. 108 cl (10), 135—Civil Procedure Code (Act V of 1908), O. XXI, r. 100—Application under O. XXI, r. 100—Alternative remedy provided by s. 108, cl. (10), Oudh Rent Act—Application under Civil Procedure Code to Revenue Court, if barred—Transfer of Property Act (IV of 1882), s. 52—Lis pendens—Lease of land while proceedings under O. XXI, r. 100 pending—Lessees bound by results.

Even though the plaintiffs have an alternative remedy by a suit under s. 108, cl. (10), Oudh Rent Act, their right of making an application under O. XXI, r. 100, Civil Procedure Code, to the Revenue Court is not barred on that account. There is nothing inconsistent with the provisions of the Oudh Rent Act in utilising the alternative remedy by an application under O. XXI, r. 100, Civil Procedure Code.

Where a lease in favour of defendant No 2 is executed of lands in dispute during the pendency of the proceedings in the Revenue Court by defendant No. 1 consequent on the application made by the plaintiffs under O. XXI, r. 100, Civil Procedure Code, for restoration of possession, the doctrine of *lis pendens* is applicable and the defendant No. 2 is bound by the results of the proceeding and where on defendant No. 1's failure to bring any suit against the plaintiffs to establish the right which he claimed to the possession of the property the order of the Revenue Court, directing that the plaintiffs be put into possession of the property, becomes conclusive under O. XXI, r. 103, as against defendant No. 1 the landlord, and also becames conclusive as against defendant No. 2, the lessee.

S. C. A. against the order of Mr. Justice Rachhpal Singh, dated February 13, 1934.

Messrs. *Radha Krishna* and *Ganesh Prasad*, for the Appellants.

Mr. *Bhagwati Nath Srivastava*, for the Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit for possession of certain plots of agricultural land. The plaintiffs' case is that they are entitled to possession of the plots as tenants, that they were wrongfully dispossessed by defendant No. 1, the landlord, in execution of a decree against one Suraj Bakhsh Singh and that they were restored to possession by an order of the Revenue Court passed under O. XXI, r. 101, of the Code of Civil Procedure and possession was delivered to them on March 17, 1929, but in the month of June, 1929, they were again dispossessed by defendant No. 2 who claims to be a lesses holding under a lease executed on behalf of defendant No. 1.

The trial Court decreed the plaintiffs' suit but the lower Appellate Court took a contrary view and dismissed the suit and the decree of the lower Appellate Court was upheld on appeal by a learned Single Judge of this Court.

The land in suit formed part of the tenancy holding of one Pirthipal Singh. The plaintiffs' case was that the land was divided between Pirthipal Singh, and his brothers or nephews, who were the ancestors of the plaintiffs, and that the plots in suit were allotted to their ancestors and that this partition of the holding was recognised by the landlord. After the death of Pirthipal Singh, the whole of the holding was entered in the name of Suraj Bakhsh Singh, one of his descendants, and the landlord (defendant No. 1) brought a suit to eject Suraj Bakhsh Singh on October, 24, 1927. This suit was decreed and possession of the whole holding was delivered to defendant No. 1 in May 1928, resulting in the dispossession of the plaintiffs from the plots in suit. On May 23, 1928, the plaint-

iffs made an application to the Revenue Court under O. XXI, r. 100, claiming that they were in possession of the plots on their own account and that they had been wrongfully dispossessed by the defendant No. 1, in execution of the decree against Suraj Bakhsh Singh. The Court was satisfied that the plaintiffs were in possession of the plots as tenants on their own account and accordingly directed that they should be restored to possession. Possession was delivered to the plaintiffs on March 17, 1929. During the pendency of the proceedings under O. XXI, r. 100, that on May 31, 1928, defendant No. 1, gave a lease of the plots in suit to defendant No. 2 and, according to the finding of the Court below, defendant No. 2, was not actually dispossessed in spite of the formal delivery of possession to the plaintiffs. He never allowed the plaintiffs to obtain actual possession.

The main question for consideration is what was the effect of the order passed by the Revenue Court on September 5, 1928, allowing the plaintiffs' application made under O. XXI, r. 100, and directing that the plaintiffs should be put into possession of the property. Defendant No. 1 did not bring any suit against the plaintiffs to establish the right which he claimed to the possession of the property and, therefore, under O. XXI, r. 103, the order of the Revenue Court, directing that the plaintiffs be put into possession of the property, became conclusive as against defendant No. 1, the landlord. The question is whether this order was binding upon defendant No. 2, the lessee. The learned single Judge took the view that the order could not be binding upon defendant No. 2 for the simple reason that he was not a party to the proceeding. The learned Single Judge, however, seems to have overlooked the fact that the transfer made by defendant No. 1 in favour of defendant No. 2, was made on May 31, 1928, and, therefore, was made during the pendency of the proceedings under O. XXI, r. 100. It appears from the language of his judgment that the learned Judge was under the impression that the plaintiffs filed their application under O. XXI, r. 100, after the lease had been executed in favour of defendant No. 2. For this reason the learned Judge did not even consider whether the doctrine of *lis pendens* was applicable to the lease executed in favour of defendant No. 2. From the facts stated above it is clear that the lease in favour of defendant No. 2 was executed during the pendency of the proceedings in the Revenue Court consequent on the application made by the plaintiffs under O. XXI, r. 100, for restoration of possession. In our opinion, therefore, the doctrine of *lis pendens* is applicable. At the time when the lease was executed by defendant No. 1 in favour of defendant No. 2, a proceeding was pending in a Court of competent jurisdiction which was not a collusive proceeding and in which the right to possession of the plots in suit was directly and specifically in question between the plaintiffs and defendant No. 1. The defendant No. 1, therefore, was precluded by the provisions of s. 52 of the Transfer of Property Act from leasing the property in suit so as to affect the rights of the plaintiffs which they obtained under the order made by the Revenue Court under O. XXI, r. 101. While the right to possession of the property was under litigation, no party to the proceedings could transfer the property so as to affect the opposite party. This means that defendent No. 2, being a transferee *pendente lite*, was bound by the order passed by the Revenue Court against his transferor although defendant No. 2 was no party to the proceedings.

It has been argued that the provisions of O. XXI, r. 100, are not applicable to Revenue Courts in Oudh and that the Revenue Court had no jurisdiction to pass any order under r. 101, O. XXI, of the Code of Civil Procedure. This was the view taken by the learned Single Judge against whose decree this appeal has been instituted. In our view this proposition is not correct. Section 135 of the Oudh Rent Act enacts that:

> "The provisions of the Code of Civil Procedure, 1908, shall so far as they are not inconsistent with the provisions of this Act, apply to all suits and other proceedings under this Act."

The provisions in question, therefore, are applicable unless it can be shown that they are inconsistent with the provisions of the Oudh Rent Act. It has been argued that the provisions of rr. 100 to 103, of O. XXI, Civil Procedure Code, are inconsistent with the provisions of the Oudh Rent Act because that Act contains a specific provision in s. 108, cl. (10), for a suit by a tenant for the recovery of the occupancy of any land from which the tenant has been illegally ejected by the landlord. It is contended that the plaintiffs, when they were dispossessed in execution of the decree for ejectment against Suraj Bakhsh Singh, might have brought a suit against the landlord under

s. 108, cl. (10) and, therefore, the provisions of O. XXI, r. 100, Civil Procedure Code, are not applicable. We are not prepared to accept this contention. It may be conceded that the plaintiffs had an alternative remedy by a suit under s. 108, cl. (10) but we do not think that their right of making an application under O. XXI, r. 100, is barred on that account. Under r. 100 the plaintiffs had a remedy by way of an application, a short and summary remedy, and we do not think that this remedy should be held to be barred merely because an alternative remedy was open to the plaintiffs by the institution of a regular suit under s. 108, cl. (10). In our opinion there is nothing inconsistent with the provisions of the Oudh Rent Act in utilising the alternative remedy by an application under O. XXI, r. 100.

It is also argued that as the possession of defendant No. 2 was not disturbed, there was no necessity for him to file any suit for establishing his right to the possession of the property in accordance with r. 103 of O. XXI. We agree that there was no need for defendant No. 2 to institute any such suit, as he was no party to the proceedings which resulted in the order that the plaintiffs be restored to possession of the property. This does not mean that he was not affected by that order as in our opinion he was bound by that order under the rule of *lis pendens*. If his landlord and transferor allowed the order to become conclusive as against himself, then it also became conclusive as against defendant No. 2. As defendant No. 2 took the lease during the pendency of the proceedings under O. XXI, r. 100, he was bound by the result of those proceedings although he was not a party. The plaintiffs do not rely upon the rule of *res judicata* but they rely upon the rule of *lis pendens* as binding both the lessor and the lessee by the order passed restoring the plaintiffs to possession, and we hold that their contention is well founded.

The respondent has sought to uphold the decree of the learned Single Judge on the ground that the present suit was barred by limitation. This is a new plea which was not taken previously in any of the Courts. The argument is that the period of limitation is governed by the Oudh Rent Act because the suit is not of a civil nature. We see no force in this argument. It is conceded that the suit was rightly instituted in the Civil Court in accordance with the decision in *Mindai* v. *Sajid Ali* 6 O. W. N. 1094 (1). The rules regarding limitation of suits enacted in Chap. IX of the Oudh Rent Act, apply only to suits under that Act. This suit is clearly not a suit under the Oudh Rent Act because it is admittedly cognizable by the Civil Court. No authority is cited for the proposition that the period of limitation for suits instituted in the Civil Court can in any circumstances be governed by the rules of limitation enacted in the Oudh Rent Act.

In our opinion the trial Court has taken the correct view and the plaintiffs' suit should be decreed.

We accordingly set aside the decree of the learned Single Judge, dated February 13, 1934, and the decree of the lower Appellate Court and restore the decree of the the trial Court with costs throughout.

D. *Appeal allowed.*

(1) 124 Ind Cas. 366; 9 O W N 1094: 13 R D 865; A I R 1930 Oudh 69; Ind. Rul (1931) Oudh 222.

LAHORE HIGH COURT

Second Civil Appeal No. 1063 of 1929
June 21, 1934

TEK CHAND AND ABDUL RASHID, JJ.

FIRM MELA MAL-SHIB DYAL—DEFENDANTS—APPELLANTS

versus

THAKAR DAS SUD AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS

Provincial Insolvency Act (V of 1920), s. 55, proviso —Mortgage during pendency of insolvency proceedings against mortgagor —Mortgagee having notice of same —Transaction, if protected — Execution of mortgage when old Act III of 1907 in force—Mortgagee taking mortgage in his favour with knowledge of insolvency proceedings pending against mortgagor—Mortgagee, if protected under Act III of 1907, s 38.

Under s. 55, Provincial Insolvency Act, a transferee under a transaction made before the order of adjudication is protected only if the transfer is for valuable consideration and the transferee had no notice of the presentation of the insolvency petition. In order to bring his case under the proviso to that section, the plaintiff must show that both these conditions co-exist, but where it is found that he had notice of the fact that the petition of insolvency was pending at the time when the mortgage in his favour was executed, he cannot avail himself of the protection given by the proviso to s. 55.

It is a well settled rule of interpretation of Statutes that in the absence of a provision to the contrary a new law ought not to be construed so as to interfere with vested rights. Where therefore the mortgage had been effected six months before the new Act V of 1920 came into force and according to the law then in force the mortgage was valid, notwithstanding the fact that it had been made at a time when a petition for the adjudication of the mortgagor was pending, for it was effected for valuable consideration and was protected by the proviso to s. 38 of Act III of 1907 and the mortgagee therefore,

had acquired a valuable right and this right could not be lost by the subsequent change in the law made by the enactment of Act V of 1920 and repeal of Act III of 1907.

S. C. A. from the decree of the District Judge, Hoshiarpur, dated February 4, 1929.

Messrs. *Badri Das* and *Tek Chand Dhand*, for the Appellants.

Messrs. *J. N. Aggarwal* and *J. L. Kapur*, for the Respondents.

Tek Chand, J.—The facts of the case, which has given rise to this second appeal are as follows: One Bogar Mal of Hoshiarpur, owned considerable immovable property at Hoshiarpur, and had his business in the Punjab and at Karachi. On March 13, 1918, an application was filed for adjudication of Dogar Mal as an insolvent in the Court of the Judicial Commissioner, Sind, at Karchi, under Act III of 1907, which was in force at the time. The application remained pending for more than two years, and it was on November 15, 1920, that an order was passed adjudicating Dogar Mal as insolvent. In the meantime, on March 2, 1920, Dogar Mal executed a mortgage-deed in respect of two shops situate at Hoshiarpur in favour of Thakar Das plaintiff-respondent for Rs. 4,000. The amount raised by the mortgage was paid to one Bhagat Ram who had obtained a decree for Rs. 3,966-14-9, against Dogar Mal and had taken out warrants for his arrest. This Bhagat Ram is admittedly a near relation of the proprietors of the defendant firm Meal Mal-Shib, Dayal.

About eight months after the mortgage, Dogar Mal was, as already stated, adjudicated insolvent by the Court at Karachi and his property vested in the Official Assignee. On June 2, 1925, the Official Assignee sold the shops to Mela Mal-Shib Dayal, defendants-appellants, and delivered possession to them. In the sale-deed, no reference was made to the prior mortgage by Dogar Mal in favour of Thakar Das. Shortly, afterwards, as a result of a compromise between the insolvent and the creditors, Shiv Kishen (defendant No. 3), was appointed a trustee to administer the estate, and the order of adjudication was annulled on May 19, 1926. In the meantime, on November 17, 1925, Thakar Das had brought the present suit to recover the amount due to him on foot of the mortgage, which had been executed in his favour by Dogar Mal on March 2, 1920, inpleading the vendees, Mela Mal-Shiv Dayal, and the trustee, Shri Kishen, as defendants. The suit was resisted by Mela Mal-Shib Dayal only, who pleaded that the mortgage in favour of Thakar Das was without consideration and fictitious, and had been effected in order to defeat and delay his creditors. They also urged that the mortgage was void as having been made at a time when the application for adjudication of Dogar Mal as insolvent was pending, of which fact the mortgagee was fully aware. The learned District Judge has held that the plaintiff's mortgage was for valuable consideration and, though effected by Dogar Mal during the pendency of the insolvency petition, was protected by the proviso to s. 55 of Act V of 1920.

The defendants Mela Mal-Shib Dayal have preferred a second appeal to this Court, and it has been contended on their behalf by Mr. Badri Das that the learned Judges of the Courts below have misapplied s. 55 to the facts of the present case. He has pointed out that the trial Judge had found as a fact that at the time of the execution of the mortgage in suit, the mortgagee, Thakar Das, had notice of the fact that the petition for insolvency was pending against Dogar Mal in the Karachi Court, and that though the learned District Judge has not recorded a clear finding on this point, there seems to be no doubt that he was really in agreement with the trial Judge and that this being so, the proviso to s. 55 of Act V of 1920, could not protect the plaintiff. As the District Judge had not expressly held that the plaintiff had notice of the insolvency petition, and as this was one of the crucial points in the case, we allowed Mr. Jagan Nath Aggarwal to address us on the evidence bearing thereon. After hearing him at length we have no hesitation in holding that Thakar Das had notice of the petition of insolvency at the time when he entered into the mortgage transaction in question with Dogar Mal. This being so, there can be no doubt, that if the case is governed by Act V of 1920, the decision of the learned District Judge cannot be sustained. Under s. 55 a transferee under a transaction made before the order of adjudication is protected only if the transfer is for valuable consideration and the transferee had no notice of the presentation of the insolvency petition. In order to bring his case under the proviso to that section, the plaintiff must show that both these conditions co-exist, but here it has been found that Thakar Das had notice of the fact that the petition of insolvency was pending at the time. He cannot, there-

fore avail himself of the protection given by the proviso to s. 55.

The question, however, arises whether the case is governed by Act V of 1920, as appears to have been assumed by the parties and the Courts below, or by Act III of 1907 which was in force on March 13, 1918, when the application for adjudicating Dogar Mal an insolvent was made and March 2, 1920, when he effected the mortgage in favour of Tharkar Das. It is common ground that Act V of 1920, which repealed Act III of 1907, received the assent of the Governor-General on February 25, 1920, and became operative from that date. Sub-s. (2), s. 1 of Act V of 1920, however, expressly provided that its operation extended to the whole of British India except the Scheduled Districts, and "Scheduled Districts" as defined in Act XIV of 1874 include the province of Sind. The Act therefore did not come into force at Karachi on February 25, 1920, when it received the assent of the Governor-General. Subsequently, on September 30, 1920, the Governor of Bombay in Council, acting with the previous sanction of the Governor-General-in-Council, in exercise of the powers conferred on him by s. 5. "Scheduled Districts Act" XIV of 1874, extended the Provincial Insolvency Act, V of 1920 to the province of Sind with effect from October 15, 1920 (Notification No. 9080, dated, September 28, 1920). As already stated the mortgage in favour of the plaintiff had been executed on March 2, 1920. It is thus clear that Act III of 1907 was in force both on the date on which the application for insolvency was made, and when the mortgage in favour of Thakar Das was effected, but Act V of 1920, had come into force when the order of adjudication was passed on November 15, 1920.

A comparison of the provisions of s. 55 of Act V of 1920 and those of s. 38 of Act III of 1907, which it repealed, will show that they are materially different. Under s. 38 of the old Act the only condition necessary to protect a transfer made before the date of the order of adjudication was that it had been effected for valuable consideration. In s. 55 of the new Act, however, another condition was added, namely, that beside proving that the transaction was for valuable consideration it must also be shown that the transferee had no notice that an application for insolvency of the transferor was pending at the time. As already stated, in this case it has been found that Thakar Das had notice of the application for insolvency, but that the mortgage in his favour was for consideration. It follows accordingly that on these findings the plaintiff's mortgage would be valid if the old Act applied, but it would be invalid if the new Act governed the case. It is therefore of vital importance to determine which of the two Acts is applicable.

It is a well settled rule of interpretation of Statutes that in the absence of a provision to the contrary a new law ought not to be construed so as to interfere with vested rights. It is laid down in s. 6, General Clauses Act, X of 1897 that when an Act repeals any enactment then, unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment. Now, in the case before us, the mortgage had been effected six months before the new Act came into force. According to the law then in force the mortgage was valid, notwithstanding the fact that it had been made at a time when a petition for the adjudication of the mortgagor was pending, for it was effected for valuable consideration and was protected by the proviso to s. 38 of Act III of 1907. It is conceded that under that Act the result of the petition would not have affected its validity in any way. The mortgagee therefore had acquired a valuable right on March 2, 1920, and the right could not be lost by the subsequent change in the law made by the enactment of Act V of 1920, and the repeal of Act III of 1907. There is nothing in the new Act to show that it was the intention of the Legislature that rights acquired under the old Act would be adversely affected by its repeal. I accordingly hold that s. 55 of Act V of 1920 is inapplicable to the case, and that the mortgage in favour of the plaintiff Thakar Das, was valid and binding on the Official Assignee and therefore on Mela Mal-Shib Dayal who have purchased the property from him.

The defendants-appellants thus purchased the property subject to the plaintiff-respondent's mortgage, and obviously there are no equities in their favour. It is beyond question that they were aware of the existence of the plaintiff's mortgage at the time of their purchase and it has been found that the amount raised by Dogar Mal from Thakar Das on foot of the mortgage was applied in satisfying a decree, which had been obtained against him by Daulat Ram, who was a near relation of the appellants. For the foregoing reasons, I hold

that the plaintiff's suit has been rightly decreed. I would accordingly dismiss the appeal, but as the question of law was not free from difficulty, I would leave the parties to bear their own costs throughout.

Abdul Rashid, J.—I agree.

D. *Appeal dismissed.*

OUDH CHIEF COURT

Second Civil Appeal No. 133 of 1933

March 22, 1935

NANAVUTTY AND ZIA-UL-HASAN, JJ.

SHER BAHADUR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu Sri MADHO PRASAD SINGH—PLAINTIFF—RESPONDENT

Oudh Estates Act (I of 1869), s. 8—Widow holding life estate—Confiscation of estate, and first settlement with her—Her name in list—Widow, as trustee for remainderman—Gift of property—Suit for declaration of under-proprietary rights—Decree against widow, whether binding on remainderman—Trust—Presumption—Person held under-proprietor—Presumption as to possession—Evidence Act (I of 1872), s. 13—Judgment not inter partes but evidencing possession—Relevancy—Civil Procedure Code (Act V of 1908), ss. 11, 100—Held, no res judicata—Rejection of evidence on finding of fact—Finding of fact, whether can be interfered with.

Where notwithstanding the confiscation of the land by the proclamation of Lord Canning, its restoration by affirming the absolute title of the grantees of summary settlements, and the granting a *sanad* with the full power of alienation, in her and her name being entered in the list prepared under s. 8, Oudh Estates Act, a widow holding a life-estate constitutes herself a trustee for the remainderman but makes a gift of the property and afterwards contests a suit for declaration of under-proprietary rights which is ultimately decreed, the gift is not binding on the remainderman after her death, but the remainderman is bound by the decree obtained against her. Just as a trustee cannot set up any title adverse to that of the *cestui que trust*, so also the beneficiary cannot repudiate the *bona fide* acts of the trustee entered upon for the benefit of the beneficiary or the *cestui que trust*.

[Case-law referred to.]

Where a person is held to be an under-proprietor, possession as under-proprietor must also be presumed in his favour.

Where a judgment is not *inter partes* it may be used under s. 13, Evidence Act, as instances when the possession of a party is challenged and found to be correct.

Since the lessee does not occupy a representative capacity and the lessor cannot be said to be a person claiming through his lessee, a previous decision in a suit by a lessee against a third person cannot operate as *res judicata* in a subsequent suit by the lessor against the same person. *Shri Padbhat Anantbhat Jodhi* v. *Rama Bahaji Lathi* (4), followed.

In deciding a question of fact the lower Appellate Court had rejected certain evidence on a legal presumption:

Held, that the finding of the Court on the question of fact could not be interfered with in second appeal.

S. C. A. against the order of the Sub. Judge, Fyzabad, dated January 31, 1933.

Mr. *R. B. Lal*, for the Appellant.

Mr. *S. N. Roy*, for the Respondent.

Judgment.—This is a defendants' appeal from an appellate judgment and decree of the Court of the learned Subordinate Judge of Fyzabad upholding the judgment and decree of the Munsif of Haveli decreeing the plaintiff's suit with costs.

The plaintiff Babu Sri Madho Prasad Singh, the adopted son of Anant Bahadur Singh, has brought this suit against Sher Bahadur Singh and others for a declaration that the defendants had got no under-proprietary rights in the plots in suit as also for a decree for possession of the plots in suit in case the plaintiff is not found to be in possession of them.

Upon the pleas raised by the defendants, the learned Munsif framed the following issues:—

1. Is the plaintiff the superior proprietor of village Mahulara?
2. Are the decisions in the previous suits between the defendants and the lessee, (Babu Bipin Chander Chatterji), binding on the plaintiff, and is he estopped from denying the defendants' under-proprietary title to the plots in suit?
3. Are the defendants under-proprietors of the plots in suit?
4. Have the defendants in any case acquired title to the plots in dispute by adverse possession?
5. To what relief, if any, is the plaintiff entitled?

The finding of the learned Munsif on Issue No. 1, is that the plaintiff is the superior proprietor of the plots in suit. His finding on the second issue is the negative, and he held that the plaintiff is not estopped from denying the defendants' under-proprietary title to the plots in dispute. His finding on the 3rd issue is that the defendants' ancestors did obtain a decree for under-proprietary rights in the plots in suit, but that decree is not binding on the plaintiff, because Thakurain Raghunath Kuar, the proprietor of the estate had previously parted with her rights by executing a deed of gift in favour of her nephew Bisheshwar Bakhsh Singh. His finding on the 4th Issue was that the defendants had not acquired title to the plots in suit by adverse possession. He accordingly decreed the plaintiff's suit for possession with costs.

In appeal the learned Subordinate Judge

of Fyzabad upheld the findings of the trial Court and dismissed the appeal of the defendants. Dissatisfied with the judgment and decree of the lower Appellate Court, the defendants have filed this second appeal.

We have heard the learned Counsel of both parties at great length, and have given them every opportunity of presenting their respective contentions before us. For the correct understanding of this case, it is necessary to give a short history of the Sihipur estate. One Nihal Singh was the owner of the *Taluqa* of Sihipur. He had married five wives. He had no issue. He made a will giving his estate to his wives in succession one after the other in the order of their seniority. The will of Nihal Singh also laid down that after the death of his five widows, Sheo Ambar Singh, the grandson of Harpal Singh, the brother of Nihal Singh, should become the full owner of the estate. The third wife of Nihal Singh was Thakurain Raghunath Kuar. After the death of the first two wives of Nihal Singh, Thakurain Raghunath Kuar came into possession of the estate. The second summary settlement was made with her in the year 1858 by the British Government, and a *sanad* was granted to her and she became the *taluqdarya* of the estate. She executed a deed of gift in favour of her nephew Bisheshwar Bakhsh Singh on February 27, 1877, and thereupon Thakurain Ramanand Kuar, the fourth wife of Nihal Singh, brought a suit against her and her donee Bisheshar Bakhsh Singh, for a declaration that she was the reversioner and was entitled to succeed to the estate of Sihipur after the death to Thakurain Raghunath Kuar, who held only a life-estate and was only trustee, notwithstanding anything contained in Act I of 1869. The contention on behalf of Thakurain Raghunath Kuar in that suit was that, by virtue of the summary settlement made with her on December 2, 1858, and in virtue of the grant of a *sanad* on March 15, 1861, followed by the entry of her name in the 1st and 3rd of the lists prepared by the Chief Commissioner of Oudh under s. 8 of the Oudh Estates Act, I of 1869, she had been conferred an absolute estate and she had power to alienate the estate to whom she chose. On the other hand, the contention on behalf of Thakurain Ramanand Kuar was that, even if it be accepted that the legal title was thus conferred upon Thakurain Raghunath Kuar, she had so conducted herself that she must be deemed in equity to be bound to hold the estate in trust for the purpose of carrying into effect the provision of her husband's will. The suit filed by Thakurain Ramanand Kar was ultimately decided by the Privy Council, and their judgment is reported in *Thakurain Ramanand Kuar* v. *Thakurain Raghunath Kuar* 9 I. A. 41 (1). The question for determination there was whether or not Thakurain Raghunath Kuar had so conducted herself that she must be deemed in equity to hold the estate in trust for the purpose of carrying into effect the provisions of her husband's will.

Their Lordships of the Privy Council held that:

"The doctrine that, nothwithstanding the confiscation of the land in Oudh by the proclamation of Lord Canning, its restoration by his circular letter of October 10, 1859, affirming the absolute title of the grantees of summary settlements, and the granting a *sanad* with the full power of alienation, confirmed by the Oudh Estates Act of 1869, the legal owner may, either by express agreement or by his conduct, constitute himself in equity a trustee for others as to the whole or part of the beneficial interest, has been affirmed by many decisions of this Board."

The Privy Council, therefore, allowed the appeal of Thakurain Ramanand Kuar, and held that she was entitled to the relief she prayed for, namely, that it may be declared that she was entitled to succeed to the estate after the death of the first defendant (Raghunath Kuar), and they further held that the deed of gift to the second defendant (Bisheshar Bakhsh Singh) conferred no more than the life-interest of the first defendant Thakurain Raghunath Kuar.

Anant Bahadar Singh, the grandson of Sheo Amar Singh, who, under the will of Nihal Singh, was given the rights of remainderman after the life-estates of the five widows of Nihal Singh, brought a suit against Thakurain Raghunath Kuar, and the question for determination in his case was whether Thakurain Raghunath Kuar was to be declared *quo ad* Anant Bahadur Singh to hold the estate in trust for carrying into effect the provisions of the will of Nihal Singh, and their Lordships of the Privy Council held that Anant Bahadur Singh was entitled to the declaration he sought: *Thakurain Ramanand Koer* v. *Thakurain Raghunath Kuar* (1).

These two decisions of their Lordships of the Judicial Committee make the legal position of Thakurain Raghunath Kuar quite clear. Though she was held to have an absolute title to the Sihipur estate under the *sanad* followed by the entry of her name

(1) 9 I A 41; 8 C 769; 11 C L R 149; 4 Sar. 316; 6 Ind. Jur. 328 (P C).

in the 1st and 3rd lists prepared under s. 8 of Act I of 1869, the Privy Council nevertheless held that, by her acts and declarations, she constituted herself a trustee for the purpose of carrying into effect the will of her husband, and that, therefore, Thakurain Ramanand Kuar, her co-widow, and Anant Bahadur Singh, the grandson of Sheo Ambar Singh, the remainderman, were each entitled to the declaration they sought against her. Anand Bahadur Singh, the grandson of Sheo Amar Singh, who had been given a vested remainder in the Sihipur estate predeceased Thakurain Raghunath Kuar, and so, on the death of Thakurain Raghunath Kuar on November 10, 1911, Thakurain Sri Ram Kuar, the widow of Anant Bahadur Singh, became entitled to the Sihipur estate. The Court of Wards, on behalf of Thakurain Sri Ram Kuar, sued Thakur Bisheshar Bakhsh Singh, the donee of Raghunath Kuar, and won the case.

Thakurain Sri Ram Kuar executed a deed of gift on February 28, 1911, in favour of her brother Kampta Shiroman Prasad Singh, and she executed a sale-deed in favour of the same brother on May 2, 1911. Babu Kampta Shiroman Prasad Singh gifted the *taluqa* of Sihipur on June 12, 1926, to the present plaintiff Sri Madho Prasad Singh, who styles himself in the plaint as the adopted son of Anant Bahadur Singh. Thus, the plaintiff in the present suit derives his title from Sheo Ambar Singh who had a vested remainder in the Sihipur estate under the will of Nihal Singh.

It has been found by the lower Courts and is admitted before us that Hanuman Singh and Ram Singh were the ancestors of the present defendants-appellants, and they obtained a decree for under-proprietary rights in the plots in suit in the present case against Thakurain Raghunath Kuar. Both the lower Courts have, however, held that this decree of the Settlement Court Ex. A-20, is not binding on the present plaintiff because Hanuman Singh and Ram Singh filed their suit in the Settlement Court on April 27, 1877, whereas two months before that, on February 27, 1877, Thakurain Raghunath Kuar had executed a deed of gift in favour of her nephew Bisheshwar Bakhsh Singh, and so had parted with all her rights in the Sihipur estate, and, therefore, the decree obtained by Hanuman Singh and Ram Singh was not binding on the plaintiff, because Thakurain Raghunath Kuar did not represent the Sihipur estate at the time that she was being sued by Hanuman Singh and Ram Singh. In our opinion the reasoning of the lower Courts on this point is not sound. Thakurain Raghunath Kuar had no doubt parted with her life-estate by executing the deed of gift in favour of her nephew Bisheshar Bakhsh Singh, but it has been held by their Lordships of the Privy Council that she nevertheless constituted herself a trustee both on behalf of the remainderman Sheo Ambar Singh and his grandson Anant Bahadur Singh as well as on behalf of her co-widow Thakurain Ramanand Kuar, for the purpose of carrying into effect the terms of her husband's will. It is, therefore, clear that in spite of her executing the deed of gift in favour of her nephew, she still represented the Sihipur estate held by her as a trustee on behalf of the remainderman and her co-widow. Indeed, it seems to us that if Hanuman Singh and Ram Singh had only brought a declaratory suit against Bisheshar Bakhsh Singh, the donee of Thakurain Raghunath Kuar, the under-proprietary decree that they might have obtained against him would have bound only Bisheshar Bakhsh Singh and nobody else, and certainly would not have been binding on the estate. It is also to be noted that the decree obtained by Hanuman Singh and Ram Singh against Thakurain Raghunath Kuar for under-proprietary rights was obtained by them after contest. We have examined the Settlement Court file sent for at the instance of the plaintiff-respondent, and we find from it that the suit of Hanuman Singh and Ram Singh for a declaration that they had under-proprietary rights was hotly contested by Thakurain Raghunath Kuar; and her *mukhtar* Thakur Prasad, who defended the case on behalf of Raghunath Kuar stated before the Settlement Officer that the groves and jungles land in dispute, and the disputed *sayar* income, had never been in the enjoyment of the plaintiffs within limitation, and that in 1262 and 1263, *Fasli*, the village in dispute was in the possession of the defendant Thakurain who had been collecting the *sayar* income, and that the plaintiffs of that suit, Hanuman Singh and Ram Singh, were not in possession and had got no rights. Upon the pleas raised by Thakurain Raghunath Kuar, the Settlement Court framed an issue as follows:—

"During the time that defendant was in possession of the village in question, were the plaintiffs as under-proprietors in possession of the *sayar* income in

question in subordination to the rights of the defendant within limitation or not?"

The judgment of the Settlement Court, Ex. A-20, shows that this issue was decided in favour of the plaintiffs and they were held to have under-proprietary rights in respect of the land in suit. The words of the decree are as follows:—

"Decree is *takraryia mahtati baqat mansuba mirisan mudayanwa maq buza mudayan hasab tafsil zail wa makanat mazkuna khas mudayan ander abadi wa pani wa dhaki wa rasdi talab wa jungal muhtadavia se, wake mauza Mahulera pargana Pachimrat ba haq mudayan ke bo, wa baqi dawa mudayan* dismiss *ho.*"

This decree for under-proprietary rights which had been obtained by the predecessors-in-interest of the defendants-appellants from the Settlement Court after contest with Thakurain Raghunath Kuar is, in our opinion, binding on the Sihipur estate, because Thakurain Raghunath Kuar, as a trustee on behalf of all the beneficiaries under the will of her husband Nihal Singh, represented in this litigation the interests of the remainderman Sheo Ambar Singh and his grandson Anant Bahadur Singh. Just as a trustee cannot set up any title adverse to that of the *cestui que trust*, so also the beneficiary cannot repudiate the *bona fide* acts of the trustee entered upon for the benefit of the beneficiary or the *cestui que trust*.

The learned Counsel for the plaintiff-respondent had relied most strongly upon a judgment of a Bench of this Court in First Civil Appeal No. 22 of 1929, *Dhani Singh* v. *Shri Mahdo Prasad Singh* decided on November 25, 1929. This decision is not between the parties to the present suit and is not binding on the appellants and, although it is entitled to the greatest respect from us, we are not bound to follow it, as, in our opinion, the true legal position of Thakurain Raghunath Kuar was not explained by the Counsel for the appellant in that case to the learned Judges who decided that case and were never asked to consider the position of Thakurain Raghunath Kuar as a trustee of the Sihipur estate on behalf of the remainderman Sheo Ambar Singh and his grandson Anant Bahadur Singh. What was argued in that case was that Thakurain Raghunath Kuar had parted with all interest and all title to the estate when she executed the deed of gift in favour of her nephew Bisheshar Bakhsh Singh, and that therefore she could not represent the Sihipur estate in any sense and that, therefore, the decree for under-proprietary rights obtained by the appellant in that case did not bind the Sihipur estate, and the appellant there could not obtain any decree for under-proprietary rights as claimed by him. The position taken up by the learned Judges in the case above referred to is not in conformity with the judgment of their Lordships of the Privy Council reported in *Thakurain Ramanand Kuar* v. *Thakurain Raghunath Kuar* (1), wherein their Lordships held that the deed of gift executed by Thakurain Raghunath Kuar in favour of her nephew Bisheshar Bakhsh Singh only conferred upon Bisheshar Bakhsh Singh the life estate of Thakurain Raghunath Kuar, and that in spite of the execution of this deed of gift Raghunath Kuar still continued to represent the estate of Sihipur and constituted herself a trustee for the purpose of carrying into effect the will of her husband and that, therefore, Thakurain Ramanand Kuar and Anant Bahadur Singh the grandson of Sheo Ambar Singh, the remainderman under the will of Nihal Singh, were each entitled to the declaration they sought. The legal position ascribed to Thakurain Raghunath Kuar by their Lordships of the Privy Council is analogous to the position which they ascribed to Rani Sadah Bibi in the Mahona Case, which was originally tried by one of us, and which went up in appeal to their Lordships of the Privy Council, and is found reported in *Raja Mohan* v. *Nisar Ahmad Khan* 60 I. A. 103 (2) which was decided in 1933. In that case Lord Wright in delivering the judgment of the Board observed as follows:—

"The title conferred under the Act, (Act I of 1869) did indeed give the registered *taluqadar*, (Rani Sadah Bibi), the absolute legal title as against the estate and adverse claimants to the *taluqa*, but it did not relieve the *taluqdar* of any equitable obligations to which, with a view to the completion of the Settlement, he might have subjected himself by his own valid agreement."

Similarly, in this case, Thakurain Raghunath Kuar had recognised the rights of her co-widow and of the remainderman and had constituted herself in equity a trustee for these persons as to the whole or part of the beneficial interest vested in them. That being the legal position of Thakurain Raghunath Kuar, a suit brought against her by Hanuman Singh and Ram Singh for a declaration that they held under-proprietary rights in the plots in

(2) 143 Ind. Cas. 395; 60 I A 103; A I R 1933 P C 95; 64 M L J 455; (1933) M W N 303; Ind. Rul. (1933) P C 156; 8 Luck 65; 10 O W N 601 (P C).

suit cannot be held to be a suit filed against a stranger who had no interest in the *taluqa* of Sihipur. In our opinion Anant Bahadur Singh was in law the beneficiary of the trust created by Thakurain Raghunath Kuar by her acts and admissions, and as such, he is legally bound by the decree obtained after contest fairly and squarely by Hanuman Singh and Ram Singh against Raghunath Kuar; and if Anant Bahadur Singh was bound by that decree of 1878, the present plaintiff, who derives his title from the widow of Anant Bahadur Singh, is equally bound.

We therefore hold that the defendants-appellants are under-proprietors of the plots in suit in the present case and that plaintiff is bound to recognise their under-proprietary rights in these plots.

In *Muhammad Rashid-ud-din Ashraf* v. *Ram Sukh & Sons* 24 O. C. 342 (3), it was held by a learned Judge of the late Court of the Judicial Commissioner of Oudh that the letters of the Government of India, dated October 10 and 19, 1859, which formed the First Schedule to the Oudh Estates Act, I of 1869, have not by themselves the effect of restoring all under-proprietary rights which existed before the annexation of Oudh, and that before such a right can be relied on, it must be shown that it had been recognised by the Government after the date of Lord Canning's Proclamation, either by entry in the Settlement Records or by a settlement decree or in some other way.

In the present case the defendants-appellants have proved their under-proprietary rights to the plots in suit by obtaining a decree from the Settlement Court after a contest with the superior proprietor or whose name was entered in Lists Nos. 1 and 3 of the Lists prepared under s. 8 of the Oudh Estates Act. By s. 10 of the Oudh Estates Act it is laid down that the Court shall take judicial notice of the said lists, and regard them as conclusive evidence that the persons named therein are such *taluqdars* or grantees.

We, therefore, reverse the finding of the lower Courts on Issue No. 3 and hold that the defendants-appellants have proved themselves to be under-proprietors of the plots in suit. The next point for determination is whether the decisions in the previous suit between the defendants and the lessee of the Sihipur Estate, Babu Bipin Chander Chatterji, are binding on the present plaintiff, and whether the plaintiff is estopped from denying the defendants' under-proprietary title to the plots in dispute. In our opinion, the decision obtained by the defendants against Babu Bipin Chander Chatterjee is not binding on the present plaintiff. It has been held in *Shripadbhat Anantbhat Joshi* v. *Rama Babaji Lathi* A. I. R. 1927 Bom. 270) (4), that a previous decision in a suit by the lessee against a third person cannot operate as *res judicata* in a subsequent suit by the lessor against the same person as the lessee does not occupy a representative capacity and the lessor cannot be said to be a person claiming through his lessee. We decide Issue No. 2 against the defendants and in favour of the plaintiff-respondent.

As regards the question of possession, the plaintiff himself prayed that a decree for possession be granted to him along with a decree for a declaration that the defendants are not under-proprietors of the plots in suit. This itself shows that the plaintiff had serious doubts as to his being in possession of the plots in dispute. The lower Courts have held that the possession of the plaintiff as proprietor should be presumed. No doubt the juidicial possession of the plaintiff as superior proprietor of the estate must be presumed in his favour, but, if the defendants are held to be under-proprietors, as we have held them to be, possession as under-proprietors of the plots in suit must also be presumed in their favour. As early as 1878, the Settlement Court after due enquiry and after contest by the *Taluqdarya* of Sihipur, held that Hanuman Singh and Ram Singh were in actual possession of the plots in suit as under-proprietors. That position was re-affirmed in 1927 and 1928 by the judgments of the Court of the District Judge of Fyzabad and of this Court, Ext. A-4 and Ex. A-6. Even though these judgments are not binding on the plaintiff, still they may be used under s. 13 of the Indian Evidence Act as instances when the possession of the defendants over the plots in suit was challenged and found to be proved. The Settlement Court decree as well as the judgments of this Court and of the Court of the District Judge of Fyzabad lend support to the oral evidence adduced by the defendants, and prove that they have been in posses-

(3) 65 Ind. Cas. 514; 24 O C 342.

(4) 101 Ind. Cas. 340; A.I.R 1927 Bom. 270.

sion ever since they obtained a decree for under-proprietary rights. It is true that the Indian Evidence Act does not make a finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case where the parties are not the same, but it seems to us that the lower Courts have rejected the oral evidence of possession adduced by the defendants on the legal presumption that possession must rest with the superior proprietor regardless of the fact that for the last 50 years and more the defendants have been openly asserting their title to the plots in suit as under-proprietors, and have in 1878 obtained a decree for under-proprietary rights in their favour in respect of these plots, and although the decrees Ex. A-4 and A-6, are not binding upon the plaintiff of the present suit, still the title of the defendants as under-proprietors having been established as against the present plaintiff, possession of the plots in suit as under-proprietors must also be deemed to rest with them, and the oral evidence adduced by the defendants on the question of possession should have been believed. See *Kumar Gopika Raman Roy* v. *Atal Singh* A. I. R. 1929 P. C. 99 (5).

It is true as laid down by their Lordships of the Privy Council in *Secretary of State for India* v. *Rameshwaram Devasthanam* A. I. R. 1934 P. C. 112 (6), that under s. 100 of the Code of Civil Procedure the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower Appellate Court unless they are vitiated by some error of law. In the present case, we think that the finding of the lower Appellate Court on the question of possession has been vitiated by the error of law that the evidence of the defendants has been rejected solely on the legal presumption that the superior proprietor must be deemed to be in possession, and the question of possession has not been decided as a pure question of fact but only upon a legal presumption. Had the lower Courts found that the defendants had proved themselves to be under-proprietors, and that the decree of the Settlement Court was binding upon the present plaintiff, they would never have arrived at the conclusion that the possession of the defendants as under-proprietors had not been proved.

For the reasons given above, we hold on the the evidence on the record that the defendants have proved themselves to be in possession of the plots in suit since the decree of 1878 in their favour.

The result is that we allow this appeal with costs, set aside the judgment and decree of the lower Appellate Court and dismiss the plaintiff's suit with costs of both Courts.

D. *Appeal allowed.*

(5) 114 Ind. Cas. 561; A I R 1929 P C 99; 33 C W N 463; 29 L W 674; 49 C L J 327; 10 P L T 391; 31 Bom. L R 734; (1929) A L J 246; 56 M L J 562 (P C).

(6) 148 Ind. Cas. 778; A I R 1934 P C 112; 6 R P C 134; (1934) M W N 433; 66 M L J 595; 39 L W 613; 11 O W N 775; 38 C W N 533; 59 C L J 262; 36 I L R 93; 36 Bom. L R 539; 57 M 652; 16 P L T 7; 61 A 163 (P C).

ALLAHABAD HIGH COURT

Second Civil Appeal No. 193 of 1933
March 14, 1935
ALLSOP, J.

ABDUL SHAKUR KHAN—PLAINTIFF—APPELLANT
versus
Babu RAJENDRA KISHORE SARAN SINGH—DEFENDANT—RESPONDENT

Limitation Act (IX of 1908), Sch. I, Arts. 97, 115, s. 14—Promise to execute lease—Consideration paid on October 26, 1926, and January 1, 1927—Breach of promise—Suit for return of consideration filed in Small Cause Court on October 26, 1929—Small Cause Court holding it has no jurisdiction and ordering presentation in proper Court, on May 21, 1930—Suit presented on June 11, 1930—Cause of action, when arises—Suit, whether in time.

The plaintiff instituted a suit to recover two sums of Rs. 15 paid by him to the other party on October 26, 1926, and January 1, 1927. His case was that he made these payments by way of premium or *nazrana* because the defendant had promised to execute in his favour a lease of a certain holding. He claimed that the sums should be returned on the ground that the defendant had resiled from his promise and refused to execute the lease. The suit was originally instituted in the Court of Small Causes on October 26, 1929. That Court decided that it had no jurisdiction and returned the plaint for presentation to the proper Court on May 21, 1930. It was presented on June 11, 1930;

Held, that this was clearly a claim which was governed either by Art. 97 of the Limitation Act or by Art. 115, that is, it was either a claim for money paid upon an existing consideration which afterwards failed in that the payments were made in consideration of the promise to execute the lease and the promise was afterwards repudiated or it was claim for compensation for the breach of any contract, express or implied, not in writing registered and not specially provided for.

Held, further that as the second payment was made on January 1, 1927, it was obvious that the breach of the promise occurred after that date, and the cause of action arose from the breach. As the plaintiff was entitled to the benefit of the provisions of s. 14 of the Limitation Act his claim for both the sums was clearly within time.

S. C. A. from the decision of the Second Additional Subordinate Judge of Allahabad, dated October 27, 1932.

Mr. *Basudeva Mukerji*, for the Appellant.

Mr. *Banke Behari*, for the Respondent.

Judgment.—This second appeal gives rise to a question of limitation. The plaintiff instituted a suit to recover two sums of Rs. 75 paid by him to the other party on October 26, 1926 and January 1, 1927. His case was that he made these payments by way of premium or *nazrana* because the defendant-respondent had promised to execute in his favour a lease of a certain holding. He claimed that the sums should be returned on the ground that the defendant-respondent had resiled from his promise and refused to execute the lease. The defendant-respondent did not allege that he was prepared to execute the lease. His defence was that there had been a subsequent arrangement by which the claims of the parties had been adjusted and that for that reason the amounts were no longer due. This defence was disbelieved by the Courts below. I am left, therefore, with these facts that the plaintiff advanced these two sums on the faith of a promise made by the other party that he would execute the lease in the plaintiff's favour and that subsequently the defendant refused to execute the lease.

The suit was originally instituted in the Court of Small Causes on October 26, 1929. That Court ultimately decided that it had no jurisdiction and returned the plaint for presentation to the proper Court on May 21, 1930. It was presented on June 11, 1930. The learned Judge of the lower Appellate Court came to the conclusion, and rightly so, that the plaintiff was entitled to the benefit of the provisions of s. 14 of the Limitation Act for the period from October 26, 1929 to May 21, 1930, that is for a period of very nearly seven months. He decided that the plaintiff's claim in respect of the payment made on January 1, 1927 was, therefore, within limitation on June 11, 1930, but he held that the claim for the other payment made on October 26, 1926, was barred by time, because it was outside limitation by the period extending from May 21, 1930 to June 11, 1930.

The plaintiff has only himself to blame for the decision which was reached. In his plaint he asserted that his cause of action arose on October 26, 1926 and January 1, 1927. On the consideration of the facts alleged it is clear enough that his cause of action did not arise on those dates. This was clearly a claim which was governed either by Art. 97 of the Limitation Act or by Art. 115, that is, it was either a claim for money paid upon an existing consideration which afterwards failed in that the payments were made in consideration of the promise to excuse the lease and the promise was afterwards repudiated or it was a claim for compensation for the breach of any contract express or implied not in writing registered and not specially provided for. It is immaterial which of these articles is applied to the facts of the case. It has been suggested on behalf of the respondent that the plaintiff rightly said that his cause of action arose on October 26, 1926 and January 1, 1927, but it is obvious that this is not a good argument because it is inconceivable that the plaintiff could have instituted a suit for the recovery of the money advanced on October 26, if he had wished to institute it on the next day, October 27. He would clearly then have had no claim for the refund of the money. In one sense of course a part of the cause of action did arise on the dates mentioned because there would have been no cause of action if no money had been advanced, but it is also evident that these were not the complete causes of action because the plaintiff could not claim his money until there was a breach of the promise to excuse the lease. As the second payment was made on January 1, 1927 it is obvious that the breach of the promise occurred after that date, and the cause of action really arose from the breach. As the plaintiff was entitled to the benefit of the provisions of s. 14 of the Limitation Act, his claim for both the sums was clearly within time.

The only question is whether the plaintiff should not be alleged to enforce his claim because in his plaint he wrongly stated that the cause of action occurred in respect of the first payment on October 26, 1926 and omitted to mention the other date when the breach took place. I do not think that meticulous accuracy in drafting of plaints can be demanded in this country. It does not appear that the inaccuracy in the plaint could have given rise to any difficulty on the part of the defendant or could have affected

the defences which he could have taken. I hold that the whole claim was within limitation and that the mere inaccuracy in the plaint is not sufficient to justify the dismissal of the claim. I, therefore, allow the appeal, set aside the order of the Court below and restore the order of the learned Munsif. The appellant will get his costs in the lower Appellate Court, but the parties will bear their costs in this Court. Leave to file an appeal under the Letters Patent is refused.

D. *Appeal allowed.*

PATNA HIGH COURT

Appeal from Appellate Decree No. 762 of 1931

January 25, 1935

FAZL ALI AND ROWLAND, JJ.

NANDO KAHAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Sri BHUP NARAIN SINGH AND ANOTHERS—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), s. 28, Sch. I, Art. 47—Scope of—Criminal Procedure Code (Act V of 1898), s. 145—Proceedings under, decided in favour of defendant No. 2—Defendant No. 1 bringing suit for possession three years after—Suit decreed—Plaintiff resisting possession—Resistance ineffectual—Suit by plaintiff for declaration of title and recovery of possession—Suit, whether barred—Civil Procedure Code (Act V of 1908), O. XXI, r. 100.

Section 28 of the Limitation Act provides that after the expiry of the period prescribed for instituting a suit for possession of any property, the person who should have instituted such suit but has failed to do so, shall cease to have any right to the property. There cannot be a revival of title of which there has been a statutory extinguishment. [p. 1095, col. 2]

Section 145 (6) of the Code of Criminal Procedure provides that if the Magistrate decided that one of the parties was or should be treated as being in possession of the land in dispute he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law. Thus if the successful party is evicted by means of a suit by a person other than the parties to the proceeding within the period of three years, the order of the Magistrate being rendered ineffectual, the shorter period of limitation ceases to run against the unsuccessful party, and there can be no room left for the application of Art. 47, Limitation Act, and s. 28, Limitation Act, will not become operative until the expiry of the limitation period laid down in the ordinary law. [p. 1096, col. 2.]

A proceeding under s. 145, Criminal Procedure Code, in respect of certain land between the plaintiff and defendant No. 2 was decided in favour of the latter and more than three years after this the defendant No. 1 brought a suit against defendant No. 2 and got possession in spite of plaintiff's application under O. XXI, r. 100, Civil Procedure Code. Thereupon the plaintiff brought a suit for declaration of title and recovery of possession. The plaintiffs main contention was that Art. 47, Limitation Act, applies only as between original parties to a proceeding under s. 145, Criminal Procedure Code, or those claiming under them and that it could not, therefore, be availed of by defendant No. 1 who was neither a party to the proceeding nor was a person claiming under one of the parties:

Held, (1) that s. 28, Limitation Act, was a complete answer to the plaintiff's contention; [p 1095, col 1.]

(2) that since it was not disputed that defendant No. 2 in whose favour the proceeding under s. 145, Criminal Procedure Code was decided was in possession of the disputed land for more than three years and as no step was taken by the plaintiffs to question the order under s. 145 and to evict defendant No. 2 in due course of law within a period of three years which was the period of limitation as provided by Art 47, Limitation Act, whatever title (if any) the plaintiffs had to the property, was completely extinguished; [*ibid*]

(3) that in the circumstances it was not at all necessary for defendant No. 1 to implead the plaintiffs in the suit which they subsequently brought against defendant No. 2 and the plaintiffs not having taken any steps to evict defendant No. 2, could not now question the title of defendant No. 1. *Ganga Gobind Mundul* v. *The Collector of the Twenty-four Parganas* (1), *Bhagwan Ramanuj* v. *Ram Krishan Bose* (2) and *Jogendra Kishore Roy Chowdhury* v. *Brojendra Kishore Roy Chowdhury* (4), referred to, *Aukhil Chandra Chowdhury* v *Mirza Delawar Hussain* (3) and *Pakki Adinarayana* v. *Nambura Suramma* (5), dissented from. [*ibid*]

C. A. from the decision of the Additional Subordinate Judge of Ranchi, dated January 13, 1931, reversing that of the Munsif of Hazaribagh, dated July 29, 1929.

Messrs. *Phulan Prasad Varma* and *Harinandan Singh*, for the Appellants.

Messrs. *S. M. Mullick* and *S. C. Mazumdar*, for the Respondents.

Fazl Ali, J.—The question to be decided in this appeal is whether the plaintiffs' suit is barred under the provisions of Art. 47 read with s. 28 of the Indian Limitation Act of 1908. The trial Court held that the suit was not barred but the lower Appellate Court came to the opposite conclusion and dismissed the suit. Thereupon the plaintiffs filed this Second Appeal which has been referred to us by Macpherson, J., of this Court before whom it originally came up for hearing.

The plaintiffs have sued for a declaration of their title to and recovery of possession of certain lands, two-thirds of which were settled by one *Mahanth* Dayal Das with them in 1898 and the remaining one-third was purchased by them in 1901 under a registered sale deed. The plaintiffs were duly entered in the Record of Rights as *raiyats* of these lands but in 1921 one *Mahanth* Sarup Narain Das (defendant No. 2) who had meanwhile succeeded *Mahanth* Dayal Das claimed possession of the lands on the ground that the plaintiffs were *benamidars* of *Mahanth* Dayal Das and in a proceeding under

s. 145 of the Code of Criminal Procedure which followed, an order was passed declaring *Mahanth* Sarup Narain Das to be entitled to possession and forbidding any disturbance of his possession till he was evicted from the property in due course of law. More than three years after this order the first defendant Bhup Narain Singh as landlord of the village instituted a suit against *Mahanth* Sarup Narain Das (defendant No. 2) for declaration of his title to and recovery of possession of the holding and ultimately a decree was passed in his favour and he duly obtained possession under the decree in spite of an application made by the plaintiff under O. XXI, r. 100 of the Code of Civil Procedure. The plaintiffs thereupon brought the suit out of which this appeal has arisen.

The plaintiffs' main contention is that Art. 47 applies only as between original parties to a proceeding under s. 145 or those claiming under them and that it cannot, therefore, be availed of by defendant No. 1 who was neither a party to the proceeding nor is a party claiming under one of the parties. It appears to me, however, that s. 28, is a complete answer to their contention and I have no doubt that the suit has been rightly dismissed by the lower Appellate Court. Section 28 of the Indian Limitation Act runs thus:—

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

It is not disputed that *Mahanth* Sarup Narain Das (defendant No. 2) in whose favour the proceeding under s. 145 was decided was in possession of the disputed land for more than three years and as no step was taken by the plaintiffs to question the order under s. 145 and to evict defendant No. 2 in due course of law within a period of three years which is the period of limitation as provided by Art. 47, it is clear that whatever title (if any) the plaintiffs had to the property was completely extinguished. In the circumstances it was not at all necessary for defendant No. 1 to implead the plaintiffs in the suit which they subsequently brought against *Mahanth* Sarup Narain Das, and the plaintiffs not having taken any steps to evict *Mahanth* Sarup Naran Das cannot now question the title of defendant No. 1. It is to be noted that s. 28 of the Limitation Act provides in clear terms that after the expiry of the period prescribed for instituting a suit for possession of any property, the person who should have instituted such suit but has failed to do so, shall cease to have any right to the property. As Macpherson, J., has pointed out, there cannot be a revival of title of which there has been a statutory extinguishment. That this is so will be clear on merely reading the section but the matter is also covered by very high authority. In *Ganga Gobind Mundul* v. *The Collector of the Twenty-four Parganas* (1), the Judicial Committee has clearly pointed out that after the expiry of the period of limitation the law declares not simply that the remedy is barred but that the title is extinct in favour of the possessor. In *Bhagwan Ramanuj* v. *Ramkrishan Bose* 74 Ind. Cas. 561 (2), Fletcher, J., dealing with s. 28 of the Limitation Act, observed:—

"The learned Judge, however, has considered that in a case of this nature, when the suit is barred, the title still remains vested in the plaintiff That obviously is not so; under s. 28 of the Indian Limitation Act, it is expressly provided that at the expiration of the period prescribed by the Act for limitation of suits, not only is the remedy barred but the right is gone. That is quite clear. That being so, the statute has operated to revoke the estate that was originally vested in the plaintiff, and to confer a statutory estate upon the defendants."

It appears that this case subsequently went up to the Judicial Committee and the decision of Fletcher, J., and the other learned Judge who had concurred in it, was upheld.

I may refer to two cases which have been greatly relied on by the plaintiff-appellant and which induced Macpherson, J. to refer the appeal to a Division Bench. The first case is that of *Aukhil Chunder Choudhary* v. *Mirza Delawar Hossain* (3) which was decided by the Calcutta High Court in 1877 and the facts of which were briefly these:—

In a proceeding under s. 318 of the old Code of Criminal Procedure (to which s. 145 of the present Code corresponds) the Magistrate in January 1871 had directed possession to be given to certain person who may be described as the Roy defendants of the lands which were the subject-matter of the proceeding. So in 1872 the defendants who were appellants in the High Court, instituted a suit against the Roy defendants to set aside the Magistrate's

(1) 11 M I A 345; 7 W R 21; 1 Suther 676; 2 Sar 284.

(2) 74 Ind. Cas. 561; A I R 1922 P C 184; 26 C W N 722 (P C).

(3) 6 C L R 93.

order and in 1873 they obtained a decree for possession in respect of the disputed land. More than three years after the Magistrate's order the plaintiff-respondents instituted two suits in March 1874 and January 1875, respectively, one with respect to ten annas and the other with respect to the remaining six annas of the disputed land and they impleaded the defendant-appellants as parties to these suits in 1875. A question arose as to whether the suit was barred under Art. 46 of the Limitation Act of 1877 (to which Art. 47 of the present Act corresponds) and the learned Judges of the Calcutta High Court held that it was not barred and observed :—

"We think, that Art. 46 can only apply between the parties whose possession was confirmed by the Magistrate and each one of the parties to that proceeding who was claiming possession against them, and that it does not apply in favour of one of those parties who subsequently succeed by a regular suit in ousting them."

In a subsequent case, however, *Jogendra Kishore Roy Chaudhary* v. *Brojendra Kishore Roy Chaudhary* (4) Hill and Rampini, JJ., felt great hesitation in following this decision and in referring the matter to the Full Bench observed:—

"Now we must say we fell great hesitation in following the above cited ruling. It is certainly not warranted by the terms of Art. 47 into which it virtually read the words 'provided the suit is between the parties to the proceeding under the Criminal Procedure Code, in which the order respecting the possession of the property was passed' which are not to be found there. It is, therefore, in reality a piece of legislation, and it gives no reason for the view it expresses. Reason might perhaps be found for the ruling in the argument that it is hard on a person bound by an order under s. 145 of the Criminal Procedure Code, that he should be bound, as it has been said, for all time, though the possession of the property may have passed from his opponent to some third party. On the other hand, it may be the policy of the law, and perhaps a sound one, that, when proprietors of land, dispute respecting the possession of land in such a way as to cause a likelihood of a breach of the peace, the party found to be out of possession should have only three years instead of (not "all time" but) twelve years to bring his suit for recovery of possession in whosesoever hands the lands may be".

The Full Bench, however, found it unnecessary to decide whether the case in question had been correctly decided or not and in my opinion it is not necessary for us also to decide that point, because the facts as we find them in that case were entirely different from those of the present, the principal distinguishing feature being that in that case before the expiry of the period of three years prescribed by the Limitation Act, a suit had been brought by the defendant-appellants and the Roy defendants who were the successful party in the proceedings under s. 145 had been evicted from the possesssion of the property. That this was an important feature of the case is clear from the fact that the learned Judges of the Calcutta High Court laid some stress upon it observing as follows:—

"So far as the Magistrate's order is concerned, the present plaintiffs were only bound to respect the possession of the Roy defendants, or those claiming under them, unless they instituted a suit within three years. That possession having been got rid of, and the defendants having obtained possession adversely to the Roy defendants, we do not think that Art. 46 prevents the present plaintiffs from suing the present defendant in a regular suit for declaration of title".

Section 145 (6) of the Code of Criminal Procedure provides that if the Magistrate decided that one of the parties was or should be treated as being in possession of the land in dispute, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law. Thus if the successful party is evicted by means of a suit by a person other than the parties to the proceeding, within the period of three years, the order of the Magistrate being rendered ineffectual, the shorter period of limitation ceases to run againt the unsuccessful party, and there can be no room left for the application of Art. 47 and s. 28 will not become operative until the expiry of the limitation period laid down in the ordinary law.

The second case relied upon by the appellant is that of *Pakki Adinarayana* v. *Namburu Suramma* (5), in which it was held (*i*) that Art. 47 of the Limitation Act is not confined in its operation to orders under s. 145 of the Code of Criminal Procedure but also applies to an order passed under s. 522 of the Criminal Procedure Code restoring possession to a person who is dispossessed by a trespasser when a charge of criminal trespass is substantiated against the latter, and (2) that when a person against whom possession is claimed was not a party to the order in the criminal proceedings and did not claim under the party successful in such criminal proceedings and that order did not uphold his possession, the order is not binding on him and Art. 47 is no bar to a suit against such a person. The facts of this case are not clearly set out in the reported decision, but as far as they can be gathered, they appear to be that one of the items of

(4) 23 C 731.

(5) 86 Ind. Cas. 744; 48 M L J 372.

the disputed property which is referred to in the report as item No. 2 was the subject-matter of a charge of criminal trespass brought by the predecessors-in-title of defendants Nos. 1, 2 and 5 against the vendors of the plaintiffs and the latter being found guilty, possession was restored to the former. Subsequently defendants Nos. 1, 2 and 5 who claimed at one time to be the tenants of the Maharaja of Vizianagram (defendants No. 4) disclaimed all interest in the land and in certain survey proceedings the Maharaja's title was found against and the third defendant in the suit being found to be in possession; in Maharaja as well as defendants Nos. 1, 2 and 5 acquiesced in the decision of the survey authorities. The plaintiff thereupon brought the suit against the third defendant whose contention that Art. 47 was a bar to the suit was negatived and the suit was remanded to the Subordinate Court who had dismissed it on the preliminary ground of limitation without trial on the merits. Now, it does not appear from the report whether the survey proceedings which resulted in favour of defendent No. 3 took place within three years of the order under s. 522 of the Code of Criminal Procedure or more than three after that order. If it took place within three years of the order then in this case also the order under s. 522 having been practically nullified by the survey proceedings, the facts of this case would bear close resemblance to those of the case of *Aukhil Chunder Choudhary* v. *Mirza Delawar Hossain* (3), decided by the Calcutta High Court. However that may be, if the learned Judges of the Madras High Court in *Pakki Adinarayana* v. *Nambura Suramma* (5) or the learned Judges of the Calcutta High Court in *Aukhil Chunder's case* (3) (*ante*) intended to lay down that in no case can a suit be instituted by a party who was unsuccessful in a criminal proceeding under s. 145 or 522 of the Code of the Criminal Procedure against one who was not a party to such a proceeding be barred by s. 47, even though it may have been instituted more than three years from the order of the Criminal Court, I am unable to agree to such a wide proposition and would respectfully dissent from it.

In my opinion the plaintiff's suit was rightly dismissed by the lower Appellate Court and the appeal should be dismissed with costs.

Rowland, J.—I agree.

D. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Second Civil Appeal No. 134 of 1933

March 26, 1935

GANGA NATH, J.

KALP NATH CHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SAMAR DHUJ CHAND—PLAINTIFF—RESPONDENT

U. P. Land Revenue Act (III of 1901), s. 42—Scope of—Held, upon facts, that the decision of Revenue Court did not bar the civil suit—Agra Tenancy Act (III of 1926), s 121.

Section 42 of the Land Revenve Act applies where the tenancy is admitted and the dispute relates to the class or tenure of the tenant *Ramjas Singh* v. *Ram Harakh Panday* (1), relied on.

The scope of s. 42, U. P. Land Revenue Act, is very limited and is limited to the case of a dispute relating to class and tenure. Where the question is, who is the tenant, s. 42 has no relation to such a dispute. It is a mistake to read into s. 42 all the provisions of s. 121 of the Agra Tenancy Act. *Kashi Prasad* v. *Ambika Prasad* (2), relied on.

In an application for the correction of *jamabandi*, under s. 42 of the Land Revenue Act, 1901, the relief sought by the applicants was that their names might be entered as "tenant-grove-holders" against the land in dispute. The case in the Revenue Court was fought on the basis of possession. The applicant-defendant stated that he had been in possession over the land in dispute for about 16 years. The application was contested by the plaintiff. He stated in his written statement that he had been in possession over the land in dispute. The Revenue Court framed the following issues: "(1) Whether the defendant No. 2 (plaintiff) holds the grove in suit as proprietor? (2) Whether the applicant is in possession as a grove-holder?" The first issue was decided against the defendant (plaintiff in this case) and the second issue was decided in favour of the defendants-applicants (the appellants). No declaration was made by the Revenue Court as to whether the defendants were the tenants of the plaintiff. The only order passed by the Revenue Court was:—"The area shall be recorded as "grove" inside the *abadi* and the applicant as the grove-holder." There was nothing in the whole of the order to show who was the land-holder;

Held, that though the application was described as one under s. 42 of the Land Revanue Act, yet it could not have been made under it, because the applicants did not state that they were the tenants of the opposite parties. The dispute between the parties was regarding the entries in the annual register. Even if the order of the Revenue Court be regarded as one made under s. 42 of the Land Revenue Act, it cannot operate as *res judicata*. Hence the suit by the plaintiff in Civil Court for declaration that he (the plaintiff) was the owner in possession of the plots of land and the tress thereon is not barred.

S. C. A. from the decision of the Additional Sub-Judge, Gorakhpur, dated November 26, 1932.

Mr. *Shiva Prasad Sinha*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondent.

Judgment.—This is a defendants' appeal

and arises out of a suit brought against them by the plaintiff-respondent for a declaration that he (the plaintiff) was the owner in possession of the plots of land described in the plaint and the trees thereon situated in *Mauza* Narainpur, Tappa Shahpur and that the defendants had nothing to do with them. The plaintiff's case was that his predecessors-in-title were co-sharers in the village and the land in dispute was allotted to the plaintiff's predecessors in partition. The defendants have got their names entered in the revenue papers against the trees on the land in dispute.

According to the plaintiff's case, the plaintiff's grandfather and his brother had a share in the village. The plaintiff's grandfather's brother sold his share to Murli Manohar from whom it descended to his widow *Musammat* Param Jot Kuari. After the sale the village was partitioned and the disputed plots were allotted to the share of *Musammat* Param Jot Kuari. As the plots in dispute were behind the plaintiff's house, the plaintiff remained in their possession and planted trees on them. On June 6, 1929, the plaintiff obtained the plots in dispute by a deed of exchange executed by *Musammat* Param Jot Kuari. Thereafter the defendants applied to the Revenue Court for the entry of their names as grove-holders and the Revenue Court allowed their application. The plaintiff brought this suit for declaration of his proprietary title after the order of the Revenue Court.

The defendants contended that they were the owners of the land and the trees in dispute. They stated in cl. (*d*) of their additional statements:

"The plaintiff or his ancestors and the *zemindars* have nothing to do therewith; nor have they been ever in possession and enjoyment thereof. All the allegations made by the plaintiff to the contrary are evidently wrong and not correct. The contesting defendants are the owners in possession of the land in dispute and the trees standing thereon as *baghdars*. The plaintiff has no right to take objection or bring a suit."

The trial Court found in favour of the plaintiff and decreed the suit. On appeal, the learned District Judge, Gorakhpur, agreed with the findings of the trial Court and, confirming the decree of the trial Court, dismissed the appeal.

Both the Courts have found concurrently in favour of the plaintiff. The trial Court found that the plaintiff was the owner of the land and the trees and this finding was confirmed by the lower Appellate Court.

The learned Counsel for the appellants has urged that the order of the Revenue Court about the entry of the defendants' names in the revenue papers bars the present suit. As will appear from the application made by the defendants, it was an application for the correction of *jamabandi*, under s. 42 of the Land Revenue Act (III of 1901), as was stated in the application. The relief sought by the applicants was that their names might be entered as "tenant-grove-holders" against the land in dispute. The case in the Revenue Court was fought on the basis of possession. In para. 2 of their application the defendant Kalp Nath Chand stated that he had been in possession over the land in dispute for about 16 years. The application was contested by the plaintiff-respondent. He stated in his written statement that he had been in possession over the land in dispute. The Revenue Court framed the following issues:—

"(1) Whether the defendant No. 2 (Samar Dhuj Chand) holds the grove in suit as proprietor?"

(2) Whether the plaintiff is in possession as a grove-holder?"

The first issue was decided against the defendant, Samar Dhuj Chand, and the second issue was decided in favour of the defendants-applicants (the appellants). No declaration was made by the Revenue Court as to whether the defendants were the tenants of the plaintiff. The only order passed by the Revenue Court was:—"The area shall be recorded as "grove" inside the *abadi* and the applicant as the grove-holder." There is nothing in the whole of the order to show who was the landholder. The case in the Revenue Court cannot be regarded be any stretch of imagination as one for a declaration under s. 121 of the Tenancy Act. On the other hand, the application itself shows that it was made under s. 42 of the Land Revenue Act. Though the application was described as one under s. 42 of the Land Revenue Act, yet it could not have been made under it, because the applicants did not state that they were the tenants of the opposite parties. Section 42 of the Land Revenue Act applies where the tenancy is admitted and the dispute relates to the class or tenure of the tenant. As held in *Ramjas Singh* v. *Ram Harakh Panday* (1), a clear distinction exists between the case where the tenancy itself is disputed and the case where the tenancy is admitted but

(1) 120 Ind. Cas. 200, A I R 1930 All. 305; (1929) A L J 1257; Ind. Rul. (1930) All. 24; 14 R D 28.

its class or tenure is in dispute. In the revenue case, the applicants wanted themselves to be entered as grove-holders. The dispute between the parties in the revenue case was regarding the entries in the annual register. Section 40 of the Land Revenue Act lays down that all disputes regarding entries in the annual register shall be decided on the basis of possession. Both the parties, as already stated, fought the case and it was actually decided on the basis of possession.

Even if the order of the Revenue Court be regarded as one made under s. 42 of the Land Revenue Act, it cannot operate as *res judicata*. In *Kashi Prasad* v. *Ambika Prasad* (2), it was laid down that the scope of s. 42 was very limited and was limited to the case of a dispute relating to class and tenure. Where the question was, who was the tenant, s. 42 had no relation to such a dispute. It was a mistake to read into s. 42, all the provisions of s. 95 of the Tenancy Act of 1901 (s. 121, of the present Tenancy Act). It was also held that assuming that the Assistant Collector's judgment was given under s. 42 of the Land Revenue Act, his decision could not operate as *res judicata*.

As already stated, the defendants do not themselves admit to be the tenants of the plaintiff nor have they so far got it declared. The dispute between the parties, as already stated, is about the proprietary title of the land and the trees. Both the parties allege themselves to be the proprietors. The matter of proprietary title does not relate to the annual register mentioned in cl. (*e*) of s. 32 of the Land Revenue Act. It relates to the register mentioned in cl. (*a*). Whether the order of the Revenue Court be regarded as passed under s. 40 or 42 of the Land Revenue Act, the order of the Revenue Court would not bar a suit in the Civil Court in view of the provisions of cl. (3) of s. 40 or s. 44. I, therefore, agree with the finding of the lower Court that the suit is not barred by the order of the Revenue Court passed in the case of the correction of *jamabandi*. In the face of the findings of fact of the lower Courts, there is no force in the appeal. It is, therefore, ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed.

Permission to file a Letters Patent Appeal is granted.

D. *Appeal dismissed.*

(2) 125 Ind. Cas. 23; (1930) A L J 736; Ind. Rul. (1930) All. 647; A I R 1930 All. 611; 14 R D 450.

PATNA HIGH COURT

Civil Appeal No. 162 of 1931

September 27, 1934

MOHAMMAD NOOR AND LUBY, JJ.

SOURENDRA MOHAN SINHA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SECRETARY OF STATE—DEFENDANT—RESPONDENT.

Bengal Cess Act (IX of 1880), ss. 6, 106—Collections by zemindar from traders resorting to hat for selling goods, whether assessable—Revenue Board cannot add to or subtract from Cess Act—Income not assessable under Act cannot be made assessable—Civil Procedure Code (Act V of 1908), s. 80—Notice under, whether should be copy of plaint—Notice showing that assessment of cess on income from hat was ultra vires—Relief asked being relief from such assessment—All forms of reliefs need not be given in detail—Relief not covered in notice added in plaint—Entire suit should not be dismissed—Interpretation of Statutes—Interpretation by Courts conflicting—Amendment of statute.

Whether a particular sum of money collected from persons who use a *zemindar's* land is or is not rent is a mixed question of law and fact. Where traders come and sell their commodities on the land and pay something to the *zemindar* and the same set of traders do not necessarily come on every *hat* day and no land is settled with them for any period of time, the money thus realized is not ground rent and is not assessable to cess. *Umed Rasul Shaha* v. *Anath Bandhu* (1), *Munindra Chandra Nundi* v. *Secretary of State* (2), *Secretary of State* v. *Karuna Kanta* (3), *Secretary of State* v. *Ramasray Singh* (4) and *Kundan Lal* v. *Nafisuddin* (5), relied on. [p. 1100, col. 2.]

Section 106, Bengal Cess Act, does not authorize the Board of Revenue to make that income assessable to cess which is not assessable under the Act itself. The Board have no power to add to the Act or subtract anything from it. The rules must be rules for the purposes of carrying out the Act. If any income is not assessable, it cannot be made assessable by any order of the Board of Revenue. [p. 1102, col 1.]

What s. 80, Civil Procedure Code, requires is that the notice should contain the cause of action, etc., and the relief claimed. If the fact that a particular rule was *ultra vires* is mentioned in the notice and omitted from the plaint, the notice does not become invalid on that ground. From the plain meaning of s. 80, Civil Procedure Code, the notice need not be practically a copy of the plaint. The notice should be such as to give substantial information to the Government, the basis of the claim and the relief which the plaintiffs seek. Where it is obvious from the notice taken as a whole that the plaintiffs wanted to have it declared by the Court that the assessment of cess on their *zemindari* on the income of the *hat* was *ultra vires* and that the relief which they wanted to seek was that they should be relieved of that assessment, it is not incumbent upon the plaintiffs to give in detail all the forms in which they would seek the relief. [p. 1102, col. 2.]

The addition in the plaint, of a relief which was not covered by the notice does not entail the dismissal of the entire suit. It is open to the plaintiffs to amend their plaint at any stage and proceed with the suit without a prayer for that relief [p. 1103, col. 1.]

The legislature must be taken to be aware of the interpretation of the statute enacted by them by the

Courts; and if they find that the interpretations by Courts of Justice are not in conformity with their intention, they should amend it to bring it in conformity with their intention. [p. 110], cols. 1 & 2.]

S. C. A. from appellate decree of the Additional District Judge, Bhagalpur, dated November 3, 1930.

Messrs. *P. R. Das* and *J. C. Sinha*, for the Appellants.

The Government Pleader, for the Respondents.

Muhammad Noor, J.—This is an appeal against a decree of the District Judge of Bhagalpur confirming that of the Munsif of that place whereby the appellants' suit for a declaration that a certain assessment of local cess was illegal and *ultra vires* and for other incidental reliefs was dismissed.

The facts are these. The plaintiffs are the sixteen annas propietors of Lakhiraj Punsia bearing Tauzi Nos. 1183-C and 1044-B, in *thana* Amarpur. It appears that a *hat* is held twice a week on their land, and, as is usual, collections are made on their behalf from traders who resort to the *hat* for selling goods. The Revenue Authorities have included the income so derived in assessing the cess on the plaintiffs. The plaintiffs instituted the suit for a declaration that under the law the assessment was *ultra vires* as no local cess could be assessed on that income and asked for a refund of Rs. 9-15-0, which they had paid by way of local cess and also for an injunction against the defendant not to realise the assessed amount in future. Both the Courts below have dismissed the suit on two grounds: first, that the notice served upon the defendant under s. 80, Civil Procedure Code, was at variance with the plaint and therefore insufficient; and, secondly, that the assessment was not *ultra vires*. The plaintiffs have appealed. The learned Government Pleader has supported the decrees of the Courts below on these grounds.

I take up the second point first. The learned Government Pleader has contended that there is a finding of fact that the assessment was on the ground rent and not on the profit from the *hat*. I however do not think that there is any finding of fact that the assessment was really on the ground rent or that any ground rent was being realized by the plaintiffs from the traders who resorted to the *hat*. Had there been any such finding, it would have been vitiated on account of the fact that there is not an iota of evidence on the record to support that finding. The only evidence on the record is that of the plaintiffs' Circle Officer who has described the nature of the collection made and this shows that it is not rent. People go to the *hat*, some of them spread their merchandise on the ground and sell it; others roam about in the *hat* and hawk the articles which they have for sale. Both classes of traders pay some money to the plaintiffs for carrying on their business on their land. The Courts below have used the expression "ground rent" simply because the Revenue Authorities have done so. In fact, the plaintiffs themselves, both in the notice and in the plaint, admitted that the land was assessable to ground rent. Whether a particular sum of money collected from persons who use a *zamindar's* land is or is not rent, is a mixed question of law and fact. It is not disputed and the evidence is one-sided that traders come and sell their commodities on the land and pay something to the plaintiffs and that the same set of traders do not necessarily come on every *hat* day and there is not even a suggestion that any land is settled with them for any period of time. The question, therefore, is whether such a payment is rent. If it is not rent under the law, it will not become so because the Revenue Authorities have treated it as such. Even the defendant in his written statement did not claim that the assessment was on ground rent. He simply raised a question of law that *hat* income was profit from immovable property, and as such, assessable.

The question whether collections from a *hat* are assessable to cess has been the subject-matter of judicial decisions in the Calcutta High Court as well as in this Court. First of all I refer to *Umed Rasul Shaha* v. *Anath Bandhu*, (1). There the appellant had obtained from the plaintiff and *pro forma* defendants a right to hold a fair on certain land once a year when there was no crop upon it. The Collector assessed his profit to cess and realized this from the plaintiff. The plaintiff in his turn sued the appellant to recover the amount from the appellant. The question raised was whether the income derived from a *Mela* was assessable to cess. It was held that it was not. The plaintiff of that suit relied upon r. 33 of the Bengal Board of Revenue. It ran thus:

"The benefit, which a *zamindar* receives from a fair or *hat* in the shape of payments for the occupation of land by dealers or traders is assessable to cess. When a fair or *hat* is held on land appertain-

(1) 28 C 637; 6 C W N 128.

ing to an estate, it is to be valued under Chap. 2, Bengal Act IX of 1880, as part of the estate to which it belongs. But when, as in some cases in the Darjeeling District, a fair or *hat* is held on land reserved solely for such purposes, and which does not form part of an estate, it should be valued under Chap. 5 of the Act under s. 79; the annual valuation of such lands is not necessary.

Note.—Profits derived from the rent of shops and other miscellaneous revenue derived by *zamindars* from *hats* and fairs should not be excluded from the cess valuation of the land on which they are situated; valuation should not, however, be made on trade profits or on benefits derived by traders (Board's cess proceeding of November 12, 1898, No. 2, collection 10, file 96 of 1897)."

Their Lordships held the rule to be *ultra vires*. It is to be noticed that this Bengal rule corresponds to Bihar and Orissa rule No. 56 (r. 51 in the paper book is a mistake). There is, however, some difference, the most important being that instead of the use of the words "benefit which the *zamindar* receives" in the Bengal rule, the words "Rent on Revenue" are used in the Bihar and Orissa rule. But it is obvious that by the change of name the nature of the thing is not altered. The decision was, however, based on the proposition that as the *Mela* income was assessable to income-tax, it was not assessable to cess. This view was not accepted in a later case in connecion with mines in *Munindra Chandra Nundi* v. *Secretary of State* (2), where it was held that both cess and income-tax can be levied on royalties from mines and was disapproved by a Full Bench in *Secretary of State* v. *Karuna Kanta* (3). The Full Bench case was of cess on income from *Mela* and it was held there that the profits of *Mela* were not paid by tenant to landlord, nor for the use and occupation of land, and, consequently were not rent, and did not fall within the definition of "annual value of land" in s. 4, Cess Act; and that an assessment of cesses made by the Collector on the basis of such profits was illegal and *ultra vires*. It was also held that cattle sellers and stall-keepers who resorted to the fair were not tenants, but licensees.

It is to be noted that since these decisions of the Calcutta High Court under which this province was up to the year 1911, the Cess Act has been amended for several purposes and an extensive amendment was made by the Bihar and Orissa Council in 1916 (Act I of 1916). It is a well settled principle of law that the Legislature must be taken to be aware of the interpretation of the statute enacted by them by the Courts; and if they find that the interpretations by Courts of Justice are not in conformity with their intention, they should amend in to bring it in conformity with their intention. The Full Bench decision of the Calcutta High Court has been mentioned in the note under s. 4: see p. 4 of Bihar and Orissa Cess Manual. Government must be taken to be aware of that decision. They have taken no step to amend the Act. The question has come up before this Court also in *Secretary of State* v. *Ramasray Singh*, (4). In that case the Revenue Authorities assessed certain *raiyats* who made collections from those who resorted to Sonepur. Fair for carrying out trade upon their land. The question whether such collections were rent, or not, was specifically raised and the Bench, to which one of us was a member, decided that the persons who hold the *hat* and keep the cattle on the land were not lessees. They were mere licensees who had been granted license to come upon the land and to sell their cattle, etc. The difference between a lessee and a licensee has been pointed out in the case of *Kundan Lal* v. *Nafisuddin*, (5), and the Full Bench decision of the Calcutta High Court in *Secretary of State* v. *Karuna Kanta* (3), was followed. Kulwant Sahay, J., who was one of the members of the Bench in *Secretary of State* v. *Ramasray Singh*, (4), held that what was realized on account of sale of goods in a *hat* is not rent and therefore could not be taken into account in determining the amount of assessment under ss. 7, 2 and 3, Bengal Tenancy Act. It is obvious therefore from the statement of the plaintiff that he was not realising anything by way of rent. The Court below had absolutely no basis to find, if they have found that it was ground rent, on which assessment had been made. Now, apart from the question of decided cases, in my opinion the law itself is very clear. Section 6, Cess Act of 1880, provides:

"The local cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries, tramways, railways and other immovable property, ascertained respectively as in this Act prescribed; and the rate at which such cess shall be levied for each year shall be determined for such year in the manner in this Act prescribed;"

"Annual value has been defined in s. 4 which says:

"Annual value of any land, estate or tenure" means the total rent which is payable, or if no rent is actually payable, would on a reasonable assessment be payable during the year by all the cultivating

(2) 34 C 257; 5 C L J 148.
(3) 35 C 82; 6 C L J 342; 11 C W N 1053 (F B).
(4) 145 Ind. Cas. 808; A I R 1933 Pat. 430; 12 Pat. 701; 14 P L T 231; 6 R P 208.
(5) 142 Ind. Cas. 43; A I R 1933 Pat. 36; 13 P L T 648; Ind. Rul. (1933) Pat. 101.

raiyats of such land, estate, or tenure, or by other persons in the actual use and occupation thereof:"

The collections made from the persons who come to carry on business on land are not rent nor money paid for use and occupation of the land. They do not hold land under the landlord. Therefore the money does not come within the meaning of "annual value of the land" and is not assessable under s. 6, Cess Act. The Courts below have doubted whether the decision in *Secretary of State* v. *Karuna Kanta* (3), is of any force in this province in view of the Board's Rule No. 51. The Board has been given power of making rules under s. 106, Cess Act. This section does not authorize the Board of Revenue to make that income assessable to cess which is not assessable under the Act itself. The Board have no power to add to the Act or subtract anything from it. The rules must be rules for the purposes of carrying out the Act. The simple question is whether such income, which the plaintiffs are getting admittedly from the *hat*, is assessable to cess under the Act itself. If it is so, the matter ends there. If it is not, it cannot be made aasessable by any order of the Board of Revenue. The utmost that can be said is this: that the Board of Revenue have interpreted the Act to mean that such incomes are assessable. But those interpretations, however binding they may be on the Revenue Authorities, are not binding on the Courts.

The next question for our consideration is whether the notice given is sufficient. The defect found is that the relief, as mentioned in the notice, does not tally with the relief claimed in the suit. The main reliefs for which the notice was given were:

"1. That it be declared that the assessment of cess upon the profits of the *hat* in Lakhiraj Punsia is *ultra vires*. 2. That the cess valuation be rectified upon assessment of the land on the basis of a reasonable rent to be fetched. 3. That the order of the Board of Revenue as well as the Subordinate Courts be set aside so far as the assessment is concerned."

It is clearly indicated that the plaintiffs wanted to be relieved from the assessment. The learned Munsif held the notice to be invalid on two grounds; first, that Kanti Chandra Roy who gave notice was not authorized to give that notice. That point has been decided by the learned Additional District Judge in favour of the plaintiffs. The second ground was the one I have stated, namely, that the plaint did not tally with the notice. Two of such differences have been mentioned. One is that relief No. 3 of the notice is not mentioned in the plaint. Relief No. 3 of the notice is:

"That it be declared that r. 51, Cess Act, is not applicable and if it be held to be applicable, it is *ultra vires*."

The learned Munsif says that this does not find place in the plaint. It is obvious that this was absolutely superfluous in the notice. What s. 80 requires is that the notice should contain the cause of action, etc., and the relief claimed. The notice fulfils the requirements of law, and if the fact that a particular rule was *ultra vires* was mentioned in the notice and omitted from the plaint, the notice does not become invalid on that ground.

The next objection of the learned Munsif is that the relief (*c*) of the plaint which seeks to recover Rs. 9-15-0 and asks for an injunction is not covered by the notice. It has been held and it is obvious from the plain meaning of s. 80, Civil Procedure Code, that the notice need not be practically a copy of the plaint. The notice should be such as to give substantial information to the Government, the basis of the claim and the relief which the plaintiffs seek. It is obvious from the notice taken as a whole that the plaintiffs wanted to have it declared by the Court that the assessment of cess on their *zamindari* on the income of the *hat* was *ultra vires* and that the relief which they wanted to seek was that they should be relieved of that assessment. It was not incumbent upon the plaintiffs to give in detail all the forms in which they would seek the relief. Two paragraphs of this notice, in my opinion, were sufficient to give the defendant all the information which s. 80 requires a plaintiff to give, namely, reliefs Nos. (1) and (5), as given in the notice. In the suit the plaintiffs want, apart from the declaration of the illegality of the assessment, an injunction against the defendant, not to realise that cess and this is incidental to the declaration. In my opinion the plaint is substantially the same as the notice. It was perhaps realised by the plaintiffs that the Civil Court could not set aside the order of the Revenue Authorities, but could only stop the defendant from realizing the cess. Instead of seeking the relief exactly in the form in which it was mentioned in the notice, the plaintiffs have sought it in the form in which it can be given by a Civil Court.

There is, however, one matter which can be said to be not covered by the notice, namely, the prayer for refund of Rs. 9-15-0,

I find no authority that for this addition in the plaint which was not covered by the notice, the entire suit of the plaintiffs should be dismissed. It was open to the plaintiffs to amend their plaint at any stage and proceed with the suit without a prayer for refund. As a matter of fact, we are asked to strike out from the prayer portion so much of it as relates to the refund of Rs. 9-15-0. I would direct that this be done. The result is that the appeal is partly allowed, and the plaintiffs' suit is decreed. They will get all the reliefs which they have claimed, except the relief which I have ordered to be struck out. The defendant will bear the costs of the suit throughout.

Luby, J.—I agree.

Suit decreed.

ALLAHABAD HIGH COURT

Second Civil Appeal No. 545 of 1933
March 22, 1935
ALLSOP, J.
ASHFAQ ALI KHAN—PLAINTIFF—APPELLANT
versus
INAYAT BEG—DEFENDANT—RESPONDENT

U. P. Land Revenue Act (III of 1901), s. 34—Suit by assignee of profit from co-sharer for profits for certain period—Held, that no report under s. 34 was required—Held, also that assignee was entitled to bring such suit in Revenue Court.

The suit was in respect of the profits for the years 1333 to 1335 *Fasli*. These profits were transferred to the plaintiff after they had accrued. It is obvious that the plaintiff could make no report under s. 34 of the Land Revenue Act. He had obtained no right either in the *mahal* or in any share of it or in the profits of it in respect of the year in which the transfer was made or in respect of any subsequent year. There was no right subsisting in him which could be entered in the register. What was transferred in this case was not a right to the profits in a *mahal* at any time after the transfer but it was a transfer of a sum of money or a debt or any actionable claim which had already accrued to the transferor. There could be no entry in any register of proprietors in respect of this amount and consequently no report could be required and the right to sue could not be based on the making of any such report. In these circumstances an assignee of the right to recover, in a Court of Law, profits which had already accrued to the assignor is entitled to bring a suit in the Revenue Court. *Lallu Singh* v. *Chander Sen* (1), relied on.

S. C. A. from the decision of the District Judge of Agra, dated January 9, 1933.

Messrs. *N. P. Asthana* and *B. N. Sahai*, for the Appellant.

Messrs. *G. Agarwala* and *K. N. Agarwala*, for the Respondent.

Judgment.—This is a second appeal arising out of a suit for profits by an assignee from the co-sharer. The suit was decreed by the trial Court but was dismissed by the lower Appellate Court. The only point argued in the lower Appellate Court was that the plaintiff was not entitled to institute a suit until he had made a report under s. 34 of the Land Revenue Act asking for mutation of the register. Other grounds of appeal were mentioned in the memorandum to the Court below but they were not argued. This may have been due to the fact that the Court below made it clear that it was with the appellant on the point on which the appellant succeeded.

The first question is whether the learned District Judge was right in holding that the plaintiff had no right to sue until he had made the report required under s. 34. I have no doubt that the learned Judge was not right. The suit was in respect of the profits for the years 1333 to 1335 *Fasli*. These profits were transferred to the plaintiff after they had accrued. It is quite obvious to my mind that the plaintiff could make no report under s. 34 of the Land Revenue Act. He had obtained no right either in the *mahal* or in any share of it or in the profits of it in respect of the year in which the transfer was made or in respect of any subsequent year. There was no right subsisting in him which could be entered in the register. The fallacy in the argument addressed to the Court below arises out of a misunderstanding of the meaning of the word "profits" as used in s. 34. What was transferred in this case was not a right to the profits in a *mahal* at any time after the transfer but it was a transfer of a sum of money or a debt or any actionable claim which had already accrued to the transferor. There could certainly be no entry in any register of proprietors in respect of this amount and consequently no report could be required and the right to sue could not be based on the making of any such report. The only question which might possibly have arisen was whether an assignee of the right to recover, in a Court of Law, profits which had already accrued to the assignor was entitled to bring a suit in the Revenue Court. This question has been set at rest by the decision in *Lallu Singh* v. *Chander Sen* (1), where it

(1) 147 Ind. Cas. 937; (1934) A L J 1; 6 R A 586; A I R 1934 All. 155; L R 15 A 29 Rev.; 18 R D 32; 56 A 624.

was held that a suit in these circumstances was one which would lie in the Revenue Court.

The appeal must succeed. It has been urged that the respondent might have argued other points in the Court below on the basis of the memorandum in that Court if he had not succeeded on the preliminary point. It seems to me that there is force in this argument. The case must be remanded. I allow the appeal and set aside the decree of the lower Appellate Court. That Court will dispose of the appeal upon its merits. The costs in this Court will abide the result. This amounts to a remand under O. XLI, r. 23.

D. *Appeal allowed.*

LAHORE HIGH COURT

Second Civil Apdeal No, 2435 of 1929
May 29, 1934

ADDISON AND ABDUL RASHID, JJ.

MOHAMMAD ALI KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ANWAR HUSSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Limitation (Custom) Act (I of 1920), Art. 1 (c)—Alienation, if includes testamentary disposition—No mutation on its basis—Time, when begins to run—Suit attacking wills—Plaint cleverly worded to avoid limitation—Limitation, if can thus be avoided.

Under the Punjab Limitation (Custom) Act, "Alienation" includes any testamentary disposition of property. When alienation is not made by means of a registered deed, and no mutation on the basis of the will is entered in the register of mutation, the time begins to run from the date on which the alienation came to the knowledge of the plaintiffs. Where, therefore, the plaintiffs came to know of the existence of the wills on February 17, 1916, a suit instituted in 1926, is barred by time.

Where the suit in substance is a suit attacking the will, it is not open to the plaintiffs by cleverly wording their plaint to avoid the proper limitation for the suit. *Kirpa Ram-Lachhman Das* v. *Sawan Mal-Gopi Chand* (1) and *Gurbakhsh Singh* v. *Gurdial Singh* (2), referred to.

S. C. A. from the decree of the District Judge, Jullundur, dated July 8, 1929.

Mr. *Achhru Ram*, for the Appellants.

Messrs. *Badri Das* and *Zafrulla Khan*, for the Respondents.

Abdul Rashid, J.—One Muzaffar Hussain, petition, writer was the owner of a considerable amount of landed property and some residential houses situated at Rahon in the Jullundur District. On December 14, 1915, he wrote a will in his own hand whereby he bequeathed half of his entire property to Anwar Hussain, his sister's son and gave away the remaining half to his collaterals according to their ancestral shares. On the December 18, he wrote out another will which confirmed the contents of the original will, and contained a detailed description of the land and other immovable property which constituted his estate. He died on December 20, 1915, leaving a widow *Musammat* Shero.

On January 5, 1916, mutation of the entire estate of the deceased was sanctioned in favour of his widow *Musammat* Shero in her absence. On February 17, 1916, the widow brought to the notice of the reversioners and the Revenue Authorities that her husband had left a will whereby he had bequeathed half of the property to Anwar Hussain and the other half to the reversioners. She prayed that the estate of the deceased be mutated in accordance with the terms of the will. The application of the widow was, however, rejected by the Revenue Authorities on the March 5. On the March 13, she again presented a similar application and this was rejected on the May 9, as the reversioners, including the plaintiffs objected to the mutation of one-half of the estate of Muzaffar Hussain in the name of Anwar Hussain. A third attempt was made by the widow in 1918 to enforce the provisions of the will, but the mutation was finally rejected on November 21, 1918, by the Deputy Commissioner. Having failed to get the mutation recorded in the name of Anwar Hussain, the widow adopted another method of carrying out the wishes of her husband, *i. e.*, she made a gift of one-half of the property to Anwar Hussain and the mutation with respect to this gift in favour of Anwar Hussain was sanctioned on June 13, 1925.

On November 2, 1926, the plaintiffs, Mohammad Ali Khan, Mohammad Latif Khan and Mohammad Sharif instituted the present suit for a declaration to the effect that the oral gift made by *Musammat* Shero, defendant No. 1, in favour of Anwar Hussain, defendant No. 2, of half of the estate of the deceased Muzaffar Hussain, shall not affect their reversionary rights after the death of *Musammat* Shero. The other reversioners of Muzaffar Hussain did not join the plaintiffs and were made *pro forma* defendants. The real contesting defendant, Anwar Hussain pleaded, *inter alia*, that the widow of Muzaffar Hussain did not succeed her husband and that he himself entered into

possession of half of the estate left by the deceased in accordance with the terms of the wills executed on December 14 and 18, 1915, in his favour; that he had been in possession of the property in dispute since December 20, 1915, and that the present claim was barred by limitation. In their replication the plaintiffs challenged the genuineness and validity of the wills, and averred that the property in dispute having been mutated in favour of *Musammat* Shero on the death of her husband in 1915, they were entitled to challenge the gift made by her in favour of the defendant Anwar Hussain within six years of the date of mutation in his favour. The trial Court framed ten issues, five out of which refer to the wills in dispute. The trial Court decreed the claim of the plaintiffs, but the learned District Judge reversed this decision on appeal on the ground that both the wills on which the defendant relied were genuine and were duly executed by the testator, and that the suit of the plaintiffs was really one challeging the validity of these wills, and as such, was barred by limitation. The plaintiffs have preferred a second appeal to this Court.

It was contended by the learned Counsel for the appellants that the plaintiffs had not brought any suit for the possession of the property in dispute and that their suit was merely one for a declaration that the gift made by *Musammat* Shero shall not affect their reversionary rights after her death. It was urged that in these circumstances the lower Court ought not to have given any findings regarding the genuiness and the validity of the will and that the plaintiffs ought to have been granted a declaration to the effect that the gift made by *Musammat* Shero in favour of Anwar Hussain was invalid. The position taken up by the learned Counsel was that after the death of *Musammat* Shero the plaintiffs would, undoubtedly bring a suit to recover possession of the property and that it would be open to the Court in that suit to determine whether any will had been executed by the deceased and, if so, whether he had any power to do so. It was also argued that the mutation dated June 13, 1925, with respect to the gift by *Musammat* Shero to Anwar Hussain must be regarded as a fresh transfer by the widow and that such transfer gave the plaintiffs a cause of action to institute the present suit. In the alternative it was suggested that, even if the mutation of June 13, 1925, be regarded as giving effect to the will of Mazaffar Hussain made in 1915, the suit would still be within time under cl. (*a*), Act I, Punjab Limitation Act, 1920, as it was instituted within six years of the date of the mutation. In my opinion these contentions are without any force.

The facts summarized above show that the plaintiffs came to know on February 17, 1916, that the deceased Muzaffar Hussain had bequeathed half of his property to the defendant by means of the will dated December 14, and 18, 1915. If they wanted to challenge the validity of the wills, it was incumbent on them to institute a suit within six years of the date on which the alienation came to their knowledge. The widow made several attempts to get the land mutated in the name of Anwar Hussain in accordance with the provisions of the wills, but she failed to achieve her object merely because the collaterals opposed her applications before the Revenue Officers on each occasion. She, therefore, carried out the wishes of her husband by making a gift of half of the estate in favour of the legatee. Under the Punjab Limitation (Custom) Act, "Alienation," includes any testamentary disposition of property. This alienation was not made by means of a registered deed, and no mutation on the basis of the wills was entered in the register of mutation. In these circumstances it must be held that under cl. (*c*), Art. 1, Punjab Limitation (Customs) Act, the time began to run from the date on which the alienation came to the knowledge of the plaintiffs. It is beyond dispute that the plaintiffs came to know of the existence of the wills on February 17, 1916. The present suit having been instituted in 1926, is, therefore, clearly barred by time.

Throughout the present litigation the real contest centred round the issues which deal with the genuineness and the validity of the wills, and the first five issues framed by the trial Court deal with the wills and contain no reference to the gift in dispute, I, therefore, hold that the suit in substance was a suit attacking the wills, and that it was not open to the plaintiffs by cleverly wording their plaint to avoid the proper limitation for this suit. Reference may be made in this connection to *Kirpa Ram-Lachaman Das* v. *Sawan Mal-Gopi Chand* (1) and

(1) 106 Ind. Cas. 40; A I R 1927 Lah. 826; 9 Lah. L J 493; 29 P L R 61.

Gurbakhsh Singh v. *Gurdial Singh* (2).

The learned District Judge has held that the defendant Anwar Hussain is in possession of the property in dispute. It is also clear that he never claimed any rights under the gift. From the very start he repudiated the gift, and stated in his written statement that the widow of Muzaffar Hussain did not succeed her husband, but, on the contrary, he himself entered into possession of the landed estate left by the deceased Muzaffar Hussain in accordance with the terms of the wills dated December 14 and 18, 1915, bequeathing half of the estate to him. If the suit, therefore, is to be regarded as one attacking the gift, it must be held that the plaintiffs have no cause of action to bring the suit as the defendant, who is in possession, does not claim any rights under the gift nor does he recognize that any gift was in fact made by the widow in his favour.

For the reasons given above, I would hold that the decision of the learned District Judge is correct and would dismiss the appeal.

Addison, J.—I agree.

D. *Appeal dismissed.*

(2) 105 Ind. Cas. 220; A I R 1927 P C 230; 46 C L J 272; 53 M L J 392; 29 Bom. L R 1392; (1927) M W N 778; 4 O W N 935; 28 P L R 567; 32 C W N 119 (P C).

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1165 of 1933

March 22, 1935

THOM AND IQBAL AHMAD, JJ.

GOVIND PRASAD AND ANOTHER —DEFENDANTS—APPELLANTS

versus

SHANTI SWARUP—PLAINTIFF AND OTHERS—*Pro forma* DEFENDANTS —RESPONDENTS

Hindu Law—Joint family—Self-acquired property —Burden of proving that it is thrown in common stock—Intention—Civil Procedure Code (Act V of 1908), O. XXXII, rr. 3, 4—Provisions of, are mandatory—"Proper" person to be guardian ad litem—Decree against minor, when nugatory.

The burden of proving that a member of a joint Hindu family threw his self-acquired property into the common stock lies on the person making the assertion, and this burden can only be discharged by proof of the fact that the owner of the property clearly expressed an intention to abandon his separate and exclusive rights in the property in favour of the members of the joint family. The intention may be expressed by words, or may be inferred by the manner in which the profits of the property were dealt with.

The provisions of O. XXXII, r. 3, Civil Procedure Code, that where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, are mandatory, and a decree passed against a minor without the appointment of a guardian *ad litem* is a nullity. But if a guardian has been appointed for a minor defendant, mere irregularities in the appointment of the guardian or the mere fact that a proper person was not appointed guardian, does not render the decree nugatory against the minor unless and until it is proved that the minor was not effectively represented in the suit and was prejudiced by the omission of the guardian to take the pleas that could validly be raised on his behalf. The law insists that the minor should be represented by a proper person whose interests are not adverse to the interests of the minor, so that the minor's interest may not in any way be neglected or prejudiced. But if it is apparent that the minor's interests in the suit in which he was a defendant were not in any way prejudiced, it becomes wholly unnecessary to inquire into the question as to whether or not the guardian appointed was a "proper person" within the meaning of O. XXXII, r 4, Civil Procedure Code for the simple reason that the purpose for which a guardian is appointed are achieved. Consequently, in cases where a gaurdian *ad litem* for a minor defendant has been appointed and a decree is passed against the minor the minor is not entitled to avoid the decree without proof of the fact that he was not effectively represented in the suit, and that he was prejudiced by the omission of the guardian to raise proper pleas on his behalf. *Champi* v. *Tara Chand* (1), *Walian* v. *Banke Behari Pershad Singh* (2), *Baijnath Rai* v. *Dharam Deo Tiwari* (3), *Murli Dhar* v. *Pitambar Lal* (4) and *Raja Babu* v. *Balmukund* (5), relied on.

S. C. A. from the decision of the Third Additional District Judge of Cawnpore, dated September 20, 1933.

Messrs. *P. L. Banerjee* and *S. N. Seth*, for the Appellants.

Mr. *M. L. Chaturvedi*, for the Respondents.

Judgment.—The suit giving rise to the present appeal was brought by Shanti Swarup, respondent, for a declaration that the preliminary and the final decrees for foreclosure passed in Suit No. 92 of 1930 of the Court of the Subordinate Judge of Cawnpore in favour of the contesting defendants are a nullity and not binding on him. The said decrees were for the foreclosure of a mortgage-deed dated June 22, 1928, executed by Chhadammi Lal, the grandfather and Jagannath Prasad the father of Shanti Swarup plaintiff-respondent. The mortgage was for a sum of Rs. 7,000 and was in favour of the contesting defendants.

Chhadammi Lal, Jagannath and Shanti Swarup were impleaded as defendants in the foreclosure suit. Shanti Swarup was a minor, and his father Jagannath Prasad was appointed as his guardian for the suit.

The plaintiff-respondent assailed the validity of the decrees mentioned above

on the ground that Jagannath being himself one of the executants of the mortgage-deed was not in a position to raise appropriate pleas on his behalf in bar of the claim for foreclosure of the mortgage and, as such, was not a proper person to be appointed as his guardian *ad litem*. The plaint gave no indication of the pleas that according to the plaintiff could be successfully raised on his behalf in the foreclosure suit. At the trial, however, it was suggested on behalf of the plaintiff-respondent that Jagannath omitted to plead that the mortgage was not for legal necessity and that the rate of interest stipulated in the mortgage-deed was excessive, and lastly, that the Court should in any case instead of passing a decree for foreclosure pass a decree for sale in favour of the mortgagees, and the omission of Jagannath to raise these pleas was due to the fact that he himself was one of the mortgagors and resulted in serious prejudice to the plaintiff.

The defendants contested the suit. They denied the allegation of the plaintiff that Jagannath was not a proper person to be appointed as the guardian *ad litem* of the plaintiff in the foreclosure suit, or that he omitted to take such pleas as could validly be raised in bar of the claim for foreclosure. They alleged that the property mortgaged by the deed of 1928 was the self-acquired property of Chhadammi Lal and the plaintiff had no interest in the same, and accordingly contended that even if Jagannath was not a proper person to be appointed as the plaintiff's guardian, the plaintiff was in no way prejudiced, as he had no interest in the mortgaged property. The defendants, therefore, challenged the right of the plaintiff to the relief claimed by him.

There was abundant evidence in the case to justify the assertion of the defendants that the mortgaged property was the self-acquired property of Chhadammi Lal, and, both the Courts below have recorded a finding to that effect. But the case put forward by the plaintiff in the Courts below was that Chhadammi Lal had thrown the property into the common stock and, as such, the property became the property of the joint family consisting of Chhadammi Lal, Jagannath and the plaintiff.

The trial Court overruled the contention of the plaintiff that the property was thrown into the common stock and held that the omission of Jaggannath to take the pleas mentioned above could in no case be prejudicial to the interests of the plaintiff for the simple reason that the plaintiff had no interest in the mortgaged property. The trial Court also considered the question whether or not the debt secured by the mortgage was raised for legal necessity, and answered the question in the affirmative. It, therefore, held that Jagannath could not successfully raise the plea of want of legal necessity on behalf of the plaintiff-respondent in the foreclosure suit. It further observed that Jagannath had actually pleaded in the foreclosure suit that the rate of interest was excessive, and, the Court had given effect to that plea by reducing the rate of interest. In view of these findings the trial Court dismissed the plaintiff's suit.

On appeal by the plaintiff the lower Appellate Court reversed the decree of the trial Court and decreed the suit. It held that Chhadammi Lal had thrown the property into the common stock, and, the plaintiff had an interest in the same. It did not record any finding on the question whether or not the debt secured by the mortgage was for family necessity, as it was of the opinion, that Jagannath being one of the executants of the mortgage-deed was not in a position to resist the foreclosure suit on behalf of the plaintiff either on the ground that the debt was not for legal necessity or was tainted with immorality, or to raise the plea that the Court should in any case, in lieu of a decree for foreclosure, pass a decree for sale of the mortgaged property. It accordingly held that Jagannath was not a proper person to be appointed as the guardian *ad litem* of the plaintiff, and that this fact by itself rendered the foreclosure decree nugatory so far as the plaintiff was concerened.

The contesting defendants have come up in second appeal to this Court, and they assail the decree of the lower Appellate Court on two grounds. Firstly, it is contended that the finding of the lower Appellate Court that Chhadammi Lal had thrown the mortgaged property into the common stock is erroneous. It is accordingly urged that the plaintiff had no interest in the property with respect to which the foreclosure decrees was passed, and, is, therefore, not entitled to challenge the validity of that decree. Secondly, it is contended that in the absence of a finding to the effect that the plaintiff was not effectively and adequately represented in the foreclosure suit, and, that he was

prejudiced because of the non-appointment of a proper person as his guardian *ad litem*, the suit should not have been decreed.

As we consider that the second contention advanced on behalf of the defendants is well-founded, we are relieved from the necessity of expressing an opinion as regards the first contention advanced on behalf of the defendant-appellants. We may, however, observe that we are by no means satisfied that the finding of the lower Appellate Court as regards the property being thrown into the common stock by Chhadammi Lal is based on legal evidence. The burden of proving that a member of a joint Hindu family threw his self-acquired property into the common stock lies on the person making the assertion, and this burden can only be discharged by proof of the fact that the owner of the property clearly expressed an intention to abandon his separate and exclusive rights in the property in favour of the members of the joint family. The intention may be expressed by words, or may be inferred by the manner in which the profits of the property were dealt with. The finding of the lower Appellate Court on the point is based on the fact that Chhadammi Lal associated Jagannath and the present plaintiff with himself while executing two mortgage-deeds with respect to the property. The first mortgage was executed in the year 1925 by Chhadammi Lal and Jagannath Prasad for himself, and on behalf of the plaintiff who was a minor. The second mortgage-deed was the mortgage-deed on the basis of which the foreclosure decree was passed and, this mortgage was executed both by Chhadammi Lal and Jagannath. The lower Appellate Court observed that as Chhadammi Lal joined Jagannath and the plaintiff in the execution of the mortgage-deeds, it must be presumed that he threw his self-acquired property into the common stock. It may very well be that Chhadammi Lal associated Jagannath and the plaintiff with himself while mortgaging the property simply on the insistence and for the satisfaction of the mortgagee. Be that as it may, we are far from holding that the fact that the son and grandson of Chhadammi Lal joined in the execution of the mortgage deeds was by itself sufficient to justify the inference that Chhadammi Lal abandoned his exclusive rights to the property in favour of the joint family consisting of himself, his son and grandson.

We are, however, clearly of the opinion, that the plaintiff was adequately and effectively represented in the foreclosure suit and that all the pleas that could validly be taken on his behalf were raised by Jagannath, and, accordingly the decrees for foreclosure are binding on him.

The provisions of O. XXXII, r. 3, Civil Procedure Code that where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, are mandatory, and it is well settled that a decree passed against a minor without the appointment of a guardian *ad litem* is a nullity, *vide*, *Champi* v. *Tara Chand* (1). But it is equally well-settled that if a guardian has been appointed for a minor defendant, mere irregularities in the appointment of the guardian or the mere fact that a proper person was not appointed the guardian does not render the decree nugatory against the minor unless and until it is proved that the minor was not effectively represented in the suit and was prejudiced by the omission of the guardian to take the pleas that could validly be raised on his behalf, *vide*, *Walian* v. *Banke Behari Pershad Singh* (2), *Baijnath Rai* v. *Dharam Das Tiwari* (3) *Murlidhar* v. *Pitambar Lal* (4) and *Raja Babu* v. *Balmukand* (5). The reason for this rule of law is not far to seek. The law insists that the minor should be represented by a proper person whose interests are not adverse to the interests of the minor, so that the minor's interest may not in any way be neglected or prejudiced. But if it is apparent that the minor's interests in the suit in which he was a defendant were not in any way prejudiced, it becomes wholly unnecessary to inquire into the question as to whether or not the guardian appointed was a "proper person" within the meaning of O. XXII, r. 4, Civil Procedure Code for the simple reason that the purpose for which a guardian is appointed are achieved.

It follows, therefore, that in cases where a guardian *ad litem* for a minor defendant has been appointed and a decree is pass-

(1) 82 Ind. Cas. 516; 46 A 744; A I R 1924 All. 892; 22 A L J 665; L R 5 A 502 Civ.
(2) 30 C 1021; 30 I A 182; 7 C W N 774; 5 Bom L R 822; 8 Sar. P C J 512 (P C).
(3) 35 Ind. Cas. 707; 38 A 315; 14 A L J 353.
(4) 66 Ind. Cas. 372; 44 A 525; 20 A L J 329: A I R 1922 All. 91; 4 U P L R (A.) 170.
(5) 83 Ind. Cas. 323; A I R 1925 All. 214; L R 5 A 692 Civ.

ed against the minor, the minor is not entitled to avoid the decree without proof of the fact that he was not effectively represented in the suit, and that he was prejudiced by the omission of the guardian to raise proper pleas on his behalf.

In the case before us, we find that all the pleas that could be raised with any hope of success on behalf of the present plaintiff in the foreclosure suit were raised by Jagannath. No exception can be taken to the finding of the trial Court that the debt secured by the mortgage was for legal necessity. Out of the sum of Rs. 7,000 secured by the mortgage-deed, a sum of Rs. 6,530 was for the payment of antecedent debts. To that extent the mortgage was clearly for legal necessity. The balance of the sum Rs. 470 was paid by the mortgagee at the time of the execution of the mortgage-deed. One of the contesting defendants stated on oath that the sum of Rs. 470 was paid for the expenses of the execution and registration of the mortgage-deed, and this statement was not challenged in the course of cross-examination, and was, therefore, rightly accepted by the trial Court. It follows that the entire debt secured by the mortgage-deed was for legal necessity and it would have been idle for Jagannath to plead that the mortgage was not for legal necessity.

There was no suggestion on behalf of the plaintiff in the trial Court that the mortgage-deed was tainted with immorality. The lower Appellate Court was, therefore, wrong in proceeding on the assumption that if some person other than Jagannath had been appointed guardian *ad litem* of the plaintiff, he could have pleaded that the debt was raised for an immoral purpose.

Jagannath did plead that the rate of interest was excessive, and this plea was given effect to in the foreclosure suit. We further find that the plea that the Court should, instead of a decree for foreclosure, pass a decree for the sale of the mortgaged property, was embodied in the written statement in the foreclosure suit. There is, however, nothing in the judgment of that case to show that this plea was pressed at the time of hearing. The plea was without substance, as a Court is bound to pass a decree for foreclosure when the suit is based on the basis of a mortgage by conditional sale. It is only when the suit is on the basis of an anomalous mortgage that discretion is given to the Court to pass a decree for sale in lieu of decree for foreclosure.

It was not suggested in the Courts below, and it is not suggested in this Court, that any other pleas could be successfully raised on behalf of the present plaintiff in the foreclosure suit, nor is it suggested that Jagannath was not in a position to raise such pleas because of the fact that he was one of the executants of the mortgage-deed. There is, therefore, no escape from the conclusion that the plaintiff failed to prove that he was not effectively represented in the foreclosure suit, or that he was prejudiced in any way by the omission of Jagannath to raise appropriate pleas on his behalf. It follows that the plaintiff was not entitled to the decree granted to him by the lower Appellate Court.

We accordingly allow this appeal, set aside the decree of the lower Appellate Court and restore the decree of the trial Court with costs in all Courts.

D. *Appeal allowed.*

CALCUTTA HIGH COURT

Civil Rules Nos. 768, 769, 892 and 893 of 1934

July 20, 1934

NASIM ALI AND KHUNDKAR, JJ.

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Where there is a loan independently of the note the creditor is not debarred from suing on the original cause of action by the fact that the cause of action arose out of the same transaction in the course which the promissory note was 'executed.' *Abdul Rabbani* v. *Shyamlal* (3), relied on.

Clause (c) of s. 115, Civil Procedure Code, has been advisedly left in indefinite language in order to empower the High Court to interfere and correct gross and palpable errors of Subordinate Courts for the ends of justice. *Mathura Nath Sarkar* v. *Umesh Chandra* (8), *Raghu Nath Gujrati* v. *Rai Chatraput Singh* (9), and *Jagunnessa Bibi* v *Satish Chandra* (10) referred to.

So far as the Calcutta High Court is concerned, it can be said to be now fairly established that the High Court will not interfere with interlocutory orders unless an irreparable injury will be done and a miscarriage will inevitably issue if it holds its hand. If however irreparable injury would be caused to one of the litigants if the matter was not set right, the High Court ought to intervene in the current litigation and disturb the normal progress of a case by revising an interlocutory order that has been passed by a Subordinate Court. *Salam Chand* v. *Bhagwan Das* (12), relied on

Ordinarily the discretion of a judicial officer will not be reviewed by the High Court in revision. But it is impossible to lay down a hard and fast rule, that in no instances will the discretion exercised by the judicial officer be reviewed either under s. 115 of the Civil Procedure Code or s. 107, Government of India Act, or under the combined operation of the two sections. Under s. 107, Government of India Act (s. 15 of the Charter), the High Court can interfere where irreparable injury will be done to one of the litigants or where there will be a failure of justice if the matter is not set right. *Loke Nath Mukherjee* v. *Abani Nath Mukherjee* (13), *Gobind Mohan Das* v. *Kunja Behary Dass* (14), *Amjad Ali* v. *Ali Hossain Johar* (15), and *Charn Chunder Dutt* v. *Sarat Chunder* [illegible] (16), referred to.

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tain issues were settled by the Court on those pleadings on August 30, 1933. The issues which are relevant for the purposes of the present rules are as follows :

"Issue No. 7. Is the business an ancestral joint Hindu family business? Was it inherited by the sons of Ananda Ganguly? If so, did the business go by the name of Ganguly Brothers ?"

'Issue No. 8. Did the father of defendants Nos. 7 to 14 inherit along with the brothers the *karbar* of Ananda Ganguly ? Did they and thereafter the present defendants form a joint Hindu family Was their *karbar* a joint family *karbar* and carried on in the name of Ganguly Brothers ?" and

"Issue No. 9. Did Ganeah and Rakhal and on Ganesh's death Lakshmi Narayan and Rakhal and Rakhal's death Lakshmi Narayan act jointly and severally as the *karta* of the joint family and of the joint family *karbar* ? Did they raise the loans for carrying on the joint family business or for the benefit of the joint family?"

The hearing of the suit commenced on May 7, 1934. On May 10, 1934, the plaintiff wanted to adduce evidence on these issues. The learned Judge by his order dated May 31, 1934, refused to take evidence on these issues on the objections of the defendants to the reception of this evidence. On the same day the plaintiffs in the two suits filed applications for amendment of the plaints. On June 7, 1934, the learned Judge rejected the plaintiffs' applications for amendment. The Rules Nos. 768 and 769 are directed against the orders of the Subordidate Judge, dated May 31, 1934, in the two suits, and Rules Nos. 192 and 193 are for the revision of the orders of the Subordinate Judge dated June 7, 1934 in the two suits.

The learned Subordinate Judge refused to allow the plaintiffs to adduce evidence on the aforesaid issues on the ground that the suits were based on the hand notes only on the allegation that the makers thereof were the *kartas* of a joint Hindu family and manager of a joint family business and that the loans were taken by the hand notes executed personally in their names for the purpose of their joint family and joint business and that the plaintiffs in their plaints did not make an alternative case for recovery of money lent on the basis of an agreement independently of the promissory notes. It may be stated here that the promissory note dated December 24, 1930, which is included in Sch. (*kha*) of the plaint in Suit No. 86 of 1933 is not admissible in evidence as it is not properly stamped and that the promissory notes which are mentioned in Sch. (*ka*) of the plaint in Suit No. 8

and the promissory notes mentioned in the plaint in Suit No. 85 of 1933 were executed by Rakhal Das Ganguli, the predecessor of opposite parties Nos. 7-14 and Lakshmi Narayan Ganguli opposite party No. 1 in their own names and not as *kartas* of a joint Hindu family or as manager of a joint family business. We are concerned with these promissory notes only in the present rules. The plaints in the two suits have been placed before us by the learned Advocates appearing for the petitioner in this case. It seems to us that the plaintiffs' case in substance is that though the managers of the joint family and the joint business executed the promissory notes in their own names, the loans were taken by the joint family through their managers for the purposes of the joint family and joint family business. It is no doubt true that it is not specifically stated in the plaint that the promissory notes were taken as securities for the loans advanced to the joint family.

From the allegations in the plaint it cannot be said that by the execution of the promissory notes the debt was entirely extinguished. Taking the plaint in each suit as a whole we are not in a position to say that the suits were simple suits for recovery of money on promissory notes only. If that were so, the allegations about the joint family, family necessity for the purposes of business would be meaningless. The impleading of the members of the family other than the executants of the promissory notes or their heirs would be also meaningless. The statement in para. 10 of the plaint, namely, that the defendants being members of a joint Hindu family and the debts having been incurred to meet the necessity of the said joint family *karbar* and the joint Hindu family, the defendants are liable for the said debts, would be meaningless. We are therefore of opinion that the suits are not simple suits on the promissory notes alone. On the other hand we are inclined to hold that the plaintiffs' suits must be taken as suits on the promissory notes as well as on the original consideration, that is, the debts which are alleged to have been incurred by the managers of the joint family for the purposes of joint family and joint business. In our opinion such a course is open to the plaintiffs. This view is supported by he decision of Their Lordships of the Judicial Committee in the case of *Sadasuk Janki Das* v. *Sir Kishan Pershad* (1). The promissory notes in question were no doubt signed by the *kartas* of the joint family in their own names and not as *kartas* of the joint family or as manager of joint family business. But the promissory notes being signed by the *kartas* in their own names is equally consistent either with a borrowing by the *kartas* for their own individual purpose or a borrowing for the purposes of the joint family and the joint family business: see *Abdul Majid Khan* v. *Saraswatibai* (2). This view of ours is further confirmed by the fact that the defendants did not raise any objection when the issues mentioned above were framed by the Court. The issues show the real nature of controversy between the parties, as indicated in the pleadings. It is not disputed that those issues relate to the plaintiffs' alternative claim on the original consideration, *i. e.*, the debts for which the promissory notes are alleged to have been taken. It cannot therefore be said that when the plaintiff wanted to adduce evidence relating to those issues, the defendants were taken by surprise. It is not disputed before us that the evidence which the plaintiff wanted to adduce and which the learned Judge has rejected is relevant to the said issues. We are therefore of opinion that the learned Subordinate Judge was not justified in rejecting the evidence which was offered by the plaintiffs. We are further of opinion that in this case the learned Judge was not justified in rejecting the applications for amendment of the plaints: (1) The reasons given by the learned Judge in support of his order are:

(*a*) that

"the plaints are nothing but on the foot of the pronotes and the suits are only for recovery of money borrowed by executing those pro-notes."

(*b*) that

"the descriptions of the makers of the handnotes as *kartas* and the recitals or the purpose of the loan are immaterial and cannnot make the suits other than suits, on hand-notes."

(*c*) That there is no allegation of any obligation in the plaint apart from the obligation created by the hand-note"

Under O. VI, r. 17, Civil Procedure Code,

(1) 50-Ind. Cas. 216; A I R 1918 P C 146; 46 I A 33; 46 C 663; 29 C L J 340; 17 A L J 405; 25 M L T 258; 36 M L J 429; 21 Bom. L R 605; 1 U P L R (P. C.) 37; (1919) M W N 310; 23 C W N 937; 10 L W 143; 12 Bur. L T 160 (P. C.).

(2) 147 Ind. Cas. 1; A I R 1934 P C 4; 61 I A 90; 30 N L R 60; 10 O W N 1281; 6 R P C 48; 66 M L J 65; 39 L W 72; 58 C L J 548; (1934) A L J 79; 15 P L T 99; 35 P L R 10; 30 N L R 60; (1934) M W N 4; 15 N L J 1 (P. C.).

the Court may at any stage of the proceedings allow either party to amend his pleadings in such a manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purposes of determining the real question in controversy between the parties. The learned Judge has observed that the issues mentioned above "were wrongly framed for want of discussion of the whole law on the subject." Therefore it is clear that plaintiffs' claim on the original consideration, *i. e.*, debts for which the promissory notes were taken was already put into issue. Plaintiffs are therefore justified in thinking that the original plaints contained the alternative claim on the original consideration. When objection was taken by the defendants to the trial of those issues at the hearing the plaintiffs applied for amendment of the plaint in order that there might not be any dispute in future as regards the real nature of plaintiffs' claim in the suits, *i. e.*, as regards the real nature of controversy between the parties. If the learned Judge's view of the matter, namely that the suits are only suits on the promissory notes be correct, then this is a fit case, in which the learned Subordiate Judge should have given leave to the plaintiff's to amend the plaints as prayed for by them.

It was, however, contended by the learned Counsel for the opposite parties that the implied promise to pay the original debts was merged in the express promise to pay as contained in the promissory notes and consequently the alterantive claim, namely, the claim on the original debt alleged to have been contracted by the *kartas* of the joint family for the purposes of joint family and joint business, is not sustainable in law. In the present proceeding it is not necessary to determine whether this contention is valid or not. It is enough to point out at the stage that

"where there is a loan independently of the note, the creditor is not debarred from suing on the original cause of action by the fact that the cause of action arose out of the same transaction in the course of which the promissory note was "executed" see *Abdul Rabbani* v. *Shyamlal*, 128 Ind. Cas. 194 (3)."

We are at the present stage of the case concerned only with the question whether the application for amendment should be allowed or not. It has been already pointed out that it is open to the plaintiffs to sue on the promissory notes and alternatively upon the consideration *Sadasuk Janki Das* v. *Sir Kishan Rershad* (1), and that the promissory notes being signed by the *kartas* in their own names is not inconsistent with borrowing for the purposes of the joint family and the joint family business *Abdul Majid Khan* v. *Saraswatibai* (2). Whether the plaintiffs will ultimately succeed on the amended plaint or not is entirely a different matter and the learned Subordinate Judge will have to come to a decision on the matter after taking the evidence which the parties may think proper to adduce before him. For the purposes of the present Rule it is enough to say that the entire controversy between the parties regarding plaintiffs' claim on the transactions in question should be adjudicated upon in the present litigation. It is also urged by the learned Counsel for the opposite parties that if the amendment be allowed, the opposite parties will be deprived of a valuable right which they have acquired by virtue of the operation of the law of limitation. If we are right in our view that the alternative claim on the original debt, that is, the original consideration, was already included in the plaints the question of limitation does not arise. If however by the amendment a new claim is being added, the amendment in this case should be allowed in view of the exceptional circumstances of this case, which we have already mentioned. It is however contended by the learned Counsel for the opposite parties that even if the learned Subordinate Judge is wrong, this Court has no power to revise his orders under s. 115, Civil Procedure Code. There has been a good deal of controversy as to the exact meaning of the words "acted in the exercise of its jurisdiction illegally or with material irregularity" as used in s. 115, cl. (*c*) of the Code. In the case of *Rajah Amir Hossain Khan* v. *Sheo Baksh Singh* (4), their Lordships of the Judicial Committee have observed as follows:

"It appears that they (*i. e.*, the Judges of the lower Courts) had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

Again in the case of *Balkrishan Udayar* v. *Vasudeva Aiyar* (5), their Lordships of the Judicial Committee have observed that:

"Section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal

(3) 128 Ind. Cas. 194; 34 C W N 554.

(4) 11 C 6; 11 I A 237; 4 Sar. 559 (P. C.).

(5) 40 Ind. Cas. 650; A I R 1917 P. C. 71; 44 I A 261; 40 M 793; 15 A L J 645; 2 P L W 101; 33 M L J 69; 26 C L J 143; 19 Bom. L R 715; (1917) M W N 628; 6 L W 501; 22 C W N 50; 11 Bur. L T 48 (P. C.).

assumption of it. The section is not directed against conclusion of law or fact in which the question of jurisdiction is not involved."

In the case of *Umed Mal* v. *Chand Mal* (6), the Judicial Committee has however held that if a Court decide a case in the absence of a necessary party, that is material irregularity within the meaning of s. 115, Civil Procedure Code. Now if the third clause of s. 115, of the Code is not intended to have a meaning distinct from that of the other two clauses, it would not have been added to s. 622 of the Code of 1877 by the Amending Act of 1879. *Raja Amir Hossain Khan* v. *Sheo Baksh Singh* (4), simply decided what "illegally" or "material irregularity" is not. From *Balkrishna Udayar* v. *Vasudeva Aiyar* (5) it is not also easy to deduce any clear rule of construction of the third clause of s. 115 except the negative one that wrong conclusions of law or fact in which the question of jurisdiction is not involved are not included in it:

"All cases of 'acting illegally' are cases of error of law, though the converse is far from true. Any error in law which amounts to a usurpation of authority in the act done by the Court comes within cl. (*c*) if it is not already within cl. (*a*). In the broad sense of the word no Court has ever jurisdiction to make an order what in fact in law is wrong: see *Hindley* v. *Joy Narayan* (7), *Umed Mal* v. *Chand Mal* (6)."

seems to imply that cl. (*c*) may be applied when failure of justice is due to one or other defects of procedure. But does the said clause refer only to defects of procedure? Is it confined to error in the method or manner of trial only?

"Jurisdiction to try a suit does not mean jurisdiction to do anything whatever by order made in that suit; if it did an exception for material error in procedure strictly so-called would be almost ludicrous: *Hindley* v. *Joy Narayan* (7)."

Again the words "illegally and "material irregularity" cannot have the same meaning. If the words "acted with material irregularity" refer to irregularity in procedure what meaning is to be attached to the words "acted illegally"? In view of these difficulties it has been laid down in some cases by this Court that cl. (*c*) has been advisedly left in indefinite language in order to empower this Court to interfere and correct gross and palpable errors of Subordinate Courts for the ends of justice: see *Mathura Nath Sarkar* v. *Umesh Chandra* (8), *Raghu Nath Gujrati* v. *Rai Chatraputt Singh* (9), *Jogunnessa Bibi* v. *Satish Chandra* (10). Another branch of the argument of the learned Counsel for the opposite party in this connection is that even if this Court has power under s. 115 to revise the orders of the Subordinate Judge, the orders under discussion in these Rules are merely interlocutory orders and consequently they cannot be revised by this Court at this stage. It is argued that s. 115 of the Code is confined to a case which has been decided; in other words to a case where the rights of the parties have been determined. It is contended by the learned Counsel that as the rights of the parties have not yet been determined, this Court cannot interfere at this stage. Reliance was placed in support of this contention on the observations of Woodroffe, J., in the case of *Chandi* v. *Kripal*, 10 Ind. Cas. 308 (11). So far as this Court is concerned, it can be said to be now fairly established that this Court will not interfere with interlocutory orders unless an irreparable injury will be done and a miscarriage will inevitably issue if this Court holds its hand. If however irreparable injury would be caused to one of the litigants if the matter was not set right,

"this Court ought to intervene in the current litigation and disturb the normal progress of a case by revising an interlocutory order that has been passed by a Subordinate Court, see *Salam Chand* v. *Bhagwan Das* (12)."

It was, however, contended on behalf of the opposite parties that as these orders can be challenged in the appeal from the decree which may be passed in that suit, this Court should not interfere at this stage. Reliance was placed for this contention also on the decision of this Court in the case of *Chandi* v. *Kirpal* 10 Ind. Cas. 308 (11) cited above. It is true that in that case Woodroffe, J., observed that interlocutory orders did not come within the scope of s. 115 but the learned Judges who decided that case were of opinion that this Court would have power under s. 15, Charter Act, to interfere and to set aside the order of the Subordinate Courts. It is however argued that O. VI, r. 17 of the Code gives a discretion to the Court either to allow or reject the prayer for amendment and that

(6) 99 Ind Cas. 749; A I R 1926 P. C. 142; 53 I A 271; 3 O W N 989; 25 L W 90; 25 A L J 61; (1927) M W N 84; 38 M L T 43; 28 P L R 113; 31 C W N 413; 52 M L J 368; 45 C L J 274; 8 P L T 251; 29 Bom L R 755; 54 C 338 (P. C.).

(7) 54 Ind. Cas. 439; A I R 1920 Cal. 505; 46 C 962; 24 C W N 288.

(8) 1 C W N 626.

(9) 1 C W N 633.

(10) 83 Ind. Cas. 438; A I R 1924 Cal. 633; 51 C 690; 28 C W N 559; 39 C L J 434.

(11) 10 Ind. Cas. 308; 15 C W N 682

(12) 98 Ind. Cas. 615; A I R 1926 Cal 1149; 53 C 767; 30 C W N 907.

the Court is not bound to allow the amendment. But it has been pointed out by this Court in the case of *Loke Nath Mukherjee* v. *Abani Nath Mukherjee* (13) that

"ordinarily the discretion of a judicial officer will not be reviewed by this Court in revision. But it is impossible to lay down a hard and fast rule. That in no instances will the discretion exercised by the judicial officer be reviewed either under s. 115 of the Code or s. 107, Government of India Act, or under the combined operation of the two sections."

Again there is a respectable body of authority at any rate in this Court in support of the view that under s. 107, Government of India Act (s. 15 of the Charter), this Court can interfere where irreparable injury will be done to one of the litigants or where there will be a failure of justice if the matter is not set right: *Gobind Mohun Doss* v. *Kunja Behary Doss*, 4 Ind. Cas. 380 (14), *Amjad Ali* v. *Ali Hossain Johar*, 6 Ind. Cas. 574 (15), *Charu Chunder Dutt* v. *Sarat Chunder Singh*, 8 Ind. Cas. 87 (16), *Loke Nath Mukherjee* v. *Abani Nath Mukherjee* (13).

The point for determination therefore is whether in this particular case any irreparable loss will be caused to the plaintiff if we do not interfere at this stage. It appears from para. 22 of the petition of the plaintiffs to this Court that one Pran Krishna Mallik, who is aged about 70 and who was the principal officer of the defendants and is therefore in a position to prove the account books which have now been produced in Court in spite of the objection of the opposite parties, has recovered recently from a serious attack of double pneumonia and that if his evidence be not taken now, it may be that, if the Court of appeal ultimately be of opinion that the plaintiffs were entitled to proceed with their claim on the original consideration in this litigation, the plaintiffs may not then get the benefit of the evidence of this witness having regard to his old age and the precarious condition of his health. In the counter-affidavit, which was filed by the opposite party, the statement that the said witness is aged about 70 was not denied and the answer to the plaintiffs' allegation that the witness had recently suffered from double pneumonia and was in a precarious condition of health is only evasive. In these circumstances we are of opinion that if this evidence be not taken now and if the witness dies in the meantime, the plaintiff will suffer irreparable loss. Further if the order of the learned Subordinate Judge be now allowed to stand and if the Court of appeal ultimately comes to the conclusion that the orders of the learned Judge are wrong, the suits will have to be remanded again to the trial Court for evidence and litigation will be protracted. If, on the other hand, this evidence be taken now and the Court of appeal ultimately holds that the evidence is irrelevant, the appeal Court would reject that evidence and proceed to hear the cases on the remaining portion of the evidence. It is, therefore, in our opinion desirable in the interest of the parties that this evidence should be taken at this stage so that there may not be any risk of a remand in future by the Appellate Court. We are therefore of opinion that in view of the peculiar facts and circumstances of this case we should interfere in this matter.

We accordingly make the Rule absolute, and set aside the orders of the learned Subordinate Judge against which these rules were directed. The learned Subordinate Judge is directed to amend the plaints as prayed for by the petitioners, to treat the suits not only as suits for recovery of money on promissory notes but also as suits for recovery of money on the original consideration and then to proceed to take evidence and decide the suits on that footing. The defendants will have an opportunity of filing additional written statement and raising additional issues, if they so like. Costs in these rules will abide the result, hearing fee being assessed at ten gold *mohurs*.

D. *Rule made absolute.*

(13) 149 Ind Cas. 923; A I R 1934 Cal. 102; 37 C W N 1093; 6 R C 662.
(14) 4 Ind. Cas. 380; 10 C L J 414; 14 C W N 153.
(15) 6 Ind. Cas. 574; 12 C L J 519; 15 C W N 353.
(16) 8 Ind. Cas. 87; 12 C L J 537.

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Acquittal Appeal No. 281/4 of 1934
December 11, 1934
RUPCHAND AND C. MEHTA, A. J. Cs.
EMPEROR—PROSECUTOR
versus
DULO—ACCUSED.

Criminal trial—Crown not calling prosecution witness examined by it in Committing Magistrate's Court, in Sessions—Sessions Judge thinking him to be material witness—Court's duty—Whether it can compel Crown to examine him as Crown witness or to tender him for cross-examination.

'Where the Crown has not examined a witness in the Sessions Court but had examined him in the Committing Magistrate's Court and the Sessions Judge thinks that he is a material witness, it is open to him either to draw an adverse inference against the Crown in not calling the witness or to examine him as a Court-witness. But he cannot compel the Crown either to examine him as a Crown witness or to tender him for cross-examination.

Mr. *C. M. Lobo*, for the Crown.

Mr. *Hatim B. Tyebji*, for the Accused.

Judgment.—This appeal has been filed by Government against the order passed by the First Additional Sessions Judge of Hyderabad, acquitting the accused of an offence under s. 304, Penal Code.

The prosecution story is somewhat as follows: On January 31, 1934, at mid-day, the deceased Umer found the buffaloes of the accused trespassing into Survey No. 357, which was being cultivated by him. He wanted to take the buffaloes to the pound, but they bolted. He followed them and after the buffaloes had passed by the village where both he and the accused lived, he shouted for help when two of his relatives, Saffar and Maluk, heard the shouts and went to his help. At the same time, the accused also went up in order to prevent the deceased from taking the buffaloes to the pound. The accused was armed with a hatchet. The accused and the deceased exchanged abuses, and then the accused gave a blow to the deceased with the hatchet on his head. Saffar and Maluk who were at a distance of about 50 paces saw this, but did not go near as the accused threatened them. The accused then left with the buffaloes. Other witnesses came up a little later. The deceased was conscious and he told them what had happened, and one of the witnesses was sent to make a report to the Police. The deceased lived the whole of that day and night and died the next morning before the arrival of the Police.

The evidence consists of: (*a*) direct evidence of Saffar and Maluk, and (*b*) the dying declaration said to have been made to them and to two other witnesses Muso and Loung before Umer breathed his last. There is no evidence of identification of footprints to connect the accused with the offence, and it is said that the ground was unimpressionable except at the place where the buffaloes had caused damage to the cultivation in Survey No. 357, and at that place the buffaloes were unattended. The case, therefore, depends solely upon the evidence of these four witnesses. They are closely related to the deceased. Saffar and Maluk are brothers. Their sister is the wife of one Dodo, brother of the deceased, and Photo who is the son of their sister has married the niece of the deceased. At the time of this incident Photo was living in the house of the deceased. Loung is the nephew of Umer. Muso is a cousin of the deceased and also a co-tenant with him in Survey No. 357. The defence set up by the accused was somewhat as follows: That the deceased was struck by some unknown person when no one was nearby. But as there was enmity between him and the deceased over some woman, he was suspected of the offence and was, therefore, implicated. The learned Additional Sessions Judge has accepted the defence and has held that the prosecution evidence is altogether false. Now, although we are not prepared to go to the length to which the learned Judge has gone, we think that the investigation in this case has been faulty and the evidence is not so convincing and free from doubt as to enable us to convict the accused. (After examining the evidence, His Lordship concluded). We think that, on the whole, this is not a case in which we should interfere with the order of acquittal, more so when two out of the three assessors and the leared Judge who saw the witnesses have not placed reliance on them. We accordingly dismiss this appeal.

Before we part with these papers, it is necessary to refer to an irregularity to which our attention has been invited. We find that one of the prosecution witnesses in the Committing Magistrate's Court was one Khan Muhammad. He was a partner with the deceased in the survey number trespassed upon. He was also the Patel of the village. He produced the accused before the Police and was, therefore, cited as a Crown witness. In the Committing Magistrate's Court, he gave certain evidence in favour of the accused with reference to an alleged enmity between the accused and the deceased. The Crown thought that he was not telling the truth on that point, and accordingly the learned Assistant Public Prosecutor did not consider it advisable to examine him as a witness in the Sessions Court. An application was made on behalf of the accused to the learned Additional Sessions Judge requesting him to compel the Crown to call Khan Muhammad as a Crown witness, and, in any case, to order that

he be tendered for cross-examination, and the learned Judge acceded to this request. The result was that Khan Muhammad was examined as a Crown witness and his evidence has been made use of by the learned Judge in disbelieving the rest of the prosecution evidence.

We are afraid that the learned Judge's order was clearly erroneous. If the Crown had not called Khan Muhammad as a Crown witness, and if the learned Judge thought that he was a material witness, it was open to him either to draw an adverse inference against the Crown in not calling the witness or to examine him as a court witness. But he could not compel the Crown either to examine Khan Muhammad as a Crown witness or to tender him for cross-examination.

D. *Order accordingly.*

LAHORE HIGH COURT

Second Civil Appeal No. 1307 of 1933
May 8, 1934,
ABDUL RASHID, J.
PHUL CHAND—PLAINTIFF—APPELLANT
versus
SHUGAN CHAND—DEFENDANT—RESPONDENT.

Mortgage—Subsequent mortgagee having notice of previous mortgage—Whether can challenge terms of previous mortgage.

In the case of mortgages, the subsequent mortgagee does not become the absolute owner and he is the representative-in-interest of the mortgagor only to this extent that he is entitled to redeem the previous mortgage. If the previous mortgage is not invalid or void, he cannot challenge the terms thereof on the ground that interest is excessive or penal as he entered into the subsequent mortgage with his eyes open. The mortgagor in such cases may be entitled to certain reliefs on equitable considerations but no such considerations prevail in favour of the subsequent mortgagees *Man Kaur* v *Ishar Das* (6) and *Izzatunnissa Begam* v. *Pertap Singh* (7), distnguished.

S. C. A. from the decree of the Senior Sub-Judge, Karnal, Dated March 18, 1933.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Ajit Ram*, for the Respondent.

Judgment.—The facts bearing on the question of law involved in this appeal may be shortly stated. On February 4, 1925, Man Chand, mortgaged a house to Phul Chand plaintiff-appellant for Rs. 400. On December 15, 1925, he executed another mortgage-deed in favour of Phul Chand on the security of the same house. On June 29, 1926, Mam Chand, executed a mortgaged-deed in favour of Shugan, Chand defendant-respondent, for Rs. 500, and it was mentioned in this mortgage-deed that the mortgage in question would be subject to the rights of the prior mortgagee. Phul Chand. On July 9, 1928, Shugan Chand instituted a suit against Phul Chand for recovery of Rs. 670 on the basis of the mortgage-deed, dated June 29, 1926, and impleaded Mam Chand as well as Phul Chand as defendants. He admitted the prior mortgages in favour of Phul Chand, and stated that the money due to him should be paid after the principal and interest on the mortgages in favour of Phul Chand had been paid off. On September 26, 1930, the house in dispute was sold for Rs. 2,025 in execution of the decree in favour of Shugan Chand. The Executing Court paid Rs. 1,510-14-6 to the plaintiff, Phul Chand, and the balance amounting to Rs. 1,412-13-6 was paid to Shugan Chand. The objection of Phul Chand and his appeal to the District Judge regarding the method of distribution were dismissed. Thereupon, Phul Chand brought the present suit for recovery of Rs. 299-11-0 against Shugan Chand, the subsequent mortgagee. The defendant pleaded, *inter alia*, that stipulations in the previous mortgages regarding the enhanced rate of interest and compound interest were penal in their nature, and that the plaintiff was, therefore, not entitled to any decree. The plaintiff in reply pleaded that the defendant was estopped from questioning the validity of the stipulation regarding rate of interest in the previous mortgages as a subsequent mortgagee was not entitled to raise such pleas after purchasing mortgagee rights with full knowledge of the prior mortgages. The trial Court and the lower Appellate Court dismissed the suit of the plaintiff who has come up in second appeal to this Court.

It was strenuously urged on behalf of the appellant that a mortgagor is entitled to raise equitable pleas regarding the rate of interest, but that the subsequent mortgagee cannot take advantage of such pleas. It was maintained that the subsequent mortgagee is not the succassor-in-interest of the mortgagor for all purposes, that he may be able to plead that the previous mortgage was absolutely void, but he cannot be allowed to urge that the rate of interest was excessive or that the stipulation regarding interest amounted to a stipulation by way of penalty. It was held in *Chiranji*

Lal v. *Dost Mohamod* (1), that it would not be open to the plaintiff to plead that a mortgage contract is bad for undue influence where he is only a donee from the mortgagor's widow. He is not entitled to the equities which existed in favour of the mortgagor. In a case reported as *Rahmat Ali* v. *Shadi Ram* (2), it was observed that subsequent mortgagees with notice of the previous mortgage in favour of the plaintiff were not entitled to resist the suit upon the ground that the conditions entered in the plaintiff's mortgage operated as a clog. The following observations from a Division Bench ruling of this Court reported as *Aziz Khan* v. *Duni Chand*, 20 Ind. Cas. 812 (3), may be quoted in *extenso*:

"Moreover, it must not be forgotten that the plaintiffs are not the original mortgagors but speculators who have bought on the chance of getting redemption on easy terms It is exceedingly doubtful whether, after acquiring a mortgage which on the face of it, and as it stood at the time of their purchase, contained terms which might make redemption practically valueless to them, they can be permitted to set up, as their vendor might have done, a claim that the bargain was brought about by the exercise of undue influence. No authority has been cited in support of such a position."

Similar observations occur in *Milkhi* v. *Fattu* (4), and *Ral'a* v. *Amin Chand* (5). On behalf of the respondent it was urged that under O. XXXIV, r.13, when mortgaged property has been sold the proceeds shall be applied in payment of whatever is due to the prior mortgagee on account of the prior mortgage and of costs properly incurred in connection therewith. It was contended that the words "whatever is due to the prior mortgagee" mean whatever is validly and legally due, and that as in the present case both the lower Court had held that the stipulations with regard to the payment of enhanced interest were in the nature of a penalty, the amount due on account of interest cannot be said to be validly due to the prior mortgagee. It was also contended that under s. 91, Transfer of Property Act, the subsequent mortgagee was entitled to redeem the land from the prior mortgagee, and therefore he was the representative-in-interest of the mortgagor for all purposes. Reliance was placed on *Man Kaur* v. *Ishar Das* (6), and *Izzatunnissa Begam* v. *Pertap Singh* (7), in this connection. These rulings are, however, clearly distinguishable from the present case: *Man Kaur* v. *Ishar Das* (6), merely laid down that a purchaser at a Court sale buys the property with all risks and with all defects in the judgment-debtor's title except where it is found that the latter had no saleable interest at all. In connection, therefore, with the sale of immovable property subject to an incumbrance the auction-purchaser is entitled to contest the factum and the validity of the incumbrance.

There is no rule of estoppel which can prevent him from impeaching the charge on the property. Similar observations occur in the Privy Council ruling referred to above. It must, however, be remembered that the purchaser in an auction-sale becames the absolute owner of the property as soon as the sale in his favour in confirmed, and the judgment-debtor and the decree-holder there after cannot claim any title in the property sold. In the case of mortgages, the subsequent mortgagee does not become the absolute owner and he is the representative-in-interest of the mortgagor only to this extent that he is entitled to redeem the previous mortgage. If the previous mortgage is not invalid or void, he cannot challenge the terms thereof on the ground that interest is excessive or penal as he entered into the subsequent mortgage with his eyes open. The mortgagor in such cases may be entitled to certain reliefs on equitable considerations but, no such considerations prevail in favour of the subsequent mortgagee. The facts of the present case establish beyond doubt that the respondent had notice of the mortgages in favour of the appellant. It was open to him to make due inquiry into the terms of these mortgages, and to decline to enter into a subsequent mortgage if he considered the terms of the prior mortgages onerous or penal.

For the foregoing reasons I accept the appeal and decree the plaintiff's claim. Taking all the circumstances into account I leave the parties to bear their own costs throughout.

N. *Appeal accepted.*

(1) 79 Ind. Cas 955; A I R 1923 Lah. 634.
(2) 75 Ind. Cas. 877; A I R 1925 Lah. 45.
(3) 20 Ind. Cas. 812.
(4) 40 P L R 1903.
(5) 126 P L R 1908.
(6) 120 Ind. Cas. 162; 11 Lah. 90; A I R 1930 Lah 40; Ind. Rul. (1930) Lah. 2; 31 P L R 358.
(7) 3 Ind. Cas. 793; 31 A 583; 36 I A 203; 13 C W N 1143; 10 C L J 313; 6 A L J 817; 11 Bom. L R 1220; 6 M L T 277; 19 M L J 682 (P C).

ALLAHABAD HIGH COURT

Civil Revision Application No. 105 of 1934

March 28, 1935

NIAMAT-ULLAH AND RACHHPAL SINGH, JJ.

Musammat EHATISHAMMUNNISA AND ANOTHER—APPLICANTS—APPELLANTS

versus

MIR HADI ALI AND OTHERS—OPPOSITE PARTY—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 141, O. XXXIII, r. 1, Explanation—Application to file an application for succession certificate as pauper—Civil Procedure Code, whether applicable—Succession Act (XXXIX of 1925), s. 379.

The applicants cannot be declared paupers, unless the requirements of the Explanation to r 1, O. XXXIII, are strictly fulfilled. The deposit under s. 379, Succession Act, of a sum equal to the fee payable on a succession certificate cannot be considered to be court-fee payable on the application for a succession certificate (which corresponds to a plaint in a suit). This deposit is made necessary to ensure payment of court-fee when the succession certificate is to be issued. As a matter of fact, the court-fee on such certificate is payable under the Court Fees Act, Sch. I Art. 12, and is paid when the certificate is issued, *i e.*, after the termination of proceedings under the Succession Act. The test of pauperism, laid down by the explanation to r. 1, O. XXXIII, Civil Procedure Code, therefore, is not that the applicants have no means of paying the sum required to be deposited under s. 379, Succession Act, but that they have no means of paying the court-fee on the application for a succession certificate, that is, a trifling amount of eight annas.

[Case-law considered.]

Quaers:—Whether in view of legistative changes embodying the provisions for grant of succession certificates in the Succession Act, the general provisions of the Code of Civil Procedure applies by virtue of s. 141 of the Code to a Court sitting as a Court administering the Succession Certificate Act.

C. R. App. from the decision of the District Judge of Budaun, dated January 19, 1934.

Mr. *G. S. Pathak*, for the Applicant:

Mr. *Shiva Prasad Sinha*, for the Opposite Parties.

Niamatullah, J.—This revision raises a question of a somewhat unusual character. The applicants applied in the Court of the District Judge, Budaun, for a succession certificate in respect of debts due to their deceased mother, Mehdi Begum. It was stated in the application that the petitioners were paupers and had no funds to pay the fee prescribed for the grant of a certificate for collection of the debts of the deceased. In effect, the applicants prayed that they be exempted from the rule contained in s. 379, Indian Succession Act, which requires the deposit of a sum equal to the fee payable under the Court Fees Act in respect of the certificate on an application being made therefor. The learned District Judge dismissed the application holding that the provisions of the Civil Procedure Code, relating to suits and appeals in *forma pauperis* do not apply to proceedings for grant of a succession certificate under the Indian Succession Act. The order of the learned District Judge is challenged in revision.

It is argued, on the authority of s. 141, Civil Procedure Code, that the procedure prescribed by the Code of Civil Procedure for suits is applicable to all proceedings in any Court of civil jurisdiction and that therefore, O. XXXIII, which provides for pauper suits, is applicable to applications for grant of succession certificates. Assuming that s. 141, Civil Procedure Code, makes every part of the Code applicable to proceedings in a Court of civil jurisdiction, it seems to me that there is an insurmountable difficulty in acceding to the prayer of the applicants Order XXXIII, r. 1, provides that, subject to certain provisions, any suit may be instituted by a pauper. The explanation appended to that rule defines a pauper as a person who

> "is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or where no such fee is prescribed, when he is not entitled to property worth Rs. 100 other than his necessary apparels and the subject-matter of the suit."

Assuming that proceedings for grant of a succession certificate can be taken to be a suit under O. XXXIII read with s. 141, the application for a succession certificate is the plaint. The applicants can be considered to be paupers only if they are not possessed of sufficient means to enable them to pay the fee prescribed by law for the application for succession certificate. In other words, unless they can show that they were not possessed of even 8 annas, they cannot be considered to be "paupers" as defined in the Explanation. This is not a case in which no court-fee is payable on the plaint (in this case the application for the certificate) so that they may be treated as paupers because they are not possessed of property worth Rs. 100. It was pointed out that under s. 379, Indian Succession Act,

> "every application for a certificate . . . . . shall be accompanied by a deposit of a sum equal to the fee payable under the Court Fees Act, 1870, in respect of the certificate . . . . ."

and an attempt was made to argue tha if the applicants for a succession certificat are not possessed of sufficient means t

enable them to deposit the sum equal to the prescribed court-fee, they should be treated as "pauper" in terms of the explanation above referred to. Reference was also made to O. XXXIII, r. 8, which provides that, if the application for permission to sue as a pauper is granted, the plaintiff is not liable to pay any court-fee (other than fee payable for service of process) in respect of any petition, appointment of a pleader or other proceedings connected with the suit. According to Sch. I of the Court Fees Act, *ad valorem* fees are payable on a number of documents, including succession certificates. It is said that once the applicants are declared paupers, they will be exempt from payment of court-fee on the succession certificate. This contention may be correct; but the initial difficulty is that the applicants cannot be declared paupers, unless the requirements of the Explanation to r. 1, O. XXXIII, are strictly fulfilled. The deposit under s. 379, Indian Succession Act, of a sum equal to the fee payable on a succession certificate cannot be considered to be court-fee payable on the application for a succession certificate (which corresponds to a plaint in a suit). This deposit is made necessary to ensure payment of court-fee when the succession certificate is to be issued. As a matter of fact, the court-fee on such certificate is payable under the Court Fees Act, Sch. I, Art. 12, and is paid when the certificate is issued, *i. e.*, after the termination of proceedings under the Indian Succession Act. The test of pauperism, laid down by the Explanation to r. 1, O. XXXIII, Civil Procedure Code, is, therefore, not that the applicants have no means of paying the sum required to be deposited under s. 379, Indian Succession Act, but that they have no means of paying the court-fee on the application for a succession certificate, that is, a trifling amount of eight annas.

The applicants claim as heirs of the deceased lady; and assuming that, for the purposes of succession certificate, their position as heirs alone has to be considered and their own means have to be disregarded, they must show that, as heirs of the deceased, they have no means of paying even eight annas. As a matter of fact, the application for grant of a succession certificate was stamped, as required by the Court Fees Act. It is certainly conceivable that the legal representatives of a deceased person may not be in possession of assets equal to the value of the stamp payable on a mere application. In an ordinary case, however, it will be difficult for an applicant for succession certificate claiming as an heir to satisfy the Court that, as person representing the estate of the deceased, he has no means of paying even that amount.

In the matter of the will of Dawubai (1) was strongly relied upon by learned Advocate for the applicants. That was a case in which a probate had been applied for *in forma pauperis*. Sterling, J., reluctantly admitted the application and was greatly influenced by the equities of the case. He observed as follows:—

"I had, on a previous occasion, refused to accept such a petition, as no precedent was in existence for such a course being pursued, but in the present instance the matter was pressed upon me as one of great hardship, as the deceased had during her lifetime filed a suit to recover the property in question, and as she was a Christian, that suit must now be dismissed unless the applicant could obtain probate of her will. I therefore allowed the petition to be interpreted and affirmed gratis, so that the matter might be set down as a pauper petition and the points at issue be fully discussed."

The learned Judge then proceeded to discuss the question whether a person who has been allowed to apply for a probate *in forma pauperis* is exempt from payment of the court-fee prescribed for a probate, and answered it in the affirmative. He referred to s. 647, Civil Procedure Code, (141 of the present Code), and applied Chap. XXVI (O. XXXIII) of the present Code. He then referred to s. 410 (XXXIII r. 8), Civil Procedure Code, which exempts a person alowed to sue *in forma pauperis* from payment of all court-fees, except those payable for service of process. The essential distinction between that case and the one before us lies in the fact that Sterling, J. accepted the application for probate as one made by pauper, which implied that permission to prosecute it as a pauper had already been granted. The reasoning which followed on that assumption clearly flows from s. 647 (now s. 141) and s. 410 (now O. XXXIII, r. 8), which were held to be applicable. In the present case, the learned District Judge had to consider at the threshold of the case whether the applicant could be permitted to apply *in forma pauperis*. Though he has not referred to the Explanation to O. XXXIII, r. 1, and has thrown out the application on the ground that the provisions of the Civil Procedure Code, relating to pauper suits do not apply to such applications, the

(1) 18 B 237.

operative part of his order can be supported on the grounds herein stated. It cannot be said that he failed to exercise a jurisdiction vested in him by law.

I have so far assumed that by virtue of s. 141, Civil Procedure Code, all the provisions of that Code apply to proceedings for grant of succession certificates. There is some authority against that general assumption. A Division Bench of this Court held in *Kanhaiya* v. *Kanhaiya Lal* (2), that, except in so far as is expressly provided by the Act itself, the general provisions of the Code of Civil Procedure cannot be deemed to be applicable by virtue of s. 141 of the Code to a Court sitting as a Court administering the Succession Certificate Act. Accordingly it was held that no Receiver could be appointed in proceedings taken for the grant of succession certificates. Some legislative changes have taken place since this decision. The provisions for grant of succession certificates are now embodied in the Indian Succession Act: and it may be that a different view is now permissible. I express no decisive opinion on this point and prefer to rest my decision on the assumption that the entire Civil Procedure Code is applicable, as is contended for by the applicants. As already held, that assumption does not enable the applicants to get over the difficulty created by the definition of "pauper" given in Explanation to O. XXXIII, r. 1, Civil Procedure Code.

The result is that I would dismiss this application with costs.

Rachhpal Singh, J.—I agree.

By the Court.—The application is dismissed with costs.

D. *Application dismissed.*

(2) 79 Ind. Cas. 363; 46 A 372; A I R 1924 All. 376; 22 A L J 345; L R 5 A 238 Civ.

CALCUTTA HIGH COURT

Criminal Revision Petition No. 1185 of 1934

February 7, 1935

S. K. GHOSE AND HENDERSON, JJ.

BIRENDRA NATH BAKSHI—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 514—Bail bond—Denial of execution of bond—Forfeiture, when can be ordered—Evidence of execution—Necessity of.

Where a person denies the execution of a bail bond and the Magistrate without taking any evidence passes orders forfeiting the bond, the orders cannot be supported as it is necessary that there should be some evidence to prove that the bond was executed by him.

Mr. *Benode Lal Ghose*, for the Petitioner.

Henderson, J.—This is an application against an order of the learned Additional Chief Presidency Magistrate forfeiting a bail bond which is said to have been executed by the petitioner. The petitioner himself denied that he had ever executed the bond. The Magistrate had an inquiry made by the Police, which did not really carry the matter very far. As a result the Magistrate passed an order forfeiting the bond without giving any reasons. In his explanation he says that the petitioner was picked out in a test indentification held by the inquiring Police Officer. The Magistrate's order cannot possibly be supported. Since the petitioner denied the execution of the bond it was obviously necessary that there should be some evidence to prove that he did. The Magistrate took no evidence at all, with the result that he based his order on nothing. The Rule must, therefore, be made absolute. The Magistrate's order is set aside and anything paid in compliance with it will be refunded to the petitioner.

S. K. Ghose, J.—I agree.

N. *Rule made absolute.*

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——— Parti *land—Ancestor of tenant planting tree—Tenant cutting it down—Custom—Burden of proof—Custom not proved—Right of* zemindar *to tree.*

It is usual that in cases where the tenant cuts down a tree planted by his ancestor on a *parti* land in *abadi*, there is evidence of custom and a finding of custom, and it lies on the defendants (tenants) to plead and prove a custom by which they could be entitled to take the wood of this tree. In the absence of any proof of custom, *prima facie* the presumption is in favour of the *zemindar* The *zamindar* is the owner of the soil of a *parti* land and presumably the tree which is grown on that *parti* land and attached to the soil is transferable with a transfer of land and therefore, the tree goes with the land and must be regarded as pertaining to the land. In the absence, therefore, of a pleading and proof that the defendants had a right to cut the tree, it must be held that the defendants had no such right. RAM CHARAN *v.* GAJADHAR *All.* 1031

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The very object of accounts being kept, especially of day books, is the value that is to be attached to the entries made as each event happened. It is on the likelihood of such entries being made that the value of accounts depends But if an argument is advanced that though a drawing is made from the partnership account, it is not debited in the day-book at the time when it is drawn but only a lump sum is debited several months afterwards, it is not a proper day book; it ceases to be such an account book to which Courts are accustomed to attach value. SIVAGNANATHAMMAL *v.* NALLAPERUMAL PILLAI *Mad.* 783

——— *Non-production of accounts — Presumption—Assets not revealed—Power to direct payment of a share of value of assets.*

Where a party to a partition suit suppresses his accounts or has falsified them, the Court will make unfavourable presumptions against him.

Where the defendant has suppressed his accounts and the arbitrators have no means of ascertaining the exact nature of the oustandings, they will be justified in directing the defendant to pay the plaintiff's share of the estimated value of the outstandings without dividing the assets between them. CHIDAMBARAM CHETTIAR *v.* AYYAPPA CHETTIAR *Mad.* 1059

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——— *Actual possession, necessity of, to sustain claim to land by limitation—Land under water and unfit for occupation—Effect—Survey of land—Presumption of occupation by Government at one point of time—Whether arises.* Krishna Kuar *v.* Secretary of State for India in Council *Pat.* **122**

——— *One co-owner, when can claim adverse possession against another.* Rajana *v.* Musaheb Ali *Oudh* **23**

——— *Plea of—Whether mixed question of law and fact—Plea not advanced specifically in trial Court—Whether can be entertained in appellate stage—Civil Procedure Code (Act V of 1908), s. 100.*

In order to sustain a claim to land by limitation under the Indian Act, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him. In a suit for recovery of possession it is for the defendant to show that he had at sometime been in adverse possession of the land in suit continuously for a period of 12 years.

A certain land was under water and unfit for occupation from 1911 to 1916 and there was no evidence as to possession before 1911. The most that could be said was that the disputed land having been surveyed as a part of a village in 1898 a presumption arose that in that year the lands were capable of occupation and were in fact occupied by or on behalf of the Secretary of State :

Held, that from that evidence regarding the state of things at one point of time, it could not be presumed that the Secretary of State (defendant) had adverse possession for a period of 12 years and hence the plaintiff should succeed in the suit on proof of his title.

There can be no adverse possession by one co-owner against another until there is an ouster or something equivalent to an ouster of the latter.

The plea of adverse possession is a mixed question of law and fact and where a person wants to base his title on it, he should specifically advance the plea in the trial Court and an issue framed and finding given. Unless it is done, the plea is

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untenable and cannot be entertained. RAJANA *v.* MUSAHEB ALI *Oudh* 23
Agency, doctrine of—Applicability. SEE Transfer of Property Act, 1882, s. 92 905
Agra Tenancy Act (III of 1926), ss. 99, 230, 267—*Bench sitting in exercise of special jurisdiction conferred by s 267—Conflicting opinions expressed by single Judge of High Court sitting in appeal from Civil Court order, and by Revenue Court—Doubt as to jurisdiction—Reference under s. 267—Competency of—Previous opinion of single Judge—Whether operates as bar.*
A single Judge of the High Court sitting in appeal or revision from the order of a subordinate Civil Court is a Civil Court within the meaning of s. 267, Agra Tenancy Act For the purposes of s. 267, Agra Tenancy Act, it does not matter that doubt as to jurisdiction arises from conflicting opinions expressed by a Court of Appeal in the exercise of its jurisdiction as a Civil Court, and by the Revenue Court. Once there is a doubt created by conflicting orders of Civil and Revenue Courts the special jurisdiction of the High Court conferred by s. 237 of the Agra Tenancy Act can be invoked and can be exercised with the result stated in sub-s. (5), s. 267. Where a Bench is sitting in the exercise of a special jurisdiction conferred by s. 267, a reference to that Court is competent and the previous order of a single Judge of the High Court on the question of jurisdiction will not be a bar to the exercise of the special jurisdiction by the Bench when the doubt as to jurisdiction has arisen from conflicting opinions expressed by the Single Judge sitting in appeal from the order of a Subordinate Civil Court, and by a Revenue Court. QUDSIA JAN *v.* ZAHID HUSAIN *All.* 38
——— s. 121. SEE U. P. Land Revenue Act, 1901, s 42 1097
——— ss. 138, 139—*Rent payable by division of produce—Suit for arrears of rent—Parties failing to take steps under ss. 138 and 139 for division—Maintainability of suit.*
There is nothing in the provisions of ss. 138 and 139, Agra Tenancy Act, which may bar a suit for recovery of arrears of rent even if either of the parties fail to take necessary steps under ss. 138 and 139 for the division of the produce where the rent is taken by division or for estimate or appraisement of the standing crops. JADU DUBE *v.* DASRATH RAI *All.* 230
——— ss. 196, 197 (a) (b)—*Planting of grove—Whether changes nature of occupancy holding—Grove, if rendered capable of being mortgaged—Sale in execution of mortgage decree—Legality of.*
The planting of a grove may change the nature of the occupancy holding and render the grove capable of being mortgaged and of being sold in execution sale on a mortgage decree. Where trees have been standing for a very long time on a holding, when the *zemindar* gives implied permission that the tenant should plant a grove on a particular number of his occupancy holding, the *zemindar* must have consented to the alteration of the tenure of that number from an occupancy tenure to a grove tenure and that number becomes capable of mortgage and can be sold in execution of a mortgage decree RAM CHANDRA *v.* HUB LAL *All.* 358
——— s 225—*Interest—Court, if bound to give 12 per cent. interest only up to date of suit—Interest pendente lite and future interest is governed by Civil Procedure Code (Act V of 1908), s. 34.*
Under the provisions of s. 225, Agra Tenancy Act a co-sharer is entitled to claim interest at the rate of 1 per cent. per mensem. The Court is, therefore, bound to award him interest at 12 per cent. per annum up to the date of the suit. As regards the interest *pendente lite* and future, the case is governed by s. 34, Civil Procedure Code, which is applicable to suits in the Revenue Court as well, and under that section, in addition to any interest adjudged on the principal sum for any period prior to the institution of the suit, the Court may order interest at such rate as it deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, as well as further interest from the date of the decree till the date of realization. It is, therefore, incumbent on the Court to fix rates for *pendente lite* and future interest if it decides to award such interests; but it is not obligatory on the Court to award interest at the rate of 12 per cent. per annum, just as it is not obligatory on a Court to award *pendente lite* and future interest at the contractual rate in case of simple money debts. LALLU SINGH *v.* CHANDER SEN *All.* 943 F. B.
——— s. 226 (2). SEE Agra Tenancy Act, 1926, s. 227 653
——— ss. 227, 226 (2)—*Co-sharer—Whether can be held accountable for profits not collected by him—Collecting co-sharer—Liability of.*
There is no provision in s. 227, Agra Tenancy Act, for a co-sharer being held accountable for profits that he has not collected, and that applies in s. 226 (2) only in the case of a *lambardar*, the reason being that a co-sharer has no duty to collect for other co-sharers. Section 227 is not intended to convey the meaning that the collecting co-sharer is liable to share arrears rateably with co-sharers who do not collect. CHATAR SEN *v.* MITTER SEN *All.* 653
——— s. 230. SEE Agra Tenancy Act, 1926, s. 99 38
——— s. 238. SEE Civil Procedure Code, 1908, s. 9 37
——— s. 267. SEE Agra Tenancy Act, 1926, s. 99 38
Allahabad High Court Rules, Chap. XIX, r. 27. SEE Insolvency 661
Appeal—*Credibility of witness depending on his demeanour—Appellate Court, when can come to different conclusion from that of trial Court.*
When a Court has got to deal with a pure question of credibility of witnesses, great weight ought necessarily to be given to the judgment of the Judge, who saw the witnesses. But there may be other circumstances and facts, quite apart from manner and demeanour, which may show whether a statement can be believed or not. These circumstances and facts may justify the Appellate Court in differing from the trial Court even on a question of fact, turning on the question of credibility of witnesses whom the Appellate Court has not seen. GOLAM MUSTAPHA *v* HANUMANDAS MUNDRA *Cal.* 321
———*Findings of trial Court should not be disturbed unless manifestly incorrect.*
An appeal is not in the nature of a re-hearing. Where the Judge has heard the evidence and come to his own conclusion, that finding should not be disturbed in appeal unless it is manifestly incorrect. RAJBALLABH MISIR *v.* BISHUN PRASAD SINGH *Pat.* 81
——— *High Court whether can base its decision upon ground different from that given by trial Court.*
It is open to the High Court in appeal to base its decision upon a ground different from that given by the trial Court, provided there is sufficient evi-

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dence on the record from which a finding could be arrived at. YESHVANT *v.* GOVIND *Bom.* **50**

——— *One of defendants-respondents dying pending appeal—Suit if instituted without him would have been proper—Legal representative not brought on record in appeal—Appeal if competent.*

Where the suit would have been quite all right even if it had been instituted by the plaintiffs against the contesting defendants without impleading the deceased defendant-respondent as a defendant and there is no apprehension of there being any inconsistent decree if the appeal were to be allowed, the appeal does not become incompetent by not bringing on record the legal representative of the deceased on his death pending the appeal. SUNDAR ALI *v.* NUR MAMUD *Cal.* **733**

——— *Privy Council—Practice—Defence raised in trial but not taken in High Court—Whether can be raised before Privy Council.*

When an application is made to raise a defence not raised in the High Court though taken in the trial Court, it cannot be said that in no case could such leave be granted. The Board, acting under the Prerogative, must never abrogate their duty to tender to His Majesty in such a matter any advice which the nature of the case seems, in justice, to be called for. But the circumstances in which such an application will be entertained are necessarily exceptional. Apart from special circumstances there is no distinction in principle between the position of an appellant who abandons in the High Court a ground of appeal of which he had given notice and the position of a respondent in the High Court who does not raise a point in his favour which was open to him without notice It is quite true that it would be open to the Board on proper terms to refer to the High Court the question for their consideration. But even that the Board would not do except under special circumstances. FANNY SKINNER *v.* BANK OF UPPER INDIA, LTD. **P. C. 743**

——— *Second appeal—Judgment of lower Appellate Court based on inadmissible evidence—Finding if can be reversed in second appeal.*

Per *Mohammad Noor, J.*—If the High Court finds in second appeal that the lower Appellate Court has based its judgment partially upon a piece of evidence which was not admissible, it cannot by that reason alone, reverse that finding or remand the case if it can come to the conclusion that there was sufficient evidence on the record to justify the finding. How the High Court is to satisfy itself about the sufficiency of evidence is a matter which must depend upon the facts of each case. SONEY LALL JHA *v* DARBDEO NARAIN SINGH *Pat.* **470 F. B.**

Approver—*Corroboration, necessity of—Nature of corroboration required, in conspiracy cases—Evidence Act (I of 1872), s. 114, illus. (b)—Discrepancy between evidence of approver and of witnesses—Value of evidence.*

The evidence of an approver has to be corroborated by some independent evidence. This rule is particularly necessary in cases of conspiracy to commit crimes where the crime of criminal conspiracy is established the moment an agreement between the accused persons to commit such crimes is proved. Evidence of a mere agreement can easily be concocted or manufactured, hence the need of independent testimony by way of corroboration is manifestly essential. To amount to corroboration the evidence must implicate the accused, *i. e.*, it must confirm in some material particular not only the accomplice or

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approver's evidence that the crime has been committed, but also that the accused committed it. The corroborative evidence need not shew positively that the accused committed the crime; it is sufficient if it is merely circumstantial connecting him with the crime It must be evidence which shews or tends to shew that the approver's evidence implicating the accused is true; it must be independent testimony on a material particular or material particulars demonstrating to the Court the truth of the approver's evidence implicating the accused. Evidence to amount to corroboration must be independent testimony and therefore the evidence of one approver cannot amount to corroboration of the evidence of another.

Where there is a serious discrepancy between the evidence of the approver and that of witnesses, it makes it impossible for the Court to act upon such evidence either by itself or as corroboration of the approver's testimony. BACHCHA BABU *v.* EMPEROR *All.* **369**

Arbitration—*Agreement to refer dispute to third party, whether amounts to undertaking not to appeal.*

Where the parties say that the determination of their disputes by a person is to be final as between them, that is to be regarded as an undertaking not to appeal, and an appeal preferred would be in violation of good faith and ought not to be entertained where the real merits of the case have been withdrawn from the Court. MAHAMMAD MIA PANDIT *v.* OSMAN ALI *Cal.* **915**

——— *Arbitrators to act together—Every stage of proceeding must be in presence of all.*

Where there are several arbitrators, all must act together and each must act in the making of the award. Every stage of the proceedings must be in the presence of all, and every judicial act to be done by two or more must be completed in the presence of all who do it. Consequently where the composition of board of directors had changed from time to time since the appeal went before the board and the award was given by some of them only and some of those who were present at the earlier meetings were not present later and did not form part of the Board which made the award:

Held, that the award was not legal and must be set aside. FAZALALLY JIVAJI RAJA *v.* KHIMJI POONJI & Co. *Bom.* **801**

——— *Award—Parties acting on some terms—One of them who received benefit, whether can repudiate it.*

Where both the parties have already acted on some of the terms of the award and one of them has already received some benefit under the award, he cannot be allowed to repudiate it afterward on the ground that the award is illegal. A. R. P. R. M. MEYAPPA CHETTYAR *v.* L. V. VENKATACHELLAM CHETTYAR *Rang.* **907**

——— *Decision of third person, on question involving judicial and quasi-judicial work, is an award.*

A decision, on a reference by parties of a question involving some judicial or *quasi*-judicial work, is an award. MAHAMMAD MIA PANDIT *v.* OSMAN ALI *Cal.* **915**

——— *Misconduct—Arbitrator dictating part of award to junior—Contents of award leaking out before pronouncement—Defendant not taken into confidence—Judicial misconduct, if made out.*

The writing of a part of the award by the junior of the arbitrator at the latter's dictation is an act of a ministerial character which can be delegated

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to a third person and does not constitute judicial misconduct.

In the absence of any evidence showing that the arbitrator in any way took the defendant into his confidence, no misconduct can be attributed to him by reason of the contents of the award having leaked out before it was pronounced. Any help given by the defendant in the preparation of the copy of the award sent to the plaintiff cannot also affect the award itself. These circumstances, though raising some suspicion against the arbitrator, are not sufficient to establish a charge of misconduct. NIHAL CHAND *v.* SHANTI LAL *Oudh* **522**

———Partition suit—Suppression of accounts—Power to direct payment of share of value of assets. SEE Accounts **1059**

———*Reference to decide disputes, after going through the accounts—Accounts found unreliable—Power of arbitrators to proceed on other available materials.*

Disputes between two brothers relating to the division of their family properties were referred to arbitrators and the arbitrators were requested to make a division after looking into the accounts and taking the statements of the parties. The arbitrators found that the accounts were not reliable, made an estimate of the assets of the family from other available sources, and directed the defendant who was in possession of the assets and who maintained the accounts to pay half value of the estimated assets to the plaintiff. It was contended that the procedure adopted was illegal:

Held, that the arbitrators did not become powerless to decide the matter when they found the accounts to be unreliable. Their powers to make use of such material as was available in order to reach a conclusion so long as what they did was not in breach of the terms of the reference, were not less than the powers which a Court would possess in similar circumstances, and the procedure adopted by them was not illegal. CHIDAMBARAM CHETTIAR *v.* AYYAPPA CHETTIAR *Mad.* **1059**

———*Stay of suit, when granted.*

The Court will ordinarily stay a suit, if the parties have agreed to refer their dispute to arbitration, and refer the matters in dispute to arbitration but where difficult questions of law are involved in such dispute, the suit will be allowed to proceed. KARUMUTHU THIAGARAJAN CHETTIAR *v.* THOS SMITH & Co *Bom.* **932**

Arbitration Act (IX of 1899), s. 6—*Submission, mode of—Intention of parties is sole guide.*

The intention of the parties must be the sole guide for determining the mode of working out the submission and reaching a final decision. The law of arbitration is based upon the principle of withdrawing the dispute from the ordinary Courts and enabling the parties to substitute a domestic tribunal. Once that tribunal reaches a final decision as contemplated or agreed upon by the parties, then the Arbitration Act steps in to help the parties to enforce the said decision. FAZALALLY JIVAJI RAJA *v.* KHIMJI POONJI & Co. *Bom.* **801**

———**s. 11**—*S. 11, scope of—Award by association on appeal by board of directors from awards of umpire under bye-law held can be filed under s. 11 and is final decision.*

Section 11, Arbitration Act, in terms does not apply to an award made on appeal by the Board of directors, but if the decision of the Board which is called an award under the bye-law, which is filed under the Arbitration Act, is the final decision under the submission in accordance with the Act, then it would be an award made by the arbitrators under the submission between the parties. FAZALALLY JIVAJI RAJA *v.* KHIMJI POONJI & Co. *Bom.* **801**

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———**s. 19**—*Application for postponement of hearing of suit, whether a step in proceeding irrespective of intention of applicant.*

An application made to the Court for postponement of the hearing of the suit is a step in the proceedings within the meaning of s. 19, Arbitration Act, irrespective of the intention with which the application is made. Whether the applicant wishes to have further time to file a written statement or to raise as a bar to the suit the agreement to refer to arbitration, in either event, his application is an application to invite the Court to do something which would enable him to establish his defence. It is for the Court to determine whether any particular act or application is a step in the proceeding, irrespective of the fact that a party may not have had any intention of submitting to the jurisdiction of the Court. FIRM OF MURLIMAL SANTRAM *v.* BANARSIDAS & SONS *Sind* **895**

———**s. 19**—*Application for stay—Court's duty.*

In an application for stay of a suit under the Arbitration Act, it is the *prima facie* duty of the Court to stay and the onus lies on the plaintiff to show why he should not be bound by the agreement to refer. FIRM OF MURLIMAL SANTRAM *v.* BANARSIDAS & SONS *Sind* **895**

———**s. 19**—*Sufficient cause in refusing application for stay—Charge of fraud or forgery—Court's jurisdiction to refuse stay.*

What is a sufficient cause for refusing to stay on an application for stay under s. 19, Arbitration Act, depends on the particular facts of each case. The fact that a submission clause does not include all the matters which are the subject of legal proceedings may be a sufficient cause for refusing to stay. When there is charge of fraud or forgery, against one of the parties to a submission clause, a Court has discretion to refuse a stay. Generally speaking, where the party charged desires a public inquiry, the Court will generally refuse to send the case to arbitration but where the party making the charge desires that the matter should be dealt with in Court, the Court will be less inclined to stay the suit. But to ensure a proper discretion in refusing to stay a suit on an allegation of fraud or forgery, the Court should ascertain that there is some foundation for such a charge; otherwise there will be a tendency to allege fraud in any case in which a party to a submission clause wishes to avoid arbitration. FIRM OF MURLIMAL SANTRAM *v.* BANARSIDAS & SONS *Sind* **895**

Arbitrator—*Arbitrators selected for personal knowledge—Use of personal knowledge not illegal—Civil Procedure Code (Act V of 1908), Sch. II, r. 20.*

Where an arbitrator has been selected because of his personal knowledge of the matter in dispute, it would not be misconduct on his part to use his personal knowledge in coming to a certain decision, although in such cases it is desirable that he should tell the parties what his personal knowledge is and give them an opportunity to prove that his view is wrong.

Where the parties have not been prejudiced by use of the arbitrators' personal knowledge the Court will not interfere with their award. CHIDAMBARAM CHETTIAR *v.* AYYAPPA CHETTIAR *Mad.* **1059**

Arbitrator—concld.

———*Civil Procedure Code (Act V of 1908), Sch. II, para 15, cl. 1—Relationship of arbitrator with one defendant—Arbitrator having monetary dealings with another defendant—Non-disclosure of facts to plaintiff at time of agreement—Fraudulent concealment, if constituted—Plaintiff not conscious of right to revoke submission—Consequent failure to lodge protest—Whether constitutes waiver.*

Where the arbitrator is related to one of the defendants and has monetary dealings with the other, both of which facts ought to have been disclosed but were not disclosed to the plaintiff when he entered into the agreement, the concealment of the relationship must be considered fraudulent and the award should be set aside. As there can be no question of waiver without full knowledge of one's legal rights, where the plaintiff thought that he had no right to revoke the submission, his failure to lodge an unequivocal protest against the arbitrator acting as such, will not operate as a waiver. NIHAL CHAND *v.* SHANTI LAL *Oudh* **522**

———*Private inquiries made but award based on documentary evidence—Award, if vitiated.*

Although it is true that an arbitrator cannot import his own knowledge into a case, or base his decision upon information obtained otherwise than from the evidence submitted to him by the parties, unless permitted to do so by the terms of reference, yet when there is a concurrent finding that the private inquiries made by the arbitrator did not affect the award and the award itself shows that the arbitrators were not impressed even by the oral evidence which was given before them on behalf of the parties and based their award purely on documentary evidence and upon two statements made upon oath, it cannot be held, that the private inquiries affected the form or substance of the award in any way and in such a case no interference in revision is called for. ABDULLAH KHAN *v.* BAHRAM KHAN *Pesh.* **1022**

Army Act (VIII of 1911), s. 87 (1)—*Soldier, if can be retained for trial—Retention order must be from competent Military Authority.*

Section 87 (1), Army Act gives a power to retaine soldier in order to have the benefit of his services as soldier and has no bearing on his retention for the purposes of his trial by Court Martial. Before the section can operate, it is necessary to have an order of the competent Military Authority in which the period of retention must be specified. CONDUCTOR ALFRED BEEDHAM, QUETTA, *In the matter of. Lah.* **444** *(b)*

———**s. 90 (1)**—*S. 90 (1), if applies to soldiers who have served for 21 years—'Convenient', meaning of—Soldier under arrest—Pay, if a subsistence allowance.*

Section 90 (1) does not apply to a soldier who has served the full period of 21 years. The word "convenient" refers only to the speed with which the discharge is effected and the section does not entitle the superior Military Authority deliberately to hold up a soldier's discharge if he has become legally entitled to it.

The subsistence allowance provided to enable a soldier to live is not his pay; the allotment and other payments not paid at his request is the unilateral act of the Military Authorities, and cannot affect his legal position. CONDUCTOR ALFRED BEEDHAM QUETTA, *In the matter of Lah.* **444** *(b)*

——— **s. 158 (1)**—*Person, no more subject to military law—He can be arrested and tried within three months, else he cannot be tried by Court Martial.*

Section 158 gives powers of arrest and trial of a person who has ceased to be subject to Military Law and his trial must commence within three months of his ceasing to be so subject: and after the expiration of this period of three months the person charged with an offence ceases to be liable to arrest or trial by Court Martial. CONDUCTOR ALFRED BEEDHAM QUETTA *In the mutter of Lah.* **444** *(b)*

Army Act—concld.

Assets in s. 73, Civil Procedure Code, 1908, meaning of. SEE Civil Procodure Code, 1908, s 73 **918**

Assignment—*Mortgagee Bank going into liquidation—Agreement between Bank and purchasing Trust—Agreement not completed—Non-registration—Suit on mortgage by Bank—Maintainability.*

The defendant mortgagor executed a deed of simple mortgage in favour of a Bank, the deed containing a covenant on the mortgagor's part for payment of the mortgage-debt with compound interest. In default of payment, the mortgagee Bank had the ordinary right of proceeding by Court sale to realise its security. The Bank went into liquidation and in 1923 the Liquidator filed a suit on the mortgage In 1917, an agreement was entered into between the Bank and a concern known as the Trust of India, the purpose of the agreement being to make it possible to come to an arrangement with the other creditors of the Bank so that by the appropriation and realisation of certain assets for their benefit, with the consent of the trustees for the debenture stock, all claims against the Bank would be got rid of, and subsequently in due course the Bank would be dissolved. The mortgage-debt was included in such assets, but the agreement was not registered under the Transfer of Property, nor was the transfer completed. It was contended that all interest had passed into the Trust and the Bank had no right to sue:

Held, that the transfer of this mortgage-debt was effective as between the transferor and the transferees; but as there was no completion of the agreement and the transfer of the agreement was of no effect by reason of non-registration, any proceedings to recover the debt brought against the mortgagor must be, not in the name of the transferee, but in that of the transferor. Consequently, the Bank rightly sued to recover the mortgage-debt. The transaction as between the transferor (the Bank) and the transferee may be taken to be complete although there was no completion and no legal assignment or transfer of the assets included in the agreement and not legally transferred by virtue of the agreement itself:

Held, also as the mortgagor had not raised in the High Court the defence as to her disability on the ground of her being a *pardahnashin* lady, a defence which she raised in the trial Court, leave could not be granted to re-open that question before the Privy Council. FANNY SKINNER *v.* BANK OF UPPER INDIA, LTD **P. C. 743**

Award—*All members of Board of Directors not signing award—Irregularity can be rectified.*

The award ought to be signed by all the members of the Board who joined in the making of it. But the omission to do so is a mere irregularity capable of being rectified. FAZALALLY JIVAJI RAJA *v.* KHIMJI POONJI & Co. *Bom.* **801**

———*Part of award found invalid—Party acting on invalid part—Whether estopped from contending that it is invalid.*

If part of an award is found to be invalid as being in excess of the arbitrator's powers and is separable from the rest, the remainder of the award being

Award—concld.

good, can be maintained and acted upon, while the excessive part of the award can be declared to be unenforcible. But if a party has taken advantage of the invalid part of the award he is estopped from setting up that that clause of the award is illegal. MEYAPPA CHETTYAR *v* VENKATACHELLAM CHETTYAR *Rang.* **997**

———Reference without intervention of Court during pendency of suit—Award if can be recorded as compromise. SEE Civil Procedure Code, 1908, O. XXIII, r. 3 **915**

———*Statement in award creating new right in party—Award, if compulsorily registrable—Registration Act (XVI of 1908), s.* 7 (1) (*c*).

A mere statement of fact by a party to an instrument would obviously have no effect upon legal relations, but a similar statement in an award by arbitrators regarding a point in dispute between the parties does affect the legal relationship; in the first case it is a mere admission of an undisputed fact; in the second case, it is a decision and a finding upon a fact which is disputed. Where a clause in an award creates a new right in a party, it is a declaration with in the meaning of s. 17 (1) (*c*), Registration Act and the award is compulsorily registrable. ABDULLAH KHAN *v.* BAHRAM KHAN *Pesh.* **1022**

Bar Council—*Findings by—High Court, if bound to accept them.*

Usually the High Court will accept, especially when there is no objection preferred by the Government Advocate, the finding of the Bar Council. The High Court, however, is not bound to accept it. AN ADVOCATE, CAWNPORE, *In the matter of* *All.* **1043** (S. B.)

Benami. SEE Mortgage **234**

Bengal, Agra and Assam Civil Courts Act (XII of 1887), s. 3. SEE Jurisdiction **769**

Bengal Cess Act (IX of 1880), s 4—Kabuliyat—Ijardar *entitled to exclude anybody else from dealing with land in manner he himself is entitled to do*—Ijardar, *whether in use and occupation—What he pays under* kabuliyat *is rent.*

Where under the terms of the *kabuliyats* the *ijardars* are entitled to exclude anybody else from dealing with the lands in the particular manner in which he himself is entitled to do under his *kabuliyat*, in that sense, a limited sense though it be, the *ijardar* is in use and occupation, being allowed by his *kabuliyat* to let in or exclude anybody he likes for sale of the particular commodities to which his *kabuliyat* referred, collecting such tolls as his *kabuliyat* permitted and using perhaps such portion of the land covered by the boundaries on which those particular commodities used to be sold. What the *ijardar* has to pay under his *kabuliyat* is "rent" within the meaning of s. 4 of the Cess Act. HEM CHANDRA DAS *v.* SECRETARY OF STATE *Cal.* **1055**

———s. 6 — *Collections by* zemindar *from traders resorting to* hat *for selling goods, whether assessable.*

Whether a particular sum of money collected from persons who use a *zemindar's* land is or is not rent is a mixed question of law and fact. Where traders come and sell their commodities on the land and pay something to the *zemindar* and the same set of traders do not necessarily come on every *hat* day and no land is settled with them for any period of time, the money thus realized is not ground rent and is not assessable to cess. SOURENDRA MOHAN SINHA *v.* SECRETARY OF STATE *Pat.* **1099**

———ss. 6, 106—*Revenue Board cannot add to or subtract from Cess Act—Income not assessable under Act cannot be made assessable.*

Section 106, Bengal Cess Act, does not authorize the Board of Revenue to make that income assessable to cess which is not assessable under the Act itself. The Board have no power to add to the Act or subtract anything from it. The rules must be rules for the purposes of carrying out the Act. If any income is not assessable, it cannot be made assessable by any order of the Board of Revenue SOURENDRA MOHAN SINHA *v.* SECRETARY OF STATE *Pat* **1099**

Bengal Cess Act.—concld.

———s 47—*S.* 47, *if applies to rent-free tenures.*

The addition of s. 64-A to the Act makes it clear that s. 47 has no application to rent-free tenures. BHUNESHWARI KUER *v* DEVKI KUER *Pat.* **869** (*a*)

———ss. 52, 54, 56—*Absence of special contract—Tenant, if liable to pay anything except under s.* 56.

In the absence of a special contract nothing is lawfully payable by the tenant defendant except under s. 56 which requires as an indispensable preliminary that notices should be served under ss. 52 and 54 of the Cess Act. BHUNESHWARI KUER *v.* DEVKI KUER *Pat* **869** (*a*)

———ss. 56, 52, 54—*Cesses, if become payable only after publication of notices under ss.* 52 *and* 54.

Under s. 56, Bengal Cess Act, cesses only become payable after publication of the notices required by ss 52 and 54; and this would contradict s. 62 if the latter section were construed to mean that such cesses can be realised before publication of the notices. BHUNESHWARI KUER *v* DEVKI KUER *Pat.* **869** (*a*)

Bengal Land (Redemption and Foreclosure) Regulation (XVII of 1806), ss. 7, 8—*Notice unaer s.* 8—*Requirements of.*

If a notice under s. 8 of the Bengal Land (Redemption and Foreclosure) Regulation contains a reference to s. 7 of the Regulation, or enumerates the various methods described in it for avoiding foreclosure, the notice will be valid. The unnecessary adoption of an incomplete description of the mode of redemption allowed by s. 7 cannot affect that validity of the notice. DHUM CHAND *v.* KISHAN CHAND *Lah.* **279**

Bengal Motor Vehicle Tax Act (V of 1932)—*Rules* 10, 12, 13 *under the Act, whether* ultra vires *of Local Government.*

There is nothing contained in rr. 10, 12 and 13 of the Rules under Bengal Motor Vehicles Tax Act which is *ultra vires* of the Local Government, having regard to ss. 9 and 12, Bengal Motor Vehicles Tax Act, 1932, by which it is clearly intended that delivery of the token has to be obtained, and the token exhibited on the car, in the manner provided by the Rules. R. C. CURTIES *v.* EMPEROR *Cal.* **710**

———ss. 9, 12—*Person paying tax must obtain delivery of token—Non-exhibition of token in cars by such person whether an offence.*

It is for the person paying the tax to obtain delivery of the token at the time when the tax was paid to the Taxing Officer under the Bengal Motor Vehicles Tax Act, 1932. So far as the Taxing Officer is concerned, the requirements of the law are fulfilled if he does anything which has the effect of putting the token in the possession of the person paying the tax or of any person authorised by him. It is not intended by the provisions of the Statute and the Rules framed under the statute, which are not in any way *ultra vires*, that the Taxing Officer is to send the token to the person paying the tex. Consequenly, the failure on the part of a person toe xhibit the token on the car resulting from his

not obtaining delivery of the same from the Taxing Officer after tax had been paid, is an offence under the law. R. O CURTIES *v.* EMPEROR *Cal.* 710

Bengal Patni Taluqs Regulation (VIII of 1819), s. 8—*Proceeding for realization of arrears of rent, whether against defaulters personally—Notice published and sale held—Defaulter dead at the time of sale—Sale, validity of.*

The proceedings taken under the Patni Regulation for realization of arrears of *patni* rent are not taken against the defaulter personally at all but are taken against the tenures. Consequently, where the necessary notice as required by the Regulation has been duly published, the sale is not invalid merely because at the time when the sale was held the defaulter was dead. There is no procedure in the Patni Regulation which enables the Collector to bring on the record the heirs of the defaulting *patnidar*, if he has died in the meantime, nor is there any provision in the statute which makes it incumbent on the *zemindar* to seek out such heirs and to apply to the Collector that the sale should be held after bringing the heirs of the deceased *patnidar* on the record. ABDUL JALIL *v.* ASRAF ALI *Cal.* 201

Bengal Public Demands Recovery Act (III of 1913), s. 20—*Liability to pay cess—Nature of—Whether attaches to estate of proprietor—Hindu widow's estate sold under the Act—Reversion, if passes to purchaser.*

The liability to pay cess is a mere personal liability which does not attach to the estate of the proprietor who has to pay it. Consequently, the sale of a Hindu widow's estate under the Bengal Public Demands Recovery Act conveys only the widow's estate to the purchaser and not the reversion RAMJHARI KUER *v.* SHEONARAIN SINGH *Pat.* 750

Bengal Tenancy Act (VIII of 1885)—Amendment of 1907, if retrospective. SEE Occupancy holding 834

——— **s. 25.** SEE Bengal Tenancy Act, 1885, s 87 321

——— **ss. 30 (a) (b), (c), 32, 105**—*Enhancement of rent on ground of rise in prices of staple food crops—Matters to be considered—Period to be taken for comparison—'Practicable', meaning of—S. 30 (c) applicability of.*

The rise contemplated in s. 30 (*b*) of the Bengal Tenancy Act is the rise over the price which was prevailing at about the time when the current rent was fixed. It is assumed that the rent must have been fixed on the basis of the price prevailing. Section 32 provides the machinery for finding out what enhancement should be allowed in case there is a rise in the prices of these staple food crops Sub-clause (*a*) enjoins upon the Court to compare the average prices of the two decennial periods. One of them must be the period immediately preceding the institution of the suit; and the other may be any one which is practicable to take. But at the same time it must be equitable to take that decade in consideration. By practicable, it is to be understood the period for which figures are available or can be obtained without undue inconvenience and trouble. According to the terms of the section the Court can take any period which it thinks equitable to take. The decennium may be one immediately preceding the decennium with which the comparison is to be made or any earlier decennial period. Ordinarily, however, it may be inequitable to go beyond the decennial period just preceding the time when the current rent was fixed, as in that case it will be unjust upon the *raiyats* to pay enhancement on the basis of rise of price compared with the prices which prevailed many years before the time when the rent was fixed which must have been taken into consideration at the time of the fixing of the currentrent. Shorter period can only be substituted for decades if it is in the opinion of the Court impracticable to take the latter into consideration

Where the rent under s. 105, Bengal Tenancy Act, must have been settled on the basis of rise in the decennium just preceding the settlement, it will be more equitable to compare the prices of the decennium just before the institution of the suit with the prices which prevailed in the decade just before the settlement of rent Sub-clause (*c*), of s 30 has no application and for all practical purposes that sub-clause may now be taken to be obsolete. RAM RANBIJAY PRASAD SINGH *v.* RAMGRIHI RAI *Pat* 902 S. B.

——— **s 51.** SEE Transfer of Property Act, 1882, s 116 367

——— **ss. 65, 167**—*Subrogation—Mortgagee advancing money to mortgagor for paying off rent decree—Whether subrogated to position of landlord—Incumbrance created by tenant of transferable holding—Whether void as regards third parties.*

Where money is advanced to a mortgagor to pay off a mortgage debt and the person advancing the money gets a mortgage in security of that advance he becomes entitled to be subrogated to the rights of the mortgagee But where the landlord obtains a decree for rent, the charge created by the decree is a right to which the landlord alone is entitled and the person advancing money to the tenant to pay off the rents does not get the right of subrogation, as the charge obtained by the landlord is not on the same footing as that of a mortgagee.

So far as the other parties are concerned, the incumbrances which were created by the tenant in a non-transferable holding are not incumbrances which are void but which may be treated as void only as between the tenant and the landlord. RAMNANDAN PRASAD SINGH *v.* RAM DAS *Pat.* 663

——— **s. 85.** SEE Bengal Tenancy Act, 1885, s. 160 (*d*) 720

——— **s. 87**, *if exhaustive—Breach of implied condition—Whether a ground for ejecting occupancy* raiyat.

Section 87, Bengal Tenancy Act, is not exhaustive and there might be abandonment apart from the provisions of that section. Even if there be no abandonment within the meaning of s. 87, an inference of abandonment apart from the provisions of that section would be legitimate, if it is proved that the entire holding has been transferred and that the transferees have been put in possession of the whole holding

It is, however, open to doubt whether, in view of the express provisions laid down in s 25, Bengal Tenancy Act, the breach of an implied condition would be a ground for ejecting an occupancy *raiyat.* GOLAM MUSTAPHA *v.* HANUMANDAS MUNDRA *Cal.* 321

——— **ss. 87, 25**—*Abandonment, question of—If one of fact—Inference from facts as to existence of abandonment, whether a question of law.*

The question, as to whether there has been abandonment of the land by the *raiyat*, is largely and principally a question of fact depending upon a number of circumstances to be proved in each case. But the inference from the facts found, as to whether there was abandonment or not is a question of law. GOLAM MUSTAPHA *v.* HANUMANDAS MUNDRA *Cal.* 321

——— **ss. 88, 105, 109**—*Landlord in s. 88, if means entire body of landlords—Absence of effective*

Agra Tenancy Act—1926—concld.

splitting of holding — Plaintiffs becoming sole landlords on partition—Holding, if to be treated as sub-divided—Division of holding—What constitutes —Application for settlement of rent—Withdrawal of application—Subsequent application for enhancement on ground of rise in price—Whether barred by s. 109.

A 'landlord' in s. 88, Bengal Tenancy Act, means the entire body of landlords. Where there has been no effective splitting up of the holding as required by s. 88, Bengal Tenancy Act before the partition so as to be binding upon the entire body of landlords, they are not bound to treat the holdings as sub-divided after the partition, merely because they became the sole landlords as a result of the partition.

Section 88, speaks of a division of a tenure or holding. A mere undivided parcel or parcels of land is not a holding within the meaning of the Bengal Tenancy Act. Consequently so far as the division of the holding is concerned, what is contemplated by s. 88 is the actual division of the holding into two or more definite units and not a mere notional division of the shares held by the tenants in the holding.

Where the plaintiff applied for settlement of rent under s. 105, Bengal Tenancy Act, in a certain year before the Settlement Officer but the application was withdrawn and he subsequently applied for enhancement on the ground of rise of the average local price of local staple food crops:

Held, that the application for enhancement was not barred under s. 109, Bengal Tenancy Act. SRINANDAN PRASAD SINGH *v.* MITHAN MAHTON *Pat* 28

——s. 105. See Bengal Tenancy Act, 1885, s. 30 (*a*) (*b*) 902

——s. 115 (c). See Bengal Tenancy Act, 1885, s. 180-A, cl. (15) 812

——ss. 160 (d), 85—*Under-raiyati created in contravention of s.* 85—*Occupancy right by custom, if protected interest under s.* 160 (d).

A right of occupancy existing by custom is not a "protected interest" within the meaning of s. 160 (*d*), Bengal Tenancy Act, when the under-*raiyati* is created in contravention of the provisions of s. 85. MATI LAL DAS *v.* ADITYA CHANDRA DAS *Cal.* 720

——s. 167. See Bengal Tenancy Act, 1885, s. 65 663

——ss. 180-A, cl. (15), 115 (c)—*No dispute about status of tenant or enhancibility of rent or area—Held, dispute was only about amount of rent and no second appeal lay—In settling fair rent, Court can consider rate payable if portion of holding is kept fallow under* panchan *system.*

Where in a case there is no dispute about the status of the tenants or about the enhancibility or otherwise of the rent and also as regards the area for which the rent is to be assessed, the decision is only about the amount of rent settled and no second appeal lies.

In settling the amount of fair rent, the Court is entitled to take into consideration the rate which is payable by tenants, if a portion of their holding is kept fallow under the *panchan* system. SRISH CHANDRA PAL *v.* RAJANI KANTA BISWAS *Cal.* 812

Berar Land Revenue Code, 1896, s. 41 (1). See EVIDENCE ACT, 1872, s. 110. 264

Bihar and Orissa Public Demands Recovery Act (IV of 1914), ss. 7, 8—*Transfer of Property Act (IV of* 1882), *ss.* 100, 60—*Effect—Secretary of State, if becomes simple mortgagee of property charged with payment of cess—Suit by prior mortgagee— Secretary of State not impleaded—*

Bihar and Orissa Public Demands Recovery Act.—concld.

Whether bound by proceedings—Right of redemption if lost.

The effect of s. 8, Public Demands Recovery Act, and s. 100, Transfer of Property Act, is that for all practical purposes the Secretary of State becomes a simple mortgagee of those properties which are charged with payment of cess money under ss. 7 and 8 of the Public Demands Recovery Act. Therefore, he must be impleaded in a mortgage suit by the prior mortgagee, and when he is not so impleaded, the Secretary of State and the purchaser of the property in enforcement of that mortgage are not bound by the proceedings which take place in the prior mortgagee's suit. Nor is the sale of the property in any way binding upon them and their right of redemption remains absolutely intact. BHEKDHARI MAHTON *v.* RADHIKA KOER *Pat.* 635

——ss. 21 and 24—*Purchaser of property in certificate sale in possession in good faith—Claim under s.* 21 *by another purchaser in execution of money decree dismissed—No title suit brought within one year by claimant—Subsequent petition under O. XXI, r.* 97, *Civil Procedure Code—Order dismissing claim is conclusive.*

In a certificate sale, the entire property of a joint family was sold even though the names of all the members excepting one was not mentioned in the certificate and the purchaser was in possession of the whole property in good faith. Another person who had obtained a money decree against all the members of the joint family purchased the property in execution of his decree and he put in a claim under s. 21, Public Demands Recovery Act. The claim was dismissed and he did not file any title suit within one year. Subsequently, he filed a petition under O. XXI, r. 97, Civil Procedure Code, as he could not obtain delivery of possession. The Court held that the certificate Court had no jurisdiction to attach and sell or give possession of the share of the other members whose shares were not mentioned and ordered joint possession;

Held, that the order dismissing the claim became conclusive, that the certificate purchaser was in possession in good faith and that the Court had no jurisdiction to go into the question of title. AKHAURI HERAMBO NARAIN SINHA *v.* JAMUNA SONAR *Pat.* 957

Bombay Cotton Contracts Act (XIV of 1922)—*Bye-laws under—Forward delivery contracts—Parties not members of East India Cotton Association—Contract, if governed by the Act.*

The Bombay Cotton Contract Act, and the bye-laws made thereunder do not apply to any contract in cotton of forward delivery entered into in Bombay between parties who are not members of the East India Cotton Association, either expressly or impliedly, and consequently such contracts, even though entered by word of mouth, are valid. HEMRAJ SHIVLAL *v.* FIRM JOHARMAL RAMKARAN *Bom.* 312

Bombay Hereditary Offices Act (III of 1874), s. 15—*Sanad to inamdar by which holder agreed to pay fixed annual judi in lieu of service—Judi arrived at after deducting assessment on shet-sanadis lands—Discontinuance of service of shet-sanadis and full assessment imposed—Held, grant to shet-sanadis was kadim—Inamdar, if estopped from contending that it was not kadim—Estoppel.*

In 1902 a *sanad* was granted to the *inamdar* under s. 15, Bombay Hereditary Offices Act (III of 1874), by which the holders agreed to pay to Government a fixed annual *judi* in lieu of service. There were certain lands granted as *inam* in the village for *shet-sanadi* service. The *judi* was arrived at after

Bombay Hereditary Offices Act.—concld.

deducting the assessment of certain lands including the *shet-sanadi* lands, which were held in *inam* by village servants. In 1920 Government ordered a discontinuance of the service of *shet-sanadis* and imposed full assessments on the lands. The respondent contended that the *sanadi inam* lands had been given by his ancestors to the *sanadis* for the performance of Police duties, that they were *jadid inams*, and that he, and not the Government, was entitled to receive the full assessment which had been imposed on the lands after the discontinuance of service. Government contended that the *sanadi* lands were *kadim inams* and not *jadid* and that the *inamdar* was not entitled to the full assessment levied on the lands:

Held, the agreement between the parties evidenced by the *sanad* was based upon the assumption that the *sanadi inam* lands were *kadim inam* and the assessment of *judi* was made on that assumption, and that the respondent was not entitled to the assessment. The respondent *inamdar* had by his conduct led Government to believe that he accepted this assumption. By giving Government this impression and allowing them to act upon it, he obtained the benefit of a lower *judi* in perpetuity. The fact which he led Government to believe and act upon was that he agreed to the *sanadi inam* lands being treated as *kadim inam* and hence he could not now be allowed to contend that they are not *kadim*.

SECRETARY OF STATE *v* KAJARAM PARASHRAM *Bom.* 763

Bombay High Court Rules (Original Side, 1930, r. 559—*Bill of costs, if can be amended.*

There is no rule in Bombay restricting the normal right of a Solicitor as a professional man to amend his bill of costs which he has once presented to his client. He is at liberty to present another and revised bill for taxation. It is within the discretion of the Taxing Master to saddle him with costs of taxation if he is of opinion that he has delivered to his client an exorbitant bill of costs. D. N. REGE *v.* V. C. VIJAYAKAR *Bom.* 945

Boundaries—*Boundaries stated in deed between third parties—Whether necessarily against proprietary interest of person making it.*

Per Wort, J.—As a general question, it cannot be said that boundaries stated in a deed between third parties are necessarily and *prima facie* against the proprietary interest of the person making it. SONEY LALL JHA *v.* DARBDEO NARAIN SINGH *Pat.* 470 F. B.

Burden of proof—*Effect of registration on onus of proof—Prayer for refund of costs in registration enquiry, nature of.*

The decision of the Registrar that a document is genuine and the registration of the document have not got even the effect of shifting the onus of proof from the party who alleges that the document is genuine.

A prayer in a suit of this nature for refund of the costs incurred in the registration enquiry is not a prayer for a consequential relief but only one for an additional relief. DASARI NAGABHUSHANAM *v.* KUNAMNENI VENKATAPPAYYA *Mad.* 948

——*Execution of entry proved—Burden of proving want of consideration lies on executant.*

Where, by the evidence of finger-print expert the execution of an entry is proved, the burden of proving want of consideration is on the executant. GANGA SAHAI BHAGMAL *v.* MOLAR *Lah.* 799

Burma Municipal Act (III of 1898), s. 148—*Pawn-broker—Who is—Isolated transaction does not make person pawn-broker.*

A "pawn-broker" is a person who "carries on the business of pawn-broking." It implies one who

Bombay Municipal Act.—concld.

systematically lends money upon the security of pawns, and "carrying on business" implies, "a series or repetition of acts." It is a question of fact in each case whether a "business" is being carried on, and each case must be determined by its own special circumstances unless there can be found some systematic course of lending upon pawns or such repetition as to amount to a reasonable inference that it forms part of the particular Chettyar's money-lending business to lend on pawns. His status as a pawn-broker within the Burma Municipal Act, 1898, and the rules thereunder cannot be held to be established.

A Chettyar whose business is to lend money on promissory notes and upon security of land cannot be said to be a pawn-broker where he advances an isolated loan to another on security of a chattel. V. A. S. M. CHETTYAR FIRM *v.* EMPEROR *Rang.* 889

Burmese Buddhist Law—Divorce—*Desertion of wife for three years without communication—Divorce, if automatic.*

According to Burmese Buddhist Law the desertion of the wife by the husband for three years during which the latter does not communicate with the wife or send means of subsistence to her would automatically bring about a divorce between the husband and wife after the expiration of that period. MA E THA *v.* MA THEIN KIN *Rang.* 990

——**Divorce**—*Burmese Buddhist wife living—Husband embracing Christianity—Divorce, if automatic—Subsequent marriage with another, if valid.*

Where a Burmese Buddhist husband changes his religion into Christianity, there is no automatic divorce with his wife with whom he had married as a Burmese Buddhist, so that his subsequent marriage with another woman is invalid. MA E THA *v.* MA THEIN KIN *Rang.* 990

——**Inheritance.** SEE Lunatic 115

Calcutta High Court Rules and Orders (Original Side), Chap. X, r. 36. SEE Civil Procedure Code, 1908, O. IX, r. 9 158

Calcutta Improvement Act (V of 1911), s. 77 (1) (b)—*Property sold by widow acquired compulsorily—Claim to compensation by reversioners and purchaser—President of Tribunal deciding under s. 77 (1) (b)—Appeal, whether appeal against order relating to compensation—Court Fees Act (VII of 1870), ss. 8, 7 (iv) (c).*

Where a property which had been sold by a widow was compulsorily acquired and the reversioners and the purchaser claimed to take compensation of money and the President of Calcutta Improvement Tribunal decided under s. 77 (1) (*b*) of the Calcutta Improvement Act:

Held, that the appeal from his order was not an appeal against an order relating to compensation and s. 8, Court Fees Act, was not applicable. The claimants were really asking for a declaration and some consequential relief, namely that the money should be invested instead of being handed over to the purchaser and the case fell under ss. 8, 7 (*iv*) (c), Court Fees Act. RASH BEHARI SANYAL *v.* GOSTO BEHARI GOSWAMI *Cal.* 817

Cantonments Act (II of 1921), s. 187—*Officer ordinarily authorized to communicate sanction, writing to applicant and conveying sanction—Applicant is entitled to act on it.*

Where the petitioner makes an application to the Cantonment Authority for sanction and a person ordinarily authorized to communicate the sanction writes and conveys sanction on an official form of the Cantonment Board, the petitioner is entitled to

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act on such sanction, it being not his business to enquire if the sanction conveyed by him had been granted by the Board. GOPI CHAND *v.* EMPEROR *Lah.* **273**

C. P. Debt Conciliation Act (II of 1933), s. 15 (2) —*Applicability of — Debtor producing certificate after filing of plaint but before decree—Creditor, if can be subjected to penalty in regard to costs and interest.*

Section 15 (2), C. P. Debt Conciliation Act comes into operation not only when the certificate is granted before the institution of the suit but also when it is granted during the pendency of the suit. Consequently under s. 15 (2) the plaintiff creditor is liable to be subjected to penalty in regard to costs of the suit and interest on the debt even in case in which the certificate is produced by the debtor after the filing of the plaint but during the pendency of the suit, that is before the decree is passed. SUKHLAL MODHI BANIYA *v.* DAMROO GANESH *Nag.* **1032**

C. P. Land Revenue Act (II of 1917), s. 201— *Proceedings under, by Revenue Court—Affidavit in evidence accepted—Legality—Applicability of Civil Procedure Code to Revenue proceedings—Civil Procedure Code (Act V of 1908), Pre-amble, O. XLI, O. XIX, r. 2.*

Revenue Courts are Courts of civil judicature in matters arising under the Land Revenue Act.

Any application made under s. 201 of the C. P. Land Revenue Act is an original proceeding which must be governed by the procedure laid down in the Civil Procedure Code. Similarly the provisions of O XLI, of the Civil Procedure Code apply to the proceedings in appeal before any Revenue Court. Under O XIX, r. 2, it is permissible for any party to give evidence upon any application by affidavit, although the Court may at the instance of either party, order the attendance for cross-examination of the deponent. Thus as the Revenue Court is a Court of civil judicature it is authorised to receive affidavits in evidence. BADE *v.* EMPEROR *Nag.* **557**

C. P. Tenancy Act (I of 1920), Sch. II, Art. 1— *Whether applies to a claim for joint possession in holding.*

Article 1, Sch. II, C. P. Tenancy Act, relating to possession or dispossession of or from a holding does not include a question of a claim for joint possession or resistance of such a claim in that holding.

A person who is in joint possession cannot be said to have been dispossessed or excluded from possession of the holding by his co-tenant since his right of possession extends over the entire holding. Consequently, Art. 1, Sch II of the C. P. Tenancy Act has no application to such a case and the ordinary rules of the Limitation Act must apply.

Special enactments which derogate from the ordinary law must be strictly construed. ABDUL RAHIMAN *v.* ABDUL WAHAB *Nag.* **813**

Cess—*Liability to pay cess — When can be contracted out—Absence of contract—Cess so far paid included in rent—No mention that further cess assessed would not be payable by tenure-holder —Liability to pay additional cess imposed on tenure*

Although the liability to pay cess under the Cess Act can be contracted out, but in order to make the legal provisions for the responsibility to pay cess ineffective, the contract must be clear and expressive. Where there is no such contract and the plain meaning of the lease is that the cess so far paid has been included in the rent, and there is no mention

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that further cess assessed upon the tenure would not be payable by the tenure-holder by whom it must be paid under the provisions of law, increased cess for the period after the re-assessment should be allowed. GOUR CHANDRA CHOUDHRI *v.* SARAT KUMARI DEBI *Pat* **96**

Charge. SEE Deed **288**

Charitable and Religious Trusts Act (XIV of 1920)—*Trust—Validity of trust under the Act—Tests—Trust deed executed by Central Council of a Cult*—Guru *regarded as spiritual head—Gifts made to* Guru *in accordance with mandates of religion—Donors, if can be supposed to have intended to create trust—Deed — Construction*—Held, *deed could not be treated as title deed.*

In order that a trust of a religious and charitable nature may be valid and enforceable according to law, certain material matters must be ascertainable. In the first place it is material to ascertain the author or authors of the alleged trust. Next the intention to create a trust must be indicated by words or acts with reasonable certainty. The purpose of the trust, the trust property, and the beneficiaries must be indicated in such a way that the trust could be administered by the Court if the occasion arose.

A trust deed was executed by certain members of the Central Council Radha Swami Satsang and the objects of the trust were that "the trustees named above or those that may be appointed hereafter to succeed them, all of whom will hereafter be called 'trustees,' shall collect, preserve, administer, and if necessary, alienate the properties, movable or immovable, that have been or may hereafter be dedicated to the Supreme Being, Radha Swami Dayal, or that may be acquired for or presented to the Radha Swami Satsang and its branches, in accordance with such directions as may, from time to time, be issued in this behalf by the said Council or the Sant Sat Guru for the time being, if any who is recognised as the representative of the Supreme Being Radha Swami Dayal, and as such is the sole master of all movable and immovable properties of the aforesaid Satsang, provided that *samadhs* and places of public worship of the Radha Swami Satsang shall at no time be alienated."

Held, (i) that the deed could not be treated as a title deed creating a legal trust.

(ii) that according to the tenets of the Radha Swami religion, and in consideration of the position and authority of the Sant Sat Guru, the complete and absolute submission of his followers to him and the teachings and doctrines, the followers of the true faith when making their gifts to the "Sant Sat Guru," whom they regarded as their spiritual head (whether he was the incarnation of the Supreme Being or only his representative) in accordance with the mandates of their religion, could not be supposed to have intended to create any trust and it could not be said that the donors of the gifts were the authors of the alleged public trust;

(iii) that the provisions in the deed were wholly inconsistent with any intention on the part of the "Sant Sat Guru" for the time being, to alter his position as "Sant Sat Guru" or to divest himself of the control of the property and to create a trust for a public purpose of a charitable or religious nature, such as is contemplated by the Act XIV of 1920, but on the other hand, the regulations relating to the Central Council and the provisions of the so-called "trust" deed were in consistent with a desire on the part of the Sant Sat Guru to obtain the assistance of some of his followers in the

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management of the property, which was increasing as the years passed;

(*iv*) that in view of the essential and unalterable doctrines of the faith with respect to the "Sant Sat Guru," his supremacy and his control over the offerings, by which the properties were acquired, it would be difficult to arrive at the conclusion that it was ever intended that such a trust as is contemplated by Act XIV of 1920, should be created

[Doctrines, principles and tenets of the Radha Swami religion discussed.] PATEL CHHOTABHAI *v.* JNAN CHANDRA BASAK P. C. 409

——— s. 3—*Members of general public worshipping at religious institution, whether persons interested.* Members of the general public who worship at religious institution are persons interested in the Public Trust for the purposes of Act XIV of 1920. NIHAL CHAND *v.* NARAIN DAS *Lah.* 620

——— s. 7—*Trust for public purposes of a religious or charitable nature — Trustee, if can apply to Civil Court for opinion, advice or direction.*

A trustee of an express or constructive trust created or existing for a public purpose of a charitable or a religious nature can apply by petition to the Civil Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon. MADHO RAM *v.* JAI CHAND RAI *All.* 933

Civil Procedure Code (Act V of 1908), Preamble, O. XLI. SEE C. P. Land Revenue Act, 1917, s. 201 557

——— s. 9—*Claim for profits by one co sharer of an occupancy holding against another—Whether a suit of a civil nature—Co-sharers—Possession of one is possession of all—Agra Tenancy Act (III of 1926), s. 233.*

Where one of several co-sharers in an occupancy holding or other tenure is solely in possession, he cannot be considered to be in wrongful possession; nor can the co-sharers suing for profits be said to have been wrongfully dispossessed from the holding or tenure. Possession of one co-sharer is possession of all who should be deemed to be in constructive possession through the co-sharer who is in actual possession by cultivating the land or by receipt of rents from sub-tenants. A claim for profits by one co-sharer of an occupancy holding against another is a suit of a civil nature and hence under s. 9, Civil Procedure Code, the suit lies in the Civil Court. JUMNA DAS *v.* MISRI LAL *All.* 37

——— s. 10—*Stay of suit — Conditions—Entire subject-matter in issue in later suit must be in issue in prior suit.*

In order that a suit may be stayed under s. 10, Civil Procedure Code, pending the decision of a previously instituted suit in another Court, it is not sufficient that there should be one matter in issue in common in both the suits. The entire matter in issue in the subsequent suit must be in issue in the previous suit. MAHAGANAPATHI *v.* NATESA IYER *Mad.* 1002

——— s. 11.

SEE Oudh Estates Act, 1869, s 8 1087

SEE *Res judicata* 249 (*b*)

——— s. 11—*A bringing suit for possession of his share against some members—B and C made co-defendants—B and C supporting A's claim—A's claim dismissed as time-barred—Subsequent suit by B and C against same members for partition of same property—Held,* res judicata *applied.*

A suit was brought by *A* in 1913 against his three step-brothers for a share in a house which was in their possession. *A's* two nephews, *B* and *C* were made co-defendants. The plaint averred that there was a separation of the joint family by virtue of an agreement in 1878, though not by metes and bounds and since then the step-brothers were in exclusive possession of the property. *A's* case was supported by *B* and *C* who also asked the Court to ascertain their respective shares in the house. The High Court, on appeal, against the dismissal of the claim by the trial Court on the ground that it was time-barred and that the step-brothers were in adverse possession, found on evidence that there was a separation of the family members in 1878, and dismissed the claim as time-barred. In 1925 *B* and *C* brought a suit against their step-uncles for a share by partition in the same house alleging that it was joint ancestral property:

Held, that *B* and *C* were bound by the decision in the former suit and consequently the second suit was barred by *res judicata*. YESHVANT RAMCHANDRA BHIDE *v.* GOVIND CHINTAMAN BHIDE *Bom.* 50

——— s. 11—Ex parte *finding that execution application is not time-barred—Notice to judgment-debtor—Both parties absent—Application dismissed—Another execution application—Judgment-debtor, if estopped from raising objection that first application is not within time—Execution—Estoppel*

An execution application was *prima facie* time-barred but on the evidence of the decree-holder an *ex parte* finding that it was not time-barred was recorded. After this, notice was sent to the judgment-debtor to show cause why the execution should not be proceeded with against him, and both parties being absent on the fixed, date the execution application was dismissed. The decree-holder filed a second application whereupon the question of limitation of the first application was taken by the judgment-debtor:

Held, that the *ex parte* order which had been recorded against the judgment-debtor and which was to the effect that the application for execution was *prima facie* within time could not be taken to operate as *res judicata* or by way of estoppel or on any principle analogous to it. RAFATULLA FARAZI *v.* KUNDARMAL AGARWALLA *Cal.* 723

——— s. 11—First suit dismissed for multifariousness—Suit between landlord and tenant—Second suit on title—*Res judicata* if applies. SEE Hindu Law 7

——— s. 11—Res judicata—*Principles of—Applicability of, to execution proceedings—Constructive* res judicata.

Although s. 11 of the Code of Civil Procedure does not in terms apply to execution proceedings, yet the general principles underlying the rules of *res judicata* are applicable to execution proceedings. The applicability of the rule is not limited to matters, which were directly and substantially in issue and were heard and expressly decided in former execution proceedings, but the principle of "constructive *res judicata*", as embodied in Expl. IV to s. 11, also applies to such proceedings. PRABHU DAYAL *v.* DEWAT RAM *Lah.* 286

——— s. 13—*Foreign judgment—Court dealing with it, if can inquire, whether decision is right or wrong.*

It is not open to the Court trying a suit on a foreign judgment to decide whether the decision of the foreign Court on the materials put before

it was right or not. The duty of the Court is merely to see that the foreign Court had applied its mind to the facts and the law on the point. POPAT VIRJI *v.* DAMODAR JAIRAM *Bom.* **711**

———s. 16. SEE Civil Procedure Code, 1908, s. 21 **677**

———s. 21—Objection as to jurisdiction—Whether can be raised in appeal. SEE Jurisdiction **677**

———ss. 21, 16—*General Clauses Act* (*X of* 1897), *s.* 3 (vii)—*Question of jurisdiction depending upon public documents, if one of law—Quetta, if a part of British India.*

Where a preliminary point, that Quetta not being in British India, the lower Court had no jurisdiction to try the suit, was raised for the first time at the final hearing of the appeal;

Held, (*i*) that the question of jurisdiction at issue was one of law depending upon public documents which required no proof and were presumed under s. 81, Evidence Act, to be genuine and this question could, therefore, be raised at a late stage.

(*ii*) Quetta did not form part of British India as defined in s. 3, General Clauses Act.

(*iii*) the point of jurisdiction involving the question whether a matter in dispute is within the jurisdiction of British Indian Court at all, could be raised, notwithstanding s. 21, Civil Procedure Code. DEV SAMAJ COUNCIL, LAHORE *v.* AMRITLAL MOTILAL *Sind* **677**

——— s. 24. SEE Civil Procedure Code, 1908, s. 102 **95**

———s. 34. SEE Agra Tenancy Act, 1926, s. 225 **943 F. B.**

——— ss. 35, 141—*Creditor's application for liquidation* [*of company not* bona fide—*Costs—Company.*

Where it is clear that the action of the petitioning creditor in making the application for the winding up and in insisting upon further proceedings in liquidation is not *bona fide*, the entire costs of the liquidation should be paid by him. In the absence of a clear provision in the Companies Act dealing with a case of this kind, the matter is governed by s. 35, Civil Procedure Code. Under that section the High Court can pass proper orders in this behalf. *In the matter of* BOMBAY HOUSE, LTD. *Lah.* **852**

———s. 47.

SEE Decree **974**
SEE Mortgage **848**
SEE Receiver **848**

———s. 47—*Suit for possession of village covered by lease—Second suit for ejectment—Third suit—Prayer for demolition of* bhandar *in village—Relief, if to be obtained in executing Court—Separate suit, if maintainable—Same cause of action—Son of defendant joined in suit—Whether makes separate suit maintainable—Point not taken in second suit*—Res judicata, *if operates.*

The plaintiff brought a suit in 1920 for possession of a village which was the subject-matter of a *thica* lease and a judgment was obtained by the plaintiff and the decree for delivery of possession was put into execution. Again a suit was brought by the plaintiff of the former action for ejectment of some of the defendants from the *bakasht* land and a decree was again obtained. A third suit was filed by the plaintiff in respect of a plot of land in the same village on which a *bhandar* stood claiming that in spite of the delivery of possession through the Court he had not obtained actual possession of the land or part of the land which was the subject-matter of the lease;

Held, that it being not denied that the building was erected during the course of the lease, if the plaintiff had any right to have the building demolished before he got possession of the land at the hands of the defendant, then quite clearly he could make that claim in the former suit and that it was a cause of action or part of a cause of action which the plaintiff might have included in the first suit, and not having included it, he could not bring a separate suit with regard to it. As he had got a decree for possession of the property, any grievance he might have with regard to that matter must be made in the executing Court and not by way of a separate suit.

Held, also that the fact that another person had been joined to the third suit, a person who was not a party to the former actions, would not justify the suit unless it could be shown that the plaintiff had a separate cause of action against that person in which case the other defendant should not have been joined in the subsequent action. The fact of joining the son of the original trespasser alleging no particular cause of action against him is no answer to the point that any grievance that the plaintiff may have must be ventilated in the executing Court and not by way of a separate action.

Held, further that the mere fact that the point was not taken in the second suit did not give license to the plaintiff to continue to bring actions one after the other with regard to the property which was clearly a part of the property for which he got delivery of possession in the first suit. BHAGWAT SINGH *v.* KUMAR KAMAKHAYA NARAIN SINGH *Pat.* **268**

——— ss. 47, 145—*Surety for performance of decree, if a party—Order against him in respect of execution of decree if appealable.*

A person who is liable as a surety for the performance of the decree shall, under s. 145, Civil Procedure Code, be deemed to be a party within the meaning of s. 47, Civil Procedure Code. An appeal would lie from an order against him in regard to the execution of the decree by the sale of his property. DAW MIN BAW *v.* CHETTYAR FIRM *Rang.* **511**

———s 48—*Application for execution—When should be treated as continuation of previous application—Previous application not proceeded with—Bar removed—Fresh application, if one to revive proceedings which had to be stopped.*

An application for execution must be treated as a continuation of the previous application where the previous application could not be proceeded with on account of a bar having been placed by the allowance of the claim; and once the bar was removed that execution can proceed and the fresh application is nothing more than an application to revive the proceeding which had to be stopped BANARSI PRASAD *v.* KIRTYANAND SINGH *Pat.* **831**

——— s 48, O. XXI, r. 17—*Impleading true representative after* 12 *years from decree—Limitation—Effect of amendment.*

An amendment to an execution petition made under sub-cl. (1) of O. XXI, r. 17, Civil Procedure Code, with the sanction of the Court relates back to the original presentation of the petition.

Where an application for execution was made against a wrong legal representative within 12 years of the decree but it was amended after the expiry of 12 years from the date of the decree, by bringing the name of the true legal representative on record:

Held, that the amendment recalled to the original presentation and the application was not barred under s. 48, Civil Procedure Code. SUBRA MANIA DESIKA *v.* RANGASWAMI CHETTIAR *Mad.* **327**

———s. 52. SEE Practice **285**

———s. 60 (1) (g)—Ala jagirs *in Ambala District —Whether political pensions—Exemption from attachment.*

Jagirs known as "*ala jagirs*" in the Ambala District, should be treated as political pensions and so exempt from attachment in execution of decrees within the meaning of s. 60 (1), Civil Procedure Code. SHIV NARAIN SINGH *v.* MUNI LAL *Lah.* 540 (*b*)

———s. 64. SEE Civil Procedure Code, 1908, s. 73 918

———s. 73—*Application for rateable distribution —Court, if can inquire as to whether decree is proper or* bona fide *one—Remedy of aggrieved judgment-creditor.*

The Execution Court is only concerned with those matters which are set out as being the conditions for participation, and so long as a decree is put forward by the holder of that decree, and the holder of the decree satisfies the Court that the money due under that decree has not been paid, then that decree-holder is entitled to come in and claim a proportionate share in the assets of the judgment-debtor. If any part of those assets is paid out to a decree-holder who has obtained a decree by fraud or collusion or by any other improper means, then a remedy is open to the judgment-creditor who has suffered from those circumstances, as provided for in sub-s. (2), s. 73 of the Civil Procedure Code. The dominating factor with regard to this point is this: that the Court concerned with the distribution of the assets is doing something in connection with execution proceedings. The distribution of assets is only one of the acts in the execution proceedings, and the Court is functioning in an administrative and not in a judicial capacity, and no procedure is provided under the provisions of s. 73 of the Act of 1908, and no machinery exists for the holding of an enquiry of the kind involved in the ascertainment as to whether or not the decree is not a *bona fide* or proper decree. BISWAMBAR BISWAS *v.* APARNA CHARAN MOHARY *Cal.* 480 F B.

———s. 73, 64, O. XXI, r 55—*Assets in s. 73, meaning of—Assets not held by Court—Decree-holder, if entitled to rateable distribution—Two decrees against same judgment debtor — Attachment of property in execution of first decree—Private sale of property by judgment-debtor—Application for rateable distribution—Purchaser depositing decretal amount with consent of decree-holder—Release of property from attachment—Legality of—Waiver by decree-holder.*

A fund or a sum of money cannot be regarded as assets unless it is in some sense the property of the judgment-debtor and can therefore be legitimately applied to the payment of his debt. Any money which belongs to a stranger or any money paid into Court by a third party under a misapprehension cannot be described as assets. When no assets are held by the Court the holder of the second decree is not entitled to rateable distribution.

The decree-holder had two decrees against the same judgment-debtor. In pursuance of execution of first decree, a property of the judgment debtor was attached. Before the sale, the judgment-debtor sold the property. In execution of the second decree, the decree-holder applied for rateable distribution of the assets in the first execution proceedings. The purchaser of the property with the consent of the decree-holder deposited the decretal amount and costs in the first execution case and the property was released from attachment. The execution case was struck out on full satisfaction. To this the decree-holder objected contending that the order striking out the execution case was wrong in law and that as he had applied for rateable distribution, the sum deposited should be rateably distributed between the two execution cases in which he was the decree-holder and that the sum if so rateably distributed would be in part satisfaction of the decrees and he was entitled to have the property sold in execution:

Held, that as the decree-holder had consented to the deposit and by his conduct he must be deemed to have waived the benefit of s. 64, Civil Procedure Code, the attachment of the property must be necessarily deemed to have terminated and the private sale by the judgment-debtor must be held to be valid. RADHA MOHAN *v.* WAHIDAN *Pat.* 918

———s. 80—*Notice under, whether should be copy of plaint—Notice showing that assessment of cess on income from* hat *was* ultra vires—*Relief asked being relief from such assessment—All forms of reliefs need not be given in detail—Relief not covered in notice added in plaint—Entire suit should not be dismissed.*

What s. 80, Civil Procedure Code, requires is that the notice should contain the cause of action, etc., and the relief claimed. If the fact that a particular rule was *ultra vires* is mentioned in the notice and omitted from the plaint, the notice does not become invalid on that ground. From the plain meaning of s. 80, Civil Procedure Code, the notice need not be practically a copy of the plaint. The notice should be such as to give substantial information to the Government, the basis of the claim and the relief which the plaintiffs seek. Where it is obvious from the notice taken as a whole that the plaintiffs wanted to have it declared by the Court that the assessment of cess on their *zemindari* on the income of the *hat* was *ultra vires* and that the relief which they wanted to seek was that they should be relieved of that assessment, it is not incumbent upon the plaintiffs to give in detail all the forms in which they would seek the relief.

The addition in the plaint, of a relief which was not covered by the notice does not entail the dismissal of the entire suit. It is open to the plaintiffs to amend their plaint at any stage and proceed with the suit without a prayer for that relief SOURENDRA MOHAN SINHA *v.* SECRETARY OF STATE *Pat.* 1099

———s. 99. SEE Compromise 1067

———s. 100. SEE Adverse possession, plea of 23

———s. 100—*Discretion as to costs exercised by lower Court—No legal principle involved—Second appeal, competency of.*

Where the Courts below have exercised their discretion and no legal point or matter of principle is involved, the High Court will not interfere in second appeal. FATEH SINGH *v.* MAUJ RAI *Lah.* 558

———s. 100—*Finding as to who broke the contract, if can be challenged in second appeal.*

In a contract to sell and to buy, a finding by the lower Appellate Court as to who broke the contract is a finding of fact which cannot be challenged in second appeal. MOHANLAL MARWADI *v.* GYANIRAM *Nag.* 778

———s. 100—*Finding based on admissible evidence—Finding of fact.*

Where evidence which is admissible is admitted and a finding arrived at by the lower Appellate Court, the finding is one of fact and cannot be questioned in second appeal. BANAPHAL SINGH *v.* NOOR MOHAMMAD *All.* 634

———s. 100—*New plea involving question of jurisdiction—Whether can be raised for first time in second appeal.*

The Court of second appeal can, in the interests of justice allow to be raised for the first time a plea involving a question of jurisdiction. KHUD MUKHTAR BANK, UTRAWAN *v.* BHAGWAN DIN *Oudh* **92**

——— **s. 100**—*Question, whether* sanadi inam *lands are* kadim *or* jadid *is one of law*—Inam.

The question whether the *sanadi inam* lands were *kadim inam* or *jadid inam* is one, the determination of which depends on the legal effect of certain facts which have been proved by the evidence in the case. Consequently, it is a question of law, into which the High Court is entitled to go, in second appeal. SECRETARY OF STATE *v.* RAJARAM PARASHRAM *Bom.* **763**

——— **s. 100**—*Rejection of evidence on finding of fact—Finding of fact, whether can be interfered with.*

In deciding a question of fact the lower Appellate Court had rejected certain evidence on a legal presumption:

Held, that the finding of the Court on the question of fact could not be interfered with in second appeal. SHER BAHADUR SINGH *v.* MADHO PRASAD SINGH *Oudh* **1087**

——— **s. 100**—*Second appeal — Finding of fact arrived at in complete disregard of legal questions involved — Whether can be interfered with in second appeal.*

Where the finding of the lower Appellate Court is so worded as to amount to a finding of fact but it has been arrived at in complete disregard of the legal propositions involved in the consideration of the question, the finding is vitiated by errors of law and can be interfered with in second appeal. BABOO SINGH *v.* RAM MANOHAR *All.* **824**

——— **ss. 100, 115**—*Mixed question of law and fact—Erroneous decision—Interference in revision —Legality of.*

Where the question is a mixed one of fact and law, and from one point of view, the lower Court has decided erroneously, this fact does not give the High Court jurisdiction to interfere in revision. MRS. M. D'SILVA *v.* MRS. MINNIE LAL *Pat.* **419**

——— **s. 102**—*Suit of nature cognizable by Small Cause Court—Defence, nature of, if makes any difference as to nature of suit—Suit for damages for cutting of and appropriation of fruit of trees —Defence that land on which trees stood did not belong to plaintiffs—S. 102, if applies—Second appeal, if lies.*

Section 102 of the Code of Civil Procedure contemplates a suit of the nature cognizable by Courts of Small Causes irrespective of what defence is put up in the case.

A suit for damages in regard to the cutting of two *seeshum* trees and appropriation of the fruit of mango trees is of a nature cognizable by a Court of Small Causes. The defence that the land on which the trees stood did not belong to the plaintiffs makes no difference so far as the nature of the suit is concerned. Section 102, Civil Procedure Code, applies to it and no second appeal is competent. NARPAT SINGH *v.* JAGOO SINGH *Oudh* **240**

——— **ss. 102, 24**—*U. P. Honorary Munsifs Act (II of 1896), ss. 7, cl. (4), 9—Suit of value below Rs. 500—Institution of suit in Honorary Munsif's Court — Transfer by District Judge to Munsif's Court —Trial by Munsif— Second appeal from decision of Munsif to High Court—Competency of.*

Where a suit for a sum of money below Rs. 500 was rightly filed in the Honorary Munsif's Court but on the Honorary Munsif writing to the District Judge that as he was related to one of the parties, he would not like to try the suit, the District Judge under s. 24, Civil Procedure Code transferred the suit from the Court of the Honorary Munsif to another Court which was not a Court of Small Causes, and the suit was heard by that Munsif:

Held, that it was not obligatory on the District Judge to transfer it to the Court of Small Causes but as the suit was of a nature cognizable by a Small Cause Court and was heard by a Munsif against whose decision an appeal did lie, the decision of the lower Appellate Court was not appealable by way of a second appeal to the High Court under s. 102, Civil Procedure Code. SULAIMAN HUSAIN KHAN *v.* SITA *All.* **95**

——— **ss. 104 (2), 96 (3)**—*Second appeal from order recording disputed compromise whether lies.*

No second appeal lies from an order recording a compromise when the *factum* or legality of the compromise is questioned. MAHAMMAD MIA PANDIT *v.* OSMAN ALI *Cal.* **915**

——— **s. 104 (2), O. XLIII (m)**—*Order under O. XLIII (m) on appeal—Second appeal, if lies.*

No appeal lies from any order passed in appeal under O. XLIII (*m*), Civil Procedure Code. SHAH JAHAN BEGAM *v* GHULAM RABBANI *All.* **1067**

——— **s. 104 (f)**. SEE Civil Procedure Code, 1908, Sch II, para 14 **1022**

——— **s. 107**—*Remand—Pleadings and issues clear —Parties not producing evidence—Case, if to be remanded for re-hearing.*

Where the pleadings and issues are clear and the parties cannot have failed to appreciate what the real issues were that fell for determination in the suit, but plaintiff has not produced evidence, the case should not be remanded to the trial Court for re-hearing. A. P. L. PALANIAPPA CHETTIAR *v.* A. K. R. M. S. FIRM *Rang.* **10**

——— **ss. 109, 110, 112**—*Proceedings for contempt for publication of article in newspaper by Advocate — Whether in the exercise of inherent jurisdiction of Court and of a criminal nature—Leave to appeal to His Majesty in Council—Whether can be granted.*

Where the High Court took cognizance of contempt committed by the publication of an article in a newspaper by an Advocate and ordered notice to be issued to the writer, editor and printer and publisher to show cause why they should not be convicted and punished for contempt, the proceedings are in the exercise of the inherent jurisdiction of the High Court and of a criminal nature. A mere misdescription in the notice issued by the office will not make the proceeding one of a civil nature. Nor can it be said that merely because the Advocate was an officer of this Court, the proceeding against him was of an administrative character. The conviction and the fine imposed are themselves sufficient to show at least that the proceeding was not of a civil nature. The matter is of an exclusive jurisdiction and the order is final.

Section 110, Civil Procedure Code has no application to such a case. Nor is s. 109 applicable and s. 112, sub-s. (2) expressly makes the Code inapplicable to matters of criminal jurisdiction. Further as the question for consideration being not so much of jurisdiction as of an interpretation of the passage objected to, the case cannot be certified as being otherwise a fit one for appeal to His Majesty in Council. KAPILDEVA MALVIYA *v.* HON'BLE THE CHIEF JUSTICE AND THE HON'BLE JUDGES OF THE HIGH COURT AT ALLAHABAD *All.* **188**

——— **s. 110**—*Decision on question of impartibility of estate—Whether one affecting whole estate.*

A decision on the question of the impartibility

of an estate raised as a bar to the suit for partition is one which possibly affects the estate and if the value of the estate is above Rs. 10,000, appeal to His Majesty in Council is competent. KARUNAKAR TIKAIT *v.* PURNA CHANDRA *Pat.* 633

——— s. 110—*Lower Court's decree modified by High Court—Liability of appellant reduced as a result—High Court decree, if one of affirmance.*

Where as a result of the High Court decree which modifies the decree of the lower Court, the liability of the appellant under the decree is reduced to a certain extent, the decree of the High Court is not one of affirmance. B. N. RY. CO., LTD. *v.* RUTTANJI RAMJI *Cal.* 727

——— s. 110—*Question, whether in partition suit valuation for purposes of appeal to Privy Council should be of entire property—Whether of sufficient importance to allow appeal to Privy Council.*

The question whether for the purpose of s. 110 of the Civil Procedure Code in the right to appeal to His Majesty in Council the valuation for the purpose of that section is to be taken of the entire property which it was sought to partition or whether it is the value of the share claimed by the plaintiff itself is one of sufficient importance for allowing leave to appeal to the Privy Council. KARUNAKAR TIKAIT SAMANTA *v.* PURNA CHANDRA BIDYADHAR MAHAPATRA *Pat.* 633

——— s. 110, O. XLI, r. 35—*Two cross-appeals separately disposed of—One allowed but the other dismissed—Effect—Decision in latter, if not one of affirmance—Appeal to Privy Council—Leave, if can be granted.*

When two cross-appeals are separately disposed of, the matters in controversy in the two appeals are distinct and separate and, therefore, the adjudications of such matters are also distinct and separate. The dismissal of the plaintiff's appeal is, therefore, an affirmance of the adjudication made by the first Court so far as the matter in controversy in the plaintiff's appeal is concerned. Whereas the allowing of the defendants appeal is a variation of the adjudication of the first Court so far as the matter in controversy in that appeal is concerned. From the mere fact that a cross-appeal has been allowed and the adjudication varied so far as the matter in controversy in that appeal is concerned, it does not follow that the decision in the other appeal which is dismissed is not one of affirmance. Consequently where there are cross-appeals filed in the High Court on behalf of the plaintiff and the defendant and the defendants' appeal is decreed and the decree of the Court below varied, but the plaintiff's appeal is dismissed, the plaintiff cannot be allowed to appeal against the judgment of the High Court reversing the first Court's decree. BENARES BANK, LTD., AGRA *v.* RAJNATH KUNZUR *All.* 487 F. B

——— s. 112. See Civil Procedure Code, 1908, s. 109 188

——— s. 115.

See Civil Procedure Code, 1908, s. 100 419
See Civil Procedure Code, 1908, O. IX, r. 13 837
See Civil Procedure Code, 1908, O. XXI, r. 97 957

——— s. 115—*Decree on award—Revision, whether lies.*

It cannot be laid down as a general rule that the High Court cannot interfere in revision under s. 115, Civil Procedure Code, with a decree passed in accordance with an award. Revision is permissible if the arbitrators or the Court have exceeded their jurisdiction or acted with material irregularity in exercising their jurisdiction. SAVARALA VENKATASUBBIAH *v.* KUMARA RAMIAH *Mad.* 381

Civil Procedure Code—contd.

——— s. 115—*Error of law not raising any question of jurisdiction—If a good ground for revision—Punjab Courts Act (VI of 1918), s 44,*

A mere error of law which does not raise any question affecting jurisdiction is no good ground for interference in revision. KRISHNA CHAMBER OF COMMERCE LTD., *v* FIRM L. PREM SINGH KISHEN CHAND *Lah.* 533

——— s. 115—*High Court's power of interference—Limits of.*

Per *Courtney-Terrell, C. J.*—The High Court will not interfere in revision with a decision on the merits even if the lower Court should err both in law and in fact, provided always that such subordinate Court had jurisdiction to entertain the dispute between the parties. But if the Court had no jurisdiction whatever to entertain the matter, the High Court must listen to the contention and if it finds that the lower Court has made a mistake as to the extent of its jurisdiction, it may then interfere and this is particularly so when the lower Court, in determining the ambit of its own jurisdiction, construes a legislative enactment.

Per *Dhavle, J.*—An erroneous decision on a question of law or fact after jurisdiction has been once legally assumed would not be a ground for interference, but if the decision is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers it at once comes within the purview of the s. 115, Civil Procedure Code and the petitioner should be heard as the objections on the ground of another remedy being open to him are not objections *in limine*? HARIHAR PRASAD *v.* GOPAL SARAN *Pat.* 976

——— s. 115—*Revision—Omission to decide question of estoppel—Revision to prevent prolonging of litigation.*

The High Court has power to interfere in revision under its general powers of superintendence to prevent an inquiry which would not only prolong the litigation unnecessarily but would also lead to a determination of the rights of the parties upon an improper basis. Where the Court declined to decide a question of estoppel which clearly arose on the pleadings and appointed a Commissioner for local inquiry:

Held, the High Court had power to interfere in revision and set aside the order appointing a Commissioner. POTTA REDDI *v* KARUPPA GOUNDAN *Mad.* 1013

——— s. 115, O. VII, r. 11—*Interlocutory order—Powers of interference of High Court—Interlocutory order on question of court-fee—Revision, if competent.*

Although ordinarily the High Court will not interfere in revision with an interlocutory order when there is another course open to him, yet when there is no right of appeal and the order complained against is calculated to cause irreparable damage to the petitioner, the High Court may interfere with an interlocutory order. An interlocutory order deciding the question of court-fee will not be interfered with in revision as another remedy by way of appeal is open to the injured party. RAMKINKAR SINGH *v.* JOGENDRA NATH SINGH *Pat.* 617

——— s. 115, O. IX, rr. 9, 13—*Suit on behalf of minor plaintiff—Dismissal for default—Duty to restore even if no cause for non-appearance of guardian is shown—Restoration of suit—Necessity of adjournment for final hearing—Ex parte decree on same day—Small Cause suit—Application for*

Civil Procedure Code—contd.

revision against ex parte *decree—Maintainability.*

Where a suit instituted on behalf of a minor is dismissed for default owing to the non-appearance of the guardian on the date of hearing and the minor applies for the restoration of the suit to the file, the suit should be restored, whether the guardian had sufficient reasons for non-appearance or not.

If a suit dismissed for default is restored, the Court should, in view of the provisions of O. IX, r. 13, Civil Procedure Code, appoint a day for proceeding with the suit. It is illegal for the Court to proceed with the suit on the same day on which the suit is restored.

Where the Court restored a small cause suit which had been dismissed for default and on the same day passed an *ex parte* decree against the defendants and the latter applied to the High Court to revise the decree:

Held, that it was not incumbent on the defendants to apply for setting aside the decree under s. 17 of the Provincial Small Cause Courts Act and the High Court had power to set aside the decree in revision. SANNIDHI CHINNASUBBARAYULU *v.* GODASI VEERASWAMI *Mad.* **575**

——s. 115, O. XXV, r. 1—*Security for costs—Order on application for security—Revision, whether lies—Order for security against pauper plaintiff—Permissibility.*

Where a defendant put in a petition for security for costs at the earliest possible opportunity but the Court, instead of disposing of the petition at once, adjourned the petition along with the case and finally dismissed the petition on the ground that as the suit itself was ready for trial and the defendant had already incurred the costs, no useful purpose could be served by directing the plaintiff to furnish security for costs:

Held, that the procedure adopted was calculated to defeat the entire object of petitions of this nature and as the Court acted with material irregularity in exercising its jurisdiction, the High Court had power to interfere and set aside the order of the lower Court.

There is no absolute rule of law that a pauper plaintiff cannot be asked to furnish security under O. XXV, r. 1, (3). If it is shown that a pauper plaintiff is a puppet in the hands of persons able to find security, it would not be improper to make an order for furnishing security for costs.

Though an order requiring security for costs is entirely a matter of discretion with which the High Court would not interfere in revision, the High Court can interfere where the lower Court has acted with material irregularity in exercising its jurisdiction. S. RAMASWAMI PILLAI *v.* KRISHNAMAL *Mad.* **317**

——s. 115 (c), O. VI, r. 17—*Scope of cl.* (c) *of s. 115—High Court, when will interfere with interlocutory orders—Calcutta High Court—Practice.*

Clause (*c*) of s. 115, Civil Procedure Code, has been advisedly left in indefinite language in order to empower the High Court to interfere and correct gross and palpable errors of Subordinate Courts for the ends of justice.

So far as the Calcutta High Court is concerned, it can be said to be now fairly established that the High Court will not interfere with interlocutory orders unless an irreparable injury will be done and a miscarriage will inevitably issue if it holds its hand. If, however, irreparable injury would be caused to one of the litigants if the matter was not set right, the High Court ought to intervene in the current litigation and disturb the normal progress of a case by revising an interlocutory order that has been passed by a Subordinate Court.

Ordinarily the discretion of a judicial officer will not be reviewed by the High Court in revision. But it is impossible to lay down a hard and fast rule, that in no instances will the discretion exercised by the judicial officer be reviewed either under s. 115 of the Civil Procedure Code or s. 107, Government of India Act, or under the combined operation of the two sections. Under s. 107, Government of India Act (s. 15 of the Charter), the High Court can interfere where irreparable injury will be done to one of the litigants or where there will be a failure of justice if the matter is not set right. INDU BALA DASSI *v.* LAKSHMI NARAYAN GANGULY *Cal.* **109**

——ss. 115, 151, 145—*Execution application dismissed for default—Restoration application also dismissed—Revision from former order, if lies.*

Where an execution petition is dismissed in default of a decree-holder and an application to restore it is also dismissed, revision from the order of dismissal of execution petition does not lie. KASHMIRI LAL *v.* CHUNI LAL *Lah.* **503**

——s. 141. SEE Civil Procedure Code, 1908, s. 35 **852**

——s. 141, O. XXXXIII, r. 1, Explanation—*Application to file an application for succession certificate as pauper—Civil Procedure Code, whether applicable—Succession Act* (XXXIX *of* 1925), *s.* 379.

The applicants cannot be declared paupers, unless the requirements of the Explanation to r. 1, O. XXXIII, are strictly fulfilled. The deposit under s. 379, Succession Act, of a sum equal to the fee payable on a succession certificate cannot be considered to be court-fee payable on the application for a succession certificate (which corresponds to a plaint in a suit). This deposit is made necessary to ensure payment of court-fee when the succession certificate is to be issued. As a matter of fact, the court-fee on such certificate is payable under the Court Fees Act, Sch. I Art. 12, and is paid when the certificate is issued, *i. e.*, after the termination of proceedings under the Succession Act. The test of pauperism, laid down by the explanation to r. 1, O. XXXIII, Civil Procedure Code, therefore, is not that the applicants have no means of paying the sum required to be deposited under s. 379, Succession Act, but that they have no means of paying the court-fee on the application for a succession certificate, that is, a trifling amount of eight annas.

Quære:—Whether in view of legistative changes embodying the provisions for grant of succession certificates in the Succession Act, the general provisions of the Code of Civil Procedure applies by virtue of s. 141 of the Code to a Court sitting as a Court administering the Succession Certificate Act. EHATISHAMMUNNISA *v.* MIR HADI ALI *All.* **118**

——ss. 144, 154—*Restitution—Power of Court to grant, apart from s. 144—Inherent powers.*

The power of the Executing Court to grant restitution is not confined to the cases governed by s. 144. A Court has inherent power to grant restitution apart from the power bestowed by that section. MAM CHAND *v.* ALI MUHAMMAD *Lah.* **500**

——s. 145.

SEE Civil Procedure Code, 1908, s. 47 **511**

SEE Civil Procedure Code, 1908, s. 115 **503**

——s. 148. SEE Civil Procedure Code, 1908, O. XXI, r. 89. **603**

Civil Procedure Code—contd.

——— s. 151.
See Civil Procedure Code, 1908, s. 115 503
See Civil Procedure Code, 1908, s. 144 500

——— s. 151—*Objection to execution — Objection upheld—Order for delivery of possession not passed —Restoration of possession under s.* 151—*Necessity of.*

A tenant *R* sold part of his lands to *B* and later on a part to *K*. Both the sales were accepted by the landlord. He then filed a suit for arrears of rent against *R*, *B* and *K* including also rent for a period prior to the sale. An *ex parte* decree was passed but not against any definite portion of the land. In execution he brought to sale lands sold to *B* and *K* as well and was given possession. *B* and *K* objected and the Court held that their interest was not affected by the sale but as they were said to be in possession, no orders were passed:

Held, that the Court should have, under s. 151, Civil Procedure Code, restored possession to the objectors and directed that the possession should be re-delivered of their respective portions to the objectors as s. 151 emphasises the fact that nothing in the Code prevents the Court from passing such order as may be necessary to meet the ends of justice or to prevent the abuse of the processes of the Court. Kabutri v. Ram Prashad Sahu *Pat.* 225

——— s. 151—*Order under s.* 151, *if appealable.*

No appeal from the order passed in the exercise of inherent jurisdiction under s. 151, Civil Procedure Code, is competent. Kashmiri Lal *v.* Chuni Lal *Lah.* 503

——— ss. 151, 152, O. XXIII, r. 1—*Suit for possession—Proceedings in Criminal Court pending — Plaintiff given possession of some land—Appeal granting possession of the rest—Criminal Court's order upset—Application for amendment of decree of Civil Court—Maintainability—Declaratory suit —Evidence closed—No formal defect—Application to withdraw with liberty to bring fresh suit— Whether should be granted.*

P brought a suit under s. 9, Specific Relief Act, for possession of land against *K* and others. *K* brought a suit against *P* for a declaration of his title to the same land and both the suits were tried simultaneously. Criminal proceedings between the parties were also pending about the same time and possession of a part of the land in suit was restored to *P* by the Criminal Court. Counsel for the plaintiff, made a statement in Court that his client had received possession of a part of the land in dispute. Counsel for *K* and others stated that an appeal had been preferred against the award of possession to *P*. The suit proceeded and finally the Judge granted a decree to *P* for possession of the land in suit excluding that portion in respect of which a statement had been made by his Counsel that possession had been given to him by the Criminal Court. Subsequent to the judgment and the decree that followed it, an application was made on behalf of *P*, purporting to be under ss. 151 and 152, Civil Procedure Code, alleging that at the date of the judgment and the decree the order of the Criminal Court awarding possession of a part of the disputed land to *P* had been set aside by the Appellate Court and *P* had been dispossessed of that land. A prayer was therefore made that the judgment and decree be amended under the sections mentioned above so as to include that land also in the decree. In the suit brought by *K* against *P* it was alleged on behalf of *K* that a third person, not party to the suit, had taken possession of the disputed property and, therefore a decree, if passed in *K*'s favour, would become infructuous. An application was, therefore, made to withdraw the suit with liberty to institute a fresh suit. This application was granted by the Court:

Held, that this was not a case in which action under s. 152, Civil Procedure Code, could be taken because on the material on the record the judgment and decree were correct. But if the facts alleged by the petitioner were true, the trial Court should have, in the peculiar circumstances of the case, proceeded under s. 151 to make the necessary amendments in its judgment and decree because during the pendency of the suit there had been a change in the circumstances of the case which had restored the parties to the position in which they were on the date of the institution of the suit.

Held, also, that as regards the case by *K* against *P* the circumstances did not satisfy the requirements of O. XXIII, r. 1 according to which permission to withdraw the suit with liberty to bring a fresh suit can be awarded only if the suit is likely to fail on account of some formal defect. There was no formal defect in this case. The evidence of the parties had been closed and the only question involved was whether *K* or *P* had title to the property and that question could be decided irrespective of the consideration whether a third person had or had not taken illegal possession of the property; presumably according to both the parties the third party's possession was illegal and hence the suit should not be allowed to be withdrawn. Pyare Lal *v.* Kale Khan *Lah.* 186

——— ss. 151, 152, 153, O. I, r. 8—*Powers under —Discretion—Suit in representative capacity by one creditor—Other creditors brought on record as plaintiffs by officer of Court mistaking order of Court—Dismissal of suit with costs—Amendment of decree and plaint for removal of names of other creditors from array of plaintiffs — Whether should be allowed.*

The language of ss. 152 and 153, Civil Procedure Code, is wide enough to cover the correction of mistakes and errors in any proceeding in a suit. Extensive powers may be exercised under the provisions of ss. 151, 152 and 153 of the Code, and the question whether these extensive powers ought to be exercised in any given case is a matter purely within the discretion of the Court with reference to the facts of each particular case.

The plaintiff in a suit applied for permission to sue on behalf of all creditors of the defendant. All that was required of the Court under O. I, r. 8, Civil Procedure Code, was to have a notice of the institution of the suit sent at the expense of the plaintiff to all such persons whom the plaintiff wanted to implead either by personal service or where from the number of persons or any other cause such service was not reasonably possible, by public advertisement as the Court in each case might direct. But although no order was passed by the Court making them plaintiffs, the *peshkar* of the Court amended the plaint by bringing them on record. The suit was ultimately dismissed with costs and the defendants applied in execution for recovery of their costs not only from the plaintiff but also from the other creditors who had been wrongly impleaded as plaintiffs:

Held, that Court neither intended nor had the jurisdiction to saddle the other creditors with the costs of the suit and that this was a fit case in which the High Court should exercise the powers vested in them under ss. 151, 152 and 153, Civil Procedure Code

Civil Procedure Code—contd.

and their names should be removed from the array of the plaintiffs in the plaint and the decree. MUSADDI LAL *v.* DAL CHAND *Oudh* **236**

———**s. 152.** SEE Civil Procedure Code, 1908, s. 151 **186**

———**s. 152**—*Order under—Applicability—Judge purporting to act under s. 152 but wrongly passing fresh decree—Appeal, if lies.*

Although no appeal lies from an order under s. 152, Civil Procedure Code, yet where the Judge purporting to act under s. 152, wrongly passes a fresh decree, the mere fact that the new decree was wrongly passed does not take away the plaintiff's right to appeal. SHEOGA *v.* DHANNA *Lah.* **587**

———**ss. 152, 153.** SEE Civil Procedure Code, 1908, s. 151 **236**

———**O. I, r. 3.** SEE Civil Procedure Code, 1908, O. XXXIV, r. 1 **156**

———**O. I, r. 8.** SEE Civil Procedure Code, 1908, s. 151 **236**

———**O. I, r. 13**—*Non-joinder of parties—Objection as to—When should be raised.*

If the objection as to non-joinder is not made in time the defendant cannot take it afterwards either before or after judgment.

A suit was brought by *A* who described himself in the plaint as proprietor of the firm *A-B*. *B* was then dead and had left a widow but she was not made a party to the suit. The defendants raised no objection as to non-joinder and the issues between the parties were settled on March 12, 1932. The case was fixed for evidence on May 25, 1932. On that date the defendants raised an objection to the effect that *A* was not competent to sue alone without impleading the widow of *B* as a party. *A* thereupon, made a statement to the effect that on the death of *B* he became the sole owner of the firm *A-B*. It was held that the interest of *B's* widow had not passed to *A* at the time of the institution of the suit and that he was, therefore, not competent to sue in his own name. The suit was, therefore, dismissed. On appeal the District Judge held that the objection as to non-joinder not having been raised before the issues were settled, it should be deemed to have been waived and should not have been allowed to be taken subsequently. The Judge also expressed the opinion that the suit was in substance on behalf of the firm *A-B* and that the heading of the plaint could be treated merely as a misdescription. The appeal was, therefore, accepted and the case was remanded for a decision on the merits.

Held, that the case fell within the purview of O. I, r. 13, Civil Procedure Code and that the objection which was not raised before the settlement of issues should not have been allowed to be raised subsequently. TRIKHA RAM *v.* DURGA PARSHAD *Lah.* **314**

———**O. I, r. 13**—*Suit not brought in firm's name—All partners should be impleaded.*

If a suit is not brought in the name of a firm all the partners should be impleaded. TRIKHA RAM *v.* DURGA PARSHAD *Lah.* **314**

———**O. III, r. 2**—*Appeal, if proceeding in suit—Power-of-attorney authorising agent to prosecute claim—Authority to file appeal, if implied.*

An appeal is a proceeding in a suit and the prosecution of a suit includes the prosecution of all the proceedings till a final decree is passed. Where a power-of-attorney authorises the agent to prosecute the claim (*pervi dawa*), it confers an implied authority on him to file an appeal. BALQIS BEGAM *v.* MUHAMMAD HAMDAM *Lah.* **479**

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———**O. V, r. 15 (as amended by Allahabad High Court).** SEE Civil Procedure Code, 1908, O. XLI, r. 21 **676**

———**O. VI, r. 4.** SEE Fraud **890**

———**O. VI, r. 17.** SEE Civil Procedure Code, 1908, s. 115 (*c*) **1109**

———**O. VI, r. 17**—*Amendment of plaint—Suit to declare right to worship for particular year—Expiry of year before trial—Amendment of plaint for declaration of right to worship by turns—Permissibility.*

Order VI, r. 17, Civil Procedure Code of 1908 is considerably wider than the corresponding section of the old Code and Court is given very wide power or discretion to allow amendments especially to avoid multiplicity of suits.

The plaintiff filed a suit for a declaration that they were *golla mirasidars* of a temple and that in pursuance of an agreement they were entitled to enjoy the said office according to turns from July 1, 1931, to June 30, 1932, and for possession of the office. The suit did not come up for trial till March 1933. The plaintiff, therefre, prayed for amending the plaint by adding a prayer for a declaration that they were entitled to get possession during alternate years :

Held, that the case was one in which an amendment ought to be allowed. GOLLA LAKSHMIAH NAIDU *v.* GOLLA KRISHNASWAMI NAIDU *Mad.* **1016**

———**O. VI, r. 17**—Plaint, amendment of—If can be allowed at the stage of hearing of appeal. SEE Specific Relief Act, 1877, s. 42 **209**

———**O. VII, r. 6**—*Limitation Act (IX of 1908), s. 19—Plea of limitation resting on certain acknowledgment taken for first time at time of argument—Whether can be allowed.*

When a plaintiff deliberately takes up a definite position as to when the cause of action arose, he cannot be allowed to shift his ground later on, when he finds that position untenable. Thus the plaintiff cannot be allowed to take up a new plea of limitation resting on certain acknowledgment at the stage of arguments, when he finds his original position untenable. To adopt such a course is unfair, as the defendant has no notice either of the plea or of the statements in certain documents on which reliance is sought to be placed and he cannot, therefore, be reasonably expected to meet the plea. SECRETARY OF STATE *v.* AKBAR SHAH *Lah.* **819**

———**O. VII, r. 11.** SEE Civil Procedure Code, 1908, s. 115 **617**

———**O. VIII, rr. 8, 9, O. IX, r. 3**—*Clerk of Court fixing date in absence of presiding Judge—Failure to appear on such date—Whether justifies dismissal in default.*

In the absence of the presiding Judge, the clerk of the Court has no power to fix a date. Failure to appear on the date so fixed does not justify dismissal in default. HUKAM CHAND *v.* MANI SHIBRAT DASS *Lah.* **514** (*a*)

———**O. IX, r. 9.**

SEE Civil Procedure Code, 1908, s. 11 **882**

SEE Civil Procedure Code, 1908, s. 115 **575**

———**O. IX, r. 9**—*Calcutta High Court Rules and Orders (Original Side), Chap. X, r. 36—Res judicata—Suit dismissed under Chap. X, r. 36—Plaintiff, if debarred from bringing fresh suit.*

On general principles there is nothing to prevent a plaintiff, whose suit has been dismissed for want of prosecution, from instituting forthwith a suit against the same defendant upon the same cause of action and, in the absence of any rule made by the Court to deal with such a state of affairs, where

the suit is dismissed under the provisions of Chap. X, r. 36, Calcutta High Court Rules and Orders (Original Side), the plaintiff is at liberty to bring a fresh suit if he be so minded. SHAILABALA DASEE *v.* GOBARDHANDAS LADSARIA *Cal.* 158

——— O. IX, r. 9—*Suit dismissed for want of prosecution under O. IX, r. 9—No issues tried—Res judicata.*

The question of *res judicata* does not arise where a suit is dismissed for want of prosecution, under O. IX, r. 9, Civil Procedure Code, and the issues which are raised or might have been raised are never tried out and there is no judicial determination of any of them. SAMARENDRANATH MITRA *v.* PYAREEHARAN LAHA *Cal.* 882

——— O. IX, r. 13. See Civil Procedure Code, 1908, s. 115 575

——— O. IX, r. 13, s. 115—*Held, decree was indivisible and could not be dismissed against one and allowed to proceed against the other—Revision.*

Held, that the decree against father and son was one and indivisible and it could not be allowed to stand against father alone, and where such a result comes from the lower Court's decision, the High Court can interfere in revision. NANAK CHAND *v.* HAZARI MAL *Lah.* 837

——— O. IX, r. 13, O. XVII, r. 2—*Finding as to sufficient cause—Necessity of, under O. IX, r. 13—Case fixed for final hearing—Pleader applying for adjournment and then stating 'no instructions'—Dismissal—Application by way of restoration under O. XVII, r. 2—Whether lies—Remedy of defendant.*

Under O. IX, r. 13, Civil Procedure Code, it is necessary that the Court should find that defendants were prevented by any sufficient cause from appearing when the suit was called on for hearing.

Where on the date fixed for final hearing of a suit, the pleader for defendants asked for an adjournment which was refused and he then stated he had no instructions and the case was heard and decided:

Held, that as the pleader was engaged in making an application it must be held that the defendants did appear on the date in question and hence no application by way of restoration under O. XVII, r. 2 lay and that the only remedy which defendants had against the decree was by way of appeal. RAM SARAN DAS *v.* MALLU *All.* 249 *(a)*

——— O. XIX, r. 2. See C. P. Land Revenue Act, 1917, s. 201 557

——— O. XIX, r. 3—*Affidavit not stating grounds of belief—Necessity of.*

Where the deponent in his affidavit does not say which part is based on information and which on belief, nor the grounds of his belief, the affidavit is defective. DURGADAS DAS *v.* NALIN CHANDRA NANDAN *Cal.* 354 *(b)*

——— O. XXI, r. 2—*"Decree of any kind" in O. XXI, r. 2—Meaning of.*

The words "of any kind" in para. (1) to O. XXI, r. 2, Civil Procedure Code, were introduced in the Code of 1908 in order to get over conflicts between various High Courts on the question of whether or not the mere word "decree" as it originally stood referred only to decrees for the payment of money. The words "decree of any kind" mean a decree of any kind capable of execution. It does not include a preliminary decree. HARIHAR PRASAD *v.* GOPAL SARAN *Pat.* 976

——— O. XXI, r. 2, *if applies to payment made before final decree for sale.*

Order XXI, r. 2, Civil Procedure Code, does not apply to a payment made before the final decree for sale. SEWA RAM *v.* PARBHU DAYAL *Oudh* 231

——— O. XXI, r. 2, O. XXIII, r. 3, O. XXXIV, r. 5—*Suits on mortgages—Whether excluded from operation of O. XXIII, r. 3—Payment made out of Court before final decree—Payment admitted by plaintiff—Payment, if to be ignored for not being made as required by O. XXXIV, r. 5—Procedure—Inquiry as to whether payment has in fact been made—Necessity of.*

The provisions of O. XXI, r. 2, and O. XXIII, r. 3, are complimentary of each other. There is nothing in the terms of O. XXIII, r. 3 to exclude suits based on mortgages from the operation of this rule. While on the one hand O XXXIV, r. 5 contemplates a payment into Court, on the other hand under O. XXIII, r. 3, the payment has to be recognised even though it has been made out of Court. If before a final decree is passed a payment is made out of Court and the payment is admitted by the plaintiff, it would be in the highest degree unreasonable to ignore that payment because of its not being made in Court as required by O. XXXIV, r. 5. In such cases if the payment is admitted by both parties, the satisfaction based on such payment ought to be recorded under O. XXIII, r. 3 in spite of its not being made into Court. On the other hand, if the alleged payment out of Court is disputed, the payment having been made in clear disregard of the mandatory provisions of O. XXXIV, r. 5, the Court is not bound to embark upon any inquiry into the question whether the alleged payment was in fact made or not. SEWA RAM *v.* PARBHU DAYAL *Oudh* 231

——— O. XXI, r. 16. See Decree 974

——— O. XXI, r. 19—*Set-off—Executing Court, if can entertain claim to set-off.*

An executing Court can entertain a claim to set-off and although a case does not come within the strict terms of O. XXI, r. 19, Civil Procedure Code, the Court can, in the exercise of its inherent power, give effect to such a claim. KRISHNA CHANDRA BHOUMIK *v.* PABNA DHANABHANDAR CO., LTD. *Cal.* 991

——— O. XXI, r. 22—*Decree more than three years old—Application after an year from last order—No notice—No reasons recorded.*

Where a decree is more than three years old, and the application for execution of the decree is made more than a year after the passing of the final order on the last application for execution and no reason is recorded for not issuing notice as required by O. XXI, r. 22, Civil Procedure Code, the omission to issue notice to the judgment-debtor is not a mere irregularity, but is a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction. U NYO *v.* U PO THIT *Rang.* 959

——— O. XXI, r. 22—*Objection stated with clarity—Advocate pointing out wrong rule—Objection, if waived.*

If the objection based upon the provisions of O. XXI, r. 22, is stated with substantial clarity in the petition of objection, the fact that the Advocate at the hearing happened to point out an inapposite rule of O. XXI, does not alter the fact that objection under r. 22 was in reality taken, and cannot be regarded as being tantamount to a waiver of that objection U NYO *v.* U PO THIT *Rang.* 959

——— O. XXI, r. 37. See Civil Procedure Code, 1908, O. XXI, r. 40 (3) 168

——— O. XXI, rr. 40 (3), 37—*Judgment-debtor not arrested but pleading poverty to notice under r. 37—Surety undertaking to pay—Court, if can demand such bond.*

Civil Procedure Code—contd.

Where the judgment-debtor has never been arrested, there cannot be an order directing his release. Consequently, the Court has no jurisdiction to demand a bond for the payment of decretal amount under O. XXI, r. 40 (3), Civil Procedure Code, when judgment-debtor pleads poverty to notice under r. 37 of O. XXI, Civil Procedure Code. AHMAD BAKHSH *v.* MUSLIM BANK OF INDIA, LTD. *Lah.* 168

——O. XXI, r. 49—*Money decree against one partner—Sale of partnership property—Whether operative against the other.*

Order XLI, r. 49, Civil Procedure Code, is an imperative provision of the statute and renders the sale of partnership property in execution of the decree in a money suit against one partner, invalid and inoperative as against the other partners. RATI LAL NANJI *v.* UTTAM LAL SARCAR *Cal.* 842 *(b)*

——O. XXI, rr. 53 (1), (b)—*Scope of—Attachment of decree obtained by judgment-debtor—Attachment, when ceases.*

Order XXI, r. 53 (1) *(b) (ii)*, Civil Procedure Code does not mean that when the holder of the decree sought to be executed makes such an application, the attached decree ceases to be an attached decree; it only means that a period is provided by the rule up to which a stay of execution is to be arranged by the Court to which notice is sent to enable the holder of the decree sought to be executed to make application for execution of the attached decree. The rule relates not to the date of cessation of the attachment but only to the manner in which the attachment is to be effected.

W obtained a decree against *S*. *A* had a decree against *W* and in execution of that decree he got attached *W's* decree against *S*. The application of *A* to execute this attached decree was dismissed for default. *W* assigned his decree to *B*. *S* paid a sum of money out of Court to *A* on account of the decree which *W* had obtained against *S* and which *A* had attached. *B* the assignee applied to execute that decree against *S* who pleaded payment out of Court and satisfaction:

Held, that the attachment of the decree of *W* against *S* did not cease when proceedings in execution of that attached decree were dismissed for default in the Court which had received notice under O. XXI, r. 53, from the Court which had passed the decree in favour of *A* against *W*. FIRM SUNDAR DAS VIR BHAN *v.* FIRM UMA DATT HANSRAJ *Lah.* 315

——O. XXI, r. 55. SEE Civil Procedure Code, 1908, s. 73 918

——O. XXI, r. 57—*Default, meaning of—Failure to go on with application and proceed with sale—Whether constitutes default—Attachment, cessation of—Fresh application for execution—Competency of.*

The word "default" used in O. XXI, r. 57, Civil Procedure Code, is not restricted to default of appearance, but means a failure to do what the decree-holder was bound to do, that is, to go on with his application and have the property sold and if a default took place, the attachment previous to that had come to an end on the decree-holder's application being struck off. In such cases any intermediate order passed by the Court becomes a nullity and the decree-holder can file a fresh application for execution. DATAR SINGH *v.* KHAN CHAND. *Lah.* 332

——O. XXI, r. 58—*Possession with a person—Court, if precluded from entering into question of whether possession was of judgment-debtor.*

Although it is true that when once a person is found to be in possession under O. XXI, r. 58 the Court has no jurisdiction to go behind that possession and enter into a question of title yet it cannot be said that the Court is precluded from entering into the question of whether the possession of the person actually found in possession was the possession of the judgment-debtor or not. When the Court finds that some person other than the judgment-debtor is in possession, it becomes necessary to determine whether that person is in possession for the judgment-debtor and in many cases it is often necessary to go into the question if that possession was the result of a purchase and whether the purchase was a *benami* purchase or not. MRS M. D'SILVA *v.* MRS. MINNIE LAL ... *Pat.* 419

——O. XXI, r. 63—*Auction-purchaser, if a necessary party to suit under O. XXI, r. 63.*

The auction-purchaser is a necessary party to a suit under O. XXI, r. 63, Civil Procedure Code, and if there is no suit in which he was a party until more than a year after the dismissal of objection to attachment, the order dismissing the objection is conclusive in favour of the auction-purchaser. GHULAM HAIDAR *v.* SAID AHMAD ALI ... *Pesh.* 272

——O. XXI, r. 63—*Dismissal of claim after investigation—Onus.*

In a suit under O. XXI, r. 63, Civil Procedure Code, by an unsuccessful claimant where the claim petition is dismissed after investigation, the onus is on the plaintiff. SUPPAN ASARI *v.* ALIMA BIBI. *Mad.* 17

——O. XXI, r. 63—*Suit by claimant—Judgment-debtor if a necessary party.*

A judgment-debtor is not a necessary party in a suit by the claimant under O. XXI, r. 63, Civil Procedure Code. SUPPAN ASARI *v.* ALIMA BIBI. *Mad.* 17

——O. XXI, rr. 89, 92—*Purchase of property at something under its value—Whether evidence of fraud—Scope of O. XXI, in setting aside sales.*

In order to set aside an auction sale it is necessary to bring the matter within O. XXI of the Code of Civil Procedure. The mere fact that the purchaser purchased the property at something under its value is not by any means evidence of fraud and would not justify the setting aside of the sale. Once the property has been knocked down at the auction, there is an end of the matter unless the sale can be set aside under the provisions of O. XXI. HAZARI LAL LABH *v.* ABDUS SAMAD ... *Pat.* 288

——O. XXI, rr. 89, 92 (3), s. 148—*Limitation Act (IX of 1908), Sch. I, Art. 166—Deposit of amount for setting aside sale—Deposit not made due to act of Court—Effect of—'Actus curiae neminem gravabit'—Applicability of.*

It may be taken as settled law that under O. XXI, r. 89, Civil Procedure Code, read with r. 92, (3) and Art. 166 of the Limitation Act, it is necessary that not only the application but also the deposit must be made within thirty days of the date of the sale. Section 148 has no application to such cases and the period of thirty days cannot be extended by the Courts. But at the same time a party litigant ought not to be penalized when he found it impossible to comply with the requirements of the statute, not because of any fault of his own, but by reason of the action or inaction of the Court. On the happening of such a contingency, the maxim "*actus curiae neminem gravabit*" (an act of Court prejudices no man) applies. Consequently, when a deposit is not made in time due to the Court's action, the person depositing will be deemed to have deposited at the time he was ready to deposit. BUTI RAM *v.* SARDAR SINGH *Lah.* 603

Civil Procedure Code—contd.

———O. XXI, r. 92. See Civil Procedure Code, 1908, O. XXI, r. 89 228

———O. XXI, r. 92. O. XLIII, r. 1 (j)—*Order refusing to set aside sale—Appeal—Auction-purchaser, if a necessary party.*

In an appeal from an order passed under O. XXI, r. 92 of the Civil Procedure Code, rejecting an application to set aside a sale in execution of a decree, the auction purchaser is a necessary party and the appeal cannot proceed in his absence. Qamaruddin *v.* Dhanpal Singh *Lah.* 354 (*a*)

———O XXI, r. 92 (3). See Civil Procedure Code, 1908, O. XXI, r. 89 603

———O. XXI, r. 97.

See Bihar and Orissa Public Demands Recovery Act, 1914, ss. 21 and 24 957

See Limitation Act, 1908, Sch. I, Art. 11-A 702

———O. XXI, r. 97, s. 115—*Summary view of justice is not safe guide where real obstacle of opposite party is bar of limitation.*

Where the conditions set out in s. 115, Civil Procedure Code, are present, a summary view of justice is often not a conclusive or even a very safe guide, especially, where the real obstacle in the way of the opposite party is a statutory bar of limitation. Akhauri Herambo Narain Sinha *v* Jamuna Sonar *Pat.* 957

———O. XXI, rr. 98, 99. See Civil Procedure Code, 1908, O. XXI, r. 103 249 (*b*)

———O. XXI, r. 100.

See Limitation Act, 1908, Sch I, Art 47 1094

See Oudh Rent Act, 1886, s. 108, cl. (10) 1082

See Transfer of Property Act, 1882, s. 52 1082

———O. XXI, r. 100—*Decree against father—Sons, if can be said to be persons other than the judgment-debtors.*

Where a decree has been made against the father of the petitioners the petitioners will *prima facie* be bound by the decree and cannot therefore be said to be persons other than the judgment-debtors within the meaning of O. XXI, r. 100. Daroga Prasad Sahu *v.* Bhagwati Prasad Singh *Pat.* 93

———O. XXI, rr. 100, 101—*Person not dispossessed—Whether can, apply under r.* 100.

It is only when the person is dispossessed that he can apply under O. XXI, r. 100, Civil Procedure Code. Where no possession has been given to the decree-holders, an order under O. XXI, r. 101, cannot be passed as the Court has no jurisdiction to determine the matter in the form of an anticipatory application. Daroga Prasad Sahu *v* Bhagwati Prasad Singh *Pat.* 93

———O. XXI, r. 101. See Civil Procedure Code, 1908, O XXI, r. 100 93

———O. XXI, rr. 103, 98, 99, 101—*Suit under—O. XXI, r.* 103—*Scope of*

The scope of a suit under O. XXI, r. 103 of the Civil Procedure Code, filed to contest an order made under either r. 98, or r. 99 or r. 101, is not the determination of the mere question of possession of the parties concerned but the establishment of the *right* or *title* by which the plaintiff claims the present possession of the property. Krishnarao Raghunath Yardi *v.* Ghamon Ghama *Bom.* 249 (*b*)

———O. XXII, r. 3—*Suit for possession of land and demolition of constructions against several defendants—Decree—Appeal—Death of one defendant during pendency of appeal—Legal representatives not brought on record—Dismissal of suit by lower Appellate Court—Procedure, if proper.*

The plaintiff's suit for recovery of possession of a plot of land and for demolition of certain constructions made by the defendants thereon, was decreed by the trial Court. The defendants, eight in number, filed an appeal in the lower Appellate Court, during the pendency of which one of the defendants died and his legal representatives were not brought on the record. The appeal was accepted and the plaintiff's suit dismissed *in toto*:

Held, on second appeal, that any one of the defendants could have resisted the plaintiff's claim to possession and to demolition of the constructions made by the defendants. As anyone of them could have impugned the entire decree and the lower Appellate Court did set aside the entire decree at their instance and dismissed the plaintiff's suit *in toto*, no fault could be found with the procedure of that Court and its decree was not open to challenge. Badloo *v.* Nanu *All.* 602

——— O. XXII, rr. 3, 4

See Civil Procedure Code, 1908, O. XXII, r. 11 359

See Civil Procedure Code, 1908, O. XXII, r. 12 969

———O. XXII, rr. 3, 11—*Suit for specific performance of contract by two plaintiffs—Plaintiffs' shares not specified—Share in consideration not known—Appeal by them against lower Court's decision—Death of one of them—Legal representative not brought on record within time—Held, appeal abated as whole—Held also that ignorance of death was not sufficient cause to extend limitation—Limitation Act (IX of* 1908), *s.* 5—*Contract Act (IX of* 1872), *s.* 45.

A contract was entered into by defendant No. 1 in favour of two persons named *P* and *K* who were the plaintiffs in a suit for specific performance of the contract to sell certain land and both of them had preferred the appeal jointly. During the pendency of the appeal *P* died and no application was made within the prescribed period to bring his legal representatives on the record. It was, however, made after the prescribed period, but it merely stated that the delay was due to ignorance on the part of the applicants:

Held, (*i*) that the reason for delay could not be considered to be an adequate ground for extension of time under s. 5 of the Limitation Act.

(*ii*) that the right of appeal on the death of *P* vested in the legal representative of *P* and not in *K* and the appeal abated according to the provisions of rr. 3 and 11 of O. XXII, Civil Procedure Code, at least so far as *P* was concerned.

(*iii*) that since the agreement between the parties did not specify any shares and it was impossible to say in what shares the consideration was to be paid by, or the land to be divided between the two plaintiffs, the right to enforce the contract vested on the death of *P* in his legal representatives along with *K* and not in *K* alone. Therefore, no relief could be given to *K* when the legal representatives of *P* had not been brought on the record and his share could be ascertained. Consequently, the whole appeal abated. Pir Bakhsh *v.* Kidar Nath *Lah.* 610

———O. XXII, r. 4—*Tort-feasors—Death of one—Non-impleading of legal representatives—Suit, if abates as against the other.*

Where one of two tort-feasors dies and his legal representatives are not brought on record, the suit or appeal does not abate as against the other. Roda Mal *v.* Nighania *Lah.* 869 (*b*)

———O. XXII, r. 11. See Civil Procedure Code, 1908, O. XXII, r. 3 610

———O. XXII, rr. 11, 3, 4—*Party impleaded both in appeal and memorandum of objections—Two*

Civil Procedure Code—contd.

separate applications, if necessary for bringing his legal representative on record.

Where a party is already impleaded both in the appeal and the memorandum of objections, there is no necessity of two separate applications to bring his legal representatives on the record. TIRUNARAYANA PILLAI *v.* P. R. Y. MANIOKAVACHAGAM CHETTIAR *Mad.* 359

——O. XXII, rr. 12, 3, 4—*Execution proceedings —Whether abate on death of decree-holder—Representative, if can get his name substituted and continue execution—Fresh application, if necessary.*

An execution proceeding does not abate on the death of the decree-holder and there is no bar to the execution continuing at the instance of his representative. The representatives of a deceased decree-holder can get their names substituted during the pendency of an execution proceeding and proceed with it. No fresh application is necessary for this MONAUGHT *v.* SARASWATI THAKURAIN *Pat.* 969

——O. XXIII. See Civil Procedure Code, 1908, O. XXXII, r. 7 912

——O. XXIII, r. 1. See Civil Procedure Code, 1908, s. 151 186

——O. XXIII, r. 1—*Cl.* (b) *of sub-r.* (2), *if to be read* ejusdem generis *to cl.* (a).

Clause (*b*) of sub-r. 2 of O. XXIII, r. 1, Civil Procedure Code, although disjunctive, must be read *ejusdem generis* to cl. (*a*). SUKHUMAR GUPTA *v.* CHAIRMAN, DISTRICT BOARD, GAYA *Pat.* 210

——O. XXIII, r. 1 (2) (a) (b)—*Suit not found to fail by reason of formal defect—Grounds for allowing plaintiff to file fresh suit not stated—Order allowing plaintiff to withdraw suit and file fresh suit—Whether Court has jurisdiction to pass*

Unless the Court brings the case within cl. (*a*) of sub-r. 2 of O XXIII, r. 1, Civil Procedure Code, or set out grounds why the plaintiff should be allowed to bring a fresh suit, the Court has no jurisdiction to pass an order allowing the plaintiff to withdraw a suit and to bring a fresh suit. SUKUMAR GUPTA *v.* CHAIRMAN, DISTRICT BOARD, GAYA *Pat.* 210

——O. XXIII, r. 3. See Civil Procedure Code, 1908, O. XXXIV, rr. 4, 5 976

——O. XXIII r. 3—*Suit pending—Reference made without Court's permission—Award, if a compromise.*

An award made on a reference without the intervention of the Court during the pendency of a suit cannot be recorded as a compromise or adjustment of the suit under O. XXIII, r. 3, Civil Procedure Code. MOHAMMAD MIA PANDIT *v.* OSMAN ALI *Cal.* 915

——O. XXV, r. 1. See Civil Procedure Code, 1908, s. 115 317

——O. XXVI. See Evidence Act, 1872, s. 35 1040

——O. XXX, r. 1—*Suit by partners—Partners, if can bring suit for firm's benefit—Their* locus standi, *if can be questioned by third party.*

Partners can bring a suit for the benefit of the firm, and although they may be prosecuting the litigation on their own responsibility, the benefit goes to the concern, and it is no business of third parties to question their *locus standi*. ARJAN SINGH BHAJJAN SINGH *v.* FIRM SURJAN SINGH ACHAREJ SINGH *Pesh.* 1006

——O. XXXII, r. 3—Guardian appointed—Procedure not followed—Effect. See Minor 711

——O. XXXII, r. 3—*Guardian* ad litem *appointed by Court—Decree against minor—Onus of proof that he was not properly represented.*

Where the defendant is a minor, it is the duty of the Court not only to appoint a guardian, but to satisfy itself that the proposed guardian was a fit and proper person to represent the minor in the suit, to put in a proper defence, and generally to act in the interest of the minor and if the Court gives judgment against the minor, the onus is on the minor to prove that he was not properly represented in the former suit. POPAT VIRJI *v* DAMODAR JAIRAM *Bom.* 711

——O. XXXII, rr. 3, 4—*Provisions of, are mandatory—"Proper" person to be guardian* ad litem *—Decree against minor, when nugatory.*

The provisions of O. XXXII, r. 3, Civil Procedure Code, that where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, are mandatory, and a decree passed against a minor without the appointment of a guardian *ad litem* is a nullity. But if a guardian has been appointed for a minor defendant, mere irregularities in the appointment of the guardian or the mere fact that a proper person was not appointed guardian, does not render the decree nugatory against the minor unless and until it is proved that the minor was not effectively represented in the suit and was prejudiced by the omission of the guardian to take the pleas that could validly be raised on his behalf. The law insists that the minor should be represented by a proper person whose interests are not adverse to the interests of the minor, so that the minor's interest may not in any way be neglected or prejudiced. But if it is apparent that the minor's interests in the suit in which he was a defendant were not in any way prejudiced, it becomes wholly unnecessary to inquire into the question as to whether or not the guardian appointed was a "proper person" within the meaning of O. XXXII, r. 4, Civil Procedure Code, for the simple reason that the purpose for which a guardian is appointed are achieved. Consequently, in cases where a gaurdian *ad litem* for a minor defendant has been appointed and a decree is passed against the minor the minor is not entitled to avoid the decree without proof of the fact that he was not effectively represented in the suit, and that he was prejudiced by the omission of the guardian to raise proper pleas on his behalf. GOVIND PRASAD *v.* SHANTI SWARUP *All.* 1106

——O. XXXII, rr. 4, 11—*Certificated guardian appointed guardian* ad litem—*Such person ceasing to be certificated guardian—Whether ceases to be guardian* ad litem, ipso facto.

Normally if a minor wishes to institute a suit and he has a certificated guardian then that certificated guardian is the right person to act as the next friend of the minor. If, on the other hand, a suit is brought against a minor who already has a certificated guardian then he is the person who must be appointed guardian for the suit unless the Court otherwise decides. There is no inherent disqualification in all persons other than certificated guardians to be a guardian *ad litem*. Where a person appointed guardian *ad litem* at the time when the suit was started is in fact the certificated guardian, the appointment is strictly in conformity with the provisions of sub-r. (2), O. XXXIV, Civil Procedure Code. The mere fact that he subsequently ceased to be the certificated guardian, and somebody else was appointed in his stead, does not of itself impose such an absolute and fundamental disqualification

Civil Procedure Code—contd.

that he automatically vacates his office and becomes *functus officio*. The only way of getting rid of a guardian *ad litem* who has once been properly appointed, is under the provisions of r. 11, subject perhaps to the implications of sub-r. (1), r. 4. SAMARENDRANATH MITRA *v.* PYAREECHARAN LAHA *Cal.* 882

——O. XXXII, r. 7—*Next friend entering into compromise without Court's permission—Same next friend representing minor in appeal—Compromise will not be set aside.*

Obiter.—A compromise effected by the next friend without the Court's permission as required by O. XXXII, r. 7, Civil Procedure Code, will not be set aside in appeal, if the minor happens to be represented in the appeal by the same next friend. MAHAMMAD MIA PANDIT *v.* OSMAN ALI *Cal.* 915

——O. XXXII, r. 7, O. XXIII—*Petition for leave to compromise—Minor parties—Considerations before Court—Leave granted—Recording of compromise and passing of decree—Necessity of.*

When a petition for leave is filed under O. XXXII, r. 7, Civil Procedure Code, the Judge should consider whether the compromise is in the interests of the minors. If he is satisfied that it is for the benefit of the minors, then he must grant leave. If he is not so satisfied, he should refuse leave. If leave is granted, he has no option but to record the compromise and pass a decree in accordance with it. In deciding whether the petition of compromise is for the benefit of the minors, it will be open to the Court to make such alterations in the terms of the compromise agreed to by the parties, as it deems expedient. MA FATI *v.* KALIMUTHU *Rang.* 912

——O. XXXII, r. 15—*Applicability—Inquiry as to unsoundness of mind—Nature of—Decree in favour of plaintiff who brings suit on behalf of person alleged to be of unsound mind—No inquiry as to unsoundness of mind—Lower Appellate Court directing inquiry by trial Court—Held, that such inquiry should be held by lower Appellate Court.*

In order that O. XXXII, r. 15, Civil Procedure Code, should be applicable in the case of a person who has not been adjudged to be of unsound mind the words of the rule require something more than a finding after an inquiry that a person is of unsound mind it should be found on enquiry that by reason of unsoundness of mind or mental infirmity, the person is incapable of protecting his rights as a plaintiff or as a defendant.

Plaintiff brought a suit on behalf of a person alleged to be of a unsound mind. The trial Court, without inquiring as to the unsoundness of mind as required by O. XXXII, r. 15, Civil Procedure Code, passed a decree in favour of the plaintiff. On appeal by the defendant, the lower Appellate Court passed an order directing the trial Court to hold an inquiry:

Held, that the enquiry under r. 15, O. XXXII, should have been held by the Appellate Court itself because the enquiry was not likely to be a lengthy or a protracted one. On the result of such enquiry if such unsoundness of mind as is required by the rule has been made out, the Court would hold that the trial that was held in the Court of first instance, was in order, and it would be necessary for the lower Appellate Court to dispose of the appeal on merits. If, on the other hand, it came to the conclusion that such unsoundness of mind as is contemplated by the rule has not been made out, it will have to be held that the plaint that was presented was not in order and as a necessary consequence of such a finding it would have to be held further that the proceedings that followed were not proceedings taken in accordance with law and consequently the decree that was passed in the suit would have to be held a nullity. NIRENDRA LALL *v.* BEPIN CHANDRA *Cal.* 696

——O. XXXIII, r. 1, Explanation. SEE Civil Procedure Code, 1908, s. 141 1118

——O. XXXIV, r. 1, O. I, r. 3—*Mortgage suit—Person claiming ownership in derogation of title of mortgagor—Whether necessary party to suit—Determination of such title to be avoided in suit.*

A person who claims the right of ownership in a mortgaged property in denial and derogation of the mortgagor, is not a necessary party in the mortgage suit. As the determination of his title in the suit is bound to lead to confusion, it should be avoided. RASOOLAN BIBI *v* RAM KUAR *All.* 156

——O. XXXIV, r. 4—*Preliminary decree—Dismissal of appeal with costs—Application for amendment of final decree to include costs—Order allowing application—Construction.*

Where the decree-holder after obtaining a preliminary decree for mortgage under O. XXXIV, r. 4, Civil Procedure Code which was confirmed in appeal, applied that the final decree previously prepared be amended so as to include the costs awarded by the Appellate Court, and the trial Court allowed the amendment as prayed:

Held, that the decree-holder's application asking for amendment and the order of the Court making use of the same word amounted, in substance, respectively to an application and an order for preparation of a fresh final decree, that the order was conclusive, and the final decree passed in pursuance of it was equally so and that that was the only decree capable of execution. BAHAL SINGH *v.* CHAMELI *All.* 495

——O. XXXIV, rr. 4, 5, O. XXIII, r. 3—*Mortgage suit—Compromise—Preliminary decree—Application for making final decree—Proceedings, whether proceedings in suit or execution.*

Order XXXIV, Civil Procedure Code has no application to a compromise decree and the application to make a decree absolute is not a proceeding in execution and O. XXI, r. 3, does not prevent the Court from recognizing an uncertified payment or adjustment made out of Court?

Proceedings for obtaining a final decree are proceedings in the suit and not proceedings in execution?

There had been some conflict of judicial opinion before 1908 on the question whether proceedings for obtaining the order absolute for sale were proceedings in the suit or proceedings in execution, and the amendments of 1908 made it clear beyond dispute that they are proceedings in the suit itself. There is thus even less reason now than before for holding that O. XXI, r. 2 (3) bars the recognition of uncertified payments in proceedings for obtaining a final decree under O. XXXIV, r. 5?

There is nothing in O. XXIII, r 3 to make it inapplicable to a suit after the preliminary decree and before the final decree. Even if the contrary were to be held there is no doubt that in proceeding upon a preliminary decree which is based on a compromise and therefore does not come within O. XXXIV of the Code, the Court will have inherent jurisdiction to take into account payments and satisfaction after that decree before passing the final decree?

Where the decree on the basis of which the petitioner moves the Court for passing a final decree for sale of the mortgaged property is based on a

compromise, which expressly calls it a preliminary mortgage decree and provides that it is not to be made final until a specified date, such a decree does not come under O. XXXIV, r. 4, Civil Procedure Code, and therefore O. XXXIV, r. 5 does not apply to the case and the proceedings for obtaining the final decree in the matter are proceedings in the suit and not in execution. HARIHAR PRASAD *v.* GOPAL SARAN *Pat.* 976

———O. XXXVIII, r. 5—*Present intention of obstruction or delaying execution of decree must be proved.*

Where there is nothing in documents filed by way of objections by the defendants to an application under O. XXXVIII, r. 5, Civil Procedure Code, to show that the defendants ever had any intention of obstructing or delaying the execution of any decree which might be passed against them or with such intent were about to dispose of their property, it cannot be said that the Court could be satisfied "otherwise" within the meaning of r. 5 (b) of O. XXXVIII, Civil Procedure Code, and the mere fact that a defendant has in the past mortgaged or disposed of his property is not a sufficient ground for levying attachment. There must be a present intention. DURGADAS DAS *v.* NALIN CHANDRA NANDAN *Cal* 354 (*b*)

———O. XXXVIII, r 5, O. XXXIX, r. 1—*Injunction or attachment, when to be granted*

Prima facie case is essential before either injunction or attachment can be granted Moreover, the Court must be satisfied that interference is necessary to prevent injury which is irreparable, and that the mischief or inconvenience which is likely to arise in consequence of withholding the relief will be greater than that from granting it. DURGADAS DAS *v.* NALIN CHANDRA NANDAN *Cal.* 354 (*b*)

———O XXXVIII, r. 5, O. XXXIX, r. 1—*Orders under O. XXXVIII, r. 5, and O. XXXIX, r. 1—Whether discretionary—Interference by Appellate Court.*

Orders pressed under O XXXVIII, r. 5 and O. XXXIX, r. 1, Civil Procedure Code, are discretionary, and an Appellate Court ought not to interfere with the exercise of a Judge's discretion unless satisfied that it was not judicially exercised, that is to say, that the Judge acted on wrong principles. The mere fact that the Judges of the Appellate Court might have taken a different view is not a sufficient ground for interference. If the Judge rightly appreciates the facts; and applies to those facts the true principles, that is a sound exercise of judicial discretion.

Neither injunction nor attachment ought to be lightly granted. It would be a serious thing if persons in possession were restrained from making use of the property merely because a suit had been instituted about it It is only where it is essential that property should be kept in its existing condition pending suit that the Court should interfere. DURGADAS DAS *v.* NALIN CHANDRA NANDAN *Cal.* 354 (*b*)

———O. XXXIX, r. 1—*Essentials for an order under O. XXXIX, r. 1.*

Before any order can be made under the provisions of O XXXIX, r. 1, Civil Procedure Code, the plaintiff must prove some overt act towards the alienation of the properties such for example as negotiations or offers for sale and that the property is in danger of alienation. DURGADAS DAS *v* NALIN CHANDRA NANDAN *Cal* 354 (*b*)

———O. XXXIX, rr. 1, 2, cl. 3—*Cl 3 of r 2 whether covers breach of injunctions issued under r. 1.*

Clause 3 of r. 2 of O. XXXIX, Civil Procedure Code, applies to disobedience generally of an injunction granted by the Court and the words 'in case of disobedience' in cl. 3 are wide enough to cover breaches of injunctions issued under O. XXXIX, r. 1, for which breaches no penalty is elsewhere provided. MUHAMMAD NAZIRUDDIN *v.* RAJA RAM *Pat.* 619

———O. XL, r. 1—*Receiver during pendency of mortgage suit — Sums realized by him from mortgaged property, whether form part of mortgaged property —Receiver, when can be appointed.*

The nature of the office of a Receiver is simply this : that he is an impartial person appointed by the Court to collect and receive, pending the proceedings, the rents, issues and profits of land or personal estate or other things in question which it does not seem reasonable to the Court that either party should collect or receive. The object sought by the appointment of a Receiver is the safeguarding of property for the benefit of those entitled to it. His possession is on behalf and for the benefit of all the parties to the suit in which he is appointed, and is the possession of all the said parties according to their titles. The property in his hands is in *custodia legis* for the person who can make a title to it. The title of the real owner is in no way affected either in theory or on principle by his appointment. He collects and receives the rents, issues and profits not upon his own title but upon the title of some persons, parties to the action. The appointment of a Receiver by the Court under O. XL, r 1, Civil Procedure Code, in no way diminishes or enlarges the title to the property which comes into his possession so far as the person otherwise entitled to it is concerned. It follows therefore, that the sums of money in the hands of the Receiver are not sums payable to the mortgagor, but form part of the mortgaged property upon which the debt due to the mortgage was secured. MA JOO TEAN *v.* COLLECTOR OF RANGOON *Rang.* 776

———O. XLI, r. 21, O. V, r. 15 (as amended by Allahabad High Court)—*Due service—Pardahnashin lady—Personal service, how to be effected—Lady present in house—Summons handed over to relation—Whether due service*—Ex parte *decree against lady, if should be set aside.*

Summons can be delivered or tendered to a *pardahnashin* lady even though it may not be possible for the process-server to have access to her : nor can a *pardahnashin* lady be considered to be a person who cannot be personally served. It is the duty of the process server to make an attempt to find ways and means of delivering or tendering the summons to the *pardahnashin* lady for whom it is intended.

Where, although the lady on whom summons had to be served was not absent from the house, the process-server, without trying for means whereby personal service could be effected, handed over the summons to her husband's brother who did not inform her of it and the appeal against her was consequently dismissed *ex parte* :

Held, that as the process-server did not comply with the requirements of law provided in O. V, r. 15, Civil Procedure Code, as amended by the Allahabad High Court, she could not be considered to have been duly served and consequently under O. XLI, r. 21, the Court was bound to set aside the

ex parte decree passed against her. AMNA *v.* RATAN LAL *All.* 676

———O. XLI, r. 22—*Cross-objection—Whether can be taken against a co-respondent—Case of co-respondent having nothing in common with that of appellant—Maintainability of cross-objection against such co-respondent.*

The expression "cross-objection" is clearly indicative of the fact that it should be directed against the appellant, but it may be taken against a co-respondent also, if there is a community of interest between the latter and the appellant. When the cross-objection is directed solely against a co-respondent, whose case has nothing in common with that of the appellant but proceeds on the same grounds on which the appeal does, it is not maintainable. HUSAIN YAR BEG *v.* RADHA KISHAN *All.* 89

———O. XLI, r. 23, O. XLIII, r. 1—*Remand of suit to determine it finally—Appeal to High Court, if permissible.*

Although the provisions of O. XLI, r. 23, Civil Procedure Code, might not strictly apply where the Court of appeal has remanded the suit to the first Court which has been asked to determine finally the suit by the order of remand, an appeal to the High Court is permissible under the provisions of O. XLIII, r. 1, Civil Procedure Code. MAHAMMAD ALI FAKIR *v.* KARAM ALI TALUQDAR *Cal.* 506

———O. XLI, r. 27—*Inherent lacuna on the record on all important points—Appellate Court should remit case to the trial Court for further enquiry.*

Where, on almost every important point, there is an inherent lacuna on the record and it is not possible to come to a satisfactory finding on the question in issue, the only proper course for the Court of Appeal is to remit the case to the trial Court for further enquiry under O. XLI, r. 27, Civil Procedure Code. RODA SINGH *v.* UJAGAR SINGH *Lah.* 329

———O. XLI, r. 27—*O. XLI, r. 27, scope of.*

Order XLI, r. 27, Civil Procedure Code, cannot be used to test the evidence of a witness. It is intended to obtain additional evidence. DAW MIN BAW *v.* CHETTYAR FIRM *Rang.* 511

———O. XLI, r. 35—*Two cross-appeals, whether like appeal and cross-objection—Distinction between them.*

The case of two cross-appeals is not exactly identical with an appeal and a cross-objection. In the case of an appeal and a cross-objection, there is only one judgment delivered and only one decree is prepared by the Court which embodies the adjudication in both the appeal and the cross-objection. On the other hand, under O. XLI, r. 35, the decree of the Appellate Court has to contain the number of the appeal, the names and description of the appellant and the respondent and a clear specification of the relief granted or other adjudication made. If there are two cross-appeals pending in the High Court, two decrees have to be prepared giving all these particulars. BENARES BANK, LTD., AGRA *v.* RAJNATH KUNZRU *All.* 487 F. B.

———O XLIII, r. 1 (m). SEE Civil Procedure Code, 1908, s. 104 (2) 1067

———O. XLIII, r. 1. SEE Civil Procedure Code, 1908, O. XLI, r. 23 506

———O. XLIII, r. 1 (j). SEE Civil Procedure Code, 1908, O. XXI, r. 92 354 (*a*)

———O. XLVII, r. 1—*Review—Suit for possession of revenue-free land—Profits—Court taking* Fasli *year for calculating profits and not applying General Clauses Act (X of 1897)—Whether error on the face of the record—Deductions—Arguments about deductions not made at time of original order—Whether can be made on an application for review—Court Fees Act (VII of 1870), s. 7 (v) (a) (b).*

Where in a suit for possession of a part of a village which was revenue-free, the Court in calculating the profits under s. 7 (*v*) (*c*) of the Court Fees Act, took the *Fasli* year and it was urged in an application for review that according to the General Clauses Act, the year to be taken was the calendar year:

Held, that inasmuch as s. 3 of the General Clauses Act states that the definitions would apply unless there was anything repugnant to the context, and in view of sub-s. (*a*) and (*b*) of sub-s. (*v*) of s. 7, Court Fees Act, the Court was right in taking the *Fasli* year for sub-s. (*c*) where the land was revenue-free and that it could not be said that, in not applying the General Clauses Act there was any error apparent on the face of the record:

Held, also that whatever argument about deductions was to be made should have been made at the time of the original order and not later on an application for review. CHANDRA SHEKHAR *v.* MAHARAJ *All.* 668

———O. XLVII, r. 1 (1)—*Delay in filing appeal not due to mistake on the part of appellant—Appellant knowing facts—Appeal dismissed as time-barred—Review—Held, there was sufficient cause.*

The error made in the Copying Department in the heading of the copy of the judgment and the consequent delay in filing an appeal may be treated as a sufficient reason within O. XLVII, r. 1 (1), Civil Procedure Code, for review of the order dismissing the appeal as time-barred. BALWANTRAO *v.* BALMUKUND *Nag.* 588

———O. XLVII, rr. 4, 7 (1)—*Order granting review on ground of error apparent on the face of the record—Appealability of.*

No appeal lies from an order granting review under O. XLVII, r. 4, Civil Procedure Code, except on grounds mentioned in O. XLVII, r. 7 (1). Where the ground for granting review is an error apparent on the face of the record, no appeal lies from the order. KESHO RAM *v.* BHAGWAN DAS *Lah.* 130

———Sch. II, para. 1, cl (2)—*Application to refer dispute to arbitration—Whether should be in writing.*

Application to refer a dispute to arbitration need not be in writing as the expression "application shall be in writing" in para. 1, cl. (2) of the Second Schedule of the Code of Civil Procedure is merely directory and not mandatory. JAGAN NATH SINGH *v.* MADHO SINGH *Oudh* 290

———— ———— paras. 14, 15, 21, s. 104 (f)—*Power of Appellate Court to go into question indicated by para. 14 or para. 15—Decree in terms of award—Whether should bear same date as order filing award.*

The words of the first part of para. 21, Sch. II, Civil Procedure Code, clearly imply that proof of the existence of any ground such as is mentioned or referred to in para. 14 or para. 15 is a bar which prevents the Court from ordering that the award be filed. Hence it cannot be held that proof in respect of these grounds should be taken after the order for filing. It follows that s. 104 (*f*) of the Code empowers the Appellate Court not only to go into the question of the existence of the reference and of the award, but also to go into questions such as are indicated by para. 14 or para. 15. There is nothing in the Code which necessitates the decree bearing the same date as the order filing the award, and one effect of

Civil Procedure Code—concld.

these provisions is that it settles the date for the purpose of limitation of appeal; another effect is that if the trial Court disobeys the direction given in cl. (1) of para. 21 and pronounces judgment in excess of or not in accordance with the award, there will be a remedy by an appeal from the decree as distinct from the appeal against the filing. ABDULLAH KHAN *v.* BAHRAM KHAN *Pesh.* 1022

——— Sch. II, para. 15—*Arbitrator—Procedure opposed to natural Justice—If a misconduct—Plaintiffs asked to rearrange record and sort out exhibits—Award, if vitiated.*

Irregular procedure opposed to the principles of natural justice, amounts to legal misconduct on the part of an arbitrator.

Where there has been an opportunity afforded to one side to get an advantage with the arbitrator over the other, either by lack of notice, or by the absence of the other side, and there is even a remote possibility that the advantage so obtained may have unconsciously influenced the mind of the arbitrator, the proceedings are vitiated by a breach of the principles of natural justice, and whether this is so or not must depend on questions of fact.

The arbitrator sent for one of the parties (plaintiff) and asked him to re-arrange the record of the case in proper order and to sort out certain exhibits:

Held, that the plaintiff was used to perform only a ministerial act and an award by him was not vitiated on that account. MUNICIPALITY OF AHMEDABAD *v.* RAVJIBHAI *Bom.* 669

——— para. 15.—*Arbitrator basing decision on private enquiries and inadmissible evidence—Validity of award.*

Where the arbitrators in arriving at their decision were influenced by private inquiries about the case, their conduct amounts to misconduct and the award will be invalid. SAVARALA VENKATASUBBIAH *v.* KUMARA RAMIAH *Mad.* 381

——— ——— para 20. See Arbitrator 1059

——— ——— para. 21. See Civil Procedure Code, 1908, Sch. II, para 14 1022

Companies Act (VII of 1913), s. 86—*Directors allotting shares in meeting—Directors not paying allotment money themselves—Resolution allotting shares—Validity of.*

Even though none of the Directors of a Company had paid the allotment money on the shares held by them, all acts done by them as such Directors are valid. Where therefore, in a meeting called for the purpose, they allot the shares to the shareholders, the allotment is proper. *In the matter of* INDIAN COMPANIES ACT VII OF 1913 *Lah.* 536

——— s. 109 (d)—*Assignment of book-debt by company as security for securing existing debt, whether amounts to mortgage of that debt—Registration, if essential—Transfer of Property Act (IV of 1882 as amended by Act XX of 1929), ss. 130, 134.*

An assignment of a book-debt as security for the purpose of securing an existing debt, constitutes a mortgage of that debt and unless it is registered as required by the provisions of s. 109 (*d*) of the Companies Act, the assignment will be inoprative as against the liquidator and the creditors of the Company. RANJIT RAY *v.* D. A. DAVID *Cal.* 193

——— s. 153—*Depositor becoming decree-holder against company—Company subsequently embarking on scheme—Such depositor, if bound by it—Remedy of decree-holders*

A depositor ceases to be a depositor when he obtains decree against the company and becomes a decree-holder against it. When after passing of such decrees

Companies Act—concld.

the company embarks upon a scheme and a meeting is called and notice is sent to all depositors, the decree-holder creditors, are not bound to attend the meeting and any scheme framed at such a meeting is not binding on them. The meeting, though sanctioned by the Court, has no right by a mere definition to include the decree-holders within the scope of depositors, any more than a company has the right by definition to include its general trade creditors. Where the meeting includes the decree-holders as depositors and the Court sanctions it *per incuriam* or because the circumstances are not sufficiently explained to the Judge, the decree-holders can get the scheme modified by the Court, by having such portion of the scheme which affects them expunged from the scheme. *In the matter of* DEWANGUNJ BANK AND INDESTRY LD. *Cal.* 811

——— s. 156. See Limitation Act, 1908, Sch. I, Art. 112 16

Company. See Civil Procedure Code, 1908, s. 35 852

——— *Claim against Company — Liquidation — Subsequent termination of liquidation—Company, how to be represented—Parties—Pleadings.*

Where a limited Company is defendant in a suit, the liquidation of the Company cannot make any difference. The change brought about by the liquidation in regard to the suit is merely that in the conduct of its defence, the Company before liquidation will act through the directors but during liquidation through the liquidators and after the termination of the liquidation through the directors once more. DAWSONS BANK, LIMITED *v.* NIPPON MENKWA KABUSHIKI KAISHA P. C. 1

Compromise. See Legal Practitioner 297

——— *Decree passed on compromise—Compromise not recorded—Decree, validity of.*

The omission to record the compromise before passing the decree is not fatal to the validity of the decree. The defect is cured by s. 99, Civil Procedure Code. SHAH JAHAN BEGAM *v.* GHULAM RABHANI *All.* 1067

——— *Petition on behalf of guardian and on behalf of minors, indivisible — Compromise considered bad as regards minors—Effect on guardian.*

When the petition presented by a respondent on his own behalf and on behalf of minor respondents is an indivisible one, if the compromise is held bad in respect of the minors, it must be held to be bad so far as the other respondent also is concerned. MA FATI *v.* KALI MUTHU *Rang.* 912

Contempt—*Contempt of Court—Writer believing what he states to be true—Whether justification—Evidence to establish truth of allegations—Whether can be led—Election manifesto slandering judiciary—Contempt is punishable—Printer and publisher acing on Advocate's words—Absence of intention—Unqualified apology—Punishment, if called for.*

There can be no justification of contempt of Court even assuming that the writer of an election manifesto believed all he stated therein to be true. If anything in the manifesto amounts to contempt of Court he is not permitted to lead evidence to establish the truth of his allegations. Contempt of Court is saying or writing anything about the Court which may lower the prestige of the Court or bring it into contempt.

It is not uncommon to attack abuses and to attack persons in an election manifesto whether the abuses be existent or not, or whether the persons deserve the vituperation which is often showered upon them in these productions, but to slander the whole

Judiciary of a Province in an attempt to secure votes at a Bar Council election, is not only contemptible but almost criminal in its purpose.

The passage in respect of which notice was issued was as follows: "I believe you must have seen my name prominently in the press in connection with a contempt of Court case and again under the Legal Practitioners Act last year. I was conducting my private case. It was not a case of a client and was not a case of moral turpitude but even then I was punished twice over for the same alleged offence. We are helpless. Being a fighter and having suffered for the strength of my convictions I can assure you that I will fight for your rights as well."

Held, that the passage was a clear reflection upon the High Court and that it could not be regarded merely as a technical contempt but the casting of the aspersion amounted to serious contempt of Court.

On the proprietor and printers of the press in which the manifestoes containing the above passage were printed, stating that they had no intention to make any aspersion either against the High Court or the Subordinate Judiciary and that they were unaware that what they were printing contained a contempt of Court and further that if they had unwittingly committed contempt of Court they offer an unconditional apology :

Held, that although no doubt they relied entirely upon the Advocate who gave instructions that nothing was being printed that was contempt of Court, it was not unreasonable that they should have relied upon the fact that they had been instructed to do the printing by an Advocate and though undoubtedly guilty of contempt, in view of the unqualified apology tendered by them, no punishment was necessary. RAM MOHAN LAL AGARWALA, *In the matter of* *All* **33**

Contempt of Court—*Article undermining authority of Court of Justice—Held, the article amounted to gross contempt of Court.*

Any act or writing tending to undermine the authority of Courts of Justice, or to influence the result of pending litigation, is a most serious offence.

The gravamen of the article in question was that judgment after judgment was being given in the High Court arbitrarily, and that neither law nor facts were discussed, before judgment was delivered. It further said that it was necessary "to restore the confidence of the public that law is discussed and facts are digested before cases are disposed of." It alleged that summary justice was being administered :

Held, that there could be no doubt that the article was as gross a contempt of Court and misrepresentation of proceedings in Court as it was possible to imagine. Nothing could have been more calculated to bring the Court into contempt and to lower its authority with the general public. *In the matter of* CONTEMPT OF HIGH COURT *Lah* **695** S. B.

Contract—*Breach of—Defaulter, if can defeat his own contract.*

No one by his own default can be allowed to defeat his own contract. CONDUCTOR ALFRED *In the matter of* *Lah.* **444** (*b*)

———*Consideration—Document found to be without consideration—Enforceability.*

Where the plaintiff wants to enforce a document which the defendant alleges to be without consideration and the Court which is the final Court of facts has come to the conclusion that there was no consideration for the document, the plaintiff who is setting up the document must, necessarily fail. NAWAB SINGH *v.* DALJIT SINGH *All.*. **928**

———*Plaintiff's debtor executing bond in favour of defendant—Money left with defendant to pay plaintiff—Suit on failure to pay—Agreement to lend—Enforceability of—Decree against defendant, if can be passed.*

Where a person who was indebted to the plaintiff executed a bond in favour of the defendant leaving the entire amount with the latter for payment to the plaintiff and on not receiving payment, the plaintiff instituted a suit on the basis of the bond :

Held, that in substance the plaintiff's case, so far as it was based on the bond, amounted to a claim for enforcement of the defendant's promise to advance money in future, and as an agreement to lend money not being specifically enforceable, no decree could be passed against the defendant HUMELA *v.* ORI SAHOO *All.* **550**

———*Repudiation of, by plaintiff—Earnest money if can be recovered by plaintiff.*

When a plaintiff repudiates the contract into which he had entered with the defendants, he would not be entitled to recover that portion of the earnest money which he had paid. RAMCHAND *v.* CENTRAL FLOUR MILLS OF KASUR *Lah.* **728**

———*Sale—Breach by buyer—Vendor, if can keep it alive for recovering heavier damages—Measure of damages.*

In a contract to sell and buy it is open to the seller to avoid the contract when the buyer fails to take delivery but he cannot elect to keep alive the broken contract in the hope that he might recover heavier damages for the breach of the contract than he would be entitled to recover at the time of the breach of the contract. In such cases the measure of damages is the difference between the contract rate and the market rate at the expiry of the period agreed upon as the time for delivery in the contract; it is, however, open to the parties to agree that the time for performing the contract of sale should be postponed. In such circumstances, the damages for non-delivery or non-acceptance of the goods will be calculated at the market price of such goods on the last day to which the contract was extended if a date was fixed, or at the date when the plaintiff refused to grant further indulgence, or at a reasonable period after his last grant of an indulgence. MOHANLAL MAKWADI *v.* GYANIRAM *Nag.* **778**

Contract Act (IX of 1872), s. 16—*Pardanashin lady—No domination of will—Held, relationship was not unequal*—Pardanashin *lady intelligent—Relations to assist her—Held, there was independent advice.*

Where the relationship of the transferee with the transferor, who is a *pardanashin* lady was not such as would enable him to dominate the will of the transferor and the *pardanashin* lady was intelligent and was not difficult for her to understand the transaction and the nature and effect of the transaction upon her interest in the property and further she had her father, brother and intelligent neighbours to assist her in the matter:

Held, that it could not be said that the relation between the parties at the time of the transaction was such as to suggest that they were not on equal terms and it could not also be said that she had no independent advice. PURNA CHANDRA CHAUDHURY *v.* SAROJINI CHAUDHURANI *Cal.* **1027**

———**s. 23**—*Plaintiff advancing money to defendant in consideration of his promise to give a girl in marriage to plaintiff's brother—Non-compliance with promise—Criminal prosecution for offences under ss.* 417, 420, 500, *Penal Code*

(*Act XLV of 1860*)—*Arbitration—Bond in pursuance of award—Suit on bond—Maintainability.*
The plaintiff had advanced Rs. 63 to the defendant in consideration of the latter's promise to give a girl in marriage to the plaintiff's brother. When the defendant did not comply with the promise, the plaintiff prosecuted him for offences under ss. 417, 420 and 500 of the Penal Code. While the prosecution was pending, the parties referred their differences to arbitration and the arbitrators decided that the defendant should pay Rs 53 to the plaintiff. In pursuance of this award of the arbitrators, the bond in suit was executed and the prosecution was withdrawn:
Held, that although the institution of the criminal prosecution was the occasion for the reference to arbitration which resulted in the execution of the bond in suit, yet it was in reality the civil dispute between the parties as regards the sum of money alleged to have been advanced by the plaintiff to the defendant, which was the subject of reference to the arbitration. Further, one of the offences forming the subject-matter of the criminal prosecution was compoundable by the parties and the other two compoundable with the permission of the Court. Consequently, the real object of the agreement not having been to interfere with the course of justice, the suit should not be dismissed on the ground of the consideration being opposed to public policy. GAYA PRASAD *v* JAMNA PRASAD *Oudh* **341**

———s. 25. SEE Limitation Act, 1908, s. 19 **1074**

———s 45. SEE Civil Procedure Code, 1908, O. XXII, r. 3 **610**

———ss. 55, 82—*Mercantile contract—Presumption that time is essence, whether arises.*
There is no place in mercantile contracts for the presumption that time is not of the essence of contract. MOHANLAL MARWADI *v.* GYANIRAM *Nag* **778**

———s. 61—*Appropriation—Absence of appropriation by creditor or debtor—Duty of Court—Discharge in order of time.*
On the principle underlying the provisions of s. 61, Contract Act, the Court should, in the absence of any appropriation by either the debtor or the creditor, direct that the payment should be applied in discharge of the debts in order of time if there be such, and if they are all of the same date, in discharge of each of such debts proportionately. RAM NATH *v.* CHIRANJI LAL *All.* **136 F B.**

———s. 62. SEE Promissory note **184**

———s. 62—*Accounts settled—Some amount paid in cash, some given up and* hundi *for rest—Receipt stating no accounts left except liability on* hundi—Hundi, *inadmissible not being stamped—Held, original cause of action was put to an end to.*
When a cause of action for money is once complete in itself, whether for goods sold or for money lent or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may sue for the original consideration ; but when the bill or note is the only existing contract between the parties and for want of proper stamp or some other reason it is not admissible in evidence, the creditor must lose his money. It is a question of fact to be decided in each case whether the parties intended the bill or note to be an absolute or a conditional payment of the original debt.
The parties settled their accounts, and a sum of Rs. 831 3-3 was found due by the defendants to the plaintiffs. Of this sum, Rs. 234-3-3 were given up by the plaintiffs, and the balance of the liability was discharged by the defendants paying Rs. 100 in cash and executing a *hundi* for Rs 500 in favour of the plaintiffs; they executed on that very date a receipt making it clear that there remained no other account between them except the liability arising upon the *hundi*. The plaintiffs brought the present action for the recovery of a certain sum of money on the basis of the *hundi*, and it was found that the *hundi* being unstamped could not be admitted in evidence :
Held, that there was a novation of contract, and the original cause of action put an end to FIRM HARJAS-MAL-MEHR CHAND *v.* FIRM BHAGAT RAM ANAND RAM *Lah.* **15**

———s. 62—*Land alleged to be held as* brit zar kharidi—*Opposite party asserting transaction to be mortgage—Compromise that party in possession should give up possession on payment of money—Decree — Construction — Novation — Mortgage, if created by decree—Subsequent suit to redeem mortgage—Maintainability.*
The essence of a novation of a contract lies not in the dissimilarity of the terms between the old and the new contract, but in the intention of the parties to supersede the old by the new.
In a previous suit filed by the predecessor-in-interest of the defendants against the predecessor-in-interest of the plaintiff, the former pleaded that he held a certain land as *brit zar kharidi* under a deed of 1241 *Fasli*, while the latter pleaded that the deed was a mortgage. A compromise was entered into and it was agreed that whenever the latter paid a sum of money, the former would give up possession of the property. The suit was decreed accordingly. The plaintiff filed a suit for redemption :
Held, that by the compromise the parties was created a fresh mortgage in respect of the land and the mortgage could be redeemed. BHABHUTI PRASAD *v.* PARBATI KUAR *Oudh* **534**

———s. 65—*Mortgage of insolvent's property by Receiver set aside and adjudication annulled—Mortgagor, when entitled to possession.*
A mortgage was effected of the insolvent's property by the Receiver and it was set aside by the District Judge and the adjudication was annulled. The mortgagor subsequently brought a suit against the mortgagee for possession :
Held, that until he was re-paid the sum advanced on the security of the land the mortgagee was entitled to remain in possession. BAKHSHI SINGH *v.* BACHAN SINGH *Lah.* **722**

———s. 65—*Specific Relief Act (I of 1877), s. 41—Fraud—Minor—No misrepresentation on part of minor when executing bond—Held, on facts that no fraud was committed and plaintiff was not entitled to return of his money.*
Fraud operating to deceive must be found as a fact and whether in any particular case there was such fraud must depend on its own circumstances. It must be shown to the satisfaction of the Court by the party who alleges fraud that he was deceived into action by the fraud Where it has not been found that, at the time when the minor executed the bond and received the money, he was aware that his minority was extended under the law nor has it been proved that he held himself out as being of age or that the plaintiff was deceived by any misrepresentation on his part, there is no fraud or misrepresentation on the part of the minor and the plaintiff is not entitled to return of his money either under s. 65, Contract Act, or under s. 41, Specific Relief Act ;

Contract Act—concld.

Held, in the above case that even if it is permissible to maintain that the power to give equitable relief is more extensive in India than in England, in other words, that Courts in British India can give equitable relief apart from cases which do not come either under s. 65, Contract Act, or s. 41, Specific Relief Act, the plaintiff cannot get any relief in view of the findings of fact which have been arrived at. HARIMOHAN *v.* DULU MIYA *Cal.* **1017**

——ss. 93, 94—*Delivery to be given at godown of seller—Telegraphic notice by buyer, whether adequate application for delivery.*

Under ss. 93 and 94 of the Contract Act, the seller is not bound to deliver goods until the buyer applies for delivery, and delivery is to be given at the place at which goods were at the time of the contract for sale. A telegraphic notice is not an adequate application for delivery of goods. The buyer is bound to send some one to take delivery at a place where the goods are and until that is done the seller is not bound to make delivery. MOHANLAL MARWADI *v.* GYANIRAM *Nag* **778**

——s. 107—*Goods neither ascertained nor appropriated—Sale, if complete—Right of re-sale.*

Where the goods are never ascertained or appropriated, the property in the goods does not pass from the seller to the buyer, and so there is no question of re-sale. Even if the seller has power to re-sell under s. 107, Contract Act, he has no right to re-sell without notice to the buyer. MOHANLAL MARWADI *v.* GYANIRAM *Nag.* **778**

Co-owners. SEE Partition Act, 1893, s. 2 **223**

——*Party wall—Right of co owner of party wall—Interference with reasonable use of wall—Co-owners.*

Co-ownership implies that each co-owner should have a reasonable user of the thing owned in common and so long as each co-owner uses the wall reasonably without interfering with the enjoyment of that wall by the other party, or without doing anything which would weaken, damage or increase or diminish the wall enjoyed in common, he is entitled to do what he likes. A co-owner of a party wall has no right to do any act which may have the effect of excluding the other co-owner from the wall or interfere with his reasonable use of the wall. PADUMAN DAS *v* PARBATI *All* **365**

Copyright—*Copyright Act* 1911 (1 & 2, *Geo. V, Ch.* 46), *ss.* 1, 2—*Existence of copyright not denied—Representation and performance of the works—Whether constitute infringement of copyright.*

Where the existence of copyright in certain books is not denied, then the representation and performance of the works of the author by the defendants amounts to an infringement of copyright under ss. 1 and 2, Copyright Act of 1911. NALADRI NATH MUKHERJEE *v.* MADAN THEATRES, LTD. *Cal.* **867**

——*Printing of books, if necessary, to infringe copyright before Copyright Act*, 1911 (1 & 2, *Geo. V, Ch.* 46.)

Obiter. In order to infringe the plaintiffs copyright in books, it is not essential that the defendant should print the books even before the Copyright Act of 1911. NILADRI NATH MUKHERJEE *v.* MADAN THEATRES, LTD. *Cal.* **867**

Copyright Act 1911 (1 & 2, Geo. V, Ch. 46), ss. 1, 2. SEE Copyright **867**

Co-sharer. SEE Agra Tenancy Act, 1926, s. 227 **653**

Co-sharer—*Adverse possession—Entry by co-sharer into possession of share of other co-sharer, not as co-tenant but in denial of such right—Possession, if enures for benefit of other co-sharer—Possession of tenant-in-common, if adverse to that of his co-*

Co-sharers—contd.

tenant—Principle, if applies to person not recognised as co-tenant.

Where a co-sharer enters into possession of the share of the other co-sharer not in his right as a co-tenant but in denial of such right of the co-tenant, it cannot be said that his possession would enure for the benefit of the other co-sharers whom he has excluded from the enjoyment of the property. It is true that the principle of possession between the co-owners is that every co-owner is a tenant-in-common and that the possession of a tenant-in-common is not adverse to that of his co-tenants, but a person cannot be a tenant-in-common with a person whom he never recognized as a co-tenant. KRISHNA CHANDRA DAS *v.* PURNA CHANDRA DAS *Cal.* **987**

——*Mortgage by one, of his undivided share—Partition—Mortgagee can proceed against property falling to mortgagor's share only—Mortgagee, if party to partition.*

The property being joint at the time of the execution of the mortgage, one co-sharer can only mortgage his undivided share in the property. Such a right is always subject to the right of the other co-sharers to effect a partition and when such partition is carried out the mortgagee can only enforce his rights against such property as falls to the share of his mortgagor, unless he can show that the partition was fraudulent. It is not necessary that the mortgagee must be a party to the partition proceedings. He has only a charge on the undivided share of the mortgagor and he has no right to prevent the co-sharers from partitioning property. DIWAN CHAND *v.* MANAK CHAND *Lah.* **938**

——*Partition—Absence of building at time of partition—Plot allotted to plaintiff on partition—Other co-sharers, if have right to remain in possession over that plot.*

Where a partition has been effected under the provisions of the United Provinces Land Revenue Act, 1901 and the site of the house of one co-sharer has been allotted to the share of another co-sharer, the presumption is that the owner of the house was to retain possession of the house. Where no building existed at the time of partition, the defendants have no right to remain in possession over a plot which has been allotted to the plaintiff in partition. BRAJ KISHORE UPADHIA *v* PANCHAITI AKHARA *All.* **667**

——*Possession of one—Whether should be considered to be constructive possession of others.*

In the case of co-sharers possession of any one of them must be considered to be constructive possession of all unless the person in actual possession ousted his co-sharers in denial of their rights. BABOO SINGH *v.* RAM MANOHAR *All.* **824**

——*Sale by some co-sharers—Co-sharer in possession, if can be presumed to know contents of deed*

A co-sharer cannot be presumed to know the contents of a registered document, executed by persons who impliedly denied his title by executing the document. BABOO SINGH *v* RAM MANOHAR *All.* **824**

——*Suit by co-sharer of ex-proprietary tenure against other co-sharers for share of profits—Suit, if cognizable by Civil Court.*

A suit by a co-sharer of an ex-proprietary tenure against other co-sharers, for his share of the profits, is within the jurisdiction of the Civil Court. QUDSIA JAN *v.* ZAHID HUSAIN *All.* **38**

——Suit for one co-sharer for partition—Court-fee payable. SEE Court-fee **815**

——*Transfer by one of land held in several*

Co-sharers—concld.

—*Other co-sharers, if can have transfer set aside and take joint possession with transferor.*

One of several co-sharers in an undivided *mahal* cannot transfer to a stranger, lands held by him in severalty and if he does so, the other co-sharers are entitled to have the alienation set aside, to eject the transferees and to take joint possession with the transferors QUTUBUDDIN *v.* MANGALA DUBEY *All.* 829

Costs. SEE Civil Procedure Code, 1908, s 35 852

———*Appellant succeeding only on point which could have been rectified by lower Court itself—Costs, by whom to be paid.*

Where the only point on which the appellant succeeds is a point which could have been rectified by an application to the lower Court for amendment of the decree and but for this point, he actually fails, he must pay the respondent's cost of the appeal. MAUNG BA KYWE *v.* MA NYEIN *Rang.* 234

———*Costs of Collector, when claimant can be made liable for.*

In land acquisition proceedings the claimant should not be called upon to pay the Collector's costs unless his claim was extravagant or the claimant was negligent in putting his case before the Collector. DAWOOD SAHIB *v.* COLLECTOR OF CHINGLEPUT *Mad.* 280

———*Discretion—Correspondence of Solicitor undignified—Solicitor deprived of his costs—Discretion, if properly used.*

Judges have a very wide discretion in the matter of costs, but it is a discretion which must be exercised judicially. For a Judge to deprive a Solicitor of costs because the Judge disapproves the style of his correspondence and would be glad to see the controversial methods of Solicitors generally altered, is, to confuse the functions of a Judge with those of a school-master. D. N. REGE *v.* V. G. VIJAYAKAR *Bom.* 945

———*Privy Council — Whether carries interest—Interest.*

The costs of the Privy Council do not carry interest unless such interest is specifically mentioned. CHANDMAL MARWARI *v.* SHIB PRASAD SINGH *Pat.* 769

Court-fees—*Courts must look to substance of claim and not only form.*

Courts of Justice have not to look at the mere form of the suit but should try to find out what the real substance of the claim is. Although it is open to a party to save the amount of the court-fee by framing the plaint in a manner permitted by the law, still the litigants should not be permitted, to deprive the Revenue Authorities of what is due to them by adopting methods of pleading which cannot be supported by the language of the relevant Statute. SRI RAM *v.* KHAWAJU *Lah.* 209

———*One co-sharer filing suit for partition alleging that he is in joint possession with defendant—Court-fees, payable.*

Where the plaintiff files a suit for partition of his share and alleges that he is in joint possession with the defendant co-sharer, the suit is a suit for partition and *ad valorem* court-fee need not be paid; but if the Court finds that evidence establishes that he is altogether out of possession, it can ask for *ad valorem* court-fees. TULSI BIBI *v.* FARRAK BIBI *Cal.* 815

———*Question of—Depends on allegations in plaint.*

The question as to what the proper court-fees ought to be levied on the plaint depends on the allegations which are contained in the plaint. TULSI BIBI *v.* FARRAK BIBI *Cal.* 815

Court Fees Act (VII of 1870), s. 7 (iv-A), Sch. II, Art. 17-A (1)—*Specific Relief Act (I of 1877), s. 39—Suit for declaration that a registered document is forgery—Prayer for cancelling deed, whether necessary—Proper court-fee.*

Where the plaintiff brought a suit alleging that a sale deed which purported to have been executed by him and which was directed by the Registrar to be registered was in fact a forgery by the defendant and praying that the instrument may be declared a forgery:

Held, that it was not incumbent on the plaintiff to have it cancelled or set aside and the suit was governed for purposes of court-fee, by Sch. II, Art. 17-A (1) of the Court Fees Act and not by s. 7 (*iv-A*). DASARI NAGABHUSHANAM *v.* KUNAMNENI VENKATAPPAYYA *Mad.* 948

———**s. 7 (v) (a) (b).** SEE Civil Procedure Code, 1908, O XLVII, r. 1 668

———**s. 7 (iv) (c).** SEE Specific Relief Act, 1877, s. 42 209

———**ss. 8, 7 (iv) (c).** SEE Calcutta Improvement Act, 1911, s. 77 (1) (*b*) 817

———**Sch. I, Art. 1**—*Appeal against personal liability only—Court-fee payable.*

An appeal merely against the personal liability of the appellants can be filed on a court-fee of Rs. 10 only. BULAQI DAS *v.* LAL CHAND *Lah.* 752

———**Art. 1**—*Costs—Appeal against order for costs—Court-fee, if payable.*

Ordinarily no court-fee is payable upon costs entered in the decree against which an appeal is presented, but where apart from and independently of any other relief which the appellant seeks, he seeks distinct relief on the ground that by the decree under appeal the costs of the parties have not been properly assessed or apportioned, the value of such distinct relief should be reckoned as part of the subject-matter in dispute for the purpose of the First Schedule of the Court Fees Act. FATEH SINGH *v.* MAUJ RAI *Lah.* 558

———**Art. 1, Sch. II, Arts. 11, 17**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 50 (2)—Appeal from order under—Court-fee payable.*

The subject-matter in appeal against an order passed under sub-r. 2 of O. XXI, r. 50, Civil Procedure Code, is the liability of the judgment-debtor or the same amount. This amount is clearly ascertainable, and it cannot, therefore, be said that the subject-matter of the appeal is one where it is not possible to estimate it at a money value. The case is governed by Sch. I, Art. 1, Court Fees Act under which the proper court-fee payable is *ad valorem* on the subject-matter in dispute, *i. e.*, the amount for which the party concerned is sought to be made liable. JUGAL KISHORE-GULAB SINGH *v.* DINA NATH SIRI RAM *Lah.* 639

———**Art. 1, Sch. II, Art. 17**—*Cross-objections—Court-fee on, how to be paid—Principle to be followed.*

The court-fee on cross-objections should be paid *ad valorem* according to the value of the subject-matter in dispute under Art. 1, Sch. I of the Court Fees Act and not on the same principle as laid down for the case of appeals in Art. 17 of the Second Schedule. ABDUL SUBHAN KHAN *v.* MASARAT ALI KHAN *Oudh* 293

———**Sch. II, Art. 6**—*Provincial Small Cause Courts Act (IX of 1887), s. 17—Security bond furnished for setting aside* ex parte *decree in Small Cause suit—Proper stamp duty.*

A security bond furnished under the proviso to s. 17 of the Provincial Small Cause Courts Act, falls within Art. 6 of Sch. II of the Court Fees Act and requires a stamp of eight annas only.

Court Fees Act—concld.

An order setting aside an *ex parte* decree in a Small Cause suit is an order made under the Civil Procedure Code and even in cases where the petitioner tenders a security along with the very first application without a previous order of the Court the security bond falls within Art 6 of Sch II of the Court Fees Act. KALAPATI PEDA PITCHAMMA *v.* CHIRUVELLA PEDAMUNEYYA *Mad.* **559 S. B.**

——— **Sch. II, Art 11.** See Court Fees Act, 1870, Sch. I, Art. 1. **293, 639**

——— **Art. 17-A (1).** See Court Fees Act, 1870, s 7 *iv*-A) **948**

——— **Art. 17 (iii)**—*Suit for declaration that hypothecation bond was not enforceable and family property mortgaged was not saleable in execution of mortgage decree—Prayer, if merely for declaratory decree—Court fee payable.*

Where a suit was brought for a declaration that a hypothecation bond executed by the plaintiff's father in favour of the defendant was unenforceable and that the family property mortgaged by that deed was not saleable in execution of an *ex parte* decree for sale obtained by defendant on the basis of the said mortgage deed:

Held, that the relief for a declaration that the family property was not saleable in execution of the decree was a declaratory relief and not a consequential relief and as the plaintiff merely prayed for a declaratory decree, for purposes of court-fee, the case was governed by Art. 17 (*iii*), Sch. II, Court Fees Act. ISHWAR DAYAL *v* AMBA PRASAD *All.* **546**

Criminal Procedure Code (Act V of 1898),

s. 44. See Limitation Act, 1908, Sch. I, Art. 2 **131 F. B.**

——— **ss. 70, 71, 134 (2)**—*Procedure under s. 134 (2), when can be resorted to.*

It is only if the order cannot be served in the manner provided for service of summons that the publication of a proclamation under sub-s. 2, s. 134, Criminal Procedure Code, may be resorted to. ABDUL JABBAR SARKAR *v.* EMPEROR *Cal.* **416** (*a*)

——— **s. 96.** See Madras Gaming Act, 1930, s. 5 **496**

——— **s. 96**—*Madras Gaming Act, 1930, ss. 5, 6—Defects in warrant—Remarks in judgment supplying defects, value of.*

The remarks of a Magistrate which are intended to supply the omissions or defects found in a warrant and to vary its terms are not admissible as evidence. The warrant is to be in writing and must contain all the matters that the law requires to be stated there in. PUBLIC PROSECUTOR *v.* SUBRAMANIA SASTRI *Mad.* **496**

——— **s. 103**—*Search lists—Prosecution's duty to prove case with regard to different items severally.*

When in a case there are several search lists, in each of which several items of property are mentioned, the prosecution ought to prove their case with regard to the different items severally, and the different items of property or different groups thereof mentioned in a search list ought to be separately and consecutively numbered either by letters or figures or by some other distinguishing marks and the same numbering should be followed while recording the evidence of witnesses relating to the searches to which those search lists refer. If that procedure is adopted, there will be no difficulty on the part of the Court in appreciating the evidence that is adduced in respect of the searches. RAFIQUEUDDIN AHMAD *v.* EMPEROR *Cal.* **687 F B.**

——— **s. 103**—*Search—Witnesses to be selected—Qualifications—Provisions should be complied with—Non-compliance—Inference.*

Criminal Procedure Code—contd.

Where respectable persons can be found in the neighbourhood, and the Police Officer making a search takes with him persons whose respectability is questionable or who come from a distant locality, the inference is that he was prompted by a desire to have such witnesses as would be easily persuaded to support any story which he might put forward. SADLU *v.* EMPEROR *All* **406**

——— **s. 107** See Criminal Procedure Code, 1898, s. 145 **36**

——— **s. 109**—*'A satisfactory account of himself,' meaning of—Simply avoiding Police or taking unfrequented route—Whether by itself ground for action under s. 109.*

"A satisfactory account of himself" does not necessarily mean that he should give his correct name and address or even the object of his being present at night, but that he should satisfy the authorities by explaining the suspicious circumstances appearing against him. Simply avoiding the Police by a bad character or taking an unfrequented route is by itself no ground for action under s. 109, Criminal Procedure Code. It may be that in some cases simply not giving an explanation may not be enough, for instance, an apparently respectable person returning from the house of his mistress very late at night is using unfrequented streets and avoiding being seen He cannot come under s 109, Criminal Procedure Code: Each case must be decided on its own facts. EMPEROR *v.* BISHI SAHARA *Pat.* **729**

——— **s. 109 (a)**—*Words 'is taking' in cl. (a), significance of.*

In s. 109, cl. (*a*), the words 'is taking' mean 'has taken' or 'has been taking'. EMPEROR *v.* BISHI SAHARA *Pat.* **729**

——— **s. 109 (a) (b)**—*Person found with housebreaking implements near wealthy man's house—Admission of object of being there—Person, if can be dealt with under cls.* (a) *and* (b).

If a man be found by the Police with implements of house-breaking lurking near the house of a wealthy man thereby indicating that he is about to commit burglary there and when challenged by the Police he admits the object of his being there, he can be dealt with under cls. (*a*) and (*b*). EMPEROR *v.* BISHI SAHARA *Pat.* **729**

——— **s. 109 (a) (b)**—*Cl.* (a), *meaning and effect of.*

Section 109, cl. (*a*), Criminal Procedure Code, does not mean that the man is taking precautions to conceal the fact of his being present within the local limits of such Magistrate; but it means that he is taking precautions to conceal his presence and that the concealment is to be within the local limits of such Magistrate. EMPEROR *v.* BISHI SAHARA *Pat.* **729**

——— **s. 134 (2).** See Criminal Procedure Code, 1898, s. 70 **416** (*a*)

——— **s. 144**—*Knowledge of order—Question of evidence—Prosecution, nature of proof required by—They can only prove circumstances enabling Court to infer if accused knew of the order or not.*

The question of whether a person has knowledge of an order promulgated under s. 144 is a matter of evidence. Where it appears that the order had been promulgated for several weeks, that there had been disturbances in the city, and that notices containing the order had been posted up at various places in the city and none of the accused persons pleaded ignorance of the order when making statements in the Magistrate's Court, it is scarcely conceivable that they had no knowledge of the order passed. In such cases the prosecution cannot be expected

to prove everything that takes place in the minds of the accused. They can only prove the circumstances which will enable the Court to infer either that the accused knew of the order or that the accused did not know of it. SHANDER *v.* EMPEROR *All.* 185

———ss. 144, 145—*Period of sixty days—When begins to run—Dispute as to possession of immovable property—Proceeding under s.* 145 *should be preferred to that under s.* 144.

The period of sixty days referred to in s. 144, Criminal Procedure Code begins to run from the date on which the notices are issued.

Held, on the materials before the Court that it would not interfere after the order had spent itself.

Where the dispute is with regard to possession of immovable property, a proceeding under s. 144 of the Code of Criminal Procedure is a poor substitute for a proceeding under s. 145 which settles once for all so far as the Criminal Courts are concerned, the question of possession with regard to a particular piece of immovable property. Such cases should be decided under s. 145. PURAN SINGH *v.* RAMJHARI KOER *Pat.* 88

———s. 145. SEE Limitation Act, 1908, Sch. I, Art. 47 1094

———ss. 145, 107—*Previous order of Court in land registration case—Weight to be attached to it—Discretion of Magistrate—Interference with, if proper—Keeping case pending till revision against previous order is decided—Propriety of—Duty of Magistrate to receive evidence.*

The likelihood of the breach of the peace is sufficient to give the Magistrate jurisdiction. The weight to be attached to a previous order of a Civil or Criminal Court is a question for the consideration of the Magistrate. Where therefore the Magistrate has jurisdiction to proceed under s. 145, Criminal Procedure Code, there can be no interference with his discretion even if the matter might have been more suitably dealt with under s. 107. In such circumstances, however, the case ought not to be kept pending for the decision of the application for revision against the previous orders in a land registration case relating to the land in dispute. The Magistrate should proceed with the case and decide it without avoidable delay so that the property may be restored as soon as possible to the party which was in possession of it. He is bound to receive all such evidence as may be produced. GAYA PRASAD SINGH *v.* RAM SAROBER SARAN SINGH *Pat.* 36

———ss. 145, 537—*Magistrate, if can take action merely on sworn testimony of complainant—Omission to record grounds for being satisfied of likelihood of breach of peace—Whether cured by s.* 537—*Such omission if a ground for setting aside Magistrate's final order.*

Per *King, C. J. and Srivastava, J.*—There is nothing in the language of s. 145, Criminal Procedure Code to suggest that the Magistrate cannot take action merely on the sworn testimony of the complainant himself, if the Magistrate believes it to be true. If a Magistrate believes the statement of one witness to be true, he is at perfect liberty to act upon it for the purpose of passing an order under s. 145 (1). It is not incumbent upon him to hold a preliminary inquiry himself by examining further witnesses, nor is it necessary for him to call for a report from the Police. If the Magistrate is satisfied on the strength of the testimony of one witness then he can pass an order under s. 145 (1).

When the Magistrate is so satisfied regarding the likelihood of a breach of the peace, his omission to say so in his order is a mere omission to frame his order in accordance with law and as long as no failure of justice or prejudice to the accused has been occasioned, the omission is covered by s. 537, Criminal Procedure Code and cannot furnish a reason for setting aside the Magistrate's final order.

Per *King, C. J.*—Magistrates are not to understand that defects in procedure are of no importance. Slipshod procedure is to be condemned even though it does not necessarily result in vitiating the whole proceeding.

Per *Nanavutty, J.*—Before passing an order under s. 145 (1), the Magistrate should call upon the complainant to produce evidence on his behalf to prove that there really was a dispute between him and the opposite parties concerning the plots he mentioned in his complaint, and that that dispute was of such a nature as was likely to cause a breach of the peace. And this preliminary inquiry is necessary to enable the Magistrate to satisfy himself that such a dispute did exist and that it was, in all probability, likely to cause a breach of the peace.

The omission of the Magistrate to satisfy himself of the existence of a dispute concerning land which, in his opinion, was likely to cause a breach of the peace is an omission which goes to the root of the matter as there is an initial want of jurisdiction on the part of the Magistrate to initiate proceedings under s. 145 of the Code, and such an infringement of the Code does not come within the purview of s. 537, for it vitiates at the very outset the entire proceedings of Magistrate. BIBI ASGHARI KHANAM *v.* EMPEROR *Oudh* 169

———s. 162—*Accused, if can apply for copy of statement any time after witness has been called.*

The accused may apply for a copy of the statement of a witness to the Police at any time after he has been called, that is, at any time after the witness has entered the witness-box and while he is giving evidence. The cross-examination of the witness must be adjourned until the necessary copy has been given. NGA U KHINE *v.* EMPEROR *Rang.* 66

———s. 162—*Accused in appeal if can complain that trial Court refused to refer to statement and at the same time say that Appellate Court is not entitled to refer to them.*

The appellant cannot complain that the trial Court refused to refer to the statements, although requested by the appellant to do so, and then say that the Appellate Court is not entitled to refer to them because the appellant has not requested it so to refer. He cannot be permitted to approbate and reprobate at the same time. NGA U KHINE *v.* EMPEROR *Rang.* 66

———s. 162—*Evidence Act (I of* 1872), *s.* 30—*Statement to Police Officer in course of investigation—How used—S.* 162, *scope of—Statement of co-accused—When to be used against accused.*

Section 162, Criminal Procedure Code, provides that no statement made by any person to a Police Officer in the course of an investigation shall be used for any purpose at the subsequent trial subject to the exception that such statements may be used to contradict witnesses for the prosecution. This section refers only to statements made by witnesses and not to statements by an accused person. Therefore statements made by a co-accused to the Police might be admissible against himself, but they would be inadmissible as against the accused by the ordinary rule that hearsay evidence is excluded. This rule may briefly be stated as meaning that any statement made by a person who is alive and has not been

Criminal Procedure Code—contd.

called as a witness is inadmissible to prove the truth of that statement. Under s. 30 of the Evidence Act, the Court may take into consideration the confession of a co-accused. Where, however, the co-accused makes no confession but throws the blame entirely on the accused and tries to exculpate himself such statement cannot be taken against the accused. POTRAM *v.* EMPEROR *Nag.* **258**

———**s. 162**—*Second proviso to s. 162—Part of statement, when excluded—Part of statement when used for contradiction must be proved.*

Under the second proviso to s. 162, Criminal Procedure Code, the Judge (or Magistrate) should exclude from the copy supplied any part of the statement which in his opinion satisfies one or other of two conditions, *viz*, (1) that it is irrelevant or (2) that its disclosure to the accused is both unessential in the interests of justice and inexpedient in the public interest. There are only two separate and distinct conditions under which a part of the statement can be excluded. To justify exclusion under the second of the above conditions the two circumstances mentioned therein must exist together in conjunction. If he excludes any part of the statement the Judge (or Magistrate) must record the opinion on which he bases such exclusion, but not his reasons for that opinion.

Those parts of the statement to the Police which are used in cross-examination to contradict the witness must be proved and brought on to the record. This can ordinarily be done by the admission of the witness that he made the statement, or by examination of the Police Officer who recorded it. If the latter course is necessary, in order to avoid delay, there can be no objection to allowing cross-examination subject to subsequent proof of the statement. NGA U KHINE *v.* EMPEROR *Rang.* **66**

———**s. 162**—Statement in nature of confession—Admissibility. SEE Evidence Act, 1872, s. 27 **260**

———**s. 162**—*Statement made to Police in course of investigation, if can be used without request of accused—Scope of s* 162,

Under s. 162, Criminal Procedure Code, a statement made by a person to a Police Officer in the course of an investigation, whether oral or reduced to writing, cannot be used for any purpose, save on the request of the accused (or, his pleader). The Judge (or Magistrate) has no authority to look at the Police papers unless requested to do so by the accused. On the request of the accused, the Judge (or Magistrate) must refer to the statement of a witness to the Police, if it has been reduced to writing, whether that statement is separately, recorded or recorded in a Police diary. The purpose for which the Judge (or Magistrate) refers to the statement is inorder to see whether any part of the statement ought to be excluded under the second proviso to the section, and not for the purpose of deciding whether there is in the statement material for cross-examination of the witness in the manner provided by s. 145, Evidence Act. Subject to any part being excluded under the second proviso to the section, the accused is entitled to a copy of the whole of the statement to the Police. It is not for the Court to decide whether there is any variation between the statement in examination-in-chief and the statement recorded by the Police Subject to the power of the Judge (or Magistrate) to disallow any question which, in his opinion, does not fall within the scope of s. 145, Evidence Act, it is for the accused or his pleader to decide in what manner and to what extent he will use the statement for the purpose of cross-examination; but the cross-examination on the statement must be confined to alleged contradictions between the statement and the evidence-in-chief of the witness, and must be carried out in the manner provided by the latter part of s. 145, Evidence Act, *i. e*, by calling his attention to the parts of the statement which it is intended to use for the purpose of contradicting him. NGA U KHINE *v.* EMPEROR *Rang* **66**

———**s. 162**—*Statement of accused—Applicability of s.* 162.

Information received from a person accused of an offence is not a statement within the meaning of s. 162 (1), Criminal Procedure Code as he is not a person who, from the information given or otherwise appeared to be acquainted with the circumstances of the case whom the Police were entitled to examine under the provisions of ss. 160 and 162 of the Criminal Procedure Code. Though s. 162 applies to statements of persons examined as witnesses by the Police in the course of an investigation, it does not apply to the statement of an accused person. MUHAMMAD *v.* EMPEROR *Lah.* **260**

———**s. 162**—*Statement of accused to Police during investigation—Whether can be used to discredit accused on account of any contradiction.*

It is not proper that the Sessions Judge should cross-examine the accused with a view to confronting them with the statements which they made to the Investigating Officer. Statements made even by witnesses to a Police Officer in the course of an investigation are not permitted to be used in evidence for any purpose, except as provided in s. 162 of the Criminal Procedure Code, that is to say, on the request of the accused the Court shall refer to the written statement and direct that the accused be furnished with a copy of it in order that the witness may be contradicted by the use of this statement. It was certainly never intended that an accused person when being examined by the Court for the purpose of explaining anything in evidence against him should be confronted with the statement which he had made to the Police for the purpose of being discredited on account of any contradiction. BHAGWAN DAS *v.* EMPEROR *All.* **560**

———**ss. 162, 537**—*Infringement of mandatory provision of Criminal Procedure Code, if sufficient to hold that Court failed to administer justice.*

If a mandatory provision of the Code of Criminal Procedure is infringed, that does not of itself make it necessary to hold that the Court must have failed in administering justice to the accused. In order that an infringement of the provisions of the Criminal Procedure Code should be of such a nature that it does not come within the purview of s. 537 of the Code, it must go to the root of the trial and must in effect vitiate the proceedings. It must in effect amount to an assumption by the Court of a jurisdiction which it does not possess, or a failure to exercise a jurisdiction which it does possess. NGA U KHINE *v.* EMPEROR *Rang.* **66**

———**ss. 190, 192**—*Cognizance is taken of offence and not of individual offenders—Transfer of case—Sub-Divisional Magistrate transferring case to another Magistrate—Explanation as to intention of transferring Magistrate—(Held, on facts, that whole case was transferred).*

Under s. 190, Criminal Procedure Code, cognizance is taken of the offence and not necessarily of the individual offenders whose names transpire in the course of the investigation.

A Rule was issued in respect of five out of nineteen persons who were convicted under s. 147,

Criminal Procedure Code—contd.

Penal Code. The case was remanded to the District Magistrate calling for an explanation as to whether the Sub-Divisional Officer, who transferred the case to the Magistrate who tried and convicted the accused, intended to transfer the whole case or the case only of those persons against whom the Police recommended that the case should be started. The explanation stated that cognizance was taken only in respect of those persons sent up by the Police and that the intention of the Sub-Divisional Officer was that investigation should proceed only with regard to the persons sent up by the Police:

Held, (on facts) that the explanation of the Sub-Divisional Magistrate that "he took cognizance only in respect of the persons sent up by the Police", meant only that he took cognizance of the offence and his action in transferring the case without excluding any of the accused, showed that he transferred the whole case for disposal. MATHURA SINGH *v.* EMPEROR *Pat.* 58

——ss. 190, 556—*Sessions Judge ordering arrest and production of witness before him, for trial before City Magistrate—Magistrate committing him to Sessions—Same Judge convicting him—Magistrate, if justified in taking cognizance—Permission under s.* 556 *not taken—Defect, if fatal.*

In the trial in the Sessions Court a man was produced and examined as a witness for the prosecution. The Sessions Judge came to the conclusion that this witness ought to have been charged as a receiver of stolen property. He consequently recorded the following order. "From the evidence recorded by me in the Sessions Case, I find that there is sufficient material before me for trying the witness under s. 411, Penal Code. I, therefore, order him to be arrested and produced before the City Magistrate, to be tried for the same offence." The City Magistrate took cognizance of this offence and committed the witness for trial in the Court of Session. This trial went on before the same Judge who had made the order for the arrest and for his production before the City Magistrate to be tried. The trial in the Sessions Court ended in a conviction:

Held, that the City Magistrate was justified by s. 190 (*a*) Criminal Procedure Code, in taking cognizance of this offence.

Held, also, if at the initial stage when the Sessions Judge first took up the case himself he had requested the permission of the High Court to try the case, the disqualification might perhaps have been removed, and that there was a technical defect more serious than could be overlooked. RAHIMBUX KARIMBUX *v.* EMPEROR *Sind* 448

—— s. 192. SEE Criminal Procedure Code, 1898, s. 190 58

——ss. 195 (3), 476—*Order by Small Cause Court Judge, Saugor, under s.* 476—*Appeal from, whether lies to Additional District Judge, Saugor, or to District-Judge, Jubbulpore.*

The Additional District Judge sitting at Saugor determines all matters arising from the Saugor Revenue District and there is no limitation either by general or special orders of the Local Government or by any particular order of the District Judge, which debars the Additional District Judge from hearing an appeal under s. 476, Criminal Procedure Code, which comes before him in the ordinary course of the distribution of the business. Consequently an appeal from an order of the Court of Small Causes, Saugor, under s. 476, Criminal Procedure Code, lies to Additional District Judge, Saugor, and not to the District Judge, Jubbulpore. LOKMAN *v.* HALKU *Nag* 863

——— s. 196-A—*Conspiracy—Object to commit cognizable offence punishable with rigorous imprisonment for over two years—Sanction, if necessary.*

Where the object of the conspiracy is to commit cognizable offences punishable with rigorous imprisonment for more than two years, under s. 196-A (2), Criminal Procedure Code, no sanction is necessary for a charge under s. 120-B, Penal Code. RAMJANAM TEWARI *v.* EMPEROR *Pat.* 866

——— s. 197—*S.* 197, *when operates—Offence must be so connected with official duty as to become inseparable from it—Order of Magistrate quashing proceedings—Whether amounts to discharge.*

In order to attract the provisions of s. 197, Criminal Procedure Code, the act must be so connected with the official duty as to become inseparable from it. It must be so connected with the official act as to form part of the same transaction. It will be perhaps quite a different thing if for the time being the public officer stops the official work, engages himself in private work and in that connection commits an offence. But it may be that a Judge or public servant may commit an offence as against a stranger while acting or purporting to act in the discharge of his official duty.

Where a Deputy Magistrate was engaged in realising taxes and he had threatened the defaulters and immediately he turned round and engaging himself with the complainant took him to task for being near him in a particular manner:

Held, that the offence alleged against him was so connected with the performance of his official duty that it was impossible to say that it was an independent act in no way connected with the realization of taxes, and that it did not matter that the Deputy Magistrate had no jurisdiction over the complainant. Consequently, sanction of the Local Government was necessary for prosecution. RAM SINGH *v.* S A. RIZWI *Pat.* 126

——— s. 199—*Complaint, if should specify the section under which accused is to be charged.*

For the purpose of s. 199 of the Code of Criminal Procedure the complaint need not specify precisely the section under which the accused is to be charged so long as it sets forth matter which, if proved, would warrant a conviction, and a desire is expressed that the accused be punished for what he has done. SAIN *v.* EMPEROR *Lah.* 595

——— s. 202.

SEE Evidence Act, 1872, s. 35 1040

SEE PENAL CODE, 1860, s. 182 1070

——ss. 209, 437—*Discharge of accused by Magistrate—Order set aside by Sessions Judge and re-trial in Sessions Court ordered—Jurisdiction to set aside the order—"Improper", meaning of.*

Under s. 437, Criminal Procedure Code, the Sessions Judge or the District Magistrate has jurisdiction to set aside the order of a Magistrate discharging the accused under s. 209, Criminal Procedure Code, if he is of opinion that the order is improper. It is not necessary that the order should be perverse or manifestly contrary to the evidence in the case.

Per *Beaumont, C. J.*—The order of discharge may be set aside on the ground that the Magistrate has, however competently, taken upon himself the discharge of a duty which under the Code is entrusted to the Sessions Court, that is to say, the duty of appreciation of evidence of doubtful credibility or in a proper case on the ground that he disagrees with

the appreciation of evidence by the Magistrate.

Per *Rangnekar, J.*—In a case triable exclusively by the Court of Session, the Sessions Judge can set aside the order of discharge and commit the accused for trial: (1) when he considers that the charge was not groundless, and (2) when he considers that there are sufficient grounds for commitment, both on facts and on legal grounds, or even when the proceedings before the inferior Court were not regular and that is the meaning of the expression "improperly discharged."

The result of a careful consideration of the sections and the cases is, as follows :—(1) That it is competent to the Committing Magistrate at any stage of the preliminary inquiry to discharge the accused if he considers the charge to be groundless for reasons to be recorded by him. (2) The Committing Magistrate is entitled to weigh and appreciate the evidence led on behalf of the prosecution and on behalf of the defence, and if on a consideration of this evidence he is of opinion that there are not sufficient grounds of committing the accused or trial, in other words, there is no case which would fairly justify or sustain a conviction at the trial, or no evidence on which any reasonable person can hold the accused to be guilty, then it is his duty to discharge the accused. (3) If after a charge is framed and a list of further witnesses put in by the accused and the Magistrate after examining any such witnesses thinks that there are not sufficient grounds for committing the accused for trial, it is his duty to cancel the charge and discharge the accused. (4) The expression "sufficient ground" means, when credible witnesses make statements which, if believed, would sustain a conviction. (5) The Sessions Judge has jurisdiction to interfere in revision but such jurisdiction should be exercised only if he thinks that the order is illegal or incorrect or otherwise improper. (6) The expression "improper" in this connection means that in the opinion of the Sessions Judge there were sufficient grounds before the Magistrate on which he ought to have made an order for committal. (7) The power in revision must not be used freely. (8) The Sessions Judge must give reasons for his interference, so that if the matter comes to the High Court, there may be materials before it for deciding whether the Sessions Judge acted properly in interfering with the order of discharge. RAMCHANDRA BABAJI GORE *v.* EMPEROR *Bom.* **101** F. B.

——— **ss. 215, 439**—*Order admitting evidence in preliminary inquiry prior to committal—Interference in revision.*

The High Court will not in the exercise of its revisional powers interfere with an order admitting a certain piece of evidence made by a Subordinate Court in the course of a preliminary inquiry prior to commitment to the Sessions in view of the fact that if the case is committed for trial, it will rest upon the trial Court independently to decide upon the admissibility of the evidence and if it is not committed intervention would have been unnecessary. KATIKINENI VENKATA GOPALA NARAIMHA RAMA RAO *v.* CHITRLURI VENKATARAMAYYA *Mad.* **395** (*b*)

——— **ss. 233, 234, 235**—*Joinder of charges—Offences under s.* 3 (1), *Indian States (Protection against Disaffection) Act, whether can be consolidated.*

Since being the author, the editor, the printer and the publisher are distinct offences under s. 3 (1) of the Indian States (Protection against Disaffection) Act, 1922, they cannot be consolidated for the purpose of holding a joint trial without violation of the mandatory provisions of ss. 233 and 234 of the Criminal Procedure Code. The several acts of the accused in composing the offending article, editing and printing it at a certain place and publishing the same at six different places on different occasions cannot be regarded as "one series of acts so connected together as to form the same transaction" within the meaning of s. 235 of the Criminal Procedure Code. DIWAN SINGH *v.* EMPEROR *Nag.* **450**

——— **s. 237**—*Charge under s.* 353, *Penal Code—Conviction under s* 323—*Legality of*—Quære.

Quære.—Whether a man who has been charged under s. 323, Penal Code, cannot be convicted on the failure of the prosecution to prove that the person against whom the criminal force was used was a public servant, under s. 323, Penal Code, because the latter is not a minor offence as compared to the former. DIP CHAND *v.* EMPEROR *All.* **540** (*a*)

——— **s. 238**—*Penal Code (Act XLV of* 1860), *ss.* 454, 441—*Charge under s.* 454—*Conviction under s.* 441—*Legality of.*

Where a person is charged under s. 454, Penal Code for committing trespass with the intention of committing theft, he can be convicted under s. 441, for trespass committed with the object of committing an offence. NIHERA KAHAR *v.* EMPEROR *Pat.* **629**

——— **s. 239**—*Offences under ss.* 406, 174, *Penal Code, not committed in course of same transaction—Joint trial, if legal—Acquittal under s.* 406, *Penal Code, if makes trial under s.* 174 *legal.*

The joint trial of the accused under ss. 406 and 174, Penal Code, the offences not being committed in the course of the same transaction, is illegal. The mere fact that the accused has been acquitted of the charge under s. 406, Penal Code, does not make his trial under s. 174, Penal Code, illegal. DHAN SINGH *v.* EMPEROR *Lah.* **163**

——— **ss. 274 and 276**—18 *jurors summoned in murder case—*8 *present—*7 *selected and trial with their aid—Trial valid.*

In a murder case 18 jurors were duly summoned for the trial of the case. But when the Judge took up the trial and the names of the 18 jurors were called, only eight of them were found present in Court. Thereupon the Judge chose seven of them and held the trial with the aid of seven jurors :

Held, that it was not the duty of the Judge to send his Court officers to search for jurors in adjacent Sessions Court. The constitution of a jury of seven, in the circumstances, was not, an illegality such as would render the trial invalid. MUKUNDA MURARI PAL *v.* EMPEROR *Cal.* **599**

——— **s. 288**—*Scope of—Evidence given before Magistrate—Whether can be utilised in support of conviction—Independent corroboration is not necessary.*

Under s. 288 of the Criminal Procedure Code, evidence admitted under that section may be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act. It will not be proper to limit the use of such evidence by the proviso that unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilised in support of a conviction. Nor can it be said that evidence admitted under s. 288, Criminal Procedure Code, invariably requires

some independent corroboration in the same manner as the statement of an accomplice. RAJA RAM *v.* EMPEROR *All.* 657

——— s. 297—*Cases arising out of sexual matters —Charges by woman against man—Testimony of woman—Corroboration—Judge's duty in charging the jury—Penal Code (Act XLV of* 1860), *s.* 376.

The Judge should warn the jury that in cases arising out of sexual matters, when charges are made against a man by a woman, it is dangerous to convict upon her evidence alone and that they ought to require corroboration of her story before they bring in a verdict of "guilty." The kind of corroboration required by the rule must be independent evidence, that is to say, the evidence of some witnesses other than the girl herself. He should make the jury understand that only in exceptional cases would they be justified in accepting her uncorroborated testimony EMPEROR *v.* NUR AHMED *Cal.* 584

——— s. 307 (3)—*High Court, if can, under s.* 307 (3), *order re-trial.*

A re-trial in a criminnl case should not be ordered too lightly and should be avoided as much as possible. A re-trial certainly should not be ordered, where it can be established that there is really no evidence to go before a jury, because to order a re-trial in such circumstances would be to put the accused to unnecessary harassment.

Under sub-s. (3), s. 307, Criminal Procedure Code, the High Court has ample power in a case, in which there has been no proper or adequate trial, to make an order that the accused persons should be re-tried. RAFIQUEUDDIN AHMAD *v.* EMPEROR *Cal.* 687 F. B.

——— s. 307—*Sessions Court accepting jury's verdict on one charge and disagreeing with jury on another charge—Reference to High Court under s.* 307—*Competency of.*

It is not open to a Court of Session to accept the verdict of the jury on one charge and disagree with the jury on another charge and refer the matter to the High Court under s. 307 of the Code of Criminal Procedure. RAMJANAM TEWARI *v.* EMPEROR *Pat.* 866

——— s. 342—*Penal Code (Act XLV of* 1860), *s.* 75 *—Previous conviction—Mere admission, if sufficient —Documentary evidence, necessity of.*

All previous convictions which are being relied on for the purposes of s. 75, Penal Code, must be proved in accordance with the law. A mere admission of the accused is not sufficient especially when there is nothing on the record to justify the questioning of the accused under s. 342, Criminal Procedure Code, on that point. SARDAR AHMAD *v* EMPEROR *Lah.* 478

——— s. 350 (1), proviso (a)—*Applicability— Trial by Bench of two Magistrates — Evidence recorded by one—Dissolution of the Bench—Case proceeded with by Magistrate taking evidence— S.* 350 (1), *does not apply.*

Section 350, Criminal Procedure Code, refers to cases heard by a Magistrate sitting singly, who is succeeded by another Magistrate sitting singly. It contemplates cases in which the second Magistrate is a person other than the first Magistrate and in which the second Magistrate has not had any previous opportunity of hearing the witnesses. Where two Magistrates have heard a case and one of them has recorded the depositions and on the dissolution of the Bench, the Magistrate who has recorded the deposition proceeds with the case, s. 350, Criminal Procedure Code, is not applicable and in such a case no re-trial can be claimed. ABDUL HAKIM *v.* FOZU MIA *Cal.* 1003

——— s. 369. SEE Criminal Procedure Code, 1898, s. 421 736 F. B.

——— s. 386—*Salary not yet drawn by salary earner—Whether can be attached—'Movable property,' meaning of.*

The expression 'movable property' as used in s. 386, Criminal Procedure Code does not include salary not yet drawn by a salary earner. Consequently a Magistrate acting under s. 336, Criminal Procedure Code, cannot attach salary, which the salary-earner has not only not drawn, but has not even yet earned. The warrant can issue only after the salary has come into the salary-earner's possession or into that of the bailiff in his behalf. MAUNG SOE HLAING *v.* MA THEIN KHIN *Rang.* 742

——— s. 386—Warrant—Endorsement to clerk—Legality. SEE Police Act, 1861, ss. 15, 16 421 (*b*) S B

——— s. 403 (3). SEE PENAL CODE, 1860, s. 302 287

——— s. 417—*Acquittal, appeal against—Principles of interference.*

In the case of appeals from acquittals, the decision of the Court below must be clearly wrong before the High Court will interfere, that is to say, a reasonable decision of a Court entitled to deal with the matter should not be set aside merely because the High Court took a different view. EMPEROR *v.* KURA *Lah.* 118

——— ss. 419, 421, 561-A, 369—*Order dismissing appeal filed under s.* 419—*Whether final—When can be set aside—Whether conditions under s.* 421 *have been fulfilled, is a question of fact—Interference by High Court.*

An order passed under s. 421, Criminal Procedure Code, dismissing an appeal filed under s. 419, Criminal Procedure Code is *prima facie* final.

Such an order cannot be vacated under s. 561-A, Criminal Procedure Code unless it is proved that other of the conditions precedent to the passing of the order as laid down by s. 421 has not been fulfilled and this is a question of fact depending on the circumstances of each case. The burden of proving that either of the conditions has not been complied with, lies heavily on the person challenging the finality of the order.

Where it is proved that either of the conditions precedent has not been complied with, the High Court has power to interfere under s. 561-A and in such a case it is immaterial whether the Bench which is called upon to interfere is composed of the same or different Judges. Where there is no proof that either of the conditions have not been complied with, the High Court, whether the Bench is composed of the same or other Judges, has no power to interfere. SHAHU *v* EMPEROR *Sind* 736 F.B.

——— s. 421—*Compliance with s.* 421—*Appellant or his pleader, if must be heard.*

Section 421, Criminal Procedure Code, does not require that the appellant or his pleader shall be heard before the appeal is decided, but all that it requires is that a sufficient opportunity should be afforded to them of being head. If a sufficient opportunity of being heard is afforded to either of them, the neglect of the appellant or his pleader who is his agent debars him from claiming a second hearing. SHAHU *v.* EMPEROR *Sind* 736 F. B.

——— ss. 421, 369—*Dismissal of appeal summarily in exercise of powers under s.* 421— *Whether judgment.*

There is no dismissal of a criminal appeal for

default of appearance by a party as in a civil case and therefore when an appeal is summarily dismissed deliberately and openly by a Court of competent jurisdiction in the apparent exercise of the powers vested in it under s. 421, Criminal Procedure Code, it is *prima facie*, a judgment within the meaning of s. 369, Criminal Procedure Code. SHAHU *v.* EMPEROR *Sind* **736 F. B.**

——ss. 421, 422, 423, 439—*Powers of Appellate Court to dismiss appeal summarily—Appeal not dismissed summarily—Duty of Court to comply with provisions of ss.* 422 *and* 423*—Powers of Appellate Court under s.* 423 *and High Court under s.* 439*—Whether same—Jurisdiction of Courts conferred by Statute—Courts cannot go outside the provisions.*

Upon the true construction of the Criminal Procedure Code, the Appellate Court is not entitled to dismiss an appeal summarily in terms of s. 421 unless the Court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in the appeal, and where the appeal is not dismissed summarily, the Court, is bound in order to the disposal of the appeal, to comply with the provisions of s. 422 as to notice, and with the provisions of s. 423 as to sending for the record, if such record is not already in Court.

The terms of s. 421 exclude the possibility of partial summary dismissal, *e. g.*, in so far as the conviction is appealed against. Failing summary dismissal, the provisions of ss. 422 and 423 apply and, the provisions as to notices in s 422 and the provision as to sending for the record in s. 423 are clearly peremptory, and there can be no room for revision at that stage. The words 'admitted' and 'admission' in reference to appeals which are not summarily dismissed, though not infrequently used in the Courts in India, are not happily chosen. From their ordinary meaning they would imply that the appeal requires to be admitted at this stage, whereas the Appellate Court are bound to deal with the appeal, and they can only do so when they have complied with the preliminary steps of giving the statutory notices under s. 422, and sending for the record, which will enable the Court to deal with the appeal in accordance with the provisions of s. 423. The powers conferred on the Appellate Court under s. 423 are as ample as the High Court would have on revision under s. 439, with the exception of the power to enhance the sentence, and if the appeal is before a High Court, and it is thought to be desirable, there is no reason why the accused should not be warned that, at the hearing on the petition, he may be called on to show cause why his sentence should not be enhanced. The jurisdiction of the Court in these matters is statutory, and the Court, however admirable its intentions, is not entitled to go outside these provisions and, in effect, to legislate for itself. EMPEROR *v.* DAHU RAUT **P. C. 386**

——ss. 423, 439—Powers of Appellate Court under s. 423 and of High Court under s. 439—Whether same. SEE Criminal Procedure Code, 1898, ss. 421, 422, 423, 439 **386**

——s. 428—*Sessions Judge hearing appeal from decision of Assistant Sessions Judge in trial with aid of assessors — Additional evidence, recording of—Legality—Such evidence, if admissible —Sessions Judge forming opinion as to guilt of accused on such evidence—Re-hearing—Transfer to another Judge—Necessity of.*

It is only when the Court of Session is sitting to hear an appeal from a judgment of a Magistrate has it got power under s. 428 of the Criminal Procedure Code to record additional evidence itself, or direct it to be taken by a Magistrate, and it is only the High Court, which is the Appellate Court of the Court of Session, that can, under s. 428 of the Code, direct a Court of Session or a Magistrate to record additional evidence in a case pending before it in appeal. The Sessions Judge is not justified by the provisions of s. 428, Criminal Procedure Code, in recording additional evidence while deciding an appeal against the judgment of the Assistant Sessions Judge who tried the case with the aid of assessors. Such evidence is not legally admissible and the accused cannot legally be convicted upon that evidence.

When once a Sessions Judge has formed an opinion as to the guilt of the accused upon the additional evidence recorded by him, it is desirable that a re-hearing of the appeal is not made before the same Judge. An application for transfer to another Court, should, in the circumstances, be granted. HORI LAL *v.* EMPEROR *Oudh* **753**

——s. 428 (1)—*Appellate Court's power to remand case for re-trial with condition to consider evidence already on record.*

The lower Appellate Court has no power to order a re-trial with the condition that the evidence already on record should be taken into consideration. If there is to be a re-trial, the accused is entitled to demand that there shall be a *de novo* trial. Under s. 428 (1) of the Criminal Procedure Code, if the Appellate Court thinks that additional evidence is necessary, it may, after recording its reasons, either take such evidence itself, or direct it to be taken by a Magistrate. If it thinks that further evidence is necessary it should proceed under that sub-section. I'OTRAM *v.* EMPEROR *Nag.* **258**

——s. 436—*Power of High Court to order further inquiry without reference to High Court.*

The order of a Magistrate quashing the proceedings amounts to an order of discharge and it is open to the Sessions Judge, if he is of that opinion, to order further inquiry into the complaint without referring to High Court. RAM SINGH *v.* S. A. RIZWI *Pat.* **126**

——s. 437. SEE Criminal Procedure Code, 1898, s. 209 **101 F. B.**

——s. 438—*Reference to High Court—When can be made—Question of law—Necessity of—Reference contrary to findings of facts of trial Court—Legality of.*

The High Court will not accept any reference or revision which involves no question of law. The Sessions Judge should not, therefore, make any reference to the High Court or submit any application for revision of any order contrary to the findings of facts arrived at by the trial Court.

Where in an application for maintenance the trying Magistrate finds that the husband was residing within his jurisdiction it must be accepted as correct and it is not open to the Sessions Judge to hold anything to the contrary. DULARE *v.* SUNDARIA *Oudh* **726** (*a*)

——s. 438—*Reference—When can be made to High Court—No question of law involved—Reference to be rejected.*

A refenence can only be made to the High Court if after accepting loyally the finding of facts arrived at by the trial Magistrate some question of law arises which necessitates interference with the order passed by the trial Court. When no question of law is involved the reference is to be rejected. EMPEROR *v.* MR. B. A. PETERS *Oudh* **724**

Criminal Procedure Code—contd.

———s. 439
See Criminal Procedure Code, 1898, s 215 395 *(b)*
See Criminal Procedure Code, 1893, s. 421 386
——— s. 439—*Criminal trial—Power of High Court to interfere with findings of fact in revision—Restrictions in s. 439, Criminal Procedure Code.*
Although the powers of the High Court to interfere with findings of fact in revision are not in any way restricted by s. 439 of the Criminal Procedure Code, in practice they are only exercised in exceptional cases and under exceptional circumstances. They are, however, invariably exercised in cases where it is established that the findings of fact reached by the two Courts below are based either on no evidence or on inadmissible evidence or on legally inadequate evidence or are perverse. Diwan Singh *v.* Emperor *Nag.* 450
——— s. 476. See Criminal Procedure Code, 1898, s. 195 (3) 863
———s. 476—*Order after enquiry that complaint should be made against applicant—Court not expressing in so many words that a prosecution should follow—Order, if rendered illegal—Penal Code (Act XLV of 1860) s 193.*
Where after making an enquiry the Court ordered under s. 476, Criminal Procedure Code, that a complaint should be made against the applicant under s. 193, Penal Code:
Held, that although the Court did not express in so many words that it was expedient that a prosecution should follow, the order was not thereby rendered illegal and that the prosecution for perjury that followed was a perfectly proper proceeding. Ibn Ali *v* Emperor *All.* 490
———s. 488—*Husband's offer to maintain*—Bona fides *of offer and sufficiency of reasons for refusal to go back to husband should be considered before making order.*
The mere fact that some three years ago the husband beat the wife and turned her out is no reason for holding that the subsequent offer to take her back, was not *bona fide* or could justify the refusal of the wife to go back to her husband. Unless the Magistrate finds that the offer is not *bona fide* or that the reason given by the wife for not going back to her husband is sufficient, he should not make an order for maintenance. Nur Muhammad *v.* Hajran *Lah.* 609
———s. 488—*Maintenance proceedings — Wife, examination of—Husband expressing willingness to take back wife —Duty of Court to examine wife.*
Proceedings under s. 488, Criminal Procedure Code are not complaints and hence it is not legally necessary for the wife to be examined. But when a husband expresses his willingness to take back the wife and child, it is the duty of the Magistrate to enquire from the wife her reasons for not going back to her husband and failure to do so amounts to illegality. Nur Muhammad *v.* Hajran *Lah.* 609
———s. 488, 489, 490—*Second Class Magistrate —Power to pass sentence of imprisonment for breach of order directing payment of maintenance.*
A Second Class Magistrate is not competent to pass a sentence of imprisonment for breach of an order under s. 488 of the Criminal Procedure Code directing payment of maintenance. The power to enforce an order for maintenance does not necessarily include the power to sentence a person, against whom it was passed, to imprisonment. *In re* Kuppini Naiken *Mad.* 694
———s. 497 (1)—*Granting of bail—Considerations to be taken into account by Court.*
The High Court's power to grant bail under s. 498 of the Criminal Procedure Code, is not limited by the restriction imposed by s 497 (1). The High Court will not, however, grant bail in non-bailable cases except in special circumstances and according to the exigencies of each particular case.
Bail will not be withheld merely as a punishment. But in granting or refusing bail the Courts will take into consideration, amongst other things, the question whether the accused, if released on bail, is likely to tamper with the prosecution evidence or get up false evidence in support of the defence.
Magistrates are bound to consider whether a prisoner, if released, will suborn evidence and they may well refuse to enlarge on bail a prisoner who is of such a character that his presence at large will intimidate witnesses. Emperor *v.* Mahammed Panah *Sind* 113
——— s. 513—*Bail—Surety bond, nature and effect of.*
Per *Muhammad Noor, J.*—When a Court orders an accused to be released on bail on his offering surety or sureties the question of the forfeiture of the amount of surety, in case the accused does not appear on the date fixed, is of secondary consideration; the primary consideration is the personal element of the surety or sureties concerned. When an accused is released on bail on his offering surety for the amount ordered, the Court expects the surety to see that the accused appears on the date fixed and also that the surety will take steps for getting the accused arrested in case there is any attempt on the part of the accused to abscond or to avoid attendance in Court. The surety or sureties must have a personal stake in seeing that the accused carries out his obligation. Surja Narain *In the matter of* *Pat.* 430 S. B.
———s. 514—*Bail bond—Denial of execution of bond—Forfeiture, when can be ordered—Evidence of execution—Necessity of.*
Where a person denies the execution of a bail bond and the Magistrate without taking any evidence passes orders forfeiting the bond, the orders cannot be supported as it is necessary that there should be some evidence to prove that the bond was executed by him. Birendra Nath Bakshi *v.* Emperor *Cal.* 1120
———s. 526—*Accused and his witnesses residing at considerable distance, whether a ground for transfer—For accused to appear in certain place risky and inconvenient—Held, case should be transferred.*
The fact that an accused person and his defence witnesses reside at a considerable distance from where they are being tried is ordinarily no ground for transfer; but where it is highly inconvenient and risky for the applicant to appear either as an accused or as a witness in certain place, the case should be transferred from that place. Satbhari *v.* Muhammad Sidik *Sind* 1010
———s. 526—*Two complaints—One against, and other by, accused—Parties same—Complaint of accused dismissed—Whether ground for transfer of complaint against him.*
Interest or bias is not to be inferred from the opinions formed on evidence judicially recorded, and a Magistrate is not, therefore, disqualified to try the second case, merely because he has expressed his opinion on the first case tried by him.
Where two complaints were filed before the same Magistrate, one by the accused and the other against him, in both of which the parties were the same and

the complaint filed by the accused was dismissed;

Held, that it was no ground for transfer of the case against him. GHULAMALI *v* EMPEROR *Sind* 994

——s. 537. SEE Criminal Procedure Code, 1898, s. 145 169

——s. 537—*Cross cases—Joint trial—Irregularity, if cured by s.* 537, *when no prejudice is caused to accused.*

Although the joint trial of two cross-cases, the prosecution evidence in one of which constitutes the defence evidence in the other, is an irregularity, it can be cured under s. 537, Criminal Procedure Code, if no prejudice has thereby been caused to the accused. GANGA SINGH *v.* EMPEROR *All.* 541

——s. 537—Defect, when can be cured under. SEE Criminal Procedure Code, 1898, s. 162 66

——s. 556. SEE Criminal Procedure Code, 1898, s. 190 448

——s. 561-A—*Inherent powers under, can be exercised by High Court.*

Under s 561-A, Criminal Procedure Code, inherent powers in that behalf may be exercised by the High Court and not by a Court of inferior jurisdiction. SHAHU *v.* EMPEROR *Sind* 736 F. B.

——s. 562—*Offences under s.* 114, *Railways Act —Offender should be punished irrespective of no previous conviction — Precedents—Full Bench not agreeing with interpretation of penal section, by Division Bench—Altered interpretation, if has retrospective effect—Interpretation of statutes.*

Per *Full Bench, Mehta, A. J. C.*, dissenting :—

Offences punishable under s. 114, Railways Act, are easy to commit but not easy to detect. When detection has been successfuly effected, an offender should not go scot-free, even if he has not been convicted before.

Per *Mehta, A. J. C.*—When a particular penal section of a statute like the Railways Act has been interpreted in a particular way in favour of a subject by a Division Bench of a High Court, the subject has a right to say that he has not committed any offence, and that he had no guilty intention whatsoever in doing an act in the belief that the interpretation was correct. If subsequently that interpretation is found fault with by a Full Bench, so that the very act which at one time was not looked upon as an offence is to be regarded as an offence, the altered interpretation should not have a restrospective effect as if the subject should have anticipated the second decision of the High Court. Even if a technical conviction is recorded, the accused should have the benefit of s. 562 (1) (A), Criminal Procedure Code. EMPEROR *v.* KODUMAL OCHIRAM *Sind* 697 F B.

——s. 562—*Release on probation of good conduct—Sentence of imprisonment, if can be imposed.*

The language of s. 562, Criminal Procedure Code makes it clear that a sentence of imprisonment imposed on a person while he is released on probation of good conduct, is wholly illegal and must, therefore, be quashed. BARKAT *v.* EMPEROR *Lah.* 283

Criminal trial SEE Criminal Procedure Code, 1898, s. 439 450

——*Accused telling lie—Conviction, if can be based on it—Whether can be used to corroborate approver.*

The fact that an accused person tells a lie is not sufficient to convict him by itself, nor can it be corroboration of the approvers' statement. BACHCHA BABU *v.* EMPEROR *All* 369

——*Benefit of doubt—Legally insufficient evidence —Moral certainty, if justifies conviction.*

There are no better established principles in the administration of Criminal Law in British and British Indian Courts than (1) that a man can be convicted only on legal evidence, and (2) that if there is a reasonable doubt of his guilt on the evidence, he should have the benefit of it. If the evidence is legally insufficient, the gravest suspicion, amounting even to moral certainty, is not enough to sustain a conviction. An accused person is, therefore, entitled to the benefit of these principles. SARDAR AHMAD *v.* EMPEROR *Lah.* 478

——*Capital case—Evidence—Nature of.*

In a capital case it is important that the more important of the witnesses should be examined in such a way as would enable the Court to properly appreciate their evidence. The evidence should be led in sufficient detail and with due regard to the sequence of events, the facts which the witnesses saw or the acts which they did and also the reasons which actuated them to do the acts being narrated in an intelligent fashion. It is only by this means that a clear and consistent account of the whole thing may be presented before the Judge and the jury. RAFQUEUDDIN AHMAD *v.* EMPEROR *Cal.* 687 F. B.

——*Case and counter-case—Court if should wait for results of steps in counter-case.*

Where there is a case and counter-case, the Court is not in any way bound to adjourn the hearing of the case indefinitely, waiting for the results of the steps taken in the counter-case. When the accused has not in any way been prejudiced by the Magistrate's refusal to grant adjournment, he cannot complain that he was not given proper facilities to have his case argued before him. RAM SINGH *v.* EMPEROR *Pat.* 421 (*b*) S. B.

——*Charge solely under ss.* 457 *and* 380, *Penal Code—No alternative charge under s.* 411, *Penal Code—No mention of s.* 411 *even in charge to jury —If an omission prejudicing accused.*

No direct evidence existed to show that the accused committed the house-breaking and theft. Yet the charge against them was framed solely under ss. 457 and 380, Penal Code, with no alternative charge under s. 411, Penal Code. In his charge to the jury the Judge did not mention s. 411, Penal Code, nor inform the jury that it was open to them either to find on the facts that the accused committed the house-breaking and theft or that they were guilty under s. 411, Penal Code, or tell them that they might convict them in the alternative. He left them no choice between a conviction under ss. 457 and 380, Penal Code, and an acquittal :

Held, that the offence under s. 411 being punishable with a lesser sentence than offences under the two former sections, this was an omission which prejudiced the accused. MAVUTHALAYAN *v.* EMPEROR *Mad.* 74

——*Confession — Magistrate recording confession, otherwise valid, in his house—Legality of.*

Where a confession is otherwise valid, the mere fact of its having been recorded at the Magistrate's house does not vitiate it. GHULAM MUHAMMAD *v.* EMPEROR *Lah.* 265

——*Confession of crime by accused—Conviction, if can be based on it even if it is retracted.*

When a grown-up man in the full possession of his senses chooses to confess his crime, then he can be legally convicted on his own confession even if it be subsequently retracted. MATHURA *v.* EMPEROR *Oudh* 527

——*Confession—Retracted confession of accused*

Criminal trial—contd.

—*Whether can be used in evidence against his co-accused.*

The retracted confession of an accused has really little or no evidential value against a co-accused but it can be taken into consideration along with the other evidence against that accused, especially when the Court considers that the confession was both voluntary and true. MATHURA *v.* EMPEROR *Oudh* **527**

———*Dying declaration, when sufficient to support conviction.*

A dying declaration alone is sufficient to found a conviction if, after applying the accepted tests, it is held to be true and genuine. It is not necessary that it should be corroborated otherwise. MASTI KHAN *v.* EMPEROR *Pesh.* **276**

——— *Evidence—Crown not calling prosecution witness examined by it in Committing Magistrate's Court, in Sessions—Sessions Judge thinking him to be material witness—Court's duty—Whether it can compel Crown to examine him as Crown witness or to tender him for cross-examination.*

Where the Crown has not examined a witness in the Sessions Court but had examined him in the Committing Magistrate's Court and the Sessions Judge thinks that he is a material witness, it is open to him either to draw an adverse inference against the Crown in not calling the witness or to examine him as a Court-witness. But he cannot compel the Crown either to examine him as a Crown witness or to tender him for cross-examination. EMPEROR *v.* DULO *Sind* **1114**

———*First trial breaking on account of illegality in conducting it—Re-trial, if can be ordered.*

When the first trial breaks down on account of any illegality in conducting it, the normal course is a re-trial. DIWAN SINGH *v.* EMPEROR *Nag.* **450**

——— *Government Pleader not producing certain eye-witness—Appellate Court if can summon him.*

It is true that it is the duty of the prosecution to produce before the Court all eye-witnesses of the occurrence, but if the Government Pleader takes upon himself the responsibility of not producing a certain eye-witness, then it is not the duty of the Appellate Court to fill up the gap in the prosecution evidence by summoning that witness HORI LAL *v.* EMPEROR *Oudh* **753**

———*Identification — Presence of Police constable —Objectionable nature of procedure — Investigation —Conduct of Police—Administration of criminal justice.*

The presence of Police constables in the room where the identification is held is most objectionable.

The administration of criminal justice requires that every act done by the agency responsible for the investigation of crime must be fair, upright and free from taint of any sort. The Police should inspire full confidence in the public and conduct itself in such a regular manner as not to afford any genuine cause of complaint to those with whom it deals. It is then and then alone that justice can be properly dispensed. KARTAR SINGH *v.* EMPEROR *Lah.* **263**

———*Motive—Crime brought home to accused—Motive should be proved.*

If upon the evidence of the prosecution witnesses the crime of the accused has been brought home to him, then the question of the motive with which the crime was committed becomes a matter of secondary importance. The prosecution is seldom able to pry deep into the secrets of unhallowed lives, or to explain the workings of evil minds or the secret desires and passions of a wicked heart. MATHURA *v.* EMPEROR *Oudh* **527**

———*Motive—One accused not getting his share in loot—Whether motive for making confession against himself.*

It is not very natural that an accused person should merely from the annoyance at not getting his proper share of the loot take an action which he must know will put himself in jail. RAM CHARAN *v.* EMPEROR *All.* **119**

———*Review—Case decided by Court of competent jurisdiction—Same Court, whether by same Judge or another, cannot review it.*

A Court of competent jurisdiction may decide a case rightly or wrongly; and it is not open to the same Judges much less to other Judges of co-ordinate jurisdiction to review that decision. SHAHU *v.* EMPEROR *Sind* **736 F. B.**

———*Sentence — Murder of wife due to her flagrant immorality — Extenuating circumstance, if exists.*

Where the accused had undergone protracted sufferings though the obstinacy, viciousness and flagrant immorality of the deceased, his wife, whom he pushed into the river, there is a mitigating circumstance entitling the accused to a lenient sentence. GHULAM MUHAMMAD *v* EMPEROR *Lah.* **265**

———*Sentence — Substantial but light sentence —Interference—Propriety—Practice (Lahore High Court).*

Where the sentence though light is substantial, it is not the practice of the Lahore High Court to interfere with it. EMPEROR *v.* TAYAB *Lah.* **241**

Crown—*Prerogative—Servant, dismissal of, at will —Railway—Damages.*

The right of the Crown to dismiss its servant at will and pleasure exists even though there is included in the contract of service an express term to the contrary, unless the Crown has deprived itself of the prerogative by statute. JAMUN *v.* SECRETARY OF STATE FOR INDIA *Lah.* **395** (*a*)

Custom SEE *Wajib-ul-arz* **569**

———Burden of proof—Custom not proved—Right of *zemindar* to tree. SEE Abadi **1031**

Custom—*Village expenses should be allowed on basis of gross rental.*

Village expenses should be allowed on the basis of gross rental. MITTHU LAL *v.* CHAMELI *All.* **800**

Custom (Punjab)—Abadi— *Non-proprietor—Right of occupation.*

In the case of non-proprietors who have built on sites presumably with the consent of the proprietors, the non-proprietors and their heirs are entitled to occupy the houses as long as they choose to do so, and the proprietors of the sites can re-claim the sites of the houses only if the non-proprietors abandon the houses or sell the sites without his consent. GANGA BISHAN KUNJ BIHARI LAL *v.* M FAZAL KARIM *Lah.* **342**

———**Adoption**—*Onus —Latest* riwaj-i-am *against adoption—Burden of proof.*

Where the entries in the latest *riwaj-i-am* are against adoption, the onus lies heavily on the adopted son to prove that the custom of adoption existed amongst the Sainis of village Sharif Chak in *Tahsil* Pathankot in 1928 when he is alleged to have been adopted. LAJPAT RAI *v.* KARAM CHAND *Lah.* **1020**

———**Alienation** — *Gohana Tahsil of Rohtak District—Male proprietors, powers of.*

A male proprietor in the Gohana Tahsil can alienate immovable property freely except for immoral purposes. ABDUL RAFI KHAN *v.* LAKSHMI CHAND *Lah.* **875**

——— **Alienation**—*Necessity — Application of money—Act of good management.*

A vendee is not expected to see to the application of the money by the vendor to the purposes mentioned in the sale-deed.

Where a proprietor sells his land in the village on seeing that his staying there is not safe and with a view to purchase land elsewhere, and he settles there, the sale is an act of good management and cannot be disturbed under any rule of law. ABDUL RAFI KHAN *v.* LAKSHMI CHAND *Lah.* **875**

——— ———*Necessity—Distinction in Punjab Customary Law and Hindu Law.*

Both under Hindu Law and the custom of agricultural tribes, alienation of ancestral immovable property is subject to restrictions, but the nature of the restrictions is somewhat different in the two cases. SOHAN LAL *v.* ISHAR SINGH *Lah.* **255**

——— ——— *Necessity—Recital in deed, how far evidence of necessity—No finding that alienor has been extravagant—Vendor need not prove that previous debts paid out of sale consideration were contracted for necessary purposes.*

The recital in a deed is clear evidence of the representation it makes and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then when proof of actual inquiry as regards the necessity for alienation has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed.

In the absence of a finding that an alienor has been recklessly extravagant or has been wantonly wasting his property, the vendee is not required to prove that previous debts whether owing to himself or to third persons which have been paid out of the sale consideration were contracted for necessary purposes. He has only to prove the existence of such debts and once that is established and it is not proved that they have been incurred for immoral or illegal purposes, their payment becomes a valid necessity sufficient to support the sale. AKKU *v.* ALI AKBAR *Lah.* **179**

——— **Applicability**—*Applicability of custom—Family following agriculture for two or three generations—If necessary to substitute custom for personal law—Proof, necessity of.*

To hold that a person is governed by agricultural custom solely on the ground that his family has followed agriculture or lived amongst an agricultural tribe for 2 or 3 generations would be to substitute conjecture for proof. There is at best a possibility of such a family adopting the rules of custom, but whether it has actually done so or not is a question of fact which must be decided on evidence and not on conjecture. According to the Punjab Laws Act the initial presumption is that Hindus and Muhammadans are governed by their personal laws and if a custom modifying such laws is alleged, it must be proved. SOHAN LAL *v.* ISHAR SINGH *Lah.* **255**

——— **Burden of proof** — *Clear statement of custom—Burden of proof on him who disputes.*

The burden is on him, who disputes the clear statement of special custom in Customary Law (Punjab), to prove the contrary. AISHAN BIBI *v.* ALLAH DITTA *Lah.* **861**

——— *Custom in same tribe, if varies according to localities — Adoption amongst Sainis of village Sharif Chak, Pathankot* Tahsil *in* 1928.

It is well established that different customs may prevail in the same tribe in different localities, and that custom cannot be extended by means of analogy.

Held, that it has not been established that the custom of adoption existed amongst the Sainis of village Sharif Chak in the Pathankot *Tahsil* in 1928 and even if a custom of adoption amongst the Sainis of Pathankot *Tahsil* be held to have existed, only a person who was below seven years of age or in any case had not yet attained the age of puberty could be validly adopted. LAJPAT RAI *v.* KARAM CHAND *Lah.* **1020**

——— *Decision in custom case, if a judgment in rem—Evidence Act (I of* 1872), *s.* 13.

A decision in a custom case is not a judgment *in rem*. It is only relevant under s. 13, Evidence Act, as a judicial instance of the custom being recognized. It may be that, owing to faulty prosecution, one decision may be arrived at between certain parties while there may be another decision in a suit arising between other persons. JANAT BIBI *v.* GHULAM HUSSAIN *Lah.* **212**

——— **Gift.** SEE Hindu Law **1068**

——— Arains *of District Jullundur—Daughter of sonless proprietor getting property from father by written deed of gift—Whether can gift it to her sister—Gift in lieu of services—Rule of reversion, if applies.*

Among the *Arains* of the Jullundur District, a daughter of a sonless proprietor can gift ancestral property received by her from her father by a written deed of gift to her sister.

The rule of reversion does not come into operation when the gift is in lieu of services. AZIZ MUHAMMAD *v.* HAJRAN *Lah.* **167**

——— **Practice**—*Original version of Customary Law in vernacular and English version of the same—Which to be preferred.*

If there is any difference in the original vernacular and the English version of the Customary Law, the English version should be preferred on the ground that it is the final draft. AISHAN BIBI *v.* ALLAH DITTA *Lah.* **861**

——— **Reversionary right**—*Sale of—Whether ipso facto becomes sale of land.*

The sale of a reversionary right *ipso facto* does not become a sale of the land which falls to the reversioner when succession opens out. MIHAN SINGH *v.* SHIV DITT SINGH *Lah.* **850**

——— **Riwaj-i-am** *of two years—Which prevails.*

Where the adoption takes place in 1928, the entries in the *riwaj-i-ams* of 1913 must govern the case and not those of the *riwaj-i-am* of 1865. LAJPAT RAI *v* KARAM CHAND *Lah.* **1020**

——— ——— *of* 1868—*Gift by* Sandhu Jat *widow—Self-acquired immovable property of husband—Gift, if valid.*

According to *riwaj-i-am* of 1868, Lahore, even self-acquired immovable property of husband cannot be gifted by the widow. AISHAN BIBI *v*, ALLAH DITTA *Lah.* **861**

——— **Shamilat land**— *Succession — Whether same rule prevails as for* khewat *land.*

Ordinarily *shamilat* land is governed by the same rule of inheritance as the *khewat* land. KARAM CHAND *v* LOKOO RAM *Lah.* **514** (*b*)

——— **Succession** — Arains *of Chunian Tahsil, Lahore District—Sister of last male-holder whether a preferential heir to collaterals of third degree.*

Among *Arains* of Chunian Tahsil, Lahore District, the sister of the last male-holder is a preferential heir to collaterals of the third degree. WARAS *v.* FATIMA *Lah.* **841**

——— ——— Aroras *of Khanewal, District Multan*

Custom (Punjab)—concld.

—*Whether governed by Hindu Law—Alienation by widow—Cognates, whether can challenge—Hindu Law—Alienation—Widow.*

Held, that an *Arora* of Khanewal in the District of Multan is not governed in the matter of succession by Hindu Law but by Customary Law and the cognates of the propositus have no *locus standi* to challenge the alienation made by the widow. BAHADUR CHAND *v.* RAMON BAI *Lah* **860**

——— **Succession**—Gaur Brahmins *of Kharkhauda, District Rohtak—Non-ancestral property—Daughter is preferential heir to collaterals of eighth degree.*

Among *Gaur Brahmins* of Kharkhauda, District Rohtak, a daughter is a preferential heir to the non-ancestral property of her father as against collaterals of the eighth degree. NOT RAM *v.* KISHAN DEVI *Lah.* **1080**

———*Gujranwala District—Non-ancestral property of father—Daughters and collaterals of 7th degree—Preferential heir.*

A daughter is entitled to succeed to the non-ancestral property of her father in preference to collaterals of the 7th degree and collaterals of the 7th degree cannot possibly be regarded as "near male kindred." KARAM SINGH *v.* RAM KAUR *Lah.* **552**

——— *Muhammadan* Gujars *of village Bodhaya in Dasuya Tahsil of Hoshiarpur district—Sisters, if preferred to collaterals.*

It is well-established that sisters are generally not recognised as heirs and the onus is on them to prove their claim as against collaterals howsoever distant even if the property is non-ancestral. BEGAN *v.* ALI GOHAR *Lah.* **340**

———*Non-ancestral property—Reversioners*—Sandhu Jats—*District Lahore—Gift to daughters, by widow—Reversioners, collaterals of fourth degree, if exclude daughters.*

Among *Sandhu Jats* of Lahore District, daughters are excluded in respect of non-ancestral property by reversioners as the fourth degree collaterals. AISHAN BIBI *v.* ALLAH DITTA *Lah.* **861**

———*Self-acquired property*—Riwaj-i-am *entry against married daughters—Onus of proof—Shifting of onus—Presumption held rebutted on evidence on behalf of daughter* -Janjuha Rajputs *of Jhelum.*

Even in the case of a *riwaj-i-am* unsupported by instances, the presumption lies in favour of its correctness and a duty is cast upon those who challenge it to rebut this presumption. Consequently, the onus is on the daughters to prove that even after their marriage they excluded the collaterals if the property was the self-acquired property of their father. But the presumption in such cases is so weak that on a mere proof of a small number of instances to the contrary it stands rebutted and the onus is then shifted on to the collaterals to prove that they exclude married daughters from the self-acquired property of their father:

Held, in a case of *Janjuha Rajputs* of Jhelum that the presumption was rebutted by evidence adduced on behalf of the daughters. FEROZE KHAN *v.* UMAR HAYAT *Lah.* **872**

———*Village growing into town—Effect on proprietor.*

It cannot be said that when a village grows into a town, the proprietor of the village sites on which houses have been built automatically loses his rights therein. GANGA BISHAN KUNJ BIHARI LAL *v.* M. FAZAL KARIM *Lah.* **342**

Custom (Punjab)—concld.

——— **Wajib-ul-arz** *of* 1855—*Ancestral property.*

Land under the *wajib-ul-arz* of 1885 refers only to ancestral land. AISHAN BIBI *v.* ALLAH DITTA *Lah.* **861**

———*Water rights—Batala*—ARS—*Held, that the custom whereby defendants could use ars of old well for carrying water of new well to fields, existed.*

Held, that the defendants had established the existence of a local custom in Batala whereby they could use the *ars* (water channels) of the old well for carrying the water of the new well to their fields on specified days. MUHAMMAD HUSSAIN *v.* DIN MUHAMMAD *Lah.* **842** (*a*)

Customary Right—*Right of privacy—Suit to remove construction affecting right of privacy—Customary right of privacy must be proved to have existed.*

In a suit for removal of constructions affecting the plaintiff's right of privacy, it is necessary for the plaintiff to allege that a customary right of privacy existed in the particular neighbourhood in which the plaintiff was living or that he individually or as a member of a particular class was entitled to take advantage of the customary right of privacy. PADUMAN DAS *v.* PARBATI *All.* **365**

———*Villagers having certain legal rights—Court's duty to defend and enforce them.*

Where it has been found that the villagers have certain legal rights in the land in suit, and that they have never surrendered those rights, it is the duty of the Courts to defend and enforce those rights. APTABUDDIN KHAN *v.* JOHAR ALI KAZI *Cal.* **75**

Damages. SEE Crown **395** (*a*)

Dangerous Drugs Act (II of 1930), ss. 2 (b) (I), (III), 14—'*Cocaine*,' *if implies substance prepared according to formula given in s.* 2 (b) (iii)—*Cocoa derivatives, if includes 'crude cocaine'.*

Section 2 (*b*) (*iii*), Dangerous Drugs Act, makes mention of cocaine; and to distinguish it from "crude cocaine" the usual chemical formula has been stated. The word cocaine implies the substance prepared according to that formula, which is well known to chemists. The expression 'cocoa derivatives' also includes crude cocaine. SADLU *v.* EMPEROR *All.* **406**

———**s. 14.** SEE Dangerous Drugs Act, 1930, s. 22 **267**

———**ss. 22, 23, 14**—*Constables not authorised to take steps which they had taken—Trial, if vitiated by this irregularity.*

Where the constables are not authorized to take the steps which they have taken, under ss. 22, 23, Dangerous Drugs Act, the irregularity does not vitiate the trial. HABIBULLAH *v.* EMPEROR *Pesh.* **267**

Debts—Priority. SEE Succession **847**

Decree—*Assignment of—Validity of assignment at issue—Judgment-debtor having no interest in it—Judgment-debtor, whether bound by it—Execution—Civil Procedure Code* (*Act V of* 1908), *s.* 47, *O. XXI, r.* 16.

Where the issue on the validity of the assignment of a decree decided by the executing Court was an issue solely between the decree-holder and his assignee:

Held, that the decree-holder was bound by the decision and he could not appeal against it. ACHHRU RAM *v.* FAZAL MOHAMMAD *Lah.* **974**

———Construction—Novation. SEE Contract Act, 1872, s. 62 **534**

———*Decree on compromise is consent decree.*

Where there is a compromise, a decree passed thereon, whether the compromise is admitted by both parties or disputed by one of them, is still a con-

Decree—contd.

sent decree. MOHAMMAD MIA PANDIT *v.* OSMAN ALI *Cal.* **915**

———*Decree should not differ from prayer in plaint—Pleadings.*

It is wrong for a Judge to pass a decree which is entirely different from the prayer in the plaint. MEYAPPA CHETTYAR *v.* VENKATACHELLAM CHETTYAR *Rang.* **997**

———Ex parte *decree—Appeal from—Adjudication regarding rights and liabilities of the person against whom* ex parte *decree is passed—Jurisdiction of trial Court to set aside* ex parte *decree.*

Where the Appellate Court has adjudicated regarding the rights and liabilities of the person against whom an *ex parte* decree has been passed, the *ex parte* decree against such person cannot be set aside by the trial Court, but where there has been no adjudication regarding the rights and liabilities of such person in the Appellate Court, the trial Court is entitled to entertain an application for the setting aside of the *ex parte* decree against him. The fact that a person has been impleaded as a *pro forma* respondent in the appeal does not in any way affect the jurisdiction of the trial Court so far as the setting aside of the *ex parte* decree against such person is concerned. SOHAN SINGH *v.* MOOL SINGH *Lah.* **845**

———*Execution*—Res judicata—*Two conflicting decrees—Principles—Cause of action and issues different in suit by* A *against* B *at* C *and suit by* B *against* A *at* S—*Decrees, if conflicting—Executability of decrees.*

On the principles underlying the plea of *res judicata* which aims at avoiding multiplicity of litigation and at securing finality, if two conflicting decrees have been obtained by parties from two different Courts or even from the same Court then the last one should be the effective decree between the parties and the first decree should be regarded as dead. The basis of this salutary rule is that if a party who could raise the plea of *res judicata* does not raise the same when an opportunity is given to him he must be deemed to have waived it. The plea of *res judicata* is not one which affects the jurisdiction of a Court. It is a plea in bar and such a plea can be waived.

Where the cause of action of and the issues in, a suit by *A* against *B* in a Court at *C* are different from those in a subsequent suit by *B* against *A* in a Court at *S*, it is not possible for *A* to plead before the Court at *S* that the decree of the Court at *C* was *res judicata*. In such circumstances there are no two conflicting decisions and it is not possible for *B* to argue that the decree of the Court at *C* is incapable of execution. SANSARCHAND LACHHMAN DAS *v.* DINA NATH DUBE *All.* **571**

———*Joint decree in favour of several mortgagees—One of them, if can give valid discharge against others.*

In the case of a joint decree passed in favour of several mortgagees one of them cannot give a valid discharge against the other mortgagees. SEWA RAM *v.* PARBHU DAYAL *Oudh* **231**

———*Two conflicting decrees—Which prevails.*

In case of conflicting decrees the later one must prevail. The reason for this is that the previous decree cannot be looked into and must be held to have been discharged by the later decree.

The judgment-debtors objected to the execution on the ground that in a previous case the District Judge had held that the assignment in favour of the opposite party was null and void. The lower Court, however, followed the earlier decision of his predecessor, which held that the assignment was good, on the ground that he was bound by the previous order of his own Court. The order of his predecessor was passed on October 5, 1925, whilst the order of the District Judge, on appeal was passed on July 16, 1926, when the matter was in issue in another case:

Held, that the later order *i. e.*, of the Districet Judge must prevail. GHULAM ALI *v* RAHIMUDDIN KAJIMUDDIN *Nag.* **726** (*b*)

Deed—Construction. SEE Charitable and Religious Trusts Act, 1920 **409**

———*Construction—Ambiguity.*

A document must be taken as a whole and if there is inconsistency between two parts of it, the case is one of ambiguity. BANAPHAL SINGH *v.* NOOR MOHAMMAD *All.* **634**

———*Construction—Deed to be read as a whole—Effect to be given to all provisions.*

It is one of the recognized canons of the interpretation of a document that the document must be read and construed as a whole and due and legitimate effect be given to each and every one of its provisions. BAQA UTLAH KHAN *v* GHULAM SIDDIQUE KHAN *All.* **416** (*b*)

———*Construction—Intention—Charge—Mortgage—Clog on equity of redemption—Agreement between parties creating subsequent charges—Necessity of.*

Whether a certain document did or did not create a charge on certain mortgaged property for the amount of the debt, depends on the intention of the parties which must be gathered from a reading of the document itself. Where a bond provides that the mortgage deed in respect of the land executed by Sant Singh in favour of the said creditors is a separate bond, that this bond has been executed separately and the amount of the bond will be paid before mortgage deed, the bond does not create a charge.

The weight of authority is against recognizing any clog on the equity of redemption in the absence of a clear agreement between the parties creating a subsequent charge on the mortgaged property. HAKIM SINGH *v.* GAJJA SINGH *Lah.* **288**

———*Construction—Lease*—Taluqdar *acknowledging perpetual occupancy rights—Use of expression* 'naslan bad naslan'—*Provision for payment of* malikana *dues to lessor and his heirs—Under-proprietary rights, if conferred on tenants.*

At the time of the first regular settlement, the plaintiff's ancestors were found to have no under-proprietary rights and they were granted, by the Settlement Commissioner in a suit claiming such rights, merely a decree for tenancy rights for life. At the second regular settlement, the *taluqdar* granted a fresh lease in which it was mentioned that he acknowledged their "occupancy right, which was for life, to be perpetual." The plaintiff's ancestors were to pay Government Revenue and *sewai* and *malikana* dues to the *taluqdar* and his heirs. He ended by saying that he executes a "perpetual lease" in favour of the persons mentioned and stated that "it behoves the lessees to remain in possession and occupation generation after generation '*naslan bad naslan*' according to the conditions of this lease and pay rent to the estate and always remain obedient and loyal to the estate:"

Held, that there were no words which would indicate any clear intention for conferring a proprietary interest or a transferable interest, that the expression '*naslan bad naslan*' was not conclusive on the point and that the mere fact that the lease was granted to the lessees and their heirs did not go

Deed—concld.

further than showing that heritable rights were conferred;

Held, also that though the word "*malikana*" is not generally applied to the rent paid by an occupancy tenant but the mere use of this word is not sufficient to show that there was any intention of conferring under-proprietary rights, and that the *taluqdar* merely wished to grant to the lessees heritable occupancy rights in place of the occupancy rights for life which had previously been conferred upon them by the settlement decree and that there was no indication of any intention of going beyond this and converting their occupancy rights into the rights of under-proprietors. HIRA LAL *v.* GAJRAJ KUER *Oudh* **909**

——Construction—Letters O. K on delivery orders—Effect. SEE Evidence Act, 1872, s. 115. **P.C. 1**

——*Construction—Mortgage—Held on interpretation, that Receiver appointed during pendency of mortgage suit held rents collected, as part of mortgage security—Transfer of Property Act (IV of 1882), s. 8.*

A mortgage deed provided that the property mentioned therein was mortgaged with "all appurtenances to the said premises belonging and all the estate, right, title, interest, property, claim and demand whatsoever of the mortgagors into and upon the said premises to hold the said premises unto the mortgagees subject to the proviso for redemption hereinafter contained:"

Held, that the mortgage was in the form of an English mortgage and that the mortgagee was entitled as a secured creditor of the mortgagor to the rents and profits of the land of which the Receiver was in possession.

Held, also that even if no reference had been made specifically to the transfer of "all the estate, right, title, interest, property, claim and demand whatsoever of the mortgagors into and upon the said premises" by reason of the provisions of s. 8, Transfer of Property Act, in the like manner the rents and profits arising out of the mortgaged land in the hands of the Receiver would form part of the mortgage which was created to secure re-payment of the loan. MA JOO TEAN *v.* COLLECTOR OF RANGOON *Rang.* **776**

Defamation. SEE Penal Code, 1860, s. 500 **638**

Divorce—*Desertion—Husband bringing concubine into family house—Wife leaving house—Husband, whether guilty of desertion.*

In order to constitute desertion, there must be a cessation of cohabitation but there is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation and does so by leaving his wife and that of a husband who with a like intent obliges his wife to separate from him.

Where the husband brought a concubine into the house where his wife was living with him and the wife had accordingly to leave the house:

Held, that the conduct of the husband amounted to desertion. RAI BARI STREE *v.* RASSINGA NAIK BISSINGH STREE *Mad* **553** **S.B.**

Easement—*Customary right of privacy—Infringement of—What plaintiff must show—Premises already overlooked—Opening of further apertures overlooking premises—Whether can be said to be not actionable*

To succeed in an action to restrain any interference with a right of privacy, a plaintiff must shew not only that such a right of privacy exists by custom in the district in which the premises are situated but also that he has in fact enjoyed such a

Easement—concld.

right and that it has been substantially or materially affected by the acts of the defendant.

It cannot be laid down as a rule that where premises are already overlooked, the opening of further apertures overlooking such premises cannot be actionable. Each case depends on its own peculiar facts. TIKA RAM JOSHI *v.* RAM LAL SAH *All.* **1056**

——*Prescription—Immemorial user—Court, whether can infer grant—Grant.*

It is open to the Court to infer a grant from immemorial user alone, when such user is open, as of right, and without interruption SHEIKH FAKIR *v.* MOSLEM MANDAL *Cal.* **719**

——*Prescription—Right of way—Mere discontinuance of user is not an interruption or abeyance of enjoyment even though such cessation occurs while right is being acquired.*

In order that a prescriptive right may be successfully claimed, the pathway must be enjoyed peaceably and openly as an easement without interruption for more than 20 years. The term interruption refers to an adverse obstruction and not a mere discontinuance of user. A person may be said to be in enjoyment of a right of way during a period of time, though he does not use the way every moment. Cessation of user is not an invariable indication of the abeyance of enjoyment of a right, that is, it is not inconsistent with the continuance of the enjoyment of the right.

Cessation of user for a time while the right is being acquired does not stand on a different basis from cessation when the right has already been acquired by 20 years' enjoyment. JOGESH CHANDRA ROY *v.* SAGHOHHANDA *Cal* **833**

——*Profit a pendre—Presumption—Defendant neither tenant nor licensee—Defendant cutting trees - Proprietor's right to price of timber cut—Limitation Act (IX of 1908), ss. 2, 26.*

There cannot be any presumption in the case of an easement that what was the state of facts twenty or thirty years ago has continued since. The law provides that an easement is established only when it is shown that there has been a continuous enjoyment.

The plaintiff was admittedly the proprietor of the land upon which certain bamboo clumps stood. The defendant admittedly was not the tenant nor was there any relationship between him and the plaintiff. The plaintiff came to the Court with a story that there was an agreement under which the defendant would pay the price of the timber cut, and, the defendant denied that he cut any trees during the years in question. The suit was dismissed on the ground that the defendant was in adverse possession for over twenty years:

Held, (1) that such an agreement, if any, naturally would take the nature of a license;

(2) that there could not be any custom strictly so called to appropriate the trees unless the defendant were a tenant. If there had been anything established in the nature of a custom to appropriate the timber, the defendant not being a tenant, it would not be a custom but would be in the nature of what is known in England as a profit *a pendre*;

(3) that there was an easement, and hence a right to trees was not established by the defendant and the fact that the plaintiff made some sort of admission by saying that he was entitled to take the leaves and branches but not the timber did not assist the defendant. JANGBAHADUR SINGH *v.* THITHAR SINGH *Pat.* **966**

Easements Act (V of 1882)—*Applicability in Bihar.*

The Easements Act does not apply to Bihar province, but the law relating to easements which is the law of justice, equity and good conscience in this respect excepting in so far as there is any statute applicable. JANGBAHADUR SINGH *v* THITHAR SINGH *Pat.* **966**

———**s. 18**—*Right of privacy—Whether a question of fact.*

Whether such a custom as a right of privacy exists and the nature and limits of such a custom, if it does exist, are questions of fact and the findings of the lower Appellate Court, if based on admissible and relevant evidence are conclusive. TIKA RAM JOSHI *v* RAM LAL SAH *All.* **1056**

Elections—Election manifesto slandering judiciary —Contempt of Court. SEE Contempt **33**

Electricity Act (IX of 1910), ss. 39, 50—*Theft of Electric energy—Prosecution not instituted by Government Electric Inspector but by Executive Officer of Cantonment Board — Quashing of prosecution.*

Prosecution for the theft of electric energy can be instituted only by one of the persons mentioned in s. 50 of the Electricity Act. A prosecution not instituted at the instance of the Government or an Electric Inspector, but by the Executive Officer of the Cantonment Board who had no authority from the Board to institute proceedings, should be quashed. DINA NATH *v.* EMPEROR *Lah.* **421** (*a*)

Equity—*Applicability to question of legal rights.*

Where it is a question of legal rights, there is no scope for the application of equitable principles. APTABUDDIN KHAN *v.* JOHAR ALI KAZI *Cal.* **75**

———*When to be invoked—Considerations.*

If equity is to be invoked it should be only in favour of persons shown to have acted disinterestedly and in good faith with no intention of securing any unfair advantage for themselves. BABAN MISRA *v.* BISHWANATH PANDE *Pat.* **870**

Estoppel.

SEE Bombay Hereditary Offices Act, 1874, s. 15 **763**

SEE Civil Procedure Code, 1908, s. 11 **723**

SEE Evidence Act, 1872, s. 116 **249** (*b*)

———*Estoppel by representation — What constitutes—Held, no estoppel arose—Evidence Act (I of* 1872), *s.* 115.

For an estoppel by representation to come into operation, there must be a deception which has led the person claiming the estoppel to entertain a false belief about a question of fact and which has also led him on the faith of that belief to change his legal position. Where the parties in the suit were also parties to the deed of sale and it has been held as a fact that the deed of sale was evidence of a transaction by which the parties intended to transfer certain other property but not the property in suit as the respondent was a party to that transaction, it cannot be said that he had been deceived about its true nature by the subsequent conduct of the other party. MUHAMMAD MUSA *v.* QASIM HUSAIN *All.* **1063**

———*Execution—Decree-holder getting symbolical possession—No objection—Subsequent application for execution for actual possession—Competency.*

Where in execution of a decree, the decree-holder gets possession and there is no objection, a second application for execution of same decree on the ground that in the former application the decree-holder has obtained only symbolical possession, is not competent. RADHANATH DAS *v.* SADHAN CHANDRA DEY *Cal.* **725**

———*Principle underlying the rule—Representation —Absence of representation by one person to make another believe in certain facts—Estoppel, if operates —Evidence Act (I of* 1872), *s.* 115.

The principle upon which the rule of estoppel rests is that it would be most inequitable and unjust if a person by a representation made or by conduct amounting to a representation has induced another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it. Where there has been no representation on the part of the defendants to make the plaintiff believe that she was really the owner of a 14 annas share in the property in dispute, there can be no estoppel against them when they show clearly that the plaintiff is in law entitled only to an 8 annas share in the property left by her father and not to the 14 annas share in that property. RAJANA *v.* MUSAHEB ALI *Oudh* **23**

Evidence—*Admission—Previous statement by party when can be legal evidence.*

A previous statement made by a party cannot be made legal evidence in the case and used against him as an admission by merely filing an attested copy of that statement, without putting it to the party concerned. SECRETARY OF STATE *v.* AKBAR SHAH *Lah.* **819**

———*Death Register—Statement in, if evidence of religion of parties.*

It is safe to rely upon statements in death registers only with reference to the fact of death and the date of death. As for the description therein of the religion of the deceased, it is doubtful if that statement is admissible, as the statement is not made by him and the statement made by some unknown person as to his religion can carry very little weight. GURUSAMI NADAR *v.* IRULAPPA KONAR *Mad.* **708**

———*Expert evidence — Finger-print expert—Evidence of—Value.*

The evidence of handwriting experts has often been found to be faulty but so far as finger-prints are concerned, it has never so far been found that two finger-prints can be identical in all respects. Consequently the evidence of finger-print experts is entitled to much weight. GANGA SAHAI BHAGMAL *v.* MOLAR *Lah.* **799**

Evidence Act (I of 1872), ss. 8, 27—*Joint acts of several persons sought to be proved in order to ask Court to draw inference from such conduct —Nature of evidence necessary.*

Where joint acts of several persons are sought to be proved in order to ask the Court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the Court to draw the necessary inference from the conduct of each one of the persons concerned in the act. The principle applies not only to evidence relevant under s. 27 but also to that under s. 8, Evidence Act. RAFIQUEUDDIN AHMAD *v.* EMPEROR *Cal.* **687 F.B.**

———**s. 10.** SEE Evidence Act, 1872, s. 32 (3) **261**

———**s. 13.** SEE Custom (Punjab) **212**

———**s. 13**—*Judgment not inter partes but evidencing possession—Relevancy.*

Where a judgment is not *inter partes* it may be used under s. 13, Evidence Act, as instances when the possession of a party is challenged and found to be correct. SHER BAHADUR SINGH *v.* MADHO PRASAD SINGH *Oudh* **1087**

——s. 25—*Confession to village* mukhia—*Admissibility.*

A village *mukhia* is not a Police Officer for the purpose of s. 25 of the Evidence Act. RAM CHARAN *v.* EMPEROR *All.* 119

——s. 27—*Statement of accused in the nature of a confession — Admissibility of—Conduct of accused, if can be taken into account against him.*

Although the statement made by the accused to the Police is not barred under the provisions of s. 162, Criminal Procedure Code, it would not be admissible under s. 27 of the Evidence Act if it is held to be of the nature of a confession if no material fact was discovered in consequence of the information received. But the conduct of the accused can certainly be taken into account. MUHAMMAD *v.* EMPEROR *Lah.* 260

——s. 30. SEE Criminal Procedure Code, 1898, s, 162 258

——ss. 30, 114, Illus (b)—*Approver—Recovery of ordinary clothes with no special marks of identification—Whether sufficient corroboration—Ornament which can be identified recovered—Corroboration, if sufficient.*

The recovery of ordinary clothes which do not have any special marks capable of definite identification does not afford sufficient corroboration to the testimony of the approver and the accused should not be convicted on such meagre corroboration. But the recovery of an ornament which can be identified is sufficient corroboration. KARTARA *v.* EMPEROR *Lah.* 305

——ss. 32 (3), 10—*Charge under ss.* 420 *and* 120-*B, Penal Code (Act XLV of* 1860)—*Accused inducing Insurance Company to accept proposal by securing false medical report—Statement of doctor—Admissibility of, under ss.* 32 (3) *and* 10.

The accused was charged under ss. 420 and 120-B, Penal Code, for committing fraud on a Insurance Company by inducing the said Company to accept the proposal for insurance on the life of one *M* securing a false medical report about the said *M* and by suppressing and misrepresenting facts about him and his family history, to the said Company.

Held, that conceding that the confession of the doctor that the report was made out according to the instructions of the accused was not admissible in evidence under s. 32 (3), Evidence Act, there could be no doubt that the statement was admissible under s. 10 of the Act, seeing that other evidence in the case disclosed reasonable grounds for believing that there was a conspiracy, and that the doctor was a conspirator. KUNJALAL GHOSE *v.* EMPEROR *Cal.* 261

——ss. 32, 11, 13—*Statement of boundaries in documents of title between third parties—Admissibility in evidence.*

A statement of boundaries in a document of title between third persons who are dead at the time the statement is sought to be put in evidence is admissible in evidence under s. 32 (3) of the Evidence Act only when it is shown first, that at the time the statement was made, it was contrary to the interests of the maker, and, secondly, that at the time it is sought to be used it is a statement of a relevant fact. SONEY LALL JHA *v.* DARBDEO NARAIN SINGH *Pat.* 470 F. B.

——s. 34—*Day-book entered after four months—Rough notes not available—Ledger from such day-book — Whether a document kept in regular course of business.*

A day book, which has been entered after four months from the happening of an event and the rough notes of which are not available, is not a document which can be said to have been kept in the regular course of business. These remarks apply *a fortiori* to the ledger which is prepared from such a day book. ARJAN SINGH BHAJAN. SINGH *v.* FIRM SURJAN SINGH ACHARAJ SINGH *Pesh.* 1006

——s. 35—*Entry, meaning of—Opinion of public officer from allegations made before him in inquiry under s.* 202, *Criminal Procedure Code (Act V of* 1898), *or under O. XXVI, Civil Procedure Code (Act V of* 1908) *—Admissibility of.*

The words "an entry" in s. 35, Evidence Act, are not intended to apply to the opinions of public officers based on or inferences drawn from the allegations made before them in the course of inquiries conducted under s. 202, Criminal Procedure Code or under O. XXVI, Civil Procedure Code, but are confined only to such statements of facts in issue or relevant facts as are made by the public officers concerned, in the course of their official duty and are required to be entered in any book, register or record intended for the purpose. This section is apparently an exception. Such opinions cannot be considered sufficient to prove the truth of the assertions made therein without the test of cross-examination. GHANAYA *v.* MEHTAB *Lah.* 1040

——s. 41—*Final order in earlier insolvency proceedings—Judgment in rem—Whether can be disturbed by subsequent applications.*

Under s. 41, Evidence Act, a final judgment, order or decree of a competent Court in insolvency proceedings has the effect of a judgment *in rem* and cannot be disturbed by subsequent applications even if not between the same parties. BANSI RAM *v.* FIRM ANANDI RAM MOHAN *Pat.* 734

——s. 44—*If has application to proceedings under Civil Procedure Code, s.* 73.

Per *Jack, J.*—Section 44, Evidence Act, has no application to proceedings under s. 73, Civil Procedure Code. It is only decrees under ss. 40, 41 and 42, Evidence Act which are referred to in s. 44, Evidence Act and such decrees have no application in execution proceedings. BISWAMBAR BISWAS *v.* APARNA CHARAN MOHARY *Cal.* 480 F. B.

——s. 45—*Expert evidence—Document typed on same machine as another document—Admissibility of evidence.*

The opinion of an expert that one document has been type-written on the same machine as another document is not admissible under s. 45, Evidence Act. The Court may ask the witness points in favour of the view whether the two documents have or have not been type-written on the same machine, but must come to its own conclusion and not treat such assistance as an expert opinion, a relevant fact in itself. BACHCHA BABU *v.* EMPEROR *All.* 369

——s. 58. SEE Evidence Act, 1872, s. 114, ill. (e) 450

——s. 90—*Document written by licensed stamp-vendor* 55 *years ago—Benefit of s.* 90.

Where a document itself is written 55 years ago by a licensed stamp-vendor and comes out from proper custody, the benefit of s. 90, Evidence Act, can be claimed. KARTAR SINGH *v.* MEHR NISHAN *Lah.* 1064

——s. 97—*One part of deed indicating that whole grove is sold—Another part indicating that only part is sold—Evidence to prove what was meant to be conveyed—Admissibility.*

Where the language of a deed, so far as the boundaries are concerned is indicative of the fact alleged by one party, namely that the whole of a grove was sold, and another part of the deed, referring to the number and area, is indicative of the fact alleged by the other party, that part only of the grove

Evidence Act—contd.

was sold, under s 97, Evidence Act, evidence is admissible to show whether it was meant that the deed should convey the whole of the grove or only part of it. BANAPHAL SINGH *v.* NOOR MOHAMMAD *All.* **634**

———s. 110—*S.* 110, *if applicable to case where Government is party—Berar Land Revenue, Code* 1896, *s.* 41 (1).

The provisions of s 110 of the Evidence Act are equally applicable in a case to which the Government is a party and s. 41 (1) of the Berar Land Revenue Code is not meant to lay down a rule regarding the burden of proof at variance with the provisions of s. 110 of the Evidence Act, it is open for the defendant to rely on the provisions of s. 41 (1) of the Berar Land Revenue Code in proving his title to the land in dispute by showing, in the first instance, that it formed part of a public road within the last 60 years and it will then be for the plaintiff to show either that his title was founded on a lost grant or that he had acquired a title by adverse possession for over 60 years. GOVIND RUPCHAND PATIL *v.* SECRETARY OF STATE *Nag.* **264**

———s. 114, Illus. (b).

SEE Approver **369**

SEE Evidence Act, 1872, s. 30 **305**

———s. 114, Illus. (b)—*Corroboration of statement of accomplice—Nature of—Circumstantial evidence—Sufficiency of.*

It is a well established rule of practice to require corroboration of the statement of an accomplice connecting the accused person with the crime; but corroboration is not required in all details. Even slight corroboration is sufficient for the purposes of this rule, if the Court is satisfied thereby about the genuineness of the accomplice's story, so far as it implicates the accused person. To insist on corroboration of the story in every detail, would practically mean requiring independent proof which will do away with the necessity of relying on the testimony of the accomplice at all The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But evidence in corroboration must be independent. HARI RAM *v.* EMPEROR *Lah.* **197**

———ss. 114, Ill. (e), 58—*Documents filed in Court, whether can be presumed to be documents referred to in order of sanction by Governor-General in absence of* prima facie *indication that they are annexures to order of sanction—Identity must be proved.*

The Court should not presume that the documents referred to in the order of sanction by the Governor-General were documents in question and that they were only forwarded by the Governor-General and reached the complainant through the usual channel, unless there be any indication on the face of the questioned documents to show that they were the annexures to the order of sanction. In the absence of any such indication it would be a violent presumption to raise that these were the documents mentioned in the order sanctioning prosecution. DIWAN SINGH *v.* EMPEROR *Nag.* **450**

———ss. 114, 133—*Statement of approver uncorroborated and unconvincing—Benefit of doubt to accused.*

Where there is no material corroboration of the statement of the approver and the statement in itself is not convincing, it is most unsafe to convict the accused on that statement and he should be given the benefit of the doubt. GUJAR SINGH *v.* EMPEROR. *Lah.* **149**

Evidence Act—contd.

——s. 115. SEE Estoppel **23, 1063**

———s. 115—*Estoppel—Conditions for operation of the rule—Estoppel and waiver—Distinction—Estoppel by waiver, if possible — Statement to ground estoppel must be clear and unambiguous—Letters "O. K" on delivery orders and bills—Construction—Whether operate as estoppel.*

Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf, (*b*) with the intention that the plaintiff should act upon the faith of the statement, and (*c*) the plaintiff does act upon the faith of the statement. On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement on behalf of his principal, agrees to waive his principal's rights, then (subject to any other question such as consideration) the principal will be bound, but he will be bound by contract, not by estoppel. There is no such thing as estoppel by waiver.

Held, that the letters O. K. on certain delivery orders and bills meant that the details contained in those documents were correctly given and that the statement being one which the maker was entitled to make, it bound his principal; but as it was not a representation that in fact the goods covered from the documents were free of all encumbrances, it could not ground an estoppel so as to prevent the principals from asserting and proving their rights as encumbrancers.

A statement to ground an estoppel must be clear and unambiguous. DAWSONS BANK, LIMITED *v.* NIPPON MENKWA KABUSHIKI KAISHA JAPAN COTTON TRADING COMPANY, LIMITED **P. C. 1**

———s 115—*Estoppel — Infringement of right allowed on previous occasion—Whether bar to asserting it later on.*

Plaintiff is not estopped from asserting his legal rights at any time on the ground that he himself permitted its infringement on some previous occasion. MUNICIPAL COMMITTEE, MULTAN *v.* ABDUL GHAFUR *Lah.* **951**

———s. 115—*Plaintiff deliberately accepting through his general agent liability to pay under-proprietary rent—Whether can seek for declaration that it is to be paid by others—U. P. Land Revenue Act (III of* 1901), *s.* 79—*Under-proprietary rent fixed by Assistant Settlement Officer—Oudh Rent Act (XXII of* 1886), *s.* 107—*Whether applies.*

Where a person has, through his general agent, deliberately accepted before the Assistant Settlement Officer the liability to pay the under-proprietary rent of a holding, he cannot subsequently resile from that position and seek for a declaration to the effect that other persons are liable to pay the under-proprietary rent. And where the under-proprietary rent was fixed by the Assistant Settlement Officer under s. 79 of the Land Revenue Act, and the provisions of s. 107 of the Oudh Rent Act relating to remission of *muafi* or rent-free grants have no applicability whatsoever. MANZOOR HUSAIN *v.* DAWAR ALI *Oudh* **295**

——s. 116—*Landlord and tenant—Estoppel—*

Evidence Act—concld.

Tenant, if should be put in actual possession for operation of estoppel—Tenant, when can deny landlord's title—Tenant in possession under kabuliyat—Suit for rent—Landlord's title, if can be denied on ground of benami.

For the purposes of s. 116 of the Evidence Act, it is not necessary that the tenant should have been actually put into possession by the landlord. It is sufficient if, being already in possession, he passes a rent-note to the landlord acknowledging that a new tenancy has arisen.

A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. A tenant who wishes to dispute his landlord's title must not only see that the tenancy has come to an end, but that the possession which was in him as a tenant has been surrendered. A tenant who holds over and remains in possession cannot be allowed to use that possession as a lever to support a case in which he denies the landlord's title.

A person executing a *kabuliyat* and obtaining possession of lands as tenant under the *kabuliyat* is estopped from denying the title or seisin of the grantor in a suit for rent on the ground that he is only the *benamidar* of some other person. KRISHNARAO RAGHUNATH YARDI *v.* GHAMON GHAMA *Bom.* **249** (*b*)

———**s. 133.** SEE Evidence Act, 1872, *s.* 114 **149**

———**s. 145**—Statement made to Police in course of investigation—Use of. SEE Criminal Procedure Code, 1898, *s.* 162 **66**

———**s. 167**—*Improper admission of evidence—Whether ground of itself for reversing decision.*

Under s. 167 of the Evidence Act, the improper admission of evidence is not a ground of itself for reversing any decision if it appears to the Court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. SONBY LALL JHA *v.* DARBDEO NARAIN SINGH *Pat.* **470** F. B.

Exchange—*Plaintiff employed in Turkey—Salary in terms of Turkish pounds—Plaintiff transferred to Bank's branch in Cyprus—Salary paid in accordance with currency of Cyprus—Retirement—Pension, in what currency payable—Rate of exchange prevalent as each instalment falls due—Whether should be adopted.*

The plaintiff was employed by the Ottoman Bank in 1905 and was taken on the pensionable staff thus being entitled on retirement to a pension on the basis of his salary in the year previous to his retirement. His salary was at the beginning expressed in terms which in the result made it payable in Turkish gold pounds. In 1915 paper currency was made legal tender in Turkey. The plaintiff was subsequently transferred to the Bank's branch in Cyprus and he retired in 1931 while in service there. In Cyprus his salary was paid in Cyprus pounds at the exchange rate of 100 Cyprus pounds to 110 Turkish pounds. Subsequently the Cyprus currency depreciated in terms of gold. The question was whether on retirement, the plaintiff became entitled to a pension payable in Turkish gold pounds translated into Cyprus currency at the exchange of the day:

Held, that his pension was to be calculated on the basis of Turkish gold pounds and he was entitled to a monthly pension in Cyprus currency of a sum equivalent to the amount of Turkish gold pounds to which he would be entitled and that the Cyprus currency was to be calculated in accordance with the rate prevailing at the date when each instalment of pension became due. OTTOMAN BANK, NICOSIA *v.* DASCALOPOULOS **P. C. 108**

Exchange—concld.

Execution. SEE Civil Procedure Code, 1908, s. 11. **723**

———*Certificate sale—Re-conveyance of what is sold—Effect.*

Nothing is sold in execution of a certificate sale except the right, title and interest of the judgment-debtor. When what is sold is reconveyed to the judgment-debtors, they regain what is lost to them on account of the certificate sale. DULHIN PARBATI KUER *v.* BAIJNATH PRASAD NARAIN SINGH *Pat.* **213**

———*Decree for costs of trial Court vacated by High Court—Dismissal of appeal to Privy Council—Execution of Privy Council decree for costs—Judgment-debtor, if can set-off costs realized by decree-holder in trial Court.*

Where the High Court vacates a decree for costs passed by the trial Court and the appeal to the Privy Council is dismissed with costs, the judgment-debtor is entitled, in execution of the decree for costs of the Privy Council, to set-off the costs realized before three years by the decree-holder in execution of the trial Court's decree. KRISHNA CHANDRA BHOUMICK *v.* PABNA DHANABHANDAR CO. LTD. *Cal.* **991**

———*Decree for* khas *possession of certain plot—Whether can be changed in execution.*

Where a decree is given for *khas* possession of a certain plot, it cannot be changed at the time of execution. RADHANATH DAS *v.* SADHAN CHANDRA DEY *Cal.* **725**

———*Execution Court, when can refuse to execute decree—Decree a nullity—Whether sufficient ground—Decree in terms of compromise against persons, proceedings against whom were ex parte—Question of want of jurisdiction or of decree being nullity if arises.*

An execution Court can refuse to execute a decree, on the ground of its being a nullity in the sense of its not being a decree at all in the eye of law either for want of inherent jurisdiction to pass it or for any other reason.

M, *B* and *T* executed a mortgage deed in favour of *S*. Subsequently *B* alone executed a deed of further charge in favour of *S* who brought a suit for sale on the mortgage and the deed of further charge and impleaded *V*, *J* and *C* as subsequent mortgagees. The parties entered into a compromise and a preliminary decree for sale was passed in terms of it. *S* then made an application for a final decree for sale against the six defendants. Though all defendants were served, *B* alone appeared and as no objection was raised by him, a final decree was passed. Subsequently, *V* made an application to have the final decree set aside as he had not been served with notice of the application for final decree being passed. Notice of this application was issued to the decree-holder alone, but when the application came up for disposal, two of the other judgment-debtors, *C* and *J* also appeared besides the applicant and the decree-holder. The Judge was wrongly informed that the other judgment-debtors had been served, although as a matter of fact no notice had been sent to them. He, therefore, made a note in the proceedings that the other judgment-debtors were absent, though served, and proceeded *ex parte* against them. The application was granted and the final decree set aside. The same day, February 22, 1930, the plaintiff *S* and the three defendants who were present filed a fresh compromise, in which some variation was made as regards the order in which some portions of the mortgaged property were

Execution—contd.

to be sold according to the terms of the first compromise. A final decree for sale was prepared in terms of the new compromise. Then *S* made an application for execution of the last-mentioned decree against all the judgment-debtors. Two of the mortgagors, objected to the execution on the ground that they were not bound by the decree as they were not parties to it:

Held, that the final decree passed on February 22, 1930, was not a nullity as against *M*, *B* and *T*, as the case was not one of the Court passing a decree against the mortgagors on the basis of a compromise to which they were not parties but merely one of a decree being passed in terms of the compromise against persons, proceedings against whom were *ex parte*. The defect was no more than one of an irregular exercise or improper assumption of jurisdiction. The mortgagors might have their remedy by means of proper proceedings against the irregularity complained of, but they could not in the circumstances treat the decree as a nullity. SHEO BEHARI LAL *v.* MAKRAND SINGH *Oudh* **759** F. B.

———*Notice—Non-appearance of judgment-debtor —Order to execute — Whether operates as* res judicata *by implication*—Res judicata.

When after notice has been issued the judgment-debtor does not appear and does not file objections, the Court is not called upon to make any further investigation into the matter, but it is its duty to order the decree to be executed. The order has to be passed automatically and there is no occasion for the Court to exercise its judgment as to the merits of any possible objection that might have been raised if the judgment-debtor had appeared. In such circumstances it is difficult to say that when the Court has no discretion in the matter, its order directing the decree to be executed is an adjudication of the dispute between the parties which operates as *res judicata* by implication. OFFICIAL RECEIVER, ALIGARH *v.* HIRA LAL *All.* **673**

———*Decree in* benamidar's *name—Real owner's right to execute—Right of real owner's creditor to attach decree.*

Where a decree has been passed in favour of a person, it is not open to another person to apply for execution of that decree on the ground that he is the real owner of the decree and the nominal decree-holder is only a *benamidar* for him.

But the fact that the real owner could not execute a decree passed in his *benamidar's* name does not mean that he has no property in the decree. Therefore a person who has obtained a decree against the real owner of another decree is entitled to attach the latter decree even though it stands in the name of the *benamidar*, and a decree declaring his right attached may be made. ASSAN *v.* MOIDIN KUTTI *Mad.* **284**

———*Restitution in favour of judgment-debtor —Surety failing to pay back certain amount—Suit finally decided in favour of decree-holder—Credit to judgment-debtor to the extent of lost amount*

In execution proceedings the judgment-debtors had paid the full decretal amount to the decree-holder and when restitution thereof was directed owing to the decree having been set aside, they recovered a certain amount by sale of the *sarai* belonging to one of the sureties of the decree-holder, but he was subsequently deprived of that *sarai* on the ground that the surety had no interest in it. In the meantime the suit was remanded and finally decided in favour for the decree-holder. In the final execution proceedings, the judgment-debtor claimed credit for this lost amount:

Held, that whatever might be the equities between the surety and the decree-holder or the judgment-debtor, the judgment-debtor having paid the full decretal amount to the decree-holder originally must be deemed to have failed to recover it in the restitution proceedings to the extent of the lost amount. The decree-holder, therefore, must give credit for this amount to the judgment-debtor. PANNA LAL *v.* BASANTA MAL *Lah.* **1011**

———*Restoration petition on dismissal—On dismissal of restoration application, appeal from order discharging surety—Extension of time spent in application for restoration, if to be allowed—Limitation Act (IX of 1908), s. 5.*

Upon the dismissal of the application to restore the execution petition, the decree-holder is not entitled to extension of time for an appeal from the order discharging the surety, in respect of the time spent in the application for restoration. Such a application cannot be considered to be proper alternative remedy for getting the order of discharge of surety set aside, as the liability of the surety is not automatically revived on the restoration of the application. KASHMIRI LAL *v.* CHUNI LAL *Lah.* **503**

———*Sale—Adjournment of sale on giving up objections to sale proclamation—Estoppel of judgment-debtor against raising those objections again.*

Where the properties of a judgment-debtor are proclaimed for sale and he gets an adjournment of the sale by giving up his objections to the sale proclamation, he is estopped from raising those objections again. POTTA REDDI *v.* KARUPPA GOUNDAN *Mad.* **1013**

———*Sale—Guarantee of title, if given—Auction-purchaser's remedy when wrong property is sold.*

An auction-sale carries no guarantee of title and no guarantee of any other kind and if the auction purchaser purchases rights which have been included in the sale improperly, he must restore possession and must pursue such remedies as the law allows him against those persons who are to blame for it. KABUTRI *v.* RAM PRASHAD SAHU *Pat.* **225**

Executor—*Probate, grant of—If a condition precedent to file suit.*

The grant of a probate is not a condition precedent to the institution of the suit by the executor. He has a right to institute the suit as executor before he obtains the probate. Whether as executor he would be entitled to recover the decree or to maintain the same passed by the Court without producing the probate is an entirely different matter, he will be entitled to get a decree, if he produces the probate before the passing of the final decree. PRABHATNATH DAS *v.* RAMENDRA KUMAR SHAHA *Cal.* **64**

———*Wilful default—Onus—Nature of proof—Investing money in unauthorised investment—Liability for loss—Executrices to be paid out of property of deceased monthly in lieu of services—Payment, if gratuitous or debt.*

The burden of proof of wilful default in respect of something which the executors could have received, but for their wilful default or neglect, is in the first place, always on the party who alleges the default. It is for that party not merely to give proof of such default, but to prove clearly and affirmatively at least one act of wilful default to the satisfaction of the Court before the Court can make a reference for take accounts on that footing. It must also be shown that the estate has suffered loss or damage, and that such loss or damage is due to

Executor—concld.

circumstances of wilful neglect or default on the part of the executrices.

Any executor who invests the moneys belonging to the estate in an unauthorised or hazardous investment is liable for the loss arising therefrom, however prudent such an investment of his own money he might think it to be.

Where under the will each of the two executrices was to be paid out of the property of the deceased Rs. 400 per mensem in lieu of their services, as long as the property is administered, after the death of the deceased ;

Held, that the payment was a sort of commission payable to the executrices by way of remuneration. It was a gratuitous bequest and not a debt. This, however, was not a gift out of the future income of the estate, for the testator had clearly provided that the remuneration must be paid out of his property, meaning out of the corpus of the estate, and was therefore, not a gift *in futuro*. MAHOMED HUSSAIN HAJI GULAM MAHOMED AJAM *v.* AISHABAI *Bom.* **334**

Extradition Act (XV of 1903), ss. 7, 9, 10—*Surrender of fugitive criminals—Warrant, necessity of.*

When a warrant has been received in respect of an extradition offence the procedure should be as under s. 7, Extradition Act. When a requisition is received in respect of any offence the procedure should be as under s. 9, Extradition Act. But when neither a warrant nor a requisition has been received, the Magistrate is empowered to issue a warrant as under s. 10, Extradition Act. It is an essential ingredient of this procedure that there should be a warrant. SANTABIR LAMA *v.* EMPEROR *Cal.* **537**

———s. 23—*S. 23, applicability of—Criminal Procedure Code (Act V of 1898), s. 54 (7).*

Section 23, Extradition Act, refers to the case of persons arrested under s. 54 clause seventh of the Code of Criminal Procedure, that is to say, when a person has been arrested not only without a warrant but also without an order from a Magistrate. Section 54, Criminal Procedure Code, is intended to cover those cases where the Police Officer acts on his own responsibility, that is to say, on suspicion or information as based on facts which the Police Officer has considered for himself. On the other hand where the arrest is made in pursuance of an order of a Magistrate it is that order which must determine the legality or otherwise of the arrest. SANTABIR LAMA *v.* EMPEROR *Cal.* **537**

———s. 23—*Construction should be in favour of subject.*

The provisions of the Extradition Act are meant to ensure that the arrest and the detention of persons, who are alleged to have committed an offence outside British territory, should be in accordance with a certain procedure, and the sections of the Act with reference to that procedure should be construed strictly in favour of the subject. SANTABIR LAMA *v.* EMPEROR *Cal.* **537**

Fatal Accidents Act (XIII of 1855)—*Fatal accident—Suit by heirs—Assessment of damages—Guiding principles.*

Although the Fatal Accidents Act, 1855, gives a right of action to the legal representatives of a person killed by an accident, only such damages can be awarded as can be shown to have been suffered financially by those bringing the suit. Sentimental damages cannot be awarded nor can damages be awarded merely for the loss of a son, daughter, wife, or husband, unless actual financial damages have been suffered or there was at the time of the accident a prospective pecuniary advantage which was lost by reason of the fatal injury caused to the person in respect of whose death the suit is filed.

Where a boy aged 12 years who was earning Rs. 6 a month was killed by an accident and in a suit for damages filed by his old mother, Rs. 600 were awarded as damages by the trial Judge:

Held, that the award was not excessive. DAVI SINGH *v.* MANGATHAYAMMAL *Mad.* **307**

Fraud. SEE Contract Act, 1872, s. 65 **1017**

———*Charge of—Substitution of fraud different from one alleged—Whether can be allowed.*

A charge of fraud must be substantially proved as laid, and when one kind of fraud has been charged, another kind of fraud cannot, on failure of proof, be substituted for it. A party cannot set up a fraud to which he has himself been a party in order to defeat the opposite party's claim. KRISHNARAO RAGHUNATH YARDI *v.* GHAMON GHAMA *Bom.* **249** (*b*)

———*Civil Procedure Code (Act V of 1908), O. VI, r. 4—Party pleading fraud or misrepresentation—Onus.*

A party who relies on plea of fraud or misrepresentation, must establish these charges. NAN KEE *v.* AH FONG *Rang.* **890**

———*Joint fraud by plaintiff and defendant—Court finding they were acting together to perpetrate fraud and there is no difference in degree of guilt—Court should not assist either party—Relief sought on basis of transaction—Defence of fraudulent nature of transaction—Maxim*—In pari delicto potior est conditio possidentis *and* nemo allegans turpitudinem—*Applicability—Transaction entered into by plaintiff's predecessor—Plaintiff, if can enforce transaction.*

Where a plaintiff is relying upon a deed, the defendant is entitled to give evidence of the circumstances under which the document came into existence and when these circumstances include an allegation of a joint fraud by both plaintiff and defendant the particulars of that fraud must be pleaded ; and it is then the duty of the Court to look into the matter, and if the Court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud and did in fact perpetrate the fraud, and that there is no difference in the degree of the guilt of the plaintiff and that of the defendant, the duty of the Court is not to assist either party.

Where the plaintiff is not seeking to avoid a certain transaction but wants relief on the basis of the transaction and alleges that there is a document of transfer in his or his predecessor's favour and possession has not been delivered to him on the basis of the document, possession may so be delivered and if the defendant pleads that the transaction should not be given effect to on the ground that the transaction was brought about in order to perpetrate a fraud on creditors the defendant should not be heard on the maxim *nemo allegans turpitudinem*, then the principle that is applicable is the principle contained in the maxim *in pari delicto*. The defendant will be permitted to state that the document is not supported by consideration and the document was executed in order to defraud another person and on proof of the defendant's averments if it is found that the plaintiff and the defendants were *in pari delicto* the Court shall stay its hand and refuse its support to either confederate letting the estate lie where it falls.

Fraud—concld.

Where the plaintiff is seeking to enforce a transaction which is not supported by consideration and whose object the Court perfectly well knows to have been a fraudulent one, he should not be allowed to do so even if the party to the transaction was not he but his predecessor-in-interest. NAWAB SINGH *v.* DALJIT SINGH *All.* 928

——— *Sale, when can be impugned on ground of fraud.*

In order that a sale may be impugned on the ground of fraud, knowledge on the part of the purchaser or reasonable notice to him, should be established as a fact. RAJBALLABH MISIR *v.* BISHUN PRASAD SINGH *Pat.* 81

General Clauses Act (X of 1897). SEE Civil Procedure Code, 1908, O. XLVII, r. 1 668

——— **s. 3 (vii).** SEE Civil Procedure Code, 1908, s. 21 677

——— **s. 6**—Applicability of, to temporary statute. SEE Special Powers Ordinance, s. 17 447

——— **s. 26**—*Does not act as a bar to trial or conviction but merely as bar to duplicate punishment.*

Section 26, General Clauses Act, does not act as a bar to trial or conviction but merely as a bar to duplicated punishment. Where the second trial results in a sentence of imprisonment or transportation, the provisions of s. 26, General Clauses Act, can be complied with merely by the direction that such imprisonment or transportation shall run concurrently with that imposed in the previous case ; in the case of a death sentence there can be no question of a concurrent sentence, for the sentence itself automatically cancels the previous sentence of imprisonment. ARSALA KHAN *v.* EMPEROR *Pesh.* 287

Gift—*Deed containing specific provision that all debts due from donors or charged on gifted property should be paid by donee—Donee, if a universal donee within s.* 128, *Transfer of Property Act (IV of* 1882)—*Non-specification of debts in deed—Whether material—Conditions, if contrary to Muhammadan Law—Muhammadan Law—Gift.*

Where a deed of gift itself contains a specific provision that all the debts which are due from the donors personally or which are charged upon the gifted property are to be paid by the donee and the donee in fact was expressly made liable for paying off all the debts of the donors and all the incumbrances upon the property, the donee must be held to be a universal donee. The fact that all the debts due from the donors were not specified in the deed of gift is immaterial. The conditions in the deed of gift making the universal donee liable to satisfy the debts of the donors are not void either for uncertainty or for being contrary to any rule of Muhammadan Law. KRISHNA BEHARI *v.* AHMADI *Oudh* 303

Government of India Act, 1915 (5 & 6 Geo. V, c. 61), s. 107—Interference with interlocutory orders. SEE Civil Procedure Code, 1908, s. 115 (*c*), O VI, r. 17 1109

Grant. SEE Easement 719

——— *Noabad land—Government, if can settle it with anyone—Government coming to wrong conclusion on question of possession—Settlement, if confers title only on grantee.*

The Government had the right to make settlement of Noabad lands with anybody it pleased. Although in making the settlment the fact of previous possession is taken into account, yet if the Sub-Deputy Collector had come to the wrong conculsion on the question of possession, still the settlement made would confer a right on the grantee alone in the land.

Grant—concld.

NISHI CHANDRA SEN *v.* ROMESH CHANDRA MAJUMDAR *Cal.* 72

Guardians and Wards Act (VIII of 1890), s. 7 (1). SEE Guardians and Wards Act, 1890, s. 47 (1) 65

——— **ss. 47 (1), 7 (1)**—*Interlocutory order—Held, that order was interlocutory order and that no appeal lay.*

Where the Court refused an application by a person for being appointed a guardian, but the proceedings were kept pending for further orders after consulting the Collector for the appointment of the Court of Wards or some other person as guardian :

Held, that the order dismissing the application was an interlocutory order and not final according to s. 47 (1) or s. 7 (1), Guardians and Wards Act and as such no appeal could be filed till a final order was passed. MIR ABI MAHAMMAD AHASAN *v.* ABU NASAR MOHAMMAD YUSUF ALI *Cal.* 65

Hindu Law—Adoption—*Widow's power to adopt —Whether depends on the question of vesting or divesting the estate—Natural son adopted in another family—Mother's right to adopt another son to continue the line.*

The power of a Hindu widow to adopt does not depend upon the question of vesting or divesting of the estate. The purpose of an adoption is to secure the continuance of the line, and when the natural son has left no son to continue the line, nor a widow to provide for its continuance by adoption, his mother can make a valid adoption to her deceased husband, although the estate is not vested in her. It is not correct to say that a widow cannot adopt a son to her deceased husband, if by so doing she would defeat an estate other than her own.

Where the natural son with his wife cease, to exist for the purpose of continuing the line in the natural family, as a result of their adoption into another family, his mother is entitled to make an adoption to secure that object. When the adoption so made has served the purpose, it cannot be impeached simply because it would defeat the estate which had vested in some other person. VIJAYSINGJI CHHATRASINGJI *v.* SHIVSANGJI BHIMSANGJI **P. C. 493**

——— *Bombay School—Widow having no authority to adopt from her deceased husband—Consent of his kinsmen, if should be obtained.*

In the Bombay Presidency a widow, who has no authority from her deceased husband, may adopt a son to him, and it is not necessary for her to obtain the consent of his kinsmen. It depends entirely upon her discretion whether she should or should not make an adoption, and her choice in the matter cannot be restricted. VIJAYSINGJI CHHATRASINGJI *v.* SHIVSANGJI BHIMSANGJI **P. C. 493**

——— **Alienation**—*Father—Proof of connection between immorality and antecedent debt—Necessity of.*

Under Hindu Law the sons must prove that the debts were incurred by the father for immoral purposes. A connection between the debt and the alleged immorality must be established. SOHAN LAL *v.* ISHAR SINGH *Lah.* 255

——— ——— *High rate of interest—Lender must prove necessity for it.*

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it would not be unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mort-

gage, that rate and those terms cannot stand. KAMTA PROSAD *v.* DURGA DAT AWASTHI *Pat.* 961

——— —Alienation *Legal necessity— Lender making enquiries—Unsubstantial part of consideration not applied for legal necessity — Legal necessity, if established.*

Where it has been established not only that enquiry was made by the lender that the money was actually required and was expended for the legal necessity but that the lender also made enquiries from the members of the family as regards an amount which formed an unsubstantial part of consideration although no enquiry was made from third persons, then under the circumstances legal necessity is established either on the ground that that amount forms an unsubstantial amount of the consideration or on the ground that enquiries were made of the only persons who could give the lender any information with regard to the matter.

Quære.—Whether in *Nazir Begam* v. *Rai Raghunath Singh*, 50 Ind Cas. 434 and *Ram Bujhawan Prasad Singh* v. *Nathuram*, 71 Ind. Cas. 933 their Lordships of the Privy Council intended to modify in any sense the principle enunciated in *Hanuman Prasad's case*, 6 M. I. A. 393. KAMTA PRASAD *v.* DURGA DAT AWASTHI *Pat.* 961

——— ——— Widow. SEE Custom (Punjab) 860

———Ancestral property — *Accumulations of income of ancestral property, if ancestral property.*

Accumulations of income of ancestral property purchased or acquired out of the income or with the assistance of ancestral property, the proceeds of sale of ancestral property, and property purchased out of such proceeds are ancestral property. RAM NATH *v.* CHIRANJI LAL *All.* 136 F. B.

———Conversion—*Hindu convert to Christianity —Marriage with a Christian lady—Husband and wife ceasing to live together as such—Reconversion of husband to Hinduism—Marriage with a convert to Hinduism—Validity of this marriage.*

A person who was a Hindu by birth became a Christian and married a Christian woman but subsequently he and his wife ceased to live as husband and wife. He then reconverted himself to Hinduism and married a woman who was a convert to Hinduism:

Held, that in view of the fact that no particular expiatory ceremonies were observed among the community to which the parties belonged and the absence of any particular ceremonies being prescribed for them by the *smriti* writers nor the performance of any *Homas* enjoined on them, it was necessary to look to the sense of the community and it was of particular significance that the community was prepared to receive him and the second wife as man and wife and their issue as legitimate. GURUSAMI NADAR *v.* IRULAPPA KONAR *Mad.* 708

——— Debt—*Antecedent debt; if should be independent of mortgage security—Debt small—Whether can burden the estate, if not for necessity.*

All the antecedent debts included in the mortgage in dispute must be held to constitute valid necessity. They need not be independent of mortgage security.

Where a debt is not for necessity though it forms only a small portion of consideration, the debt should not be allowed to burden the land in the absence of any proof as to necessity. SOHAN LAL *v.* ISHAR SINGH *Lah.* 255

——— ——— *Debts for joint family— Managers executing promissory notes in their own names— Suit on such notes—Other members impleaded —*

Allegation that debt was for benefit of joint family business — Held, that suit was not merely on promissory notes but also on original consideration.

The plaintiffs' case in substance was that though the managers of the joint family and the joint business executed the promissory notes in their own names, the loans were taken by the joint family through their managers for the purposes of the joint family and joint family business; it was not specifically stated in the plaint that the promissory notes were taken as securities for the loans advanced to the joint family:

Held, that it could not be said that the suits were simple suits for recovery of money on promissory notes only but were on the original consideration also. INDU BALA DASSI *v.* LAKSHMI NARAYAN GANGULY *Cal.* 1109

——— Family arrangement. SEE Transfer of Property Act, 1882, s. 10 699

——— Gift—*Possession, delivery of—Necessity of—Property capable of possession — Repudiation by donor soon after—Effect —Non-delivery, if makes gift invalid—Custom (Punjab)—Gift.*

Where the donor has done everything in his power to complete a gift, then the non-delivery of actual possession does not necessarily invalidate the gift, but where the property is capable of physical possession and the donor has repudiated the gift soon after the execution of the deed of gift, the non-delivery of actual possession makes the gift invalid.

Under Hindu Law a gift is not valid unless it is accompanied by delivery of possession of the subject of the gift from donor to the donee. Mere registration of a deed of gift is not equivalent to delivery of possession. It is not, therefore, sufficient to pass the title of the property from the donor to the donee. In cases where physical possession cannot be delivered owing to the nature of the property, it is enough to validate a gift if the donor has done all he could do to complete the gift so as to entitle the donee to obtain possession. DHANI RAM *v.* LEGHA *Lah.* 1068

——— Inheritance. SEE Hindu Law—Succession.

——— Joint family—*Alienation* — Mitakshara—*Undivided member, if can transfer his share—Alienation.*

A member of a joint Mitakshara family cannot make a transfer of his undivided share in the ancestral estate for his own benefit. MAHINDRA OJHA *v.* SITARAM OJHA *Pat.* 827

——— ——— *business—Adjudication of joint Hindu family as insolvent—Powers of Receiver.*

The right of a Hindu father to dispose of the joint Hindu family property in order to satisfy his own debts is properly within the meaning of s. 28 of the Provincial Insolvency Act and vests in the Receiver and the Receiver is entitled to seize the entire family property and transfer it in order to satisfy the debts of the father. It is not incumbent on such a Receiver to obtain an order of the Court to execute it and attach the family property. He can straightway seize the property and sell it under a private deed, it not being incumbent upon him to take out an attachment. In these circumstances the seizure of the property by the Receiver must be taken to be tantamount to attachment of the property by him so as to get his interest crystallised in preference to any creditor who subsequently attaches the same property. BHAGWAN DAS *v.* LAKSHMI CHAND *All.* 661

——— ——— *business — Mortgage debt contracted by father to finance new business—Sons, when liable—Manager of ancestral joint family*

Hindu Law—contd.

business—Power to borrow—Alienation, if binding on minorm embers—Test to decide if business is a new business.

Under Hindu Law where the business to finance which, money has been borrowed, is a new business, the sons are not liable for the payment of the loan contracted by the father for this business, unless the transaction was for the benefit of the family and to the benefit of the estate or it was supported by legal necessity. The question whether the particular transaction in dispute was for legal necessity or was for the benefit of the estate and the joint family, is something more than the mere question whether the money borrowed was required for the purposes of a new business. The fact that it was required for a new business would not be any justification. If in addition thereto, it could be shown that there was either a pressure of necessity to continue that business, as it was the mainstay of the family or that the particular transaction was at the time beneficial to the family and the family estate, the transaction would be supported but, of course, on the latter ground. The question whether the transaction was for such benefit or not is a question of fact depending on the circumstances of the case, and it is for the Court to decide whether it was so beneficial and was such as an ordinary prudent manager would have entered into in the interest of the family.

Per *Rachhpal Singh, J.*—A manager of an ancestral joint family trading business has full authority to take loans and make alienations to raise money for the purpose of that business. Such a transaction will be binding on the entire joint family including the minor members. The creditor is not bound to enquire into the finances of the business so long as the business forms the purpose of the debt. All that is necessary for him to see is that the money is really required for the purpose of the business and there is no element of speculation or gambling in the transaction.

The real test for deciding whether a business is a new business wholly unconnected with the joint family ancestral business, or is an extension of that business is to determine the source which supplied the money with which the new business was started. If the assets or income of the joint family ancestral funds are utilized for opening a new branch, then the new branch will form part of the old business. On the other hand, if the business is started by a manager without any aid from the ancestral family assets, then, it will be a new business. In that new business the other members will have no right nor will any liability attach to them in respect of it. But merely because a business has been extended it cannot be inferred that the extension was a new business started by the manager separately. RAM NATH *v.* CHIRANJI LAL *All* 136 F. B.

——**Joint family**—*Execution of promissory note by member—Decree against that member alone—Decree cannot be executed against shares of other members in joint family property—Binding nature of debt cannot be gone into in execution.*

Where a person in whose favour a member of a joint Hindu family has executed a promissory note, obtains a decree on the note against the executant alone without impleading the other members of the family as parties to the suit, he cannot execute the decree by attaching the shares of the other members of the family. The question of the binding character of the debt as against the other members of the family at any rate if they are not sons or descendants of the judgment-debtor cannot be gone into in execution proceedings. LAKSHMANA CHETTIAR *v.* MUTHU CHELLIA GOUNDAN *Mad.* 574

Hindu Law—contd.

——**Joint family**—*Firm in the names of father and son—Presumption that father is member of the firm—Onus of proving the contrary.*

The presumption, in case of a firm which is in the names of father and son, is that the father is a member of that firm and the burden of proving that he is not, lies on the person who asserts it. KALU SINGH-SUNDER SINGH *v.* RAM LAL *Lah.* 294

——————*Parties are tenants-in-common—No adverse possession unless there is ouster.*

Where the family is joint and there is no division the parties are tenants-in-common and there is no adverse possession of one co-tenant against another unless there is a clear ouster, in other words, demand and refusal. YESHVANT *v.* GOVIND *Bom.* 50

——————*Partition—Plaintiff's right to interest subsequent to suit — Difference between claim to interest on amount due to plaintiff and claim to share of interest received by family pending suit.*

In a suit for partition, the plaintiff is entitled to get his share of the income which has accrued due to the family by way of interest between the date of suit and the date of the decree. The claim for interest in such a case is not for interest on a sum found due by the defendants to the plaintiff but is for the plaintiff's share of the income of the family which income is derived in the shape of interest, and there is no principle of equity or justice in disallowing interest to the plaintiff in such a case. ANNAMALAI CHETTI *v.* PALANIAPPA CHETTIAR *Mad.* 151

——————*Self-acquired property—Burden of proving that it is thrown in common stock—Intention.*

The burden of proving that a member of a joint Hindu family threw his self-acquired property into the common stock lies on the person making the assertion, and this burden can only be discharged by proof of the fact that the owner of the property clearly expressed an intention to abandon his separate and exclusive rights in the property in favour of the members of the joint family. The intention may be expressed by words, or may be inferred by the manner in which the profits of the property were dealt with. GOVIND PRASAD *v.* SHANTI SWARUP *All.* 1106

——————*Suit based on adjustment of partnership accounts signed by father only—Sons, liability of.*

Under Hindu Law, in a suit based on an adjustment of a partnership where the father alone has signed the deed, the sons are not personally liable but their liability extends to the extent of their share in the joint family property. BULAQI DAS *v.* LAL CHAND *Lah.* 752

——————Suit by member against stranger transferee from manager—Stranger setting up title by adverse possession—Time run out against manager—Existence of minor members—Whether saves limitation. SEE Limitation Act, 1908, s. 7 569

——————*Transfer of one member's share to near relation for nominal consideration to save it from creditors—Whether constitutes separation—Right to share in outstandings realised by other members.*

Where a member of a joint Hindu family is induced to assign his share in the family property to a near relation (his father-in-law), for a nominal

consideration, the transfer being intended not to deprive him of his property, but to save it from his creditors, the transfer does not extinguish his interest in the estate and he does not cease to be a co-parcener in the joint property and he is entitled to a share in the outstandings, if any, realised by the other members on behalf of the family. RAMAKRISHNA AYYAR *v.* PARAMESWARA AYYAR P. C. 385

——— **Manager** *of joint Hindu family—Disclaimer, whether binding on members.*

A disclaimer by the manager of joint Hindu family which is effective as forfeiture, is binding on the other members in the absence of anything to suggest the contrary. RACHOTAPPA *v.* KONHER ANNARAO *Bom.* 516

——— **Minor.** SEE Minor 607

——— **Minority and Guardianship.** SEE Promissory note 581 F. B

——— **Mitakshara**—*Joint family—Guardian—Co-parcenary consisting of an adult and minor members—Only adult co-parcener, if can appoint guardian of co-parcenary property of minor.*

It is not competent to an only adult co-parcener of a Hindu Mitakshara family to appoint by will or otherwise, a trustee, guardian or manager of the co-parcenary property of a minor co-parcener during his minority. BRIJBHUKANDAS *v.* GHASHIRAM *Bom.* 12 F. B.

——— **Partition** *-Statement that transferor has a specific share—Whether constitutes separation*

Although from statements of separation in the deed of transfer itself an inference of fact may be drawn that there was a partition, yet simply a statement in the deed that the transferor has a specific share will not constitute separation as a matter of law.

It cannot be said that if an undivided member of a family transfers his share by will or *inter vivos*, the transfer is valid simply because he specifies the share. MAHINDRA OJHA *v.* SITARAM OJHA *Pat.* 827

——— *suit—Creditors are proper parties but decree for payment of their debts cannot be passed.*

Though creditors of a joint family are proper parties to a suit for partition of the joint family properties, there is no provision of law under which a decree could be passed in their favour for payment of their debts. MAHAGANAPATHI *v.* NATESA IYER *Mad.* 1002

——— *Witnesses not present at partition can testify as to the fact of separation.*

The mere fact that the witnesses were not present at the time of the partition of the family would not of itself be sufficient to disregard their evidence testifying to the partition entirely. The matter of separation may be and often is a question of reputation or notoriety. KAMTA PRASAD *v.* DURGA DAT AWASTHI *Pat.* 961

——— **Religious Endowment**—*Property passing from* Guru *to* Chela—*Presumption.*

The fact that properties passed always from *guru* to *chela* the exclusion of blood relations affords a strong presumption of a religious institution, the members of which renounce the world. NIHAL CHAND *v.* NARAIN DAS *Lah.* 620

——— ——— *Succession to* shebaitship—*Laying down rule different from line of Hindu inheritance is invalid.*

Rules laid down by the founder of a Hindu *debutter* for succession to the office of *shebait* are invalid, if they provide for the office to be held by some one among the heirs of the founder to the exclusion of others, in a succession differing from the line of Hindu inheritance. LAL BEHARY DHUR *v.*

ADMINISTRATOR-GENERAL, BENGAL *Cal.* 1071

——— **Religious Institution**—*Tests to determine if a religious institution is a public trust.*

A religious or monastic institution may be a public trust for religious or charitable purposes and the question whether it is so or not is to be determined by the evidence in regard to the usage and custom of the particular institution in respect of the duties and obligations attached to the office of the *mahant*. NIHAL CHAND *v.* NARAIN DAS *Lah.* 620

——— **Stridhan**—*Property purchased from income of property settled upon widow in lieu of maintenance—Whether* stridhana—*Right of alienation.*

Property purchased by a Hindu widow from the income of property settled upon her in lieu of her maintenance becomes her *stridhan* and she is competent to transfer it. RAM DAS *v.* RAM SEWAK TEWARI *Oudh* 781

——— **Succession**—*Wife, if* sapinda *of husband—Death of step-daughter—*Stridhana, *if devolves on step-mother.*

A wife, according to Hindu Law, is a *sapinda* of her husband, and hence on the death of the daughter when her *stridhan* property reverts to the next of kin, it devolves on the father's wife (step-mother) who is a *sapinda*. DULHIN PARBATI KUER *v.* BAIJNATH PRASAD NARAIN SINGH *Pat.* 213

——— ——— Samanodakas — *Relationship of* samanodakas, *whether extends beyond 14th degree.*

According to the Mitakshara school of the Hindu Law, *samanodakas* include only those agnates whose relationship to the deceased extends from the 8th to the 14th degree, and in the absence of any such agnate the estate devolves upon his *bandhus*. ATMARAM ABHIMANJI *v.* BAJIRAO JANRAO P. C. 330

——— **Texts**—*Interpretation—Conflict between text-writers and commentators—Latter must be accepted.*

In the event of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted. ATMARAM ABHIMANJI *v.* BAJIRAO JANRAO P. C. 330

——— **Widow**—*Alienation—Alienation of part of estate for religious ceremonies of daughter's son—Acts done for spiritual welfare of deceased husband—Alienation, if binding on daughter's son as reversioner.*

It is very difficult under the Hindu Law, to distinguish positively between sincere religious feeling and idle sentiment. All that can safely be said is that where the point is doubtful and where there is not the slightest suspicion of ulterior motive or fraud, the benefit of the doubt should be given to religious feeling. It is not for a Court of law to disparage the pious acts of devout people.

Under Hindu Law, a daughter's son who offers the funeral oblation is particularly worthy of honour. Consequently, where a widow who is in possession of her deceased husband's estate alienates a part of the estate, to defray debts contracted for family expenses and thread and marriage ceremonies of her daughter's son, the latter act being done as an act conducive to the spiritual welfare of her deceased husband, and not through any compelling necessity, and there was no suggestion of undue extravagence or of fraud: the alienation is binding on the daughter's son as a reversioner. In such cases the test is whether the expenditure was reasonable according to the common notions of Hindus. YELLAMRAJU VENKATASUBBA RAO *v.* LAKKARAJU ANANDA RAO *Mad.* 79

——— ——— *Compromise — Reversioner, when*

bound by it—Legal necessity—Spiritual benefit of husband—Benefit must be anterior to alienation—Mortgagé for such benefit—Alienee's duty—Civil Procedure Code (Act V of 1903), s. 11—First suit dismissed for multifariousness—Suit between landlord and tenant—Second suit on title—Res judicata *if applies.*

A suit for partition of certain undivided property between two widows was compromised and the main term of this settlement was that each widow should have absolute power to dispose of her own share in the suit property subject to her giving the other widow the right of making the first offer for it. A decree followed in the terms of the compromise, but no reference to a shop which was kept undivided was made in the decree. Subsequently one of the widows adopted the plaintiff. The other widow mortgaged her share in the shop for 999 years to defendant No. 1 but on the day after the mortgage both the widows took registered rent note from one tenant for three years. The adopting widow then sued on behalf of the adoptee to recover the possession of the shop from both the tenant and the mortgaging widow. The suit was dismissed for multifariousness and misjoinder of parties. The plaintiff (adoptee) next sued to set aside the mortgage and to evict the tenant. Defendant No. 1 contested the suit on the ground that the mortgaging widow under the compromise had absolute authority to dispose of her property as she liked. He further contended that the previous suit was conclusive against plaintiff as regards his title to the property and that it was not open to him to raise that question again in this suit. Lastly, he contended that the alienation to him was justified by legal necessity and was, therefore, binding upon the plaintiff:

Held, (*i*) that the effect of the compromise was not in any way to enlarge the estate or to benefit the estate; its only effect was to increase the powers of the widows themselves adversely to the reversioner, and hence could not be recognised as binding upon the reversioner;

(*ii*) that *res judicata* did not apply as the first suit was dismissed without consideration on the merits and it having been a suit between landlord and tenant no question of the plaintiff's rights as against the rights of the mortgagor or mortgagee could have been raised there;

(*iii*) that since the husband's spiritual benefit was complete before the alienation took place and since no debts had been incurred for the alleged spiritual benefit, the mortgage could he not be justified for legal necessity;

(*iv*) that the defendant No. 1 could not resist the suit he having failed to make proper inquiries before concluding the mortgage. CHIMANLAL GANPATRAM GHANCHI *v.* NATVARLAL MAGANLAL *Bom.* 7

——— Widow—*Co-widows—Transfer by one—Transfer not challenged by other—Presumption of transfer being made with latter's consent.*

Where one of two Hindu co-widows executes a gift deed, the deed is voidable at the option of the other co-widow and none else has the right to challenge it during the latter's lifetime. When she has not challenged it, it must be presumed that the transfer was made with her consent. MITTHU LAL *v.* CHAMELI *All.* 800

——— ———*Estate—Accretions and accumulations—Intention of widow—Onus of proof.*

A Hindu widow has got an absolute right over the income of the estate and if she acquires any property from the saving of that income, it is optional with her either to keep the property separate from the estate or mix it up with it. In the absence of evidence of a contrary intention of the widow, the property does not form part of her husband's estate and the onus of proving that it was not treated by her as her separate property is upon him who alleges it to be so. DULHIN PARBATI KUER *v.* BAIJNATH PRASAD-NARAIN SINGH *Pat.* 213

———Widow—*Estate—Joint life tenants succeeding—Whether one can relinquish her right of survivorship—Succession, when will open out, if relinquishment takes place.*

Under Hindu Law, if more than one female joint life-tenants succeed to an estate they may divide their life-tenancy and hold portions of the estate separately if they like and this arrangement will continue till their life. In other words, they may convert the joint estate into estates held in severalty. One or more of them may relinquish her or their right of survivorship in that portion of the estate which is held by the other. In that case if one dies, the estate in her possession will not revert to the other who has relinquished but will go to her heirs as if it were her *stridhan*, and if she alienates any portion of the estate, the alienee will continue in possession of the estate till the death of the last survivor. The joint tenant, who has surrendered her right of survivorship, cannot question the succession or alienation. The inevitable result, therefore, is that succession will not open till the last survivor is dead. DULHIN PARBATI KUER *v.* BAIJNATH PRASAD NARAIN SINGH *Pat.* 213

——— ———*Family business—Widow carrying on business as husband's heir—Business debt—Reversioners, if liable to pay from inherited assets.*

If a Hindu widow, as an heir, carries on business which she has inherited as an asset, and in doing that business incurs a proper trade debt, which might assume the form of passing a promissory note or *hundi*, the creditor can recover the money from the assets inherited by the reversioners after the death of the widow. POPAT VIRJI *v.* DAMODAR JAIRAM *Bom.* 711

——— ——— *Suit by widows to regain portion of their husband's estate—Suit lost due to technical defect—Decree for costs and mesne profits obtained by creditor—Widows, if personally liable for mesne profits.*

Where two widows along with their other co-sharers brought the suit to regain a portion of their husband's estate which was lost on account of the revenue sale, and the widows had a ground to have the sale set aside but lost the suit on account of a technical defect and the decree obtained by a creditor for costs and mesne profits was a decree which could have been realised from the estate of the husband of the widows and the widows carried on the litigation from the income of the estate:

Held, that they should not be held personally liable for the mesne profits. DULHIN PARBATI KUER *v.* BAIJNATH PRASAD NARAIN SINGH *Pat.* 213

——— ——— *Widow carrying on litigation regarding estate of husband—Decree, if binding on reversioners*—Res judicata, *principle of—Whether applies.*

In carrying out litigation regarding the estate of her husband a widow represents the estate and the decree obtained against her is binding upon the reversioners, provided that the litigation is honest and is fairly conducted. The rule of *res judicata* as indicated in s. 11 of the Civil Procedure Code, is not strictly applicable to such cases, but the principle itself has been held to apply so as to bind reversioners by decision in litigation fairly and honestly conducted

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given for or against Hindu females who represent the estate in such litigation. The question in each case will be whether the estate was properly represented by her. She might have been labouring under a personal disability or an estoppel. But unless a decision itself was given on a ground personal to herself, it will not any the least be binding on the reversioners. DULHIN PARBATI KUER *v.* BAIJNATH PRASAD NARAIN SINGH *Pat.* **213**

Hindu Law of Inheritance (Amendment) Act (II of 1929), s. 2—*'Sister', whether means only sister of the full blood.*

The word 'sister' as used in s. 2, Hindu Law of Inheritance (Amendment) Act must be interpreted according to the plain meaning of the word in the English language, which ordinarily means a sister of the full blood KABOOTRA *v.* RAM PADARATH *Oudh* **94**

Inam SEE Civil Procedure Code, 1908, s. 100 **763**

Income Tax—*Duty of Income-tax authorities to satisfy themselves of agent's authority to file returns.*

It is the duty of the Income-tax Officers before they accept returns signed and verified by agents to satisfy themselves about the authority of such agents to do so. COMMISSIONER OF INCOME TAX, C. P. & U. P *In the matter of* *Oudh* **180**

Income Tax Act (XI of 1922), s. 4 (2)—*Firm—Retirement of one partner—Account taken of capital and profits—Share of retiring partner paid to him—Amount paid, if assessable as profits*

Where the assessee, a partner of a firm, retired from that firm, an account was taken of the capital and of the profits and the assessee was given his share and he went out of the firm with it:

Held, that upon the retirement of the assessee from the partnership, the partnership was dissolved as between all the other members and hence there must be deemed to have been an ascertainment of the shares of all the partners and distribution of the partnership assets. The fact that the other partners continued in business together did not affect the question their doing so being merely in the capacity on a new firm, the legal position being that the old firm had ceased to exist. As the retirement brought about a dissolution of the firm and as on such dissolution the capital and profits of the firm became consolidated, no portion of the amount received by the retiring partner could be assessed to income-tax as profits. COMMISSIONER OF INCOME TAX, MADRAS *v.* MUTHUKARUPAN CHETTIAR *Mad.* **705 S. B.**

——**s. 10**—*Assessee carrying on business in piece-goods—Dacoity—Loss of sum—Held no deduction could be allowed.*

An assessee carried on business in piece-goods and for that purpose accepted deposits from various people and paid interest on those deposits, the money being used in the business. No money-lending business was carried on. A sum of Rs. 14,440 was lost in cash as a result of dacoity on the assessee's firm by an employee with the assistance of and in collusion with others. The assessee claimed deduction of this amount not under s. 10 (2), Income Tax Act, but under s. 10 (1):

Held, that the loss was a loss of capital and no allowance could be made for it. GADODIA & Co., *In the matter of* *Lah.* **995**

——**ss. 10 (vi) and 66 (3)**—*Printing press—"Type", whether part of machinery or plant is a question of law.*

In the case of a printing press whether "type" is part of the machinery or plant is a question of law. AMAR SINGH *v.* COMMISSIONER OF INCOME TAX, PUNJAB *Lah* **968**

——**s. 13**—*Fresh promissory notes issued by debtor for sum due under old note and interest thereon—Interest under old note treated as received by creditor, and making corresponding entries in accounts—Held, there was material for Income Tax Officer for assessing such interest to income-tax.*

Where the assessees have elected to treat the interest due under the original loans as having been received and paid on the execution and delivery of the fresh promissory notes by the debtors, and the interest is entered as having been received both in the interest account and in the personal accounts of the respective debtors, and the creditors accepting the obligations of the debtors under the fresh promissory notes in substitution for the old debts and the interest due thereon, and in past years were content that the interest accruing in this manner should be assessed to income tax, in these circumstances it cannot be held that there were no materials before the Income Tax Officer which would justify him in concluding that these sums represented interest liable to assessment, which the assessee has regarded as being liquidated by delivery of fresh promissory note.

In such cases if the assessees want to escape assessment for such interest, they should so adjust their accounts as to make it clear that the acceptance of a fresh promissory note is not taken as effecting payment of the interest due under the old loan. COMMISSIONER OF INCOME TAX, BURMA *v.* V. S U R. FIRM, RANGOON *Rang.* **703 S. B.**

——**ss. 22 (2), 66 (3)**—*Notice demanding return of income—Legality of notice, if a question of law—Thirty days' time to furnish return essential.*

Under s. 22 (2), Income Tax Act, the Income Tax Officer must give the proposed assessee at least thirty days' time within which to furnish his return. If this minimum is denied, the notice becomes entirely illegal and no subsequent extension of time will cure the defect that initially lay in the notice issued.

The question whether a notice demanding return of income, is illegal for not giving thirty days' time is a question of law within s. 22 (2), Income Tax Act. JAMNA DHAR POTDAR & Co. LYALLPUR *v.* COMMISSIONER OF INCOME TAX, PUNJAB *Lah.* **526**

——**s. 23.** SEE Power of Attorney **180**

——**s. 25-A**—*Whether contemplates partition by metes and bounds.*

Section 25-A, Income Tax Act, contemplates an actual partition by metes and bounds of the joint family property. SALIG RAM RAM LAL *v.* COMMISSIONER OF INCOME TAX, LAHORE *Lah.* **203**

——**ss. 30 (2), 31** SEE Income Tax Act, 1922, s. 66 (2) **124**

——**s. 31**—*'Order confirming assessment', in s. 31—Meaning of.*

An order confirming the assessment is an order which has reference to the assessment and which affirms it. Where the question of assessment is not even considered and the appeal is rejected as one barred by limitation, the order of dismissal cannot be considered to be one confirming the assessment SHIVNATH PRASAD *v.* COMMISSIONER OF INCOME TAX, CENTRAL & UNITED PROVINCES, LUCKNOW *All* **124**

——**s. 66**—*Question not raised before Assistant Commissioner—Right to demand reference.*

The assessee has no right to demand that the Commissioner of Income Tax should refer to the High Court the question which he had not raised

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before the Assistant Commissioner. JAMNA DHAR POTDAR & Co. LYALLPUR *v.* COMMISSIONER OF INCOME TAX, PUNJAB. *Lah.* **526**

———ss. 66 (2), 30 (2), 31—*Appeal to Assistant Commissioner filed beyond time—Refusal to admit appeal not being satisfied that appellant had sufficient cause for delay—Appeal, if has proceeded beyond stage referred to in s.* 30 (2)—*Action under s.* 66 (2), *if can be taken by High Court.*

Action under s 66 (2), Income Tax Act, cannot be taken if the appeal has not proceeded beyond the stage referred to in s. 30 (2), and the High Court cannot direct the Commissioner to state a case. Where an appeal is presented to the Assistant Commissioner beyond time and he refuses to admit the appeal on not being satisfied that the appellant had sufficient cause, no appeal can be registered and disposed of in the manner laid down by s. 31 and no order under s 31 can be passed and hence action under s. 66 (2) cannot be taken. SHIVNATH PRASAD *v.* COMMISSIONER OF INCOME TAX, CENTRAL & UNITED PROVINCES, LUCKNOW *All.* **124**

———s. 66 (3).

SEE Income Tax Act, 1922, s. 10 (*vi*) **968**

SEE Income Tax Act, 1922, s. 22 (2) **526**

Indian States (Protection against Disaffection) Act of 1922, s. 3 (1)—Joinder of charges—Legality. SEE Criminal Procedure Code, 1898, ss. 233, 234, 235 **450**

———s. 3 (1)—*Publisher—Meaning of—"Publishing"—Scope of—Criminal responsibility under s.* 3 (1)—*Extent of.*

The word "publisher" appearing in s. 3 (1) of the Indian States (Protection against Disaffection) Act cannot possibly be construed in the narrow sense of the local publisher in which it is apparently used in Act XXV of 1867, but must be given its ordinary meaning. "Publishing" in s 3 (1) cannot, therefore, be restricted to publishing libellous matters merely turned out of a printing press or be confined to "publishing" by an editor or printer thereof. The section fastens criminal responsibility upon any one or more of the four persons, *viz*, the editor, the printer, the publisher and the author of any handwritten or printed libellous matter against a Prince. The word "publishing" must then be understood in its ordinary significance of "making known, announcing publicly, or bringing to notice". DIWAN SINGH MAFTOON *v.* EMPEROR *Nag.* **450**

———ss. 3 (1), 5—*Sanction to prosecute under s.* 3 (1)—*Sanction regarding prosecution of one offence only—Prosecution for all offences under s.* 3 (1)—*Proceedings, legality of.*

Where the sanction necessary for the prosecution for an offence under s. 3 (1), Indian States (Protection against Disaffection) authorised the prosecution of the accused only "in respect of the publication of an article (of which a copy and translation are hereto annexed)", and the complainant failed to establish that the article referred to in the sanction was the one on which the complaint was lodged:

Held, that the complainant failed to prove that he was authorised by the Governor-General to lodge the complaint in respect of the article.

Section 3 (1), Indian States (Protection against Disaffection) Act, creates four distinct offences in respect of a written matter which brings or is intended to bring into hatred or contempt, or excites or is intended to excite disaffection towards any Prince or Chief or his administration. It hits anyone or more or these four persons, *viz.*, the author, the editor, the printer and the publisher of the libellous matter Where the sanction of the Governor-General authorises the complainant "to make complaint of an offence under s. 3 of the Act", and very clearly restricts the prosecution to one of the four offences under the section by specifying that it is to be "in respect of the publication" of an article, there is no room for the contention that the prosecution was sanctioned in regard to all the four offences covered by s. 3 (1) of the Act It follows then that the trial of the accused in respect of the three distinct offences of his being the editor, the printer and the author of the offending article is clearly illegal for want of sanction and vitiates the whole proceedings. DIWAN SINGH MAFTOON *v.* EMPEROR *Nag.* **450**

Insolvency—*Joint Hindu family firm adjudicated insolvent—Effect—All members of family, if made insolvents—Allahabad High Court Rules, Chap. XIX, r.* 27—*Provincial Insolvency Act (V of* 1920), *ss.* 79.

In the case of a firm carried on by a joint Hindu family, the effect of the adjudication of the firm as an insolvent is to make all the members of the family insolvent. BHAGWANDAS *v.* LAKSHMI CHAND *All.* **661**

———*Money in Receiver's hands consisting of rents of property mortgaged to Bank—Claim by Liquidator of Bank—Provincial Insolvency Act (V of* 1920), *ss* 47, 48—*Applicability—Receiver's right to deal with the money.*

Where the money which remains in the Receiver's hands, consists entirely of the rents and profits of the property which was the subject-matter of mortgages in favour of a Bank which has subsequently gone into liquidation, the provisions of ss. 47 and 48 of the Provincial Insolvency Act are not in any way material to the claim of the Liquidator of the Bank and the Receiver in the insolvency has no right to deal with the said money. H. HUNTER *v.* KAHIZ ABID **P. C. 426**

———*Mutual dealings between creditor and insolvent—Account of what is due should be taken.*

Where there are mutual dealings between an insolvent and a creditor, an account has to be taken of what is due from the one to the other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other. KRISHNA CHANDRA BHAUMICK *v.* PABNA DHANABHANDAR CO., LTD. *Cal.* **991**

———*One member surrendering rights by release deed in favour of Receiver—Subsequent attachment of his share by creditor—Whether confers additional rights paramount to those of Receiver.*

Where a member of a joint Hindu family firm which has been adjudicated insolvent surrenders his rights by a deed of release in favour of the Receiver, the subsequent attachment of his supposed interest cannot confer upon the attaching creditor any additional right which would be paramount to the rights of the Receiver. BHAGWAN DAS *v.* LAKSHMI CHAND *All.* **661**

———*Trust Deed executed by insolvent—Receiver in insolvency—Whether can deal with property comprised in trust—Property, if subject to be administered by Receiver on behalf of general body of creditors—Assets, if can be administered by Receiver in terms of trust deed.*

Where property of the insolvent is comprised in a trust deed, it is not the insolvent's property but is vested in the trustees, it is not competent for the Receiver in insolvency to deal with the property in any way. After the execution of the trust deed the insolvent has no interest in the properties comprised therein and consequently, they never vest in the

Insolvency—concld.

Receiver in insolvency and are not subject to be administered by him on behalf of the general body of creditors. Nor has the Receiver in insolvency any right to administer the assets in accordance with terms of the trust. H. HUNTER *v.* KANIZ ABID
P. C. 426

Interest.
SEE Costs 769
SEE Promissory note 164
——— *Interest charged at end of each year after deducting counter-interest— Each party charging interest on overdrawings of the other—Compound interest, if to be allowed.*
Where the accounts themselves showed that whenever accounts were settled at the end of each year the parties have charged interest on the overdrawings of each partner, and at the various stages of the case each side was insisting upon the payment of counter-interest on the footing that he was going to recover some amount :
Held, that in these circumstances the plaintiff was entitled to compound interest on the principal charged. SIVAGNANATHAMMAL *v.* NALLAPERUMAL PILLAI
Mad. 783
———Suit for breach of trust against trustee—Accounts not rendered properly—Liability for interest. SEE Trusts Act, 1882, ss. 19, 23, 37, 62
359

Interpretation of Statutes. SEE Criminal Procedure Code, 1898, s. 562 697 F B
———*Court's duty to examine language of Statute without any reference to English Law.*
In interpreting the statutory provisions of an Indian Act the Courts should examine the language of the Indian Statute itself uninfluenced by any consideration derived from the English Law on which it might have been based. DIWAN SINGH *v* EMPEROR *Nag.* 450
——— *Interpretation by Courts conflicting—Amendment of statute.*
The legislature must be taken to be aware of the interpretation of the statute enacted by them by the Courts ; and if they find that the interpretations by Courts of Justice are not in conformity with their intention, they should amend it to bring it in conformity with their intention. SOURENDRA MOHAN SINHA *v.* SECRETARY OF STATE *Pat.* 1099
———*Language and plain meaning to be examined.*
In arriving at a conclusion as to the meaning of an enactment, the proper course is in the first place to examine the language of the statute and ask what is its plain meaning and not to start arguing how the law previously stood. FIRM OF MURLIMAL SANTRAM *v.* BANARSIDAS & SONS *Sind* 895
———*Language of Statute should not be departed from.*
It is not permissible to depart from the language of a Statute unless there are strong and adequate grounds for it. The functions of a Court of law are merely to interpret the Statute and not to legislate. MOHAMMAD YAKUB KHAN *v.* AZIZ-UN-NISSA
Oudh 1076
———*Marginal note—When can be referred to.*
Where a marginal note has been inserted by or under the authority of the legislature, it can be referred to for an exposition of the meaning of the section. ABDUL HAKIM *v* FOZU MIA *Cal.* 1003
———*Plain wording of section to be followed.*
The sections of an Act must be interpreted on the basis of the plain wordings of the sections themselves. The Legislature must be taken to have meant what they have said and not what they contemplated to say but did not say. RAM RANBIJAY PRASAD SINGH *v.* RAMGIRBI RAI *Pat.* 902 S. B.
———*Positive enactment—Meaning to be ascertained uninfluenced by previous law or English law.*
When there is a positive enactment of the Indian Legislature, the proper course is to examine the language of the statute and to ascertain its proper meaning uninfluenced by any considerations derived from the previous state of the law or of the English law on which it may be founded. DIWAN CHAND *v.* MANAK CHAND *Lah.* 938
———*Title and preamble—Enacting part not ambiguous—Whether can be restricted by title and preamble.*
The title and preamble of a statute may be relied upon as aids to the understanding of the meaning thereof, or for determining the general object and intention of the legislature in passing the enactment. They may legitimately be consulted for the purpose of solving any ambiguity, or for fixing the meaning of words which may have more than one meaning, or for keeping the effect of the Act within its real scope, but with the important proviso that this can only be done when the enacting part is open to doubt in any of these respects. When the language, object and the scope of the Act are not open to doubt, the enacting part cannot be restricted, extended or modified by reference either to the title or preamble. There is no authority for the suggestion that the preamble of an Act is exhaustive ; it cannot be questioned that there are many Acts wherein a particular mischief or inconvenience is recited in the preamble, but in which the provisions extend far beyond that particular mischief or inconvenience. The evil recited may be the chief motive for the legislation, but the remedy may consistently and wisely be extended beyond the cure of that evil. ABDULLAH KHAN *v.* BAHRAM KHAN *Pesh.* 1022

Jurisdiction. SEE Promissory note 164
———*Question of jurisdiction not raised in trial Court—Held, it cannot be raised in appeal.*
The plaintiffs filed a suit at Shikarpur against their father and brothers who were residing at Saikarpur and the founder and trustees of Dev Samaj, who resided at Lahore. Some of the immovable property in dispute was situated in Quetta. The plaintiffs sought the following reliefs, among others, for declaration: (1) that the releass-deed executed by their father and their uncle in favour of their grand-father who was dead was of no effect against the sons or grandsons, or at any rate, against the grand sons ; (2) that the partition effected by the grand-father and his sons be set aside as being unfair, or, in the alternative the same be re-opened ; (3) that they had subsisting share in the foreign property and (4) that the trust created by their grandfather did not affect their interest and (5) that they be awarded mesne profits of their share in such foreign property :
Held, that (1) so far as that relief went, a British Indian Court would have had jurisdiction to entertain it *in personam* and although a part of the property which was the subject-matter of partition was situate outside, the title to such foreign property was only incidentally and not directly in issue.
(2) The declaratory decree, if any, passed against the Dev Samaj would operate as *res judicata* against them in any suit filed on the strength thereof in the Quetta Court as they were not only British Indian subjects but they had voluntarily submitted to the jurisdiction of the trial Court.

Jurisdiction—contd.

(3) Since a British Indian Court had jurisdiction to entertain the suit as regards some reliefs, the Dev Samaj were barred by the provisions of s. 21, Civil Procedure Code, from raising an objection in appeal as to the place in British India where this suit should have been instituted. They could not say that the suit should have been filed at Lahore and not at Shikarpur, and as some of the defendants resided at Shikarpur, the Shikarpur Court was competent to grant leave to the plaintiffs to continue the suit in that Court against defendants who were not residing within its jurisdiction if the plea had been raised at proper time. DEV SAMAJ COUNCIL, LAHORE *v.* AMRITLAL MOTILAL *Sind* **677**

———*Suit filed in Civil Court—Plea that suit was not cognizable in Civil Court—Whether can be raised for first time in Letters Patent Appeal.*

Where the plaintiffs file a suit on the allegation that a certain grove was in the possession of the defendants, and choose the Civil Court as the forum, it must be assumed against them that they treated the property as if it was not land within the meaning of the Agra Tenancy Act. A plea that the grove was a tenant's grove and the suit was not cognizable in the Civil Court cannot be entertained for the first time in a Letters Patent Appeal. ANRUDH RAI *v.* SANT PRASAD RAI *All.* **569**

———*Suit for possession—Land situated in Sub-Division D—Suit filed in Court in M sitting at P—Establishment of Court at D in M District—Execution—Court in M sitting at P, if has jurisdiction to execute decree—Bengal, Agra and Assam Civil Courts Act (XII of 1887), s 3.*

A suit was instituted by the appellants in the year 1911 in the Court of the Subordinate Judge of *M* (who at that time sat at *P*), for possession of certain lands situated in the Sub-Division of *D* and for mesne profits. The suit was decreed, but an appeal by the respondents to the High Court was successful and the judgment of the High Court was affirmed by the Privy Council. The suit was accordingly dismissed with costs. In the month of February 1931, the respondents, the present decree-holders, applied for execution in the Court of the Subordinate Judge of *M* sitting at *P*. Since 1911, when the suit was begun, by an order of the Lieutenant-Governor of Bihar and Orissa in 1917, a Subordinate Judge's Court was established at *D* in the District of *M* and the local limits of his jurisdiction ceased to be included in the local limits of the Subordinate Judge of *P* from October 31, 1917. The respondents decree holders sought to sell in execution lands situated in the Sub-Division of *P*, that is to say, outside the Sub Division of *D*. The appellants judgment-debtors resisted the execution on the ground that the proper Court in which to institute an execution case was that of the Additional Subordinate Judge of *D* and argued that the Subordinate Judge sitting at *P* had no proper jurisdiction though it was admitted that the case might afterwards be transferred to him :

Held, that the effect of the Notification was not to transfer the jurisdiction of the Court sitting at *P* to the Court sitting at *D*, but to divide the jurisdiction of the Subordinate Judge in the District of *M*, and that the mere fact that for administrative purposes the Court of the Subordinate Judge was now divided between the Subordinate Judge and an Additional Subordinate Judge and that a certain class of business or an area was allotted to the Additional Subordinate Judge did not make the Court of the Subordinate Judge sitting at *P* any the less the Court of the Subordinate Judge of *M* nor did it prevent it from executing the decree. The decree-holder had always the right to apply as of course to the Court which passed the decree for its execution even if it be in respect of property outside the territorial jurisdiction of such Court and even if execution by such Court can be no more than execution by transmission to another Court. CHANDMAL MARWARI *v.* SHIB PRASAD SINGH *Pat.* **769**

Jurisdiction—concld.

———*Suit relating immovable property in foreign country.*

Like Courts in England, the Courts in India have a limited jurisdiction to entertain suits relating to foreign immovable property. These Courts have power to exercise a jurisdiction *in personam*, in respect of foreign immovables against persons locally within their jurisdiction, in cases where there is an equity between the parties arising from contract, fraud, or trust, provided that the decision of title be not directly involved. But such an equity must be of a personal nature, *i. e.*, there must be either a fiduciary relationship or privity of some other kind between the parties. DEV SAMAJ COUNCIL, LAHORE *v.* AMRITLAL MOTILAL *Sind* **677**

———*U. P. Land Revenue Act (III of 1901), s. 233 (m)—Suit for recovery of amounts realisable by the Collector from a person on a requisition to the Collector by the Registrar, Co-operative Societies—Whether entertainable by Civil Court.*

No suit can be brought into the Civil Court for recovery of an amount realisable by the Collector from a person on a requisition to the Collector by the Registrar, Co-operative Societies, as that is a sum recoverable in the same manner as arrears of Land Revenue, for s. 233 (*m*) of the Land Revenue Act bars institution of such a suit. KHUD MUKHTAR BANK, UTRAWAN *v* BHAGWAN DIN *Oudh* **92**

———*Valuation—Objection as to valuation, if can be raised for first time in execution*

It is not open to the parties during the course of the execution proceedings to raise an objection for the first time regarding the under-valuation or over-valuation of a suit. A person who has himself given the valuation during execution proceedings cannot contend that he had under-valued his application for the filing of the award, which has to be regarded as a plaint in a regular suit. GIAN CHAND *v.* CHARANJI LAL *Lah.* **229**

———*What constitutes—Erroneous order, if can be attacked collaterally.*

Jurisdiction is the power to hear and decide and the power to decide is the power to decide erroneously as well as correctly. Consequently, unless an order has been vacated, it is operative between the parties and cannot be ignored and challenged collaterally in different proceedings. FIRM OF MURLIMAL SANTRAM *v.* BANARSIDAS & SONS *Sind* **895**

Jury trial—Misdirection. SEE Penal Code, 1860, s. 366 **662**

Karachi Small Causes Courts Act (IV of 1929), s. 32—*Section covers any order in any case—Application on pure question of fact, whether, precluded.*

By a plain reading of s. 32, Karachi Small Causes Courts Act, there is nothing whatsoever to warrant the interpretation that it covers only "final orders." It is wide enough to cover any order in any case.

Words "according to law" would preclude a multiplicity of applications on questions of pure fact unless substantial injustice has resulted. FIRM MURLIMAL SANTRAM *v.* BANARSIDAS & SONS *Sind* **895**

Land Acquisition Act (I of 1894), s. 23—*U. P. Town Improvement Act (VIII of 1919), s. 10 (3) (a)—Compensation, method of calculation—Acquisition of bazar—Principles for assessment—Market value—Compensation is not to be calculated on basis of gross collections.*

It is not possible to lay down any general method of valuation in calculating the amount of compensation to be paid in a land acquisition case under the U. P. Town Improvement Act as it is necessary to take the circumstances of each property into consideration in determining the suitable basis of compensation. Where the property is a *bazar* and the income of the property by its nature is of a fluctuating character, it is necessary to employ a costly staff for making realisations from day to day from the various stall keepers in the *bazar*, consider able vigilance is required on the part of the collection staff to prevent evasion of payments and close supervision is also necessary in order to prevent embezzlements by the staff entrusted with the realisation of these dues In such circumstances taking into consideration the use to which the land was put at the time of the acquisition, it is difficult to think that any buyer would have been prepared to purchase the property on the basis of the gross collections without making any allowance for the expenditure necessary for making collections. It will, in such case, be most unfair in calculating the compensation on the basis of gross collections. ROSHAN JAHAN BEGAM *v.* SECRETARY OF STATE FOR INDIA *Oudh* **579**

———**ss 23, 27**—*Land acquisition proceedings—Contract between Municipality and claimant—Enquiry into, legality of.*

In proceedings under the Land Acquisition Act, the Land Acquisition Officer and the Court dealing with the matter on a reference from him have only to decide the market value of the property, subject to the considerations mentioned in s 23 and the following sections. Neither he nor the Court has got the power to enforce a contract which the claimant and a Municipality might have entered into in respect of the lands acquired. DAWOOD SAH B *v.* COLLECTOR OF CHINGLEPUT *Mad.* **280**

——— **s. 32**—*Compensation—Money invested in securities 20 years before—Re-investment—President's discretion—How used.*

It is not incumbent on the President of the Calcutta Improvement Tribunal under s. 32, Land Acquisition Act, to direct a re-investment in land, the investment having been made so far back as 20 years in approved Government securities. The matter rests in his discretion but the discretion must be exercised on correct judicial principles. One of the elements which should be taken into account in the exercise of such discretion is, as to whether the parties who are vitally interested in the compensation money, have really asked for a re-investment in land. SARALA DEBI *v.* PRESIDENT, CALCUTTA IMPROVEMENT TRIBUNAL *Cal.* **999**

Land Acquisition proceedings—Costs of Collector—Liability of claimant. SEE Costs **280**

Landlord and tenant—*Claim for additional rent on ground of excess area—Onus—Presumption that standard of measurement prevalent when Record of Rights is finally published is also standard at inception of tenancy.*

In a suit for additional rent for excess area the burden of proving that the defendants are holding excess land for which they are liable to an additional rent is in the first instance on the landlord. In such a case the plaintiff is entitled to the benefit of the presumption that the standard of measurement which was prevalent at the date when the Record of Rights was finally published, was also the standard of measurement at the inception of the tenancy. GOPI KRISHNA SAHA *v.* SURENDRA NATH CHAUDHURY *Cal.* **154**

———*Disclaimer in cases not covered by Transfer of Property Act.*

There can be no forfeiture by disclaimer in cases not covered by the Transfer of Property Act unless the disclaimer is in matter of record. RACHOTAPPA ISHVARAPPA *v* KONHER ANNARAO DESHPANDE *Bom.* **516**

———*Forfeiture—Tenancies before Transfer of Property Act and those excepted from its operation—Applicability of English Law—Forfeiture by matter in pais of English Law—Applicability in India.*

The principles of English Law as to forfeiture apply both to tenancies created before the Act came into force and to those excepted from its operation.

The English Law as to forfeiture by matter in *pais* does not apply in India at all. RACHOTAPPA ISHVARAPPA *v.* KONHER ANNARAO DESHPANDE *Bom.* **516**

———*Forfeiture, when works—Denial of landlord's title—Forfeiture—Principles—Power of Court to relieve against forfeiture.*

The principle underlying the rule that disclaimer of the landlord's title by his tenant works a forfeiture of the tenancy is the principle of estoppel or the principle that a man cannot approbate and reprobate.

A person who has lawfully come into possession of land as tenant cannot, by setting up, during the continuance of such relation, any title adverse to that of the landlord, inconsistent with the real legal relation between them, acquire by the operation of the law of limitation, title as owner or any other title inconsistent with that under which he was let into possession.

The power of the Courts in India to relieve against forfeiture arising by disclaimer on grounds of justice, equity and good conscience is not necessarily limited to the cases where the tenant establishes that the denial was occasioned by fraud, mistake or accident on the part of the landlord, and the tenant was neither careless nor negligent. RACHOTAPPA ISHVARAPPA *v.* KONHER ANNARAO DESHPANDE *Bom.* **516**

———*Lump rental tenancy—Landlord deliberately and forcibly expelling tenant from part of demised premises—Tenant, if can suspend entire payment of rent.*

Where the rent is a lump rental and the case one of deliberate and forcible expulsion of a tenant from a part of the demised premises, no question of equity to an apportionment can possibly arise, and the tenant is entitled to entire suspension of rent till he is restored to possession of the dispossessed portion MAMAMMAD ALI FAKIR *v.* KARAM ALI TALUQDAR *Cal.* **506**

——— *Rent not enhanced for hundred years—Presumption of fixity of rent, if arises.*

The mere fact that the tenant only claimed that rent was not enhanced for hundred years is not enough to prove that the holding was at a fixed rent inasmuch as after the preparation of the Record of Rights the presumption for fixity of rent on account of there being no change for twenty years is no longer available to the tenant. RAM RANBIJAI PRASAD SINGH *v* RAMGIRBI RAI *Pat* **802 F. B.**

———*Tenancy, proof of—Suit by tenant against trespasser—Proof, whether sufficient if tenant proves that landlord received rent from him.*

Landlord and tenant—concld.

A tenancy can be proved by documentary or oral evidence.

In a suit for possession by a tenant against a trespasser in order to succeed, the plaintiff is not bound to prove the terms of the tenancy. If he can simply prove that the landlord had accepted rent from them, that would be quite sufficient for the purpose of maintaining a suit against the trespasser. SUNDAR ALI *v.* NUR MAMUD *Cal.* **733**

——*Trees planted by* zemindar *and standing in holding of tenants—Right of* zemindar *to timber of trees—Fruits of trees—Right of tenants, in absence of contract to contrary.*

When a land is let out to a tenant by a *zemindar* it is to be presumed that it is let out with the trees. If there was any contract to the contrary reserving the right to appropriate the fruits of the trees standing on the land for the *zemindar*, it is for the *zemindar* to set up and prove that contract. Consequently in the absence of any contract to the contrary the tenants on whose land the tree is standing have a right to appropriate its fruits. But the timber of trees planted by the *zemindar* before land is let out to tenant and standing on the holdings of tenants, whether occupancy or ex-proprietary tenants, belongs to the *zemindar*. JAGAI KURMI *v.* HARAKH RAJ SINGH *All.* **116**

Lease—*Construction—Property usufructuarily mortgaged—Same property leased to mortgagor—Collateral security clause in lease deed—Suit for rent after more than* 12 *years—Held, mortgagor was holding over as tenant and rent could be recovered for three years prior to suit—Transfer of Property Act (IV of* 1882), *s.* 116.

The defendant created usufructuary mortgage of his property in favour of the plaintiff on January 18, 1911. The mortgagee-plaintiff instead of actually taking possession of property, granted a lease of the same property to the defendant on January 19, 1911, on a fixed annual rent, payable up to the time of the redemption of the "*othi*" which was for two years according to the mortgage agreement. The lease deed contained a collateral agreement by way of mortgage under which the property was offered for security for payment of rent due under the lease. Certain amount, towards the rent due under the lease was paid by the mortgagor in 1916, and accepted by the mortgagee. After a period of 12 years, the present suit was brought by the mortgagee for recovery of the sum alleged to be due under the lease deed:

Held, that the usufructuary mortgage deed and the lease deed were parts of the same transaction, and the lease was for a period of two years only and the continuance of possession after the expiration of this period of two years, by the mortgagor must be taken to be that of a tenant holding over on the original terms of the lease.

Held, also that the collateral security clause in the lease-deed not being any part of the terms which constituted the transaction of the lease, the clause could not be carried over after the determination of the lease, *i. e.*, two years.

Held, further that the plaintiff could recover the rent due for three years prior to suit only. GNANADESIKAM PILLAI *v.* ANTONY BENATHU BOOPALARAYAR *Mad* **838**

Legal Practitioner—*Counsel's duty towards client and Court—Whether can make serious allegation in written statement against party on advice of client—Pleadings.*

Per *Thom, J.*—No Counsel is entitled to frame a serious charge against a party to a litigation unless he is in possession of admissible and relevant evidence upon which, if accepted, Counsel could reasonably ask the Court to hold the allegations true. It may well be that the evidence in support of the allegations is untrue and it is certainly not the duty of a Counsel in the ordinary course to test the truth of the witnesses whom he intends to put into the witness-box but at the conclusion of the evidence which he has led he should be in a position to submit as a reasonable proposition to the Court that the evidence which he has led, if accepted, establishes the allegations for which he had made himself responsible. If he is not in possession of such evidence to support them he is not entitled to make grave and serious allegations.

Legal Practitioner—contd.

Per *Iqbal Ahmad, J.*—It is imperative in the interest of administration of justice that too rigid a test of the conduct of an Advocate in the matter of drafting pleadings should not be emphasized and that the test should be such as not to deter a Counsel from fearlessly placing before the Court such allegations as their clients instruct them to make, so long as those allegations do not appear manifestly reckless and unfounded. It is no doubt the duty of Counsel to use their own judgment, experience and discretion and not to make irrelevant or unduly insulting allegations in the pleadings but it is equally their duty to embody the case of their clients in the pleadings fearlessly provided the instructions received from clients justify the case embodied in the pleadings. While on the one hand a Counsel is expected to be careful and not reckless in drafting the pleadings he cannot, on the other hand, assume the role of a Judge and refuse to embody allegations that his client instructs him to make unless and until he has examined the evidence on the subject. A Counsel is in one sense the mouthpiece of his client, but he does not guarantee or pledge himself for his client's veracity.

Per *Allsop, J.*—On the one hand Counsel must look to the interests of his client and not be deterred by fear or favour from making any allegations which in those interests it is necessary for him to make. On the other hand, he cannot take shelter behind his client and claim to be an entirely irresponsible instrument in his client's hands. There remains in him a duty and an obligation to his fellow citizens and he is certainly not entitled to make scandalous and serious allegations against those fellow citizens unless he has some basis upon which the allegations can be grounded.

Held, that no action was to be taken against the Advocate, in the circumstances. *In the matter of* AN ADVOCATE, CAWNPORE *All.* **1043 S. B.**

——*Premature threat from Bench—Pleader's duty to protest then and there and apply for transfer—Compromise—Pleader settling case on such threat—Compromise to be set aside.*

It is the duty of members of the Bar, if their clients are threatened prematurely from the Bench not to adopt an attitude which may be described as pusillanimous, but protest then and there that they resent such observations; and after consulting with their Attorney instructing them it may become necessary for them to apply for a transfer of the case to the list of another Judge.

Where soon after the premature threatening of his clients by the Bench, the Pleader consented to settle the case:

Held, that the Counsel was intimidated and was not free to consider the whole aspect of the settlement from an unbiased point of view, and that the

Legal Practitioner—concld.

Court had an inherent power to set aside this settlement. MOUSELL & Co. LTD. *v.* GHANSHYAMDAS JAMNADAS *Cal.* 297

Legal Practitioners Act (XVIII of 1879), ss. 12, 13. SEE Legal Practitioners Act, 1879, s 14 430 S B.

———**ss. 14, 12, 13**—*Legal practitioner becoming surety for accused persons — Propriety of—Court refusing to accept a person as surety—*Mukhtear *standing surety and entering into contract of indemnity with that person—Forfeiture of bail bond—Attempt at concealment of true facts—Conduct of* mukhtear, *if unprofessional Suspension from practice—Propriety.*

There is nothing against a legal practitioner becoming a surety for accused persons. But where a *mukhtear* enters into an agreement, with a person whose security the Court has refused to accept, to the effect that the amount deposited by that person with the *mukhtear* would indemnify the latter if he suffered any loss on account of the bail bond being forfeited, and the bail bond is forfeited and the *mukhtear* tries to conceal the above facts from the Court, the contract of indemnity is a public mischief, is highly unprofessional and is unquestionably illegal, being against public policy as it hampers the administration of justice. The further attempt at concealment of the agreement at the early stages of the proceedings is a serious aggravation of the crime. [In such circumstances the *mukhtear* was ordered to be suspended for three months.] *In the matter of* SURAJ NARAIN *Pat.* 430 S. B.

Letters Patent (Patna), cl. 33—*Jurisdiction exercised by High Court in reference for confirmation—Nature of—Petitioners having no right of appeal under cl.* 33 *or Privy Council Act—Whether can proceed direct to Privy Council for royal prerogative—Leave or certificate of High Court, if necessary.*

The jurisdiction exercised by the High Court in a reference for confirmation of death sentence is of an appellate character and can in no sense be said to be of an original nature.

Where, therefore, there is no right of appeal granted by the Letters Patent or under the Privy Council Act, those who desire to appeal must have recourse to the prerogative and approach His Majesty in Council direct for leave to present their case. In such cases, that is to say, where an appeal is presented for the exercise of the royal prerogative, either leave or a certificate from the tribunal which passed the appellate decision is not required as a preliminary step. They can proceed direct, without an intermediate application to the High Court, to His Majesty in Council and there obtain leave to present their case. RAHMAN *v.* EMPEROR *Pat.* 577

———**cl. 33**, *strict construction—Necessity of.*

The wording of cl. 33, Letters Patent (Patna) is very precise and mus be strictly construed. RAHMAN *v* EMPEROR *Pat.* 577

Limitation—*Discretion of Court to relieve decree-holders in cases of hardship—Whether exists—Duty of Court to notice the Act and give effect to it even if not referred to in pleadings.*

There is no authority to support the proposition that there is some sort of judicial discretion which would enable the Court to relieve the decree-holders from the operation of the Limitation Act in a case of hardship, particularly when it is alleged that the decree-holder was in regard to the proceedings which he took by way of execution in some way misled by some mistake in the form of the preliminary decree. It is impossible to hold that, in a matter which is governed by Act, an Act which in some limited respects gives the Court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. Section 3 of the Act is peremptory and the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings. MAQBUL AHMAD *v.* ONKAR PRATAP NARAIN SINGH P. C 205

———*Suit attacking wills — Plaint cleverly worded to avoid limitation—Limitation, if can thus be voided.*

Where the suit in substance is a suit attacking the will, it is not open to the plaintiffs by cleverly wording their plaint to avoid the proper limitation for the suit MOHAMMAD ALI KHAN *v.* ANWAR HUSSAIN *Lah.* 1104

Limitation Act (IX of 1908), s. 2. SEE Easement 966

——— **s. 2**—*Easement whether includes* profit a prendre.

What is known as profit in England is included in India in the term 'easement' in s. 2 of the Limitation Act of 1903. JANGBAHADUR SINGH *v* THITHAR SINGH *Pat.* 966

———**s. 3.** SEE Limitation Act, 1903, s 4 205

———**s 4**—*Scope of.*

The provision in s. 4 means the proper Court in which the application ought to have been made and when it is impossible to say that the application was made to the proper Court on the day on which that Court re-opened, s. 4 will not apply. MAQBUL AHMAD *v.* ONKAR PRATAP NARAIN SINGH P. C. 205

———**ss. 4 and 14,** *distinction between—Computation under s.* 14—*How to be made—Period of long vacation—When can be deducted.*

There is a marked distinction in form between ss. 4 and 14. The language employed in s. 4 indicates that it has nothing to do with computing the prescribed period. Where there is ground for excluding certain periods under s. 14, in order to ascertain what is the date of the expiration of the prescribed period, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period. MAQBUL AHMAD *v.* ONKAR PRATAP NARAIN SINGH P. C 205

———**ss. 4, 14, 3, Sch. I, Art. 181**—*Application for execution of final mortgage decree—Time during which preliminary decree was executed—Whether can be deducted in computing limitation.*

It cannot be said, apart from any other objection, that an application to obtain execution under a preliminary mortgage decree is an application for the same relief as the application to the Court for a final mortgage decree for sale in the suit. Consequently, it is not permissible, on the basis of s. 14, Limitation Act, in computing the period of limitation prescribed for an application for execution, to exclude the period during which the decree-holder was seeking execution under the preliminary decree. MAQBLUL AHMAD *v.* ONKAR PRATAP NARAIN SINGH P. C. 205

———**s. 5.**

SEE Civil Procedure Code, 1908, O. XXII, r. 3 610
SEE Execution 503

———**s. 5**—*Appeal not filed in time due to fraud by Counsel's clerk—If sufficient reason for extension of time*

Where an appeal is not filed in time due to a deliberate fraud of the Counsel's clerk and there is

Limitation Act—contd.

no fault on the part of the client who has paid everything required to be paid by him or on the part of the Counsel who trusted his clerk, there is sufficient reason for the extension of time under s. 5, Limitation Act. ALLAH WADHAYA v. FIRM HAJI MUHAMMAD RAMZAN-AMIR-UD-DIN *Lah.* 135

——— s. 5—*Appeal within time—Absence of names of parties in power-of-attorney—Defect pointed by office after limitation—Defect removed—Extension of time, if can be given.*

Where the power-of-attorney in favour of the Counsel for the appellants did not give the names of the parties at the time of filing the appeal but the defect was removed on the office pointing it out after the expiry of limitation :

Held, that the appeal could not be said to be barred by time. At any rate it was a fit case for extension of time under s. 5, Limitation Act KANSHI RAM v. MUNICIPAL COMMITTEE, MOGA *Lah.* 893

——— ss 5, 12 —*Condonation of delay in filing application must be specifically asked for—Figures in copy of judgment—Presumption of correctness.*

Where delay in filing an application for review is caused by the supply of wrong information on the part of the copying department which resulted in delay in getting the copy of the decree a person making the application is not entitled to deduction of time under s. 12, Limitation Act, as of right. He has to satisfy the Court that the wrong information was given in circumstances for which he was not responsible, and if the Court is satisfied as to the justness of his contention the Court will then extend the time under s 5, Limitation Act. Where the appeal on the face of it is time-barred it is the duty of the applicant to append to his appeal the reason for the delay and to ask for condonation of the delay under s. 5 of the Limitation Act.

An appellant is entitled to presume the accuracy of the figures which are given him in the copy of the judgment. BALWANTRAO v. BALMUKUND *Nag.* 588

——— s. 6, Sch. I, Arts. 125, 120—*Suit for declaration after death of widows whose alienation is challenged—Limitation—Minority of plaintiff—Suit within three years of majority — Plaintiff, if entitled to benefit of s. 6.*

A suit for a declaration filed after the death of the widows whose alienation is challenged does not fall under Art 125, Limitation Act, but is governed by Art. 120 under which Article read with s. 6, the plaintiff will be entitled to bring his suit within three years of his attaining majority. SITAL RAUT v. ADALAT RAUT *Pat.* 244

——— s. 7—*Hindu Law—Joint family—Suit by member against stranger transferee from manager — Stranger setting up title by adverse possession—Time run out against manager—Existence of minor members—Whether saves limitation.*

A suit brought by one member of a family against a transferee from the manager raises a question as to the authority of the manager, and in that sense, involves a dispute as to the respective rights of the members of the family *inter se*. The nature of such a suit is obviously distinguishable from that of a suit brought against a person, who is an entire stranger to the family, who does not claim title through any member of the family and who is setting up his adverse possession as a paramount title. In such cases the manager of the joint Hindu family represents the family as one unit and if time has run out against the manager, limitation is not saved merely because there are some minor members still living. The provisions of s. 7, Limitation Act, do not apply to such a suit. ANRUDH RAI v. SANT PRASAD RAI *All.* 569

——— s. 9. SEE Limitation Act, 1908, Sch. I, Art. 23 706

——— s. 12. SEE Limitation Act, 1908, s. 5 588

——— s 14

SEE Limitation Act, 1908, s 4 205

SEE Limitation Act, 1908, Sch, I, Art. 97 1092

——— s. 18, Sch. I, Art. 10 —*Fraud—Mere suggestion of fraud is not enough—Nature of fraud to be proved under s.* 18.

Where a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A person, who, in such circumstances, desires to invoke the aid of s. 18, Limitation Act, must establish that there has been fraud, and that, by means of such fraud, he has been kept from the knowledge of his right to sue, or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. Mere suggestions of fraud do not amount to such knowledge as is required by s. 18 of the Limitation Act. BHAGWANA v SHADI *Lah.* 654

——— s. 19.

SEE Civil Procedure Code, 1908, O. VII, r. 6 819

SEE Mortgage 576

s. 19—*Acknowledgment containing words "dewne kite" — Whether promise to pay within Contract Act (IX of 1872), s. 25—Extrinsic evidence to explain acknowledgment—Admissibility of—Evidence Act (I of 1872), s. 96.*

The words "4,019-11-6 *lekhe baki dewne kite*" in an acknowledgment can be reasonably construed as a promise to pay, within the meaning of s. 25, Contract Act.

According to Explanation I to s. 19, Limitation Act, it is not necessary that the writing itself should specify the exact nature of the property or right in respect of which liability is acknowledged and there is to be no bar to extrinsic evidence being admitted for the purpose. NIHALU RAM CHELA RAM v. RADHU RAM HUKMI RAM *Lah.* 1074

——— s. 19—*Document denying and repudiating liability to pay, whether sufficient to extend limitation.*

Whether a particular document or letter amounts to an acknowledgment of liability or not within the meaning of s. 19, Limitation Act, must depend upon the terms thereof Under the Indian statute there need not be a promise to pay, but the document in question must, on a fair reading, amount to an admission of liability, absolute or conditional, and in the latter case the condition must be fulfilled. But where the letter or the document relied upon expressly states that there is no liability, and the liability is in fact denied and repudiated, limitation cannot be said to be extended under s. 19 of the Limitation Act. DEBJI GHELABHAI & BROTHERS v. R. D. MEHTA & CO. ASANSOL *Cal.* 721

——— s. 20—*Payment as a matter of grace and not towards admitted debt—Limitation, if saved.*

Limitation is not saved by a payment made as a matter of grace and not towards any admitted debt. SITA RAM v. MAHMUDI BEGAM *Lah.* 238

——— s. 20—*Written statement cannot be called in aid for purpose of s.* 20.

Limitation Act—contd.

A written statement filed in the suit itself cannot be called in aid for the purposes of s. 20 of the Limitation Act. When the plaintiff institutes the suit beyond the period of limitation prescribed in the Schedule to the Limitation Act, he has to state in his plaint the reasons why the suit is still within time. If there is no such statement the Court has to dismiss the suit. A suit must be tried on the cause of action as laid in the plaint and any inherent defect of the said nature in the plaint cannot be supplied by a written statement in the suit. DEBJI GHELABHAI & BROTHERS *v* R. D. MEHTA & Co., ASANSOL *Cal.* 721

——— —s 26. SEE Easement 966

——— s. 28—Applicability. SEE Criminal Procedure Code, 1898, s. 145 1024

——— s. 28—*Scope of.*

Section 28 of the Limitation Act provides that after the expiry of the period prescribed for instituting a suit for possession of any property, the person who should have instituted such suit but has failed to do so, shall cease to have any right to the property. There cannot be a revival of title of which there has been a statutory extinguishment. NANDO KAHAR *v.* BHUP NARAIN SINGH *Pat.*. 1094

——— Sch. I, Art. 2—*'In pursuance of an enactment', meaning of—Person honestly believing that he is acting under some enactment—Protection of—Police constable making report against plaintiff—Suit for damages—Proof that defendant acted honestly on some information received—Necessity of, for protection of Art 2—Criminal Procedure Code (Act V of 1898), s. 44.*

The words 'in pursuance of an enactment' in Art. 2, Limitation Act, must be interpreted as meaning acting in conformity with an enactment and not merely pretending to act or acting under colour of such an enactment. Where a person honestly believes that he is acting under some enactment, he is protected. But where a person merely pretends that he was so acting and knows that he should not act under that enactment, he cannot be said to be acting in pursuance of any such enactment. No doubt under s. 44 of the Criminal Procedure Code, it is the duty of every person to make a report to the Police the commission of certain specified offences, but there is no such duty cast upon a citizen, much less a Police Officer, to make such a report when no facts exist He would certainly not be acting in pursuance of s. 44 of the Criminal Procedure Code, if he concocts a purely false story and then makes a report of such a false story, knowing it to be false.

Consequently, where a defendant has done an act or omitted to do an act, knowing that he had no ground whatsoever for so acting or omitting to do an act, he does not come within the purview of Art. 2. It is only defendants who have acted honestly, although they might have exceeded the actual power conferred upon them by an enactment who would be protected. Of course, where it is established that the act done was in strict accordance with an enactment, there would be an obvious protection. But even where the power was exceeded, there would be protection in cases of good faith and *bona fide* belief.

Thus where a suit is filed for damages on the ground that the defendant, a Police Constable, who cherished a grudge against the plaintiff, made a false report at the Police Station stating that the plaintiff was leading a riotous mob, if the defendant were to satisfy the Court that at the time when he made the report he acted honestly on some information received, he would be protected, even though the report might turn out to be absolutely false but not so to the knowledge of the defendant. SHIAM LAL *v.* ABDUL RAOF *All.* 131 F B.

Limitation Act—contd.

——— Sch. I, Arts. 7, 36, 102, 120, 124—*Suit by* archaka *against trustees for recovery of emoluments—Limitation—Article applicable*—Archaka, *status of—'Wages', meaning of.*

An *archaka* is a servant of the temple trustees and the perquisites or emoluments received by him are 'wages' within the meaning of Art. 102 of the Limitation Act. A suit by an *archaka* against the trustees for recovery of emoluments due to him is, therefore, governed by Art. 102 of the Limitation Act and not by Art. 120 or Art. 36. VEDAGIRI SASTRIAR *v.* JAGATHGURU SANKARACHARIAR *Mad.* 591

——— ——— Arts. 7, 102—*Distinction.*

Article 7 and Art. 102 deal with different classes of wage-earners. The former deals with a lower class of wage-earner than that dealt with by Art. 102. VEDAGIRI SASTRIAR *v* JAGATHGURU SANKARACHARIAR *Mad.* 591

——— ——— Art. 10. SEE Limitation Act, 1908, s. 18 654

——— ——— Art. 11-A— *Proceedings under O. XXI, r. 97, Civil Procedure Code (Act V of 1908)—Held, there was sufficient investigation.*

In proceedings under O. XXI, r. 97, Civil Procedure Code, the auction-purchaser was present but did not adduce evidence; the opposite party examined only one witness; there was no opposition regarding another lot and the Court passed an order:

Held, that there was an investigation or an inquiry by the Court, so as to bring it under Art. 11-A, Limitation Act. HARI SADAY SAHA *v.* MAHENDRA NARAIN RAJ *Cal.* 702

——— ——— Art. 23, s. 9—*Acquittal of plaintiff—Suit for damages for malicious prosecution—Limitation, when commences—Application for revision—Fresh period for bringing suit—Whether begins to accrue.*

So far as the first portion of Art 23 of the Limitation Act is concerned, the limitation for filing a suit for compensation for malicious prosecution is one year from the date when the plaintiff is acquitted. The fact that the defendant files an application for revision against the order of acquittal obtained by the plaintiff in his favour does not enable the latter to assert that though time had once begun to run against him from the date of the order of his acquittal, yet, as he had to contest the application for revision filed against the order of acquittal, as fresh period of limitation for bringing his suit for damages began to accrue to him. SHANKAR PRASAD *v.* SHEO NARAIN *Oudh* 706

——— ——— Art. 36. SEE Limitation Act, 1908, Sch. I, Art 7 591

——— ——— Art. 47—*Criminal Procedure Code (Act V of 1898), s. 145—Proceedings under, decided in favour of defendant No. 2—Defendant No. 1 bringing suit for possession three years after—Suit decreed—Plaintiff resisting possession—Resistance ineffectual—Suit by plaintiff for declaration of title and recovery of possession—Suit, whether barred—Civil Procedure Code (Act V of 1908), O. XXI, r. 100.*

Section 145 (6) of the Code of Criminal Procedure provides that if the Magistrate decided that one of the parties was or should be treated as being in possession of the land in dispute he shall issue an order declaring such party to be entitled to posses-

Limitation Act—contd.

sion thereof until evicted therefrom in due course of law. Thus if the successful party is evicted by means of a suit by a person other than the parties to the proceeding within the period of three years, the order of the Magistrate being rendered ineffectual, the shorter period of limitation ceases to run against the unsuccessful party, and there can be no room left for the application of Art. 47, Limitation Act, and s. 28, Limitation Act, will not become operative until the expiry of the limitation period laid down in the ordinary law.

A proceeding under s. 145, Criminal Procedure Code, in respect of certain land between the plaintiff and defendant No. 2 was decided in favour of the latter and more than three years after this the defendant No. 1 brought a suit against defendant No. 2 and got possession in spite of plaintiff's application under O. XXI, r. 100, Civil Procedure Code. Thereupon the plaintiff brought a suit for declaration of title and recovery of possession. The plaintiffs main contention was that Art. 47, Limitation Act, applies only as between original parties to a proceeding under s. 145, Criminal Procedure Code, or those claiming under them and that it could not, therefore, be availed of by defendant No. 1 who was neither a party to the proceeding nor was a person claiming under one of the parties:

Held, (1) that s. 28, Limitation Act, was a complete answer to the plaintiff's contention;

(2) that since it was not disputed that defendant No. 2 in whose favour the proceeding under s. 145, Criminal Procedure Code was decided was in possession of the disputed land for more than three years and as no step was taken by the plaintiffs to question the order under s. 145 and to evict defendant No. 2 in due course of law within a period of three years which was the period of limitation as provided by Art. 47, Limitation Act, whatever title (if any) the plaintiffs had to the property, was completely extinguished;

(3) that in the circumstances it was not at all necessary for defendant No. 1 to implead the plaintiffs in the suit which they subsequently brought against defendant No. 2 and the plaintiffs not having taken any steps to evict defendant No. 2, could not now question the title of defendant No. 1. NANDO KAHAR *v.* BHUP NARAIN SINGH *Pat.* **1094**

——— **Sch. I, Art. 85**—*Open account, nature of —Mutual account, essentials of—Balance never standing in favour of defendant — Account, if mutual—Art. 85, if applies.*

An open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise consisting of a series of transactions. An account current is an open or running account between two or more parties or an account which contains items between the parties from which the balance due to one of them is, or can be, ascertained. Such an account comes under the term of an open account, in so far as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having items on one side only, though made up of debits and credits.

Where the account between the parties was open and current, but there was no occasion when the balance stood in favour of the defendant, and it was clear from the nature of the dealings between the parties that there was no possibility of the balance standing in favour of the defendant:

Held, that although it was an open and current account, inasmuch as it had not been closed, it could not be said to be mutual and hence Art. 85, Limitation Act, did not apply. FIRM PUTTU LAL KUNJI LAL *v* FIRM B. JAGANNATH *All.* **44**

——— **Sch. I, Arts. 97, 115, s. 14**—*Promise to execute lease—Consideration paid on October 26, 1926, and January 1, 1927—Breach of promise—Suit for return of consideration filed in Small Cause Court on October 26, 1929—Small Cause Court holding it has no jurisdiction and ordering presentation in proper Court, on May 21, 1930—Suit presented on June 11, 1930—Cause of action, when arises—Suit, whether in time.*

The plaintiff instituted a suit to recover two sums of Rs. 75 paid by him to the other party on October 26, 1926, and January 1, 1927. His case was that he made these payments by way of premium or *nazrana* because the defendant had promised to execute in his favour a lease of a certain holding. He claimed that the sums should be returned on the ground that the defendant had resiled from his promise and refused to execute the lease. The suit was originally instituted in the Court of Small Causes on October 26, 1929. That Court decided that it had no jurisdiction and returned the plaint for presentation to the proper Court on May 21, 1930. It was presented on June 11, 1930:

Held, that this was clearly a claim which was governed either by Art. 97 of the Limitation Act or by Art 115, that is, it was either a claim for money paid upon an existing consideration which afterwards failed in that the payments were made in consideration of the promise to execute the lease and the promise was afterwards repudiated or it was claim for compensation for the breach of any contract, express or implied, not in writing registered and not specially provided for.

Held, further that as the second payment was made on January 1, 1927, it was obvious that the breach of the promise occurred after that date, and the cause of action arose from the breach. As the plaintiff was entitled to the benefit of the provisions of s. 14 of the Limitation Act his claim for both the sums was clearly within time. ABDUL SHAKUR KHAN *v.* RAJENDRA KISHORE SARAN SINGH *All.* **109**

——— **Arts. 97, 116, 120**—*Suit for refund of money wrongly paid—Money paid to redeem mortgage—Suit for foreclosure by person having mortgagee interest—Payment held to be wrongly made—Decree for foreclosure—Suit for refund—Article applicable—Limitation, when begins to run.*

The plaintiffs who were the representatives in interest of the mortgagors advanced Rs. 400 to defendants who succeeded to a share of the mortgagee rights, in order to redeem the mortgage. The money was received and defendants executed a deed of re-conveyance of the mortgaged property in consideration of the payment of the mortgage money made to them. *L* who had acquired an interest in the mortgagees' interest sued for foreclosure. The plaintiffs pleaded that they had already paid Rs. 400 to defendants and had redeemed the mortgage. This plea was not accepted and it was held that the payment had been wrongly made to the defendants. The decree for foreclosure was passed on September 27, 1928, and in consequence of this decree the plaintiffs had to pay a sum of Rs. 471-11-3 to *L* on February 22, 1929, for the purpose of redeeming the mortgage. Plaintiffs filed a suit for recovering the sum of Rs 400 with interest, which had been wrongly paid to defendants:

Held, that Art. 97, Limitation Act applied and the period of three years ran from

September 27, 1928, which was the date of the foreclosure decree. As soon as it had been decided by the foreclosure decree that the defendants wrongly received the money it would have been open to the plaintiffs to institute a suit to recover the money wrongly paid even before they had been compelled to make a second payment of the money to *L*. Article 116 did not apply as the suit was not framed as a suit for compensation for the breach of any covenant. Nor did Art. 120 apply to the case. SHAMBHU DUTT *v.* RAM BAKHSH *Oudh* 299

——— **Sch. I, Art. 102.** SEE Limitation Act, 1908, Sch. I, Art. 7 591

——— ——— **Art. 112**—*Company in liquidation —Liability of member to pay calls which are barred under Art.* 112—*Companies Act (VII of* 1913), *s.* 156.

A member of a company in liquidation is liable in respect of unpaid calls even though the calls were made by the company before it went into liquidation and the suit of the company for its realization had become barred by time under Art. 112 of the Limitation Act. The principle is that when a company goes into liquidation, s. 156, Companies Act, creates a new liability on the share-holders in respect of such calls, which is distinct from and independent of the rights which the company had against them before the winding up. POKHAR MAL *v.* FLOUR & OIL MILLS CO. LTD. *Lah.* 16

——— ——— **Art. 115.** SEE Limitation Act, 1908, Sch. I, Art. 97 1092

——— ——— **Art. 115**—*Contract for building construction—Before completion contract given to another—Original contractor suing for value of work done—Limitation.*

A contract for the construction of a building was given to the plaintiff but before the completion of the work the contract was given to another person. The plaintiff sued for the value of the work already done:

Held, that Art. 115 of the Limitation Act applied and the period of three years began from the date of the breach of contract. SITA RAM *v.* MAHMUDI RAM *Lah.* 238

——— ——— **Art. 120.**

SEE Limitation Act, 1908, s. 6 244
SEE Limitation Act, 1908, Sch. I, Art. 7 591
SEE Limitation Act, 1908, Sch. I, Arts. 97, 116 299

——— ——— **Art. 123**—*Suit for recovery of legacy from persons in possession who are legally bound to pay it—Limitation for suit.*

A suit for recovery of a legacy from persons in possession of the estate who are legally bound to pay the same is governed by Art. 123, Limitation Act. SRI NATHJI *v.* PANNA KUNWAR *All.* 390

——— ——— **Art. 124.** SEE Limitation Act, 1908, Sch. I, Art. 7 591

——— ——— **Art. 125.** SEE Limitation Act, 1908, s. 6 244

——— ——— **Art. 132**—*Plaintiff asking only for money decree—No prayer for enforcement of charge—Art.* 132, *if applies.*

Article 132, Limitation Act will not apply to a case in which the plaintiff does not ask for the enforcement of any charge but simply asks for a money decree against the defendants. SRI NATHJI *v.* PANNA KUNWAR *All.* 390

——— ——— **Art. 142**—*Applicability — Adverse possession—Dispossession of plaintiff—Considerations for deciding the question—Property not capable of enjoyment in possession of one co-sharer —Conduct of vendees from other co-sharers.*

Where property in dispute consists of lands actually cultivated or of house capable of actual occupation and the plaintiff sues for possession of such property, on the allegation that he was dispossessed by the defendant, Art. 142 is undoubtedly applicable and the plaintiff must show that his dispossession occurred within twelve years before the institution of the suit. But where the property is of such a nature that it is not capable of actual physical possession or where the property, though capable of physical possession, is in the occupation of one through whom the plaintiff can be in constructive possession, different considerations apply. In considering the question whether the plaintiff was dispossessed within twelve years or whether his possession discontinued within twelve years, the nature of the property and the position of those actually occupying it, if it is capable of actual occupation, must be taken into consideration:

Held, that where the property (a tank) and its appurtenances are not capable of enjoyment and there is no suggestion that the defendants so conducted themselves in relation to the tank purchased by them as to amount to the plaintiff's dispossession, the plaintiff's possession must be taken to have continued till the defendants' possession became adverse as regards continuity and extent. BABOO SINGH *v.* RAM MANOHAR *All.* 824

——— **Sch. I, Art. 166.** SEE Civil Procedure Code, 1908, O. XXI, r. 89 603

——— ——— **Art. 174**—*Limitation of ninety days—Whether applies to certificate by decree-holder.*

The limitation of ninety days provided by Art. 174 of the First Schedule of the Limitation Act is not applicable to a certification by a decree-holder. FIRM SUNDAR DAS VIR BHAN *v.* FIRM UMA DATT HANSRAJ *Lah* 315

——— ——— **Art. 181.** SEE Limitation Act, 1908, s. 4 205

——— ——— **Art. 182**—*Application for substitution and for execution*— Vakalatnama *accompanying it not bearing name and signature of pleader—Application, if one in accordance with law—Court not noticing defect and ordering notice—Judgment-debtor not appearing or objecting —Subsequent proceedings— Judgment-debtor, if can object that the defective application did not save limitation.*

Where an application for substitution of the names of the decree-holder's sons for execution is signed by a pleader and accompanied by a *vakalatnama* in which the place meant for the name of the pleader was left blank and the *vakalatnama* did not bear any signature of the pleader showing that he had accepted it, the application as filed is not one filed by a duly authorised person and is not in accordance with law.

When without noticing the defects in the *vakalatnama*, the Court ordered notice to issue to the judgment-debtors who did not appear to show cause or raise objections to the application for substitution of the sons of the decree-holder and the Court ordered their names to be brought on record and the execution to proceed, but the proceeding did not fructify and the execution case was struck off:

Held, that in subsequent proceedings it was open to the judgment-debtor to object that the defective application could not serve as a fresh

starting point for purposes of limitation as not being in accordance with law. OFFICIAL RECEIVER, ALIGARH *v.* HIRA LAL *All.* 673

——— **Sch. I, Art 182 (5)**—*Decree obtained in Small Cause Court—Suit in Munsif's Court for declaration that property of judgment-debtor is attachable in execution of decree—Decree not transferred to Munsif's Court before filing of plaint—Plaint, if step-in-aid—Munsif's Court, if 'proper Court' within meaning of Art.* 182—*Plaint, if saves limitation for execution.*

Where a decree is obtained in a Small Cause Court and subsequently a plaint is filed in a Munsif's Court for a declaration that certain property of the judgment-debtor is attachable in execution of the above decree, although the plaint can be treated as a step-in-aid, yet when the decree has not been transferred to the Munsif's Court for execution before the plaint is filed, that Court cannot be held to be the 'proper Court' within the meaning of Art. 182, Limitation Act and cl. (5) of the Article will not apply for the purpose of saving limitation. KHUSHI RAM *v.* RAM SUMER *Oudh* 505

——— **Art. 182 (5)**—*Execution of decree—Applications against deceased judgment-debtor or wrong legal representative, whether save limitation.*

Where owing to a *bona fide* error an execution petition names the deceased judgment-debtor as the person against whom execution is sought, it is sufficient to save limitation.

An execution petition presented *bona fide* against a wrong legal representative of a deceased judgment-debtor is still an application to take a step-in-aid of execution sufficient to save limitation. SUBRAMANIA DESIKA *v.* RANGASWAMI CHETTIAR *Mad.* 327

——— **Art. 182 (5), Expl. I**—*Application for execution against surety more than three years after decree—Limitation—Principal judgment-debtor and surety, whether joint-debtors—Applicability of Expl. I.*

A surety for the satisfaction of a decree is neither a joint judgment-debtor nor a person against whom a decree has been passed severally with any portion of its subject-matter distinguished as payable or deliverable by him within the meaning of Expl. I to cl. (5) of Art. 182 of the Limitation Act. An application for execution against a surety is not therefore governed by Expl. I but by the simple unqualified words of Art. 182, cl. (5).

Though a surety is technically liable from the date of the decree, in equity his liability arises only upon the failure of the judgment-debtor to satisfy the decree and the decree-holder who is proceeding against the principal debtor is not bound to file a formal and otherwise futile petition against the surety before the period of three years expires in order to keep alive the decree against the surety. SADANALA GANGARAJU *v.* INDRAGANTI SUBBAYYA *Mad* 864

Lunatic—*Co-heirs refusing to maintain lunatic—Person who is not strictly a co-heir maintaining and supporting—Inheritance to property of lunatic after his death—Co-heirs, if excluded—Rule if equitable—Burmese Buddhist Law—Inheritance.*

The share of a person who is insane and incapable of taking care of himself or his affairs should go on his death to the co heir who maintained and looked after him during his life-time The same principle applies to a person who is not strictly a co-heir of the lunatic if all the co-heirs of the lunatic refused to undertake his custody. In an extreme case, these rules are neither inequitable nor

opposed to the present day ideas of the Burmans. SAN TUN U *v.* MA NI MA *Rang* 115

Madras Abkari Act (I of 1886)—Abkari *license—Clauses* 27, 37—*Partnership to carry on* abkari *business standing in another's name—Sanction of Collector not obtained—Suit to recover money advanced to licensee—Maintainability—Legality of partnership.*

The effect of cl. 27 of the General Sales Notification issued under the Madras Abkari Act is that a partnership in an *abkari* business is prohibited unless the previous permission of the Collector has been obtained.

The first defendant successfully bid a toddy shop at an auction on July 30, 1927, and the license was issued in his name on October 1, 1927. Meanwhile on August 17, 1927, the plaintiff advanced a sum of money to the first defendant on a promissory note under an agreement to work as partners. No application was ever made for the issue of the license in the name of the partners nor was the permission of the Collector obtained:

Held, that the object with which the money was lent being for the purpose of carrying on a business in contravention of the law and opposed to public policy, the plaintiff was not entitled to recover on the note. CHAVA RAMANAYUDU *v.* SARYADEVARA SEETHARAMYYA *Mad.* 544 S. B.

Madras Gaming Act (III of 1930), ss. 5, 6. See Criminal Procedure Code, 1898, s. 96 496

——— **ss. 5, 6**—*Mere fact that occasionally people used to play cards at a place and perhaps for money—Whether makes it a common gaming house.*

The mere fact that occasionally people used to play cards at a particular place and perhaps for money, does not necessarily make it a common gaming house PUBLIC PROSECUTOR *v.* SUBRAMANIA SASTRI *Mad.* 496

——— **ss. 5, 6**—*Warrant issued under s.* 96, *Criminal Procedure Code (Act V of* 1898)—*Presumption of common gaming house, whether arises.*

The presumption referred to in s. 6 of the Madras Gaming Act can only apply to searches conducted in pursuance of a warrant issued under s. 5 of the Act. It does not apply where the warrant is issued under s. 96, Criminal Procedure Code.

The mere fact that reference was made to s. [redacted] the Gaming Act in the application for a warrant does not show that the Magistrate actually issued the warrant under that section. PUBLIC PROSECUTOR *v.* SUBRAMANIA SASTRI *Mad.* 496

Madras Local Boards Act (XIV of 1920), s. 225 (3)—*Suit for improper cancellation by President of contract with Board—Whether a suit 'in respect of an act done in pursuance of the Act'—Special rule of limitation, whether applies.*

Where, during the absence of the President of a District Board, the Vice President accepted a tender made by the plaintiff for a lease of the right to buy tolls, and the President, finding that there was a higher tender, cancelled the acceptance of the plaintiff's tender and the plaintiff filed a suit against the Board for damages for improper cancellation of the contract:

Held, that the suit was one 'in respect of an act done or purporting to be done by the President in pursuance of the Act', within the meaning of s 225 (3) of the Madras Local Boards Act and was time-barred as it was not instituted within 6 months of the accrual of the cause of action. The distinction between actions on contract and actions independent of contract which has been drawn in this connection, though convenient as a working

Madras Local Boards Act—concld.

rule, does not accurately represent the basis of the applicability of the rule. The real test is whether what is complained of is some act done in pursuance of the statute. ATHIMANNIL MUHAMMAD *v.* MALABAR DISTRICT BOARD *Mad.* 291

Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900), s. 6—*Landlord's right to set off rent against value of improvements due to sub-lessee.*

Where property has been sub-leased by the lessee and the sub-lessee has made improvements, the landlord is entitled, in a suit for eviction, to set off any sum due to him for rent in respect of the holding against the sum found due to the sub-lessee by way of compensation for value of improvements, even though nothing is due to the lessee from the sub-lessee in respect of rent.

In a suit by a landlord for eviction, the landlord is entitled to set off any money due to him for rent in respect of the tenancy against sums due by way of compensation for value of improvements to a sub-lessee to whom the lessee sub-leased the properties NARAYANI AMMA *v.* NARAYANAN NAMBOODRIPAD *Mad.* 271

Malabar Law—*Joint family—Allotment of property to descendants of some daughters to the exclusion of another daughter—Whether descendants take the property as* thavazhi *or as tenants-in-common—Right of member to sue for recovery of property from trespassers.*

A female governed by the Marumakkathayam Law had four daughters *A*, *B*, *C* and *D*. Under a *razinamah*, certain properties were allotted to the *thavazhi* of *A*, *C* and *D* and their descendants excluding *B* and her descendants. The descendants of *B* claiming the property as their own mortgaged the same. The senior member of *A's thavazhi* instituted a suit for declaring the mortgage invalid and recovering the properties;

Held, even if the *thavazhi* of *A*, *C* and *D* created by the *razinamah* was not legally constituted, the right of management under the *razinamah* vested in the senior male member and if the parties did not take the property under the *razinamah* as a *thavazhi* they would be tenants-in-common and the plaintiff as a tenant-in-common was entitled to sue to recover the properties as against the defendants who were trespassers.

Held, further, that having regard to the nature of the exclusive right set up by the defendants to the property, it was not open to them to plead in appeal that the mortgage was binding on the larger *thavazhi* to which the plaintiff belonged on the ground that the amount was advanced for that *thavazhi's* purposes. RAMUNNI KITAV *v.* CHALIKKARA KUNHAYAN *Mad.* 651

——Karar—*Total deprivation of* karnavan's *powers—Notice to strangers, whether necessary.*

Quaere.—Whether, where the effect of a *karar* is to terminate the *karnavan's* authority altogether, any disposition made by him in favour of strangers who had no notice of the *karar* will be binding on the family. RAMUNNI KITAV *v.* CHALIKKARA KUNHAYAN *Mad.* 651

Maxim—'Actus curiae neminem gravabit. SEE Civil Procedure Code, 1908, O. XXI, r. 89 603

——Expressio unius est exclusio alterius—*Applicability of.*

The doctrine *expressio unius est exclusio alterius* does not affect cases in which the express provision appears, upon the true construction of the contract, to have been super-added for the benefit of the mortgagor and to have been inserted for the purpose of adding to, and not qualifying, the provision which the law implies for his benefit. HARIHAR PRASAD *v.* GOPAL SARAN *Pat.* 976

——In pari delicto potior est conditio possidents and nemo allegans turpitudinem—*Applicability.* SEE Fraud 928

Mercantile usage—*Mercantile usage contrary to justice cannot be supported by Court of law.*

However well established the usage or practice may be, if it is contrary to natural justice, it cannot be upheld in a Court of law. Consequently mercantile usages, in the conduct of references, cannot be supported if they are contrary to the principles of natural justice. FAZALALLY *v* KHIMJI POONJI & Co. *Bom.* 801

Minor. SEE Contract Act, 1872, s. 65 1017

——Compromise by guardian—Effect. SEE Compromise 912

——*Guardian acting under authority from District Judge—Stranger purchasing minor's property from guardian—When entitled to protection—Alienation setting aside of—Burden of proof.*

A stranger purchasing from a guardian acting under authority from the District Judge, would be entitled to every protection from Courts so long as it is not shown that he acted in a fraudulent or collusive manner, knowing that the debts for the liquidation of which the purchase-money would be applied were not debts lawfully binding on the minor. The burden of proof would, in such a case, lie heavily on any one seeking to set aside such an alienation. But where the purchasers were themselves the creditors of the family whose debts it was the object of the alienations to liquidate, inasmuch as they have the means of satisfying a Court as to the origin and nature of those debts and how they are binding on the minor, the burden of proof is shifted on their shoulders as soon as the plaintiff has established a *prima facie* case. RAJBALLABH MISIR *v.* BISHUN PRASAD SINGH *Pat.* 81

——*Implied permission to sue by guardian—Absence of formal order granting leave to sue—Whether fatal to suit.*

In a suit by the guardian on behalf of the minor where implied permission of the Court to sue can be presumed, the absence of a formal order granting leave to sue is not necessarily fatal to the suit. PADUMAN DAS *v.* PARBATI *All.* 365

——*Liability under promissory note executed by guardian—Whether condition—Suit on debt, if necessary.*

The fact that a minor can be made liable only if it was executed for the purposes binding on him does not make the liability under the promissory note conditional.

It is not necessary that the plaintiff should sue in such cases on the debt. YELURI SATYANARAYANA *v.* YELURI MALLAYYA *Mad.* 581 F. B.

——*Persons dealing with property of minor—Law applicable*—Bona fide *lender—Certificate from District Judge—When can be got and relied on.*

The ordinary law applicable to those who deal with the property of a person under disability is that he must make a proper inquiry to satisfy himself (*a*) that there is legal necessity for the money and (*b*) that there is a necessity for the loan or sale to produce that money. A *bona fide* lender or purchaser may satisfy this obligation to inquire by demanding from the borrower or vendor a certificate from the District Judge that the money is required for a legitimate purpose and sanctioning the loan or sale to supply the need certified. But if he is

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already aware or has materials in his possession which reasonably put him on inquiry, he is not entitled to substitute the opinion of the Judge in place of his own opinion. RAJBALLABH MISIR *v.* BISHUN PRASAD SINGH *Pat.* 81

———*Person executing document for minor—Whether he can be valid guardian in suit, is not pure question of law—Foreign judgment against minor—Minor not represented by proper guardian—Suit in British India on that judgment—Held, there was no cause of action on foreign judgment against minor—No decree against assets of minor.*

When a person has executed a document or entered into a transaction on behalf of a minor, the question, whether that person can be validly appointed a guardian, in a suit brought against the minor on the document or transaction in question, is not a pure question of law but is one of fact, and for the decision thereof no hard and fast rule of law can be laid down. There is nothing either in the Civil Procedure Code or in the authorities to lay down that such a person cannot be appointed a guardian and under proper circumstances he can be validly appointed a guardian of the minor in such a suit.

A person, having conflicting interest with that of minor was appointed guardian *ad litem* in a suit in a foreign Court. That Court decided the suit against the minor; upon this decision the plaintiff brought an action in British India;

Held, that since the foreign Court had not followed the rules and procedure prescribed in O. XXXII, Civil Procedure Code or the rules of natural justice, and the minor was not properly represented in the suit, the appointment being prejudicial to the defence of the minor in the foreign suit, the decree passed in that suit against the minor was not binding on the minor and did not avail the plaintiff;

Held, also that the plaintiff had not filed the suit on the original cause of action but on the foreign judgment alone and as the foreign judgment was pronounced without the minor being represented in the foreign Court, there was no cause of action on the foreign judgment against the minor and the suit against him must fail.

Held, further, that no decree against the assets of the minor would be conclusive under s 13, Civil Procedure Code, where the minor had no opportunity to defend the action in which that decree was passed. POPAT VIRJI *v.* DAMODAR JAIRAM *Bom.* 711

———*Ratification—Minor just attaining majority—Old promissory note executed by mother-guardian renewed—If proves ratification of old debt—Legal necessity—Hindu Law—Minor.*

In order that an act may amount to a ratification, there must be, after majority and after the late minor has acquired full knowledge of the nature and effect of the transaction, some promise or other act, which shows an internal acknowledgment of his liability in respect of the act done on his behalf during minority. Where, therefore, a person, two months after attaining majority, renews the promissory note executed by the late agent of his mother guardian, and such agent, at the time of the renewal is in the employ of the person in whose favour the promissory note is executed, it cannot be said that the act of the minor amounted to a ratification of the act of his mother guardian and the plaintiff must prove that there was a legal necessity. SHRIRAM *v.* MOHANLAL *Nag.* 607

Mortgage. SEE Deed 288

———Benami—*Mortgagee mentioning his children's*

Mortgage—contd.

names in mortgage-deed—No mention of his own name—Presumption

Where a person advances money on a mortgage but the names of his children are mentioned in the mortgage-deeds and his name is omitted therefrom, the presumption arises that he intended these mortgages as advancements for the benefit of his children who are respectively named in the deeds. MAUNG BA KYWE *v.* MA NYEIN *Rang.* 234

———*Foreclosure—Mortgagee obtaining possession under sale in execution and mortgagee obtaining possession by foreclosure—Difference, if exists.*

There is no difference in principle between a mortgagee who has obtained possession under a sale made in execution of the mortgage decree and one who has obtained possession by foreclosure of his mortgage. SALIK RAM *v.* JANGJIT BAHADUR SINGH *Oudh* 498

———*Mortgage of reversionary rights—Validity of in the Punjab—Transfer of Property Act (IV of 1882), s 43.*

A contract mortgaging a *spes successionis* in a province where the Transfer of Property Act is not in force can be enforced as an agreement to convey the estate when it falls into possession. A mortgage of the reversionary right of succession is, therefore, enforceable in the Punjab, although it does not effect a transfer of property at the time of the sale. AUTAR SINGH *v.* LAL SINGH *Lah.* 880

———*Partial redemption—Integrity of mortgage—When can be said to be broken up.*

Under ordinary circumstances a mortgage is indivisible but this indivisibility is for the protection of the mortgagee and the mortgagee by his own act can create a situation under which the integrity of the mortgage debt must be held to have broken up. BHEKDHARI MAHTON *v.* RADHIKA KOER *Pat.* 635

———*Prior and subsequent mortgagees—Prior mortgagee bringing mortgage suit for sale—Subsequent mortgagee can receive his money from surplus money or redeem prior mortgagee—He cannot sell property if prior mortgagee's claim is satisfied before sale—Separate suit, necessity of.*

As regards a mortgage suit for sale, the rights of the subsequent mortgagee are very limited; he has the right to redeem the prior mortgage or to receive his mortgage money out of the surplus sale proceeds after satisfaction of the prior mortgage, treating the suit as one for his benefit; but he cannot ask for a sale of the property if the prior mortgagee's claim is satisfied before the sale, nor can he ask for sale of some other property included in his own mortgage: and for either of these purposes he must bring a separate suit for sale on his own mortgage. WAN TAIK YA *v.* M. S. S. CHETTYAR FIRM *Rang.* 954

———*Property not mortgaged included in sale proclamation and sold—Mortgagor not rectifying sale proclamation—If disentitled from recovering property—Suit to set aside such sale—Held, it may be treated as an application under s. 47, Civil Procedure Code (Act V of 1908), made on day the plaint was presented.*

Where property which is not included in mortgage is included in the sale proclamation and sold the mortgagor is not disentitled from recovering the same, merely because he abstains from rectifying the sale proclamation. Something more is necessary to enable the mortgagee to entitle him to bring to sale in execution of his mortgage decree such property. PROTIVA SUNDARI DEBI *v.* SARADA CHARAN GOHO *Cal.* 848

Mortgage—contd.

———*Property subject to mortgage not sold subject to it—Auction-purchaser, if can dispute its validity.*

Where a property which was subject to a motrgage is not sold subject to the mortgage in execution of a decree, the auction-purchaser can dispute its validity. A P. L. PALANIAPPA CHETTIAR *v.* A. K. R. M. S. FIRM *Rang.* 10

———*Purchaser under first mortgage decree—Whether can set up first mortgage as shield in subsequent mortgagee's suit.*

A person, who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage, is entitled at the suit of a subsequent mortgagee who is not bound by the sale of the decree on which it proceeded, to set up the first mortgage as a shield. RAMNANDAN PRASAD SINGH *v.* RAM DAS *Pat.* 663

———*Redemption—Omission to implead persons interested—Redemption of portion on payment of proportionate amount.*

If a mortgagee omits to implead persons interested in a portion of the mortgaged property and then brings about the property to sale and purchases it himself, he is bound to allow the redemption of the portion concerned on payment of the proportionate amount. BHEKDHARI MAHTON *v.* RADHIKA KOER *Pat.* 635

———*Redemption—Suit by prior mortgagee without impleading subsequent mortgagee—Decree—Purchase of property by prior mortgagee in execution—Suit for redemption by puisne mortgagee—Amount, how to be ascertained—Liability to interest.*

Where a prior mortgagee obtains a decree on foot of his mortgage and purchases the mortgaged property in execution of his own decree, to which the puisne mortgagee was not a party, the sale cannot be considered to be of no effect at all. It effectively transfers the mortgagor's right to the prior mortgagee (auction-purchaser), as between the mortgagor and the prior mortgagee, though the sale is not binding on the subsequent mortgagee, who can, in spite of it, exercise his right of redemption. When such a suit for redemption is filed, the puisne mortgagee can set off against the mortgage money the net profits from the property received by the prior mortgagee as auction purchaser. At the same time he is liable to pay interest on the mortgage amount up to date to the prior mortgagee. In the absence of evidence to show whether in the years which followed the auction sale, the profits of the property were sufficient to pay the interest each year on the aggregate amount on which interest was running, if the prior mortgagee claims that redemption may be allowed on payment of a certain sum as due to him on the date when he obtained possession, the Court may pass a decree for redemption on the puisne mortgagee accepting that amount. RAMJI LAL *v.* ROSHAN SINGH *All.* 596

———*Subsequent mortgagee having notice of previous mortgage—Whether can challenge terms of previous mortgage.*

In the case of mortgages, the subsequent mortgagee does not become the absolute owner and he is the representative-in-interest of the mortgagor only to this extent that he is entitled to redeem the previous mortgage. If the previous mortgage is not invalid or void, he cannot challenge the terms thereof on the ground that interest is excessive or penal as he entered into the subsequent mortgage with his eyes open. The mortgagor in such cases may be entitled to certain reliefs on equitable considerations but no such considerations prevail in favour of the subsequent mortgagees. PHUL CHAND *v.* SHUGAN CHAND *Lah.* 1116

———*Subrogation—Person performing his own obligation—Right to subrogation if can be claimed.*

A person cannot claim subrogation when he simply performs his own obligation or covenant. SUKHRAM DASS *v.* MAHBUB KHAN *Oudh* 905

———*Sale of portion of mortgagee's security alleged to be with consent of mortgagee—Evidence of such consent — Registered mortgage — Mortgagee, if should secure title-deeds.*

Where it is alleged that a portion of the mortgagee's security has been sold with his consent, very definite evidence must be produced that that consent was obtained.

It is not ordinarily obligatory for a person who takes a registered mortgage to secure the title-deeds of the properties mortgaged and ordinarily his registered mortgage is sufficent protection to him. WAN TAIK YA *v.* M. S. S. CHETTYAR FIRM *Rang.* 954

———*Suit for redemption—Proof that mortgage is subsisting Onus—Acknowledgment by mortgagee—Admission by him at sale of his rights, whether amounts to acknowledgment—Limitation Act (IX of 1908), s. 19.*

In a redemption suit the onus lies on the mortgagor to show that at the time of the suit his mortagage was still subsisting, and if he relies on any acknowledgment for the purposes of saving limitation, it is for him to prove that that acknowledgment was made when the limitation was still alive. The mere making of an acknowledgment does not and cannot imply that it was being made within time nor does the mere fact of a mortgagee having claimed the status of a mortgagee and not that of an owner at the time of the sale of his rights, estop his assignee from demanding proof from the mortgagor at the time he seeks redemption that the mortgage was subsisting at the time the mortgagee described himself as a mere mortgagee. SHER MOHAMMAD *v.* KARAM CHAND *Lah.* 576

———*Undertaking by mortgagor to third party subsequent to mortgage—Mortgagee, if bound.*

A mortgagee is not bound by any undertaking given by his mortgagor to a third party subsequent to the date of the mortgage. CHIMAN LAL *v.* PALI RAM *Lah.* 394

Muhammadan Law—Gift. See Gift 303

———*Beguest to heir, when valid—Consent of other heirs, nature of.*

Under Muhammadan Law a bequest to heirs can only be rendered valid by consent of the other heirs. Such consent need not be express. It may be implied by the unequivocal conduct of the other heirs. MAHOMED HUSSEIN HAJI GULAM MAHOMED AJAM *v.* AISHABAI *Bom.* 334

———*Essentials to constitute gift—Mere book-entries in respect of money which is subject-matter of gift, if enough.*

Under the Muhammadan Law there must not only be a declaration by the donor of his intention to make the gift, but the subject of the gift must be accepted by and on behalf of the donee, and delivery of possession must be given to the donee in the manner which the subject of the gift is capable of. A relinquishment of control over the subject is necessary to complete the gift. Mere book-entries in respect of money which is the subject-matter of gift is not enough to support a gift. There must be some evidence to show that the donor relinquished his control over these moneys and divested himself completely of his beneficial interest therein,

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so that he could not have operated upon these sums if he wanted to. MAHOMED HUSSEIN HAJI GULAM MAHOMED AJAM *v.* AISHABAI *Bom.* 334

———*Muhammadan executor—Probate, if essential.*

There is no statutory obligation on a Muhammadan executor to take out probate of the testator's will. A Muhammadan executor can establish his right in a Court without taking such probate. MAHOMED HUSSEIN HAJI GULAM MAHOMED AJAM *v.* AISEABAI *Bom.* 334

———**Wakf**—*Fraudulent intent—When can be said to be made out.*

It cannot be said that the mere statement in a deed of *wakf* that the property was free from all sorts of debts and liens, although it may be incorrect, indicates that there was any fraudulent intent. Nor will the mere fact that the *mutawalli* subsequently made a number of leases for five years which he was authorized to do under the *wakfnama* would indicate any fraudulent intent. AFZAL HUSAIN *v.* CHHEDI LAL *All.* 791

——— ——— Mutawalli *effecting usufructuary mortgage of* wakf *property with previous sanction of Court—Mortgage for justifying necessity—Validity of—Sanction, if can be given retrospectively.*

A usufructuary mortgage of *wakf* property by a *mutawalli* who is a *shia*, though made without sanction of the Court may be retrospectively confirmed by the Court Such a mortgage made without previous leave of the Court is not void if made for a justifiable necessity.

Where it is found that by the usufructuary mortgage in question the accumulation of interest under the simple mortgage and the decrees was prevented and the transaction would therefore have been beneficial to the dedicated property and that the transaction should have received sanction, the usufructuary mortgage should be held to be valid in law. AFZAL HUSAIN *v.* CHHEDI LAL *All.* 791

Mussalman Wakf Validating Act (VI of 1913), s. 3, proviso—*Reservation of ultimate benefit contemplated by the proviso—Whether can be made impliedly—Wakf created in perpetuity—Portion of usufruct reserved for pious and charitable objects—Wakif having in view possible extinction of line of descendants—Use of words* 'wakf fi-sabi-lillah'—Wakf—*Validity of.*

The reservation of the ultimate benefit contemplated by the proviso to s. 3 of the Mussulman Wakf Validating Act can either be made expressly or impliedly. The answer to the question whether the reservation of the ultimate benefit for those purposes has been made by a deed of *wakf* must depend on the intention of the *wakif* as disclosed by the deed. In a case where the words "*wakf fi-sabi-lillah*" have been used and *wakif* has been created in perpetuity, and there is provision for the appointment of the *mutwallis* for all time to come, and a portion of the usufruct of the *wakf* property has been reserved for pious and charitable purposes, and the *wakif* had in contemplation the possible extinction of the line of his descendants who were to be the principal recipients of the profits of the *wakf* property, the irresistible conclusion is that the *wakif* intended by implication to reserve the ultimate benefit for the purposes enumerated in the proviso. BAQA ULLAH KHAN *v.* GHULAM SIDDIQUE KHAN *All.* 416 (*b*)

Negligence See Tort 631

Negotiable Instruments Act (XXVI of 1881), s. 4—*Promissor and promisee clearly indicated and also definite promise to pay but worded in participal form—Document, whether a promissory note.*

Where in the opening portion of a document the promissor and the promisee are clearly indicated and there is a definite promise to pay though it is worded in the participal form, the document is a promissory note CHOCKALINGAM CHETTIAR *v.* RAMA MU RAMA PALANIAPPA CHETTIAR *Mad.* 184

———**s. 70.** See Promissory note 953

———**s. 118**—*Presumption under.*

Section 118, Negotiable Instruments Act, does not raise any presumption that the consideration of the promissory note was advanced for legal necessity and the burden of proving that such advance was for legal necessity rests on the plaintiff making the advance on the promissory note. SHRIRAM *v.* MOHANLAL *Nag.* 607

Occupancy holding—*Lessee of non-transferable occupancy holding purchasing it during term of lease but before amendment of Bengal Tenancy Act in 1907—Dedication to idol—Validity of—Bengal Tenancy Act (VIII of 1885)—Amendment of 1907, if retrospective.*

The amendment of the Bengal Tenancy Act in 1907 does not affect a right which has already become vested prior to the amendment which has no retrospective effect. Where, therefore the lessee of a non-transferable occupancy holding has purchased it during the continuance of the lease but before 1907 and has dedicated it to an idol, the dedication is perfectly valid. SATYANARAIN SAMI *v.* JAMUNA BAI *Pat.* 834

——— *Transfer of non-transferable occupancy holding—Whether void or voidable.*

A transfer of a non-transferable occupancy holding is not void but voidable. SATYANARAIN SAMI *v.* JAMUNA BAI *Pat.* 834

Oudh Courts Act (IV of 1925), s. 31 (1)—*Application for grant of probate transferred to Subordinate Judge—Jurisdiction of Subordinate Judge, if confined to non-contentious cases—Probate.*

Where an application for grant of probate is transferred to a Subordinate Judge by an order of the District Judge, the test is whether the Subordinate Judge was acting in his capacity as a district delegate or in the capacity of a Subordinate Judge to whom a case has been transferred by an order of the District Judge. If he is seised of the case in the capacity of a district delegate, his jurisdiction ceases, as soon as the proceedings become contentious. If, on the other hand, he is trying the case as a Subordinate Judge, to whom the case has been transferred by the District Judge, there is no provision either in the Succession Act or in the Oudh Civil Rules confining his jurisdiction to non-contentious cases. It makes no difference in principle whether the proceedings at the time of the transfer had already become contentious or whether they become contentious afterwards. In the absence of any provision taking away the case from the jurisdiction of the Subordinate Judge, when the proceedings before him become contentious, it must be held that the Subordinate Judge is entitled to deal with the case, whether contentious or non-contentious. ANANDPAL SINGH *v.* RAM CHARAN *Oudh* 501

Oudh Estates Act (I of 1869), s. 8—*Widow holding life estate—Confiscation of estate, and first settlement with her—Her name in list—Widow, as trustee for remainderman—Gift of property—Suit for declaration of under-proprietary rights—Decree against widow, whether binding on remainderman—Trust—Presumption—Person held under-proprietor—Presumption as to possession—*

Oudh Estates Act—concld.

Civil Procedure Code (Act V of 1908), s. 11—Held no res judicata.

Where notwithstanding the confiscation of the land by the proclamation of Lord Canning, its restoration by affirming the absolute title of the grantees of summary settlements, and the granting a *sanad* with the full power of alienation, in her and her name being entered in the list prepared under s. 8, Oudh Estates Act, a widow holding a life-estate constitutes herself a trustee for the remainderman but makes a gift of the property and afterwards contests a suit for declaration of under-proprietary rights which is ultimately decreed, the gift is not binding on the remainderman after her death, but the remainderman is bound by the decree obtained against her. Just as a trustee cannot set up any title adverse to that of the *cestui que trust*, so also the beneficiary cannot repudiate the *bona fide* acts of the trustee entered upon for the benefit of the beneficiary or the *cestui que trust*.

Where a person is held to be an under-proprietor, possession as under-proprietor must also be presumed in his favour.

Since the lessee does not occupy a representative capacity and the lessor cannot be said to be a person claiming through his lessee, a previous decision in a suit by a lessee against a third person cannot operate as *res judicata* in a subsequent suit by the lessor against the same person. SHER BAHADUR SINGH *v.* MADHO PRASAD SINGH *Oudh* **1087**

Oudh Rent Act (XXII of 1886), s. 7-A—*U. P. Land Revenue Act (III of 1901), s. 33*—*Sir land, gift of, subject to charge of payment of profits as maintenance allowance — Sale — Ex-proprietary rights accruing in favour of donee—Liability of purchaser to pay maintenance allowance—Amount payable—Charge—Holder of property, if personally liable—Transfer of Property Act (IV of 1882), s. 100*

The benefit which the ex-proprietary tenant gets by having ex proprietary rights created in his once *sir* plots is a benefit which cannot be filched from him by any arrangement or device entered into by him or by any other person.

Where *sir* land is gifted subject to the charge that the donee should pay the profits thereof to another as maintenance allowance and the land is subsequently sold giving rise to ex-proprietary rights in favour of the donee, his liability to pay maintenance ceases After the sale, the purchaser is the only person whom the charge-holder can look to for payment of maintenance allowance and the amount payable is the rent which the purchaser receives from the ex-proprietary tenant and not the rent which the latter receives from his sub-tenants.

When an agreement, in the nature of a family settlement, makes provision for certain maintenance allowances, which should be paid out of the *taluqa*, that agreement does not create any personal liability on the holder of the estate, but creates a charge upon the income of the estate. AKBAR HUSAIN *v* HUSAIN JAHAN BEGUM *Oudh* **40**

——**s. 107.** See Evidence Act, 1872, s. 115 **295**

——**ss. 108, cl (10), 135**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 100—Application under O. XXI, r. 100—Alternative remedy provided by s. 108, cl. (10), Oudh Rent Act—Application under Civil Procedure Code to Revenue Court, if barred.*

Even though the plaintiffs have an alternative remedy by a suit under s. 108, cl. (10), Oudh Rent Act, their right of making an application under O. XXI, r. 100, Civil Procedure Code, to the Revenue Court is not barred on that account. There is nothing inconsistent with the provisions of the Oudh Rent Act in utilising the alternative remedy by an application under O XXI, r. 100, Civil Procedure Code. THAKUR BAKHSH SINGH *v.* ABHAIDAT SINGH *Oudh* **1082**

Pardanashin lady. See Civil Procedure Code, 1908, O. XLI, r. 21 **676**

Parties. See Company **1**

Partition—*Several persons entitled to succeed to property—Property belonging to them jointly—Possession of one is constructive possession on behalf of all—Co sharers.*

Where several persons become entitled on the death of the last owner to succeed to the estate of the last owner, the properties belong jointly to all of them and possession of one co-sharer is really a constructive possession on behalf of all. TULSI BIBI *v.* FARRAK BIBI *Cal.* **815**

——*Suit for—Shares of all parties will be decided usually—Preliminary decree by consent, without rights of defendants—Decree not appealed against—Effect.*

It is usual in partition suits to decide the shares of all the parties and not merely of the plaintiffs. But where the defendants agree to passing of a preliminary decree in favour of the plaintiff and partition of his share without their rights being decided and the decree so passed is not appealed against, it cannot be contended that their rights *inter se* ought to have been decided. HASSAN MUHAMMAD *v* HUKAM CHAND *Lah* **469**

Partition Act (IV of 1893), s. 2—*Claim by co-owner for partition of party wall—If can be resisted—Applicability of s. 2—Co-owners—Party wall.*

A claim by a co-owner to partition of a party wall cannot ordinarily be resisted even where the claim causes inconvenience and difficulty of partition:

Held, that in the case of party wall it is impracticable to take any action under s. 2, Partition Act, 1893. MANSA RAM *v.* NANAK CHAND *Lah.* **223**

Partnership. See Penal Code, 1860, s. 406 **439**

——*Partner taking partnership property to himself and crediting some price of his own fixing in favour of partnership—Other partner, if bound by such valuation—If he can compel former to take such property at proper price found by Court.*

If a partner takes the partnership property and credits in favour of the partnership some price of his own fixing, *i. e*, behind the back of the other partner, the other partner is not bound by such valuation and if he questions the valuation, the Court is entitled to scrutinise it. If his price is not found to be the proper price by the Court, his taking over might be set aside, but he cannot be compelled to purchase them at the price found by the Court to be the proper price. The only result of setting aside his taking over of the property would be that his so-called one-sided purchase is simply set aside and the property remains as partnership property. SIVAGNANATHAMMAL *v.* S. V. NALLAPERUMAL PILLAI *Mad.* **783**

——*Representation by one, whether binds the other.*

Any representation by one of the partners will not bind the other partner. RATI LAL NANJI *v.* UTTAM LAL SARCAR *Cal* **842 (b)**

Party wall.

See Co-owners **365**

See Partition Act, 1893, s. 2 **223**

Patents and Designs Act (II of 1911), ss. 43, 53—*Registration of design—Design should be new and original and not of a pre-existing common type—Suit for damages for infringement—Defence that design was not new or original—Legality of.*

No registration under s. 43 of the Patents and Designs Act is effective, unless the design or configuration sought to be protected is new and original and not of a pre-existing common type. Consequently in a suit for damages for infringement of the plaintiff's design, the defendant can raise the plea that the registered design of the plaintiff was not new and original. QADAR BAKSH *v.* GHULAM MOHAMMAD *Lah.* 319

Penal Code (Act XLV of 1860), s. 34—*Whether applies where there is sudden fight between parties.*

Where there is a sudden fight between the parties s. 34, Penal Code, does not apply to the case. MASTI KHAN *v.* EMPEROR *Pesh.* 276

———ss. 34, 114, 302—*Two persons going to commit robbery—Armed with guns—Retreating on coming of villagers—Shots fired while trying to escape—One of the villagers killed from shot fired by one of the persons—Other person also is guilty under s. 302 read with ss. 34 and 114.*

Two men armed with guns entered into the shop and put the inmates into fear of instant hurt and demanded the keys. Some of the inmates managed to escape, others were put to terror. About this time many villagers came up and wanted to know what was the matter whereupon one of the intruders opened the door and threatened the villagers The intruders fired two shots and got out of the room and proceeded to go away. The villagers pursued them at a distance. The offenders continued to fire at them. At a certain place in the pursuit one of the pursuers came very near the two men and shouted, whereupon one of the two, shot and killed him :

Held, that it was not the primary intention of the two persons to kill any of their pursuers. Their intention was merely to effect their escape from the pursuers. But from the circumstances, it may be concluded that their intention was to effect their escape even though for that purpose it was necessary to shoot any of the pursuers mortally and in the circumstances of this case, the other person who did not shoot should also be convicted under s. 302 read with s. 34 or s. 114, Penal Code. MUKUNDA MURARI PAL *v.* EMPEROR *Cal.* 599

———s. 75. SEE Criminal Procedure Code, 1898, s. 342 478

———s. 75—*Previous convictions outside British India—Relevancy of, in determining sentence.*

Previous convictions outside British India cannot be made the basis of a charge under s. 75, Penal Code and a Magistrate is not bound to consider such convictions in determining the sentence even though it is open to him to do so. EMPEROR *v.* MUTHUSWAMI *Mad.* 438

———s. 107—*Accomplice — Person knowingly aiding in disposal of stolen property—Whether an accomplice.*

A person who knowingly aids in the disposal of stolen property falls under the third definition under s. 107, Penal Code, and is an accomplice. MAVUTHALAYAN *v.* EMPEROR *Mad.* 74

———s. 114. SEE Penal Code, 1860, s. 34 599

———s. 120-B—*Charge of criminal conspiracy—Essentials to be proved—Evidence of association—When of value for prosecution.*

To establish a charge of criminal conspiracy, the prosecution must prove an agreement between two or more persons to do or cause to be done some illegal act or some act which is not illegal by illegal means provided that where the agreement is other than one to commit an offence, the prosecution must go further and prove that some act besides the agreement was done by one or more of the parties in pursuance of it. Where the agreement, therefore, is one to do or cause to be done an act which is itself an offence, no overt act, *i. e.*, any act done by one of the parties to the agreement in pursuance of it, need be proved ; the crime of criminal conspiracy is established once such an agreement is proved. Consequently where the conspiracy alleged is one to commit a series of serious crimes mere proof of such an agreement between the appellants is sufficient to sustain a conviction. Proof of overt acts committed by the accused or any of them is not strictly necessary on this charge, but proof that the accused or some of them were concerned in the overt acts alleged would go far to establish that the agreement alleged was in fact made between them. Though proof of overt acts is not necessary in a case yet it may well be that if such acts are proved, the Court will be bound to infer that they are not unconnected and isolated acts, but acts which must have been committed in pursuance of an agreement made between the accused.

Evidence of association to be of any value should suggest something suspicious in such association and no inference one way or another can be drawn from a mere casual meeting or meetings or conversation between the parties in a public place or park where mere acquaintances frequently meet and talk. BACHCHA BABU *v.* EMPEROR *All.* 369

———s. 120-B—Conspiracy — Sanction under s 196-A, Criminal Procedure Code, if necessary. SEE Criminal Procedure Code, 1898, s. 196-A 866

———s. 149. SEE Penal Code, 1860, s. 301 560

———s. 174. SEE Criminal Procedure Code, 1898, s. 239 163

———ss. 182, 211, 202 (1) proviso—*Complainant not examined on oath—Magistrate, if can sanction prosecution under ss. 182, 211—Criminal Procedure Code (Act V of 1898), s. 202.*

It is not permissible for the Magistrate to order an enquiry and to sanction the prosecution of the applicant under ss. 182 and 211 of the Penal Code where he has not examined him on oath. BHAGWAN DAS *v.* EMPEROR *All.* 1070

———s. 193. SEE Criminal Procedure Code, 1898, s. 476 490

———ss. 195, 186—*Absence of written complaint by public officer—Conviction under s. 186, legality of.*

Under s. 195, Penal Code, cognizance of an offence under s. 186, Penal Code, cannot be taken in the absence of a written complaint by the public officer concerned. Where the public officers concerned, the District Magistrate who issued the warrant, and the Assessment Officer to whom the warrant was addressed, have not filed a complaint and all that was done was that information was given by the person to whom the warrant was endorsed and this did not amount to a complaint under s. 195, there can be no conviction under s. 186. RAM SINGH *v.* EMPEROR *Pat.* 421 (b) S. B.

———ss. 202 (1), 211, proviso. SEE Penal Code, 1860, s. 182 1070

———s. 294-A — *'Drawing', meaning of—Publication of scheme of lottery — Scheme not contemplating drawing by mechanical or human agency involving their chance extraction—Whether an offence.*

Penal Code—contd.

The meaning of the term 'drawing' in relation to a lottery is that the lots should be drawn by some mechanical or human agency involving their chance extraction. Where under a scheme there was no physical or mechanical 'drawing' to determine the lucky lots which depended on a sort of arithmetical progression based on an original number to be determined merely by the chance death of a bond-holder, then the publication of a scheme involving such a lottery is no offence under s. 294, Penal Code. EMPEROR *v.* GURBAKSH SINGH *Lah.* **590**

——s. 300, Excep. I—*Deceased catching hold of accused's tuft—Latter also catching tuft of deceased and stabbing him with knife—Held, case came within s. 300, Excep. I.*

In an altercation the deceased returned the abuse and caught hold of accused's tuft of hair, and gave him a blow with his fist on the back. The deceased and accused then closed with each other and accused caught hold of deceased's tuft also and stabbed the deceased to death by a knife :

Held, that the offence came under s 300, Penal Code, Excep. I as there was grave and sudden provocation. THIRUPATHURAN *v.* EMPEROR *Mad.* **408**

——ss. 300, 302—*Accused armed with deadly weapon thrushing it into the chest of deceased causing instantaneous death—Intention to murder, inference of.*

If a man, who is armed with a deadly weapon like a *sela*, thrusts that weapon into the chest of his victim and causes instantaneous death, he can have only one intention, namely, intention to murder. CHAND SINGH *v* EMPEROR *Lah.* **275**

——ss. 300, 302, 304, Part. II—*Sudden quarrel—Single* dang *blow on head—Death—Offence.*

Where in a sudden quarrel, the accused deals a single blow with a *dang* on the head of his antagonist, an old man whose weakness and enlarged spleen might have hastened his death which ensues, the accused is guilty not of murder but of culpable homicide not amounting to murder. GURCHARAN SINGH *v.* EMPEROR *Lah* **77** (*a*)

——s. 302.

SEE Penal Code, 1860, s. 34 **599**
SEE Penal Code, 1860, s. 300 **275**
SEE Penal Code, 1860, s. 304 **560**

——s. 302—*Conviction and sentence for offence under s. 307 still in force—Subsequent trial and conviction under s. 302, if barred—Criminal Procedure Code (Act V of 1898), s. 403 (3).*

An accused was tried and convicted on July 22, 1933, of attempted murder of one *G* and sentenced to imprisonment under s. 307, Penal Code. *G* died on July 25. The accused was re-tried under the provisions of s. 403, cl (3), Criminal Procedure Code, and sentenced to death under s. 302, Penal Code :

Held, that the previous conviction was no bar to subsequent trial and conviction. ARSALA KHAN *v.* EMPEROR *Pesh.* **287**

——ss. 304, 302, 149—*Accused acting without premeditation and on grave and sudden provocation—Accused beating complainant's party—Actual person causing fatal injury not known—Death—Offence—All are liable for offence.*

Where without premeditation but on grave and sudden provocation, the accused more than five in number, attacked the complainant's party and beat them and as a result of the injuries received, one of the latter died, and while it was not known who of the accused party caused the fatal injuries, it was found that though they were not acting in self-defence, they did not take undue advantage or act in a cruel or unusual manner :

Held, that all the accused were responsible for the injuries inflicted but the offence committed was not murder but culpable homicide not amounting to murder and were punishable under ss. 304-149, Penal Code. BHAGWAN DAS *v.* EMPEROR *All.* **560**

——ss. 307, 326—*Essentials for conviction under s. 307—Doctor's testimony that injuries inflicted were not sufficient in the ordinary course to cause death—Conviction under s. 307 is wrong.*

To sustain a conviction under s. 307, Penal Code, it is necessary that there must be an act done under such circumstances that death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of things; and if the act complained of is not of that description, the assailant cannot be convicted of an attempt to murder under s. 307, Penal Code. Where the doctor who treated the injured does not say that the injuries inflicted by the accused were sufficient in the ordinary course to cause her death, the principle of deducing intention from the nature of the injuries and their natural and probable consequences is misapplied and a conviction under s. 307 is not sustainable. The conviction must be altered to one under s. 326 and a sentence of 18 months' rigorous imprisonment cannot be considered to be so grossly inadequate as to require enhancement. EMPEROR *v.* BALLI *Nag.* **1014**

——s. 309—*Attempt to commit suicide—Sentence—Discretion of Court.*

The law confers upon the Court a very wide discretion in the matter of punishment, and it is not necessary to inflict a sentence of imprisonment upon a person who on account of family discord, destitution, loss of a dear relation, or other cause of a like nature, overcomes the instinct of self-preservation and decides to take his life In such a case, the unfortunate person deserves indulgence, and should be either released on probation of good conduct or sentenced to a fine if he is not too poor to pay the fine. These observations apply with greater force to the case of a woman who attempts to commit suicide in similar circumstances. It is not possible to lay down any hard and fast rule on the subject but the Court must, in each case, consider the motive which has prompted a person to destroy his or her life. BARKAT *v* EMPEROR *Lah.* **283**

——s 323. SEE Criminal Procedure Code, 1898, s. 237 **540** (*a*)

——s. 326. SEE Penal Code, 1860, s. 307 **1014**

——s. 339—*Voluntary obstruction of vehicle—Whether constitutes wrongful restraint.*

The voluntary obstruction of a vehicle cannot be held to amount to wrongful restraint within the meaning of s. 339, Penal Code. DURGA PADA CHATTERJEE *v.* NILMANI GHOSE *Cal.* **444** (*a*)

——s. 353. SEE Criminal Procedure Code, 1898, s 237 **540** (*a*)

——s. 353—*Assault—Ingredients of offence—Use of abusive language—Threatening with* lathi *in heat of temper—Assault, if committed—Sentence.*

Whether a particular act amounts or does not amount to an assault depends upon the circumstances of each particular case. A particular act may not amount to an assault in one case, but the same act taken along with the other surrounding circumstances may amount to an assault in another case. Where, therefore, the accused interposed between the attaching officer and the cattle which he was proceeding to attach and being removed under the orders of the officer, he indulged

Penal Code—contd.

in the use of abusive language and thereafter went away threatening that he would return and teach them a lesson and soon afterwards he came back with a *lathi* with companions and came sufficiently close to the officers to raise in their minds a reasonable apprehension that actual force was likely to be used:

Held, that the act of the accused came within the definition of assault.

Held, also that as the accused's subsequent appearance on the scene was in the heat of the moment and soon realising the situation he ran away from the spot and no violence or force was used by him, a sentence of fine would meet the ends of justice. RAM SINGH *v.* EMPEROR *Pat.* 421 (*b*

——— **s. 358**—*Accused using criminal force on grave and sudden provocation—Conviction under s.* 358—*Propriety of.*

Where the accused uses criminal force on grave and sudden provocation given by the patrol who had abused the accused the conviction ought to be under s. 358, Penal Code. DIP CHAND *v.* EMPEROR *All.* 540 (*a*)

——— **s. 366**—*Object of accused to bring pressure to bear on husband of woman—Judge's direction likely to lead jury to believe that this was object of accused—Conviction under s.* 366—*Legality of—Jury trial—Misdirection*

In a case under s. 366, Penal Code, if the object of the accused was to bring pressure to bear on the husband of the woman, it cannot be said that they knew it to be likely that she would be forced or seduced to illicit intercourse.

Where it appeared by the Judge's direction to the jury, the jury were likely to be misled, that is, they were likely to believe that what they had to find was not that the woman was abducted for illicit intercourse but that she was abducted for the purpose of bringing pressure to bear on her husband, and they brought in a verdict of guilty on his understanding, the conviction under s. 366 ought not to stand. NARAIN *v* EMPEROR *All.* 662

——— **ss. 366, 368, 497**—*Complaint under ss.* 366, 368—*All requirements of s.* 497, *fulfilled—Conviction under s* 497, *if legal*

If a complaint under ss. 366 and 368, fulfils all the requirements of a complaint under s. 497, and clearly makes an accusation of an offence under that section, then, if the adultery complained of is proved, a conviction under that section will not be illegal on the ground that there has been no complaint as required by s. 199 of the Code of Criminal Procedure. SAIN *v* EMPEROR *Lah.* 595

——— **s. 376.** SEE Criminal Procedure Code, 1898, s. 297 584

——— **s. 377**—*Attempt at unnatural offence—Some activity on part of accused to thrust male organ into anus of passive agent necessary—Mere preparation is not enough.*

The offence made punishable under s. 377, Penal Code, requires that penetration, however little, should be proved strictly. Thus an attempt to commit this offence should be an attempt to thrust the male organ into the anus of the passive agent. Some activity on the part of the accused in that particular direction ought to be proved strictly. A mere preparation for the operation should not necessarily be construed as an attempt.

Where there was an intention on the part of the accused to satisfy his lust by a carnal intercourse against the order of nature and he made every preparation to satisfy that lust, but before he could thrust his organ in, he spent himself; then he cannot be said to have done any act which might be construed as an attempt to commit the offence of sodomy. NOWSHIRWAN IRANI *v.* EMPEROR *Sind* 435

——— **ss. 378, 392**—*Offence under s.* 392—*Nature of—Removing of property found by chance after quarrel—Held, offence came under s.* 378.

Section 392, Penal Code, contemplates that the accused should have, from the very start, the intention to deprive the complainant of the property and should for that purpose either hurt him or place him under wrongful restraint. Where the inception of the struggle was only a quarrel and it was at the end that the accused found a chance of taking the *chaplis* and the sheet of the complainant in order to ensure the payment of the money due to him :

Held, that the offence was one under s. 378 and not under s. 392, Penal Code. MIR BAZ *v.* EMPEROR *Pesh.* 952

——— **s. 380.** SEE Criminal trial 74

——— **s. 392.** SEE Penal Code, 1860, s. 378 952

——— **s. 394**—*Medical evidence not proving death from throttling—Confession not made to Magistrate—Ornaments recovered not connected with deceased—Conviction under s.* 394, *legality of.*

Where the medical evidence did not prove that the deceased died from asphyxiation by throttling, some symptoms favouring that view and some not favouring it and the confession was not made before a Magistrate but was only stated to have been made in the village to three villagers whose evidence was of little weight to prove that a confession was made, and although the evidence of ornaments stolen being found in the houses of the accused might be correct, yet the prosecution failed to connect those ornaments with the deceased :

Held, that the prosecution had not proved the charge against the accused under s. 394, Penal Code, and they were entitled to an acquittal. RAM CHARAN *v.* EMPEROR *All.* 119

——— **s. 406.** SEE Criminal Procedure Code, 1898, s. 239 163

——— **s. 406**—*Partnership—Accused admitting receipt of money but defending by saying that he returned it—Onus of non-payment.*

Where the accused, in a trial under s. 406 against him admits having received the money alleged to have been misappropriated by him, but defended himself by saying that he had made it over to the proper person, the onus to prove the payment is not upon him, but it is on the prosecution to prove non-payment ; for it is only when the latter is proved that the presumption will arise of misappropriation or breach of trust. BHIKCHAND GANGARAM *v.* EMPEROR *Sind* 439

——— **s. 408**—*Working partner not contributing anything to partnership—Whether a clerk or servant within the meaning of s.* 408—*Whether can be guilty of breach of trust or misappropriation.*

A working partner who has not contributed anything towards partnership business, is a 'servant' or 'clerk' within s. 408, Penal Code, and can be held guilty of criminal misappropriation or breach of trust. BHIKCHAND GANGARAM *v.* EMPEROR *Sind* 439

——— **s. 411.** SEE Criminal trial 74

——— **ss. 417, 420.** SEE Contract Act, 1872, s 23 341

——— **ss. 420 and 120-B.** SEE Evidence Act, 1872, s. 32 (3) 261

——— **s. 441.** SEE Criminal Procedure Code, 1898, s. 238 629

Penal Code—contd.

———s. 452—*Trespass into complainant's house to overawe him so as not to employ a person as priest—Interference with religion—Offence not to be treated lightly.*

An interference with religion by preventing a person from employing another as his priest by forcibly entering the former's house to overawe him is not to be treated lightly. A fine of Rs. 50 is not excessive. GANGA SINGH *v.* EMPEROR *All.* 541

———s 454. SEE Criminal Procedure Code, 1898, s. 238 629

———s 457. SEE Criminal trial 74

———s. 486—*Counterfeiting trade-mark—Offence, when committed—Test in such cases.*

A person who employs a label which in general resembles the label used by another manufacturer, is guilty of counterfeiting a trade-mark under s 486 of the Penal Code, irrespective of the circumstance that the registered trade-mark of the one is quite different from the trade-mark of the other. The test is not, whether a literate purchaser would be deceived if he had the two marks side by side, but whether an ordinary unwary purchaser would be deceived. FAQIR CHAND *v* EMPEROR *Lah.* 270

——— s. 488—*Inhabited house—Delivery of possession — How to be made—Actual possession not delivered to purchaser—Forcible entry by purchaser—Whether amounts to criminal trespass.*

In order to effect delivery of possession of an inhabited house, it is necessary to eject the former occupier, delivery of possession of the house not being a mere formal act effected by beating a drum and putting up a notice. Where the certificate-debtor makes a forcible entry into the house, possession whereof has not actually be delivered to the purchaser, the former cannot be treated as having committed an act of criminal trespass. RAM JANAM SINGH *v.* MOHAN LALL AHIR *Pat.* 908

———s. 497. SEE Penal Code, 1860, s 366 595

——— s. 498—*Absence of complaint as required by s. 199—Charge under s. 498 added—Question if charge was proper—Whether one of law—Charge under s. 498 without complaint — Jurisdiction to frame—Trial, validity of.*

Where a case was committed to the Sessions Court under ss. 366, 420 and 120-B of the Penal Code, but though there had been no complaint by any person competent under s. 199, Criminal Procedure Code, to make one, the Court added a charge under s. 498, Penal Code and the charges under ss. 366 and 498 being tried by jury, a verdict of guilty under s. 498 was brought against some of the accused:

Held, that whether the charge under s. 498 of the Penal Code was or was not proper was a question of law; and under s. 298 of the Code of Criminal Procedure, it was the Judge's plain duty to decide that question himself instead of leaving it to the jury and that if the Judge was not really satisfied that the additional charge was not proper, there was no reason whatsoever why he should have treated it as question of fact and left it for the jury to deal with.

Held, also that the charge under s. 498 was framed and tried without any jurisdiction at all, having regard to the terms of s. 199 of the Code of Criminal Procedure, and that all the proceedings that followed upon that charge were equally without jurisdiction. RAMJANAM TEWARI *v.* EMPEROR *Pat.* 866

———s. 500.

SEE Contract Act, 1872, s. 23 341

SEE Press and Registration of Books Act, 1867, s. 7 450

Penal Code—concld.

———s. 500—*Defamation—Essence of offence—Articles implying that girls of a college were habitually guilty of misbehaviour—All girls in college collectively and each girl individually suffer in reputation—Complaint for defamation—Maintainability of.*

The essence of the offence of defamation is the publication of an imputation with the knowledge that it will harm the reputation of the person defamed.

Where certain articles published in a paper contained scandalous accusations against the girl students of a college and implied that the girls were habitually guilty of misbehaviour described in the article, the inevitable effect on the reader must be to make him believe that it is habitual with the girls of the college to behave in this way. As by the articles all the girls in the college collectively and each girl individually suffer in reputation, an action for defamation is competent by some of them. WAHID ULLAH AHRARI *v.* EMPEROR *All.* 638

Pleadings.

SEE Company 1

SEE Decree 997

SEE Specific Relief Act, 1877, s. 42 244

——— *Plea of unfair transaction must be specifically raised in plaint—Subsequent events should not be considered while considering whether transaction is fair or not.*

If a transaction is attacked on the ground that the transaction was not a fair transaction at all, the party attacking ought to make a specific case in the plaint and ought to join an issue on the point in order to enable the other party to show that the transaction was not an unfair one.

Whether the transaction is one that should be set aside as inequitable would depend upon the circumstances at the time when it was made and not upon subsequent events. PURNA CHANDRA CHAUDHRY *v.* SAROJINI CHAUDHURANI *Cal.* 1027

Police Act (V of 1861), ss. 15, 16—*Cost of additional Police quartered in village—Distress warrant for realization given to Assessment Officer—Whether can be endorsed to clerk—Property attached, not exclusive property of accused but joint family property—Liability to be attached.*

Where a distress warrant for realisation of amount due by way of cost of additional Police quartered in a village is entrusted for execution to the Assessment Officer, there is no provision either in the Code or the rules framed by the Local Government under s. 386 of the Code of Crimnal Procedure enabling him to endorse the warrant to his clerk.

Where the warrant is not for the realisation of fine imposed on any individual but for the realisation of cost of the additional Police quartered in a particular village which was apportioned on the inhabitants of that village, the entire family is the defaulter and the warrant for realization is issued against its head not in his individual capacity but in his capacity as head of the family which was assessed to that cost and the family property is liable to be seized. The cost may be realized as a fine but is not fine.

When an officer is entrusted with a warrant to attach the property of certain persons, his first duty is to ascertain by all means possible what property belonged to that person which is liable

Police Act—concld.

to be attached. Having satisfied himself that certain property belongs to that individual, it is his duty to attach that property unless some objection is raised which raises in his mind a reasonable doubt that the property does not belong to the person against whom the warrant has been issued. When no objection is raised, the Assessment Officer will be performing a legal duty when he proceeds to attach property. RAM SINGH *v.* EMPEROR *Pat.* 421 (*b*) S. B.

——— **s. 30**—*Scope of—Power of absolutely refusing permission to take out a procession—Whether can be read into the Act—Breaking promise not to take out procession—Whether amounts to disobeying order issued under the Act.*

It is the right of a citizen to use the public thoroughfares, provided that he commits no offence in doing so, and the taking out of a procession is not in itself an offence, nor does it require a special licence, except as provided by s. 30 of the Police Act. Section 30 empowers the authorities to control processions, and the manner in which they are to be controlled, if it is necessary to control them, is set forth in sub-s. (2). Neither in the marginal note, nor in the body of the section, is any express power given to the authorities absolutely to forbid the taking out of a procession. It is impossible to read into the Act any authority for absolutely refusing permission to take out a procession.

To break a promise to the Superintendent of Police made by a person that he would not take out a procession is not to disobey an order issued under the Act and he cannot be convicted. QASIM RAZA *v.* EMPEROR *All.* 605

Power-of-Attorney—*Agent authorised to represent family in Civil, Criminal, Revenue, registration and mutation proceedings—Whether includes power to incur debts.*

Where an agent has a power of-attorney authorising him to represent the members of the family in Civil, Criminal and Revenue Courts and in registration and mutation proceedings, there is no presumption that he was authorised to incur debts on behalf of the family. SHRIRAM *v.* MOHANLAL *Nag.* 607

——— *Construction—Income-tax return signed, verified and filed by agent—Whether permitted by terms of power of attorney—No evidence as to knowledge of assessee—Income-tax authorities not changing their position due to implied representation—Estoppel, if arises—Income Tax Act (XI of 1922), s. 23—Production of account books by assessee—Whether implies ratification of filing of return by agent.*

A return of income for an year was filed on behalf of a *taluqdar* by his *mukhtar* who also signed and verified the return. The relevant clause of the *mukhtarnama* was as follows:

Therefore, I appoint..... as my *mukhtar-i-ams* and any suits (*nalishat*) filed by them in Civil Courts, Revenue Courts, Collectorates, Criminal Courts, Appellate Courts, in the Settlement Department, Cantonment, Police, Municipalities in British India Chief Court, High Court, Commissioner's Court, Board of Revenue and other Government departments, or any applications (*darkhwasts*) filed by them on my behalf..... .....or plaints, memoranda of appeal, or written statements, or affidavits filed in support of any application..... All such proceedings shall be accepted by me as having been done by me personally —

Held, (1) that though there was no mention of the income-tax department, the words "other Government departments" were sufficiently wide to include the department of Income-tax.

(2) that the general object of the power was that the agent should be able to represent his principal in proceedings in Courts so as to dispense with the necessity of the principal appearing personally but it did not give the agent any authority to sign or verify the return of income for the purposes of assessment of income-tax.

(3) that there was no evidence that the return was filed with the authority or even with the knowledge of the assessee and even if he had the knowledge, as the income-tax authorities had not in any way changed their position to their detriment on account of any implied representation on the part of the assessee about the *mukhtar's* authority to sign and verify the return, no question of estoppel could arise.

(4) that the production of the account books by the assessee in pursuance of notice, did not constitute any ratification in respect of the return of income. *In the matter of* COMMISSIONER OF INCOME TAX, C P. & U. P. *Oudh* 180

Practice. SEE Appeal 743

———*Appellate Court—Credibility of witness—Appellate Court, if can differ from original Court.*

It is dangerous for an Appellate Court to differ from an original Court on the question of the credibility of witnesses and basing its opposite decision on mere inferences from the statements which the witnesses are recorded to have made which an Appellate Court cannot make with such certitude as can the Court which originally heard the witnesses. DAW MIN BAW *v.* CHETTYAR FIRM *Rang.* 511

———*Appellate Court deciding that decision of trial Court was wrong on legal issue—Suit should be remanded for trial on remaining issues.*

Where an Appellate Court decides that the decision of the trial Court is wrong on a legal issue, it should remand the case for trial on the remaining issue and it should not decide an issue of fact itself in the absence of evidence on it. MEYAPPA CHETTYAR *v.* VENKATACHELLAM CHETTYAR *Rang.* 997

———*Bar Council—Findings by—Importance given by High Court.*

The High Court usually attaches great weight to the finding of fact of a Committee of the Bar Tribunal. *In the matter of* AN ADVOCATE, HIGH COURT, ALLAHABAD *All.* 1054 S. B.

———*Courts should apply proper law and give proper relief—Litigant is not obliged to put down provision of law under which he seeks relief.*

It is the business of the Court to know the law and it is only incumbent upon the litigant to come before the Court and state the facts in respect of which he seeks the remedy. He must ask for such remedies as he requires and there is no obligation on him to inform the Court under which Statute or Rule he is entitled to claim those remedies. If he does not state the Statute or the Rule or if he states a wrong Statute or wrong Rule, that in no way relieves the Court of the obligation of itself applying the appropriate rule or section. KABUTRI *v.* RAM PRASHAD SAHU *Pat.* 225

———*Defendant submitting to the ruling of Court as to burden of proof and producing his evidence—Subsequent refusal—Plaintiff's evidence over—Application for further evidence by defendant refused—Held, he ought to be allowed to adduce evidence subject to paying plaintiff's costs—Burden of proof.*

Practice—contd.

When a suit was taken up the Vakils on both sides were absent. The Munsif then put the plaintiff into the witness-box and elicited an answer to a question. By that time the plaintiff's Vakil turned up and said that the burden of proof was not on the plaintiff and that the defendant should begin. The Munsif then put the defendant's agent into the box as a witness on the defendant's side and began to examine him himself. After some examination the case was adjourned. The defendant's Vakil turned up later and continued the examination of the witness. Later on, the defendant put in an application that the burden of proving issues lay on the plaintiff and that he (plaintiff) should be directed to begin. The defendant's petition was dismissed. The examination of the defendant's witness No 1 was continued and witness No. 2 on her side was also examined in part and some documents were filed. The suit was then adjourned. On the adjourned date defendant's witness No. 1 was re-called and examined, but the defendant's Vakil declined to proceed with the further chief examination of defendant's witness No 2. The plaintiff's Vakil was then allowed to cross-examine him and his evidence was closed. The defendant's Vakil put in a memorandum that day declining to let in any further evidence as the burden of proof lay on the plaintiff. The evidence on the plaintiff's side was then taken and the case was proceeded with. When the plaintiff's evidence was closed, the defendant's Vakil wanted permission to adduce evidence on the defendant's side. This permission was refused by the Munsif and the case was finally closed and a decree was given in favour of the plaintiff:

Held, that the defendant's Pleader was not justified in refusing to adduce further evidence, after he had submitted to that ruling and proceeded with the examination of defendant's witnesses Nos. 1 and 2. In view of the circumstances it was necessary in the ends of justice that an opportunity should be given to the defendant to adduce evidence. But this concession could be given only on condition that he pays all the costs of the plaintiff except the institution fee up to date irrespective of the result of the suit. SIGAPPI *v.* KATHAYEE *Mad.* **190**

———*Duty of Court—Plaintiff's case rejected—Court, if can proceed on equitable grounds to grant relief without considering risk taken by defendant.*

The Court is not justified in rejecting practically the whole of the plaintiff's case as made out in the plaint and then proceeding to give her some relief on equitable grounds without taking into consideration the risk which the defendant was taking in this transaction. PURNA CHANDRA CHAUDHRY *v.* SAROJINI CHADDHRANI *Cal.* **1027**

——*Evidence — Plaintiff wanting to explain certain acknowledgment after defendant's evidence —Court, if can refuse evidence material to decision.*

Where in a suit the question is whether certain letters written by the defendant are acknowledgments, the defendant admitting that they were written by him but professing ignorance as to whether they referred to the amount in dispute, and the plaintiff wants to give evidence to explain these letters, the Court should not refuse to record any evidence and then draw any adverse inference if it thinks fit to do so from the circumstances in which that evidence is given and in refusing to record evidence which is material for the decision of the case, the Court acts illegally. NIHALU RAM CHELA RAM *v.* RADHU RAM HUKMI RAM *Lah.* **1074**

Practice—concld.

———*Finding of fact based on evidence, whether final.*

A finding of fact arrived at by a Court of fact is final, if such finding is based on evidence. GOPI KRISHNA SAHA *v.* SURENDRA NATH CHAUDHURY *Cal.* **154**

——— Lahore High Court. SEE Criminal trial **241**

———*New plea—Fresh evidence necessary—Whether can be raised in appeal.*

Where plea was not taken in the lower Court, nor was it raised in the grounds of appeal, but it had been submitted as an additional ground of appeal:

Held, that the appellants could not raise this new point on appeal for deciding which it was necessary to take evidence. ARJAN SINGH-BHAJJAN SINGH *v.* FIRM SURJAN SINGH-ACHARAJ SINGH *Pesh.* **1006**

———*New point—Point of law—No additional evidence necessary—Whether can be raised in second appeal.*

Where a point was one of law and no additional evidence was necessary nor was it necessary to make assumptions before the point could be decided;

Held, that it could be raised in second appeal. MATI LAL DAS *v* ADITYA CHANDRA DAS *Cal.* **720**

———*Person appearing before Judge as accused —Whether raises presumption that Judge has hostile feelings towards him.*

Per *Thom, J.*—Because an accused person appears before a Judge in his Court it is ludicrous to suggest that that Judge should be presumed to entertain towards him any feeling of hostility or that the Judge, impelled by malice, would pursue the party into his private life and use his influence to prejudice the party and undermine his interests or defeat his legitimate intentions. *In the matter of* AN ADVOCATE, CAWNPORE *All.* **1043 S. B.**

———*Privy Council—Concurrent findings based on appreciation of evidence—Whether will be disturbed by Privy Council.*

Concurrent findings of the Courts below, proceeding upon an appreciation of the evidence adduced by the parties, will not be disturbed by the Privy Council RAMAKRISHNA AYYAR *v.* PARAMESWARA AYYAR **P. C. 385**

———*Suit against some only of the legal representatives of deceased debtor—Maintainability—Decree, if binding on other legal representatives not impleaded—Civil Procedure Code (Act V of 1908), s. 52.*

There is no law that all the legal representatives of a deceased person must be impleaded. It is sufficient that the plaintiff sues those persons whom he considers to be the legal representatives after enquiry. If such persons are sued, the suit is a good one and the decree will be effective to the extent of the property of the deceased which has reached their hands and a suit of this nature cannot be defeated by reason of the fact that two other sons have not been impleaded though the sons who are not impleaded will not be bound by the decree. ALI MUHAMMAD *v.* ALI MUHAMMAD *Lah.* **285**

———*Suitors should feel that Court does not decide as to veracity of witnesses before they are seen in witness-box.*

It is of cardinal importance that suitors in Courts of justice should enter and leave the Courts with a feeling that whatever may be the upshot of actions which are commenced and fought out, the Court at any rate does not make up its mind as to the truth or untruth of their witnesses before the witnesses have been seen in the witness-box. MOUSELL & Co., LD. *v.* GHANSHYAMDAS JAMNADAS *Cal.* **29**

Pre-emption—*Purchaser with equal rights with pre-emptor associating in purchase with person with inferior rights— Whether can resist pre-emptor's claim.*

If a purchaser having an equal right of pre-emption associates with himself in the purchase, a person with rights inferior to those of the pre-emptor, he is not entitled to resist the claim of such pre-emptor to enforce his rights even as to his share of the purchase. BHAGWANA *v.* SHADI *Lah.* **654**

———*Sale disguised as mortgage to avoid pre-emption—Suit for pre-emption—Limitation, when commences.*

Where a sale is disguised as a mortgage in order to avoid pre-emption, a suit for pre-emption can be brought within one year from the date on which the fraud is discovered. BHAGWANA *v.* SHADI *Lah* **654**

Press and Registration of Books Act (XXV of 1867), s. 7—*Presumption under—Identity with publisher of offending matter on production of copy of declaration—Whether can be deduced—Penal Code (Act XLV of* 1860), *s.* 500.

At the trial of a person for publishing a libel contained in a newspaper, the presumption permitted to be raised by s. 7 of Act XXV of 1867, as to his identity with the publisher of the offending matter, on production of the copy of his declaration given under s. 5 (*?*) *ibid*, is restricted to the *prima facie* proof that he was the publisher only at the place specified in the declaration and does not extend to the proof of the fact that he was also the publisher of the libel at places not specified in the declaration. DIWAN SINGH *v.* EMPEROR *Nag* **450**

Presumption—Copy of judgment—Presumption as to accuracy of figures SEE Limitation Act, 1908, ss. 5, 12 **588**

Probate SEE Oudh Courts Act, 1925, s. 31 ( ) **501**

———*Application for sale of property covered by will after obtaining probate— Application not specifically headed as one under Succession Act (XXXIX of* 1925), *s* 307—*Duty of Court.*

Where an application for sale of property covered by a will is made by a person who has obtained probate of the will but the application is not specifically headed as being one under s. 307, Succession Act, it is the duty of the Court to find out whether it had jurisdiction in the matter of the application or not under any provision of law. MADHO RAM *v* JAI CHAND RAI *All.* **933**

Promissory note—*Loan and note contemporaneous —No anterior liability apart from note—Contract Act (IX of* 1872), *s.* 62.

Where the promissory note as well as the loan are contemporaneous, there is really no question of a definite anterior liability apart from the note. CHOCKALINGAM CHETTIAR *v.* RAMA MU RAMA PALANIAPPA *Mad.* **184**

———*Loans independently of them—Creditor, if can sue on original cause of action which arose out of same transaction as execution of note.*

Where there is a loan independently of the note the creditor is not debarred from suing on the original cause of action by the fact that the cause of action arose out of the same transaction in the course which the promissory note was 'executed." INDU BALA DASSI *v.* LAKSHMI NARAYAN GANGULY *Cal.* **1109**

———*Note executed by guardian of minor—Guardian not signing as such—Minor described as maker in body of note—Liability of minor—Guardian's power to execute promissory notes on behalf of minor—Frame of suit—Hindu Law—Minority and Guardianship.*

A promissory note was executed by the mother of the minor defendants. In the body of the note the minor defendants were described as the makers with the words 'represented by their mother and guardian *V*,' but the note was signed by the mother *V* without any such description attached to her name. The pro-note was itself executed in renewal of an earlier promissory note executed by the defendants' father:

Promissory note—contd.

Held, in a suit upon the note, that it was binding on the estate of the minor defendants. In inferring the intention of the parties in such a case one must look at all the surrounding circumstances and the liability of the minor in such cases under the Hindu Law is not affected by the fact that the promissory note was made by the guardian. YELURI SATYANARAYANA *v.* YELURI MALLAYYA *Mad.* **851 F. B.**

———*Payment, where to be made—Principle that debtor should make payment where creditor resides—Whether applicable to negotiable instruments—Negotiable Instruments Act (XXVI of* 1881), *s.* 70.

The principle, that in the absence of any specific agreement as to the place where the payment of a debt is to be made, it is the duty of the debtor to make the payment where the creditor resides, or where his place of business is, is not applicable to negotiable instruments. Payment due under a promissory note, in the absence of a contract to the contrary, is ordinarily to be made at the usual place of business of the maker or at his residence. GOPIKISAN SHEONARAIN *v.* JETHMAL GOVERDHANDAS *Nag.* **953**

———*Pro-note not paid at maturity— Creditor, if can sue on original debt — Contract—Jurisdiction —Money agreed to be paid and actually paid at Madras—Agreement and subsequent promissory note made outside Madras—Suit at Madras for recovery of money paid—Jurisdiction—Interest.*

When a cause of action for money lent is once complete in itself, and the debtor then gives a promissory note to the creditor for payment of the money at a future time, the creditor, if the note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the note, under such circumstances as to make the debtor liable upon it to some third person.

A letter was given which empowered the holder of that letter to go to the plaintiff's Madras firm and require the plaintiff's agent at Madras to pay at Madras to the order of the defendant. After this the defendant executed a promissory note in favour of the plaintiff for the same amount, the promissory note containing a clause for interest. These transactions took place outside Madras. The payment, however, was made in Madras The suit for recovery of money lent and interest thereon was filed at Madras:

Held, that since the payment was agreed to be made and in fact made at Madras, part of the cause of action had arisen at Madras and therefore the Madas Court had jurisdiction.

Held, further, that the suit having been based on the contract of loan and not on the promissory note, the plaintiff was only entitled to interest at a reasonable rate from the date of demand and not at the rate provided by the promissory note. MURUGAPPA CHETTY *v.* NACHIAPPA CHETTY *Mad.* **164**

———*Usage in Burma and India among Nattukottai Chettiars—Held, on usage, that firm was payee and sole proprietor could sue on it.*

A promissory note was executed to K. S. A. V. Ramiah Raja, and the firm was carrying on business under the style of K. S. A. V.:

Promissory note—concld.

Held, in accordance with usage prevailing in Burma and India among Nattukottai Chettiars by which a Chettyar firm described generally by initials of firm prefixed to name of partner and agent, that the firm was the payee under the note and the appellant who was the sole proprietor of it could sue on it. K. S. A. V. CHETTYAR FIRM *v.* MAHMOO *Rang.* **935**

Provident Funds Act (XIX of 1925), ss. 4, 5 (2) —*Nominee holding certificate, whether entitled to preference to another having obtained prior certificate.*

The effect of s. 4, Provident Funds Act, is that in a competition between two persons it is the nominee who holds a certificate who is entitled to the money. Where, therefore, a widow holds a succession certificate in respect of assets of her deceased husband but subsequently a nominee of her husband obtains a succession certificate for the provident fund amount, the latter is entitled to the money and the former's certificate is no bar. ATUL CHANDRA SEN *v.* KAUNAMMAL *Cal.* **749**

Provincial Insolvency Act (V of 1920), ss. 4, 53 —*Transfer by insolvent—Transferee transferring property to third party—Receiver's application for annulment of insolvent's transfer—Third party not impleaded—Order of annulment, if binding on third party—Right to show that original transfer was made in good faith.*

Where the transferee of an insolvent transfers the property to a third party and the Receiver has knowledge of it, but in a subsequent petition by the Receiver for annulment of the transfer made by the insolvent, the third party is not impleaded, he is not bound by an order of annulment made against the transferee from the insolvent It will, therefore be open to him to show that the original transfer by the insolvent was made in good faith and for valuable consideration and also to show that he himself acted in good faith and paid full consideration being unaware of the insolvency proceedings. AMIR AHMAD *v.* SYED HASAN *All.* **684**

——— **ss. 4, 52**—*Execution sale—Judgment-debtor adjudicated insolvent — Insolvency proceedings—Court refusing to set aside sale—Subsequent application by insolvent and another creditor to set aside sale—Maintainability.*

In certain execution proceedings the property of the judgment-debtor was put up for sale and sold. The debtor was declared insolvent. In the proceedings in insolvency taken by the Receiver under s. 4, Provincial Insolvency Act, the Court found that no fraud was committed in respect of the sale. Subsequently, some year after confirmation of the sale, an application was made by the insolvent together with another creditor and they asked under s. 4 or the Act for a declaration that the very sale, which had been the subject of the earlier decision by the Judge in insolvency on the application of the Receiver, was invalid, and again raised the question of the jurisdiction of the Court under s. 52 of the Insolvency Act. The sale was held to be illegal and without jurisdiction :

Held, that the matter had been already decided in the earlier application and that decision being a judgment *in rem* could not be disturbed by subsequent applications even if not between the same parties.

Held, also that the Receiver not having taken any steps to appeal from the order in the earlier proceedings, it was not right, having taken that definite attitude and taken advantage of that attitude, that the auction-purchaser should be prejudiced either on behalf of the insolvent or on behalf of the creditors by an attempt to set aside the sale which took place so long ago and when a previous attempt to set aside the sale had failed. BANSI RAM *v.* FIRM ANANDI RAM MOHAN *Pat.* **784**

——— **ss. 4, 56 (3) proviso**—*Property sold—Receiver claiming it as insolvent's—Delivery of possession to purchaser, when can be given—Decision on question of title—Necessity of.*

The house in dispute was claimed by the Receiver as the property of the insolvents. The appellants denied the title of the insolvents and claimed to be the owners of the house in dispute. They preferred an objection in the Insolvency Court putting forward their claim and denying the right of the insolvents. The appellants' objection was dismissed for non-appearance. The Receiver subsequently sold the house to the respondent, who applied to the Insolvency Court for delivery of possession of the house to her. The appellants objected to any delivery of possession being made. In their objection they reiterated their title to the house and repudiated that of the insolvents. The insolvency Judge summarily dismissed the objection on the ground that a similar objection had been previously dismissed :

Held, that before the question of title is decided either by a decree in a separate suit or by an order under s. 4, Insolvency Act, the appellants could not be dispossessed from the property which, to all appearance, they claimed in perfect good faith to be their own and the fact that the appellant had not pressed his objection on a certain occasion did not justify the Insolvency Court in treating the property as belonging to the insolvent. DWARKA PRASAD *v.* SUNDER *All.* **1037**

——— **s. 28**—*Creditor obtaining decree on understanding that debtors are insolvents—Remedy—Separate execution—Legality of.*

Where a creditor has obtained a decree on the understanding that he was getting a decree against certain insolvents, his exclusive remedy is to go to the Insolvency Court and get rateable shares in the assets and not to proceed separately by way of execution and claim priority as against the Official Receiver. BHAGWAN DAS *v.* LAKSHMI CHAND *All.* **661**

——— **s. 28**—Right of Hindu father to dispose of Joint Hindu family property to satisfy his debts —Whether property within meaning of s. 28. SEE Hindu Law—Joint family business **661**

——— **s. 28 (4)**—*On death of person property devolving on undischarged insolvent—Property vests in Receiver—Mortgage of such property by insolvent —Receiver not claiming property in insolvency proceedings—Property if revests in mortgagor—Transfer of Property Act (IV of 1882), s. 3.*

Where on the death of a person the share of his esate devolves on an insolvent, it forthwith vests in the Receiver, and a mortgage of that share by the insolvent is invalid.

Although the property vested in the Receiver, if he never claimed it in the insolvency proceedings, in the absence of any order to the contrary, the property in question must be considered to have revested in the mortgagor on his discharge, and the principle laid down in s 43 of the Transfer of Property Act would be applicable and on the re-vesting of the property in the mortgagor the mortgagee will be entitled to enforce the mortgage. DIWAN CHAND *v.* MANAK CHAND *Lah.* **938**

——— **s. 28 (6) (2)**—*Secured creditor can realize security by filing suit without obtaining leave of Court*

A secured creditor of the insolvent is entitled

Provincial Insolvency Act—contd.

notwithstanding s. 28 (2), Provincial Insolvency Act, to realise the security by filing a suit or otherwise in accordance with law without obtaining the leave of the Court in that behalf. M. K. M. CHETTYAR FIRM *v.* MAUNG THAUNG *Rang.* **227**

——**ss. 47, 48**—Applicability. SEE Insolvency **426**

——**s. 52.** SEE Provincial Insolvency Act, 1920, s. 4 **734**

——**s. 52**—*Attachment of properties of debtor in execution of decree—Subsequent appointment by insolvency Court, of* interim *Receiver — Order of stay of execution and order under s. 52 by insolvency Court—Legality—Remedy—Proper proceedure.*

Where after the attachment of property of a debtor in execution of a decree against him, the insolvency Court admits a petition for insolvency by the debtor and appoints an *interim* Receiver, it is only the Executing Court that can pass an order under s. 52, Provincial Insolvency Act, on an application made to it and not the insolvency Court and where, on an application by a petitioning creditor the execution proceedings are already stayed by the insolvency Court and also an order passed under s. 52 of the Act, on an application by the decree-holder, directing the Receiver to sell the property for realising the costs of the suit and of the execution, there are two alternatives either of which may be adopted. One of these alternatives is for the insolvency Court to direct the Receiver to make a proper application to the Executing Court in order to obtain the necessary order under s. 52, Provincial Insolvency Act ; and the other alternative is for the decree-holders to apply to the Executing Court for the sale of the properties under attachment in order that their dues may be realized, in which case the insolvency Court has to vacate the stay order which he had already made. MATHURESH CHAKRAVARTY *v.* S. R. MILLS CO., LTD. *Cal.* **77** (*b*)

——**s. 53.** SEE Provincial Insolvency Act, 1920, s. 4 **684**

——**ss. 53, 54**—*Mortgage by father and sons—Father alone adjudicated—Mortgage can be avoided under ss.* 53 *and* 54 *only in respect of father's share—Transfer of Property Act* (*IV of* 1882), *s.* 53.

Where a father executed a mortgage of properties belonging to him and his two minor sons to one of their creditors acting on his own behalf and as guardian of his minor sons; and the father alone was subsequently adjudged an insolvent :

Held, that the transfer by the insolvent father alone to the extent of his own share therein would come within s. 54 of the Provincial Insolvency Act. The transfer of the sons' shares cannot be dealt with either under s. 53 or s. 54 of the Insolvency Act, though it may be sought to be avoided under s. 53 of the Transfer of Property Act. SUBRAMANIAN CHETTIAR *v.* SUBBARAYA GOUNDEN *Mad.* **611**

——**s. 54**—*Debtor in embarrassed circumstances —Mortgage in favour of one of them giving him a vendictive preference to punish the others—Transaction, if falls within s.* 54—*Vindictive preference, whether fraudulent.*

Where a debtor who was in embarassed circumstances being pricked in mind on account of the refractory conduct of some of the creditors who declined to reduce the interest as desired by him created a mortgage practically over his entire property in favour of one of them giving him a vindictive preference with a view to punish the other creditors.

Held, that the transaction came within s. 54 of the

Provincial Insolvency Act. SUBRAMANIAN CHETTIAR *v.* SUBBARAYA GOUNDEN *Mad.* **611**

——**ss. 54, 53**—*Advance of fresh loan when giving preference to creditor—Effect of.*

Where a creditor at the time of receiving a fraudulent preference by way of mortgage from a debtor in embarassed circumstances advanced a fresh loan to the debtor :

Held, that though the transaction could not be strictly viewed as a fraudulent preference within s. 54 of the Insolvency Act so far as the fresh advance was concerned, yet it could be avoided under s. 53 of the said Act even in respect of the fresh advance. SUBRAMANIAN CHETTIAR *v.* SUBBARAYA GOUNDEN *Mad.* **611**

——**s. 55, proviso**—*Mortgage during pendency of insolvency proceedings against mortgagor—Mortgagee having notice of same—Transaction, if protected—Execution of mortgage when old Act III of* 1907 *in force—Mortgagee taking mortgage in his favour with knowledge of insolvency proceedings pending against mortgagor—Mortgagee, if protected under Act III of* 1907, *s.* 38.

Under s. 55, Provincial Insolvency Act, a transferee under a transaction made before the order of adjudication is protected only if the transfer is for valuable consideration and the transferee had no notice of the presentation of the insolvency petition. In order to bring his case under the proviso to that section, the plaintiff must show that both these conditions co-exist, but where it is found that he had notice of the fact that the petition of insolvency was pending at the time when the mortgage in his favour was executed, he cannot avail himself of the protection given by the proviso to s. 55.

It is a well settled rule of interpretation of Statutes that in the absence of a provision to the contrary a new law ought not to be construed so as to interfere with vested rights. Where therefore the mortgage had been effected six months before the new Act V of 1920 came into force and according to the law then in force, the mortgage was valid notwithstanding the fact that it had been made at a time when a petition for the adjudication of the mortgagor was pending, for it was effected for valuable consideration and was protected by the proviso to s 38 of Act III of 1907 and the mortgagee therefore, had acquired a valuable right and this right could not be lost by the subsequent change in the law made by the enactment of Act V of 1920 and repeal of Act III of 1907. FIRM MELA MAL-SHIB DYAL *v.* THAKAR DAS SUD *Lah.* **1084**

——**s. 56 (3) proviso.** SEE Provincial Insolvency Act, 1920, s. 4 **1037**

——**ss 59, 68.** SEE Punjab Pre-emption Act, 1913, s. 3 (5) (*a*) **693 F. B.**

——**s. 68**—*Sale by Official Receiver at public auction—One person making highest bid and depositing one-fourth of price—Subsequent higher offer by another—Registered deed in latter's favour —Deed, if can be cancelled by Insolvency Court —More appropriate proceedings should be taken.*

The Insolvency Court cannot summarily set aside a registered sale deed. Where, therefore, the Official Receiver sells a house of the insolvent at public auction and one person *R* offers the highest bid and deposits one-fourth of the price but subsequently another person *G* offers a higher price and the Official Receiver under order of the Court executes a registered sale deed in *G's* favour, it is not open to *R* to apply to the Insolvency Court for cancellation of the sale deed. The matter in controversy

Provincial Insolvency Act—concld.

should be settled in more appropriate proceedings, granting leave, if necessary, for a suit against the Receiver and the third person claiming rights under the sale deed. KESHAB DEO *v.* RAJENDRA KUMAR BHATTACHARJI *All.* **563**

———**s. 79** SEE Insolvency **661**

Provincial Small Cause Courts Act (IX of 1887), s. 17. SEE Civil Procedure Code, 1908, s. 115 **575**

———**s. 17.** SEE Court Fees Act, 1870, Sch. II, Art. 6 **559 S. B.**

———**Sch. II, Art. 38**—*Suit "relating to maintenance"—Proceedings under s.* 488, *Criminal Procedure Code, by wife against husband—Husband agreeing to provide maintenance to wife—Wife bringing suit in Small Cause Court for arrears of maintenance—Maintainability.*

Where the parties are husband and wife, and some years ago the latter took proceedings against the former under s. 488, Criminal Procedure Code, and in the course of that litigation an agreement was entered into between them whereby the defendant agreed to pay to the plaintiff maintenance at certain specified rates and the plaintiff brings a suit for arrears of maintenance alleged to be due under the agreement, the suit is one "relating to maintenance" and is clearly excluded from the jurisdiction of the Court of Small Causes by Art. 38 of the Second Schedule of the Provincial Small Cause Courts Act. PARBATI *v* TEK SINGH *Lah.* **965**

Public Gambling Act (III of 1867), s 7—*Private room, rented by members of one caste and containing paraphernalia of club, whether* prima facie *gaming house.*

A private room containing all the paraphernalia of a club and rented by members of only one caste is not *prima facie* a common gaming house within the meaning of the Act. ADAM ALI *v.* EMPEROR *Sind* **971**

Public Purposes Land Acquisition Act (VI of 1857)—*Works of Public Utility Companies Act (XXII of* 1863), *s.* 26—*Scope of—Declaration made under Act VI of* 1857—*Courts, if can hold that it was not for a public purpose—Acquisition of land declared to be for public purpose—Effect of.*

The Works of Public Utility Companies Act (XXII of 1863), is for works of public utility to be constructed by private persons or companies in contradistinction to the Public Purposes Land Acquisition Act (VI of 1857), which was for the acquisition of land for "public purposes". The earlier sections of the Act of 1863 make provision for the machinery by which the promoters, as they are called in the Act, are to satisfy the Government that the matter in hand is a matter of public utility and a matter for the purpose of which the land should be acquired under the Act, and, amongst other things, provision for the survey of the lands which are sought to be acquired.

What is contemplated by s. 26 is a definite declaration by the Government that they are proceeding under the Act of 1863 and that the land is required for the said work; and that when once that declaration is made the declaration is conclusive for the authorities to exercise their powers under the Act to acquire land for purposes of public utility. The latter part of the section merely provides that after the declaration has been made under the earlier part of s. 26 the Government proceeds to acquire the land by the use of the machinery provided in the earlier sections of the Act of 1857.

Public Purposes Land Acquisition Act—concld.

Having exercised powers under Act (VI of 1857), and made the declaration, it is not open to any Court to hold that it was not for a public purpose. The two Acts give powers of acquisition for different purposes. The declaration under the one Act that the acquisition was for a public purpose is conclusive as is the declaration under the other that "the land may be taken under the Act,". Consequently where it has been declared that the land is acquired for a public purpose, it is not competent for any one to canvass the question whether the land was used for a public purpose or not. JAINTY CENTRAL COLLIERY, LTD. *v.* JAGDISH PRASAD SINGH *Pat.* **98**

Punjab Alienation of Land Act (XIII of 1900), ss. 2 (3), 15—*Trees, whether land.*

Trees, whether fruit trees or otherwise, cannot be considered to be "land" within s. 2 (3), Punjab Alienation of Land Act. Reading ss. 2 (3) and 15 of the Act together the terms "land" in s. 2 (3) must be confined to the ordinary meaning of "land" especially as there is a distinction drawn in the Act itself between land and the products of the earth or land. BHAGWANA *v* GOPI *Lah.* **659 F B.**

———**s. 3 (2)**—*Decree passed in violation of s.* 3 (2) —*Whether a nullity.*

A decree passed in violation of the terms of s. 3 (2) of the Punjab Alienation of Land Act is not a nullity. Such a decree unless set aside, in appeal or revision cannot be treated as a nullity. It is not a decree passed without jurisdiction. SARBALAND *v.* PREM DAS *Lah.* **615**

———**ss. 3 (2), 14, 21-A, (2)**—*Decree in violation of s.* 3 (2), *if a nullity—Remedy by Deputy Commissioner—S.* 14, *application of—Alienation by decree of Court—Deputy Commissioner's power to change nature of alienation*

The only course open to the Deputy Commissioner in a case where a decree is passed by a civil Court which offends against the provisions of s. 3 (2) Punjab Alienation of Land Act, and this defect is brought to the notice of the Deputy Commissioner, is that under s. 21-A (2) of the Act, which authorises him to move the higher Civil Court for revision in accordance with the Act. The permanent alienation cannot be converted by himself, under s. 14 of the Act, into a temporary one.

Section 14 of the Punjab Alienation of Land Act has no application to a case where a permanent alienation of land in favour of non-agriculturist has been effected by a decree of Civil Court. It deals with those cases only in which the dispute as to the validity of the alienation has not been taken to a Civil Court and that Court has not passed a decree in connection therewith. SARBULAND *v.* PREM DAS *Lah.* **615**

———**s 14.** SEE Punjab Alienation of Land Act, 1900, s. 3 (2) **615**

———**s. 14.**—Scope and Applicability. SEE Punjab Alienation of Land Act, 1900, ss. 3 (2), 14, 21-A (2) **615**

———**s. 21-A (2).** SEE Punjab Alienation of Land Act, 1900, s. 3 (2) **615**

Punjab Courts Act (VI of 1918), s. 38. SEE Suits Valuation Act, 1887, s. 9 **153**

———**s. 41 (3)**—*District Judge refusing certificate —Second appeal, if competent—High Court, whether can send case back ordering grant of certificate.*

Where a District Judge considers an application before him and finds that a certificate should not be granted, a second appeal is not competent without a certificate and the High Court has no power to send back the case to him for re-consideration

Punjab Courts Act—concld.

or with an order to grant the required certificate. JANAT BIBI *v.* GHULAM HUSSAIN *Lah.* 212

——— **s. 44.** SEE Civil Proceuure Code, 1908, s. 115 533

Punjab Court of Wards Act (II of 1903), s. 43 —*Ward of Court—Disability removed except in respect of joint property of his and another ward —Capacity to enter into fresh contract—Debt incurred during minority, if can be ratified.*

Where the effect of a notification was to remove the legal incapacity of a ward of Court except in respect of any property which he owned jointly with another who continued to be under superintendence :

Held, that the former person was not thenceforth a ward of Court and was capable of entering into a fresh contract after the removal of the disability, but that he was not in a position to ratify any debt incurred during his minority. PRABH DIYAL *v.* MUHAMMAD NAWAZ SHAH *Lah.* 1009

Punjab Land Revenue Act (XVII of 1887), s. 116—*Question regarding ownership of garden and* kotha—*If a question of title.*

The question whether the garden and the *kothas* in the garden are the joint property of two brothers or the sole property of one of them is a question of title within the meaning of s. 116, Punjab Land Revenue Act. MUZAFFAR ALI *v.* GHAZANFAR ALI *Lah.* 282

Punjab Limitation (Custom) Act (I of 1920), Art 1 (c)—*Alienation, if includes testamentary disposition—No mutation on its basis —Time, when begins to run*

Under the Punjab Limitation (Custom) Act, "Alienation" includes any testamentary disposition of property. When alienation is not made by means of a registered deed, and no mutation on the basis of the will is entered in the register of mutation, the time begins to run from the date on which the alienation came to the knowledge of the plaintiffs. Where, therefore, the plaintiffs came to know of the existence of the wills on February 17, 1916, a suit instituted in 1926, is barred by time. MOHAMMAD ALI KHAN *v.* ANWAR HUSSAIN *Lah.* 1104

Punjab Municipal Act (III of 1911), s. 172—*Order to demolish structure—Legality of—Sanction once given, if can be revoked on ground of mistake.*

Section 172, Punjab Municipal Act, authorises the Committee to prosecute an offender or demolish a structure only when it is erected without its permission in writing. Where, however, a person applies for permission to construct an overhanging balcony in anticipation of sanction and the Committee grants permission inflicting a penalty and the penalty is paid, s. 172 does not apply even if the sanction be in contravention of the bye-laws of the Committee.

There is no provision in the Punjab Municipal Act enabling the Committee to revoke a sanction once given. A sanction to build given by a Committee cannot be revoked on the ground that there had been a mistake. FAQIR CHAND *v.* MUNICIPAL COMMITTEE, LUDHIANA *Lah* 491

——— **s. 172 (1)**—*Grant of sanction under s.* 172 (1) —*Imposition of conditions, legality of.*

In granting sanction under s. 172 (1), Punjab Municipal Act, the Municipal Committee cannot impose any condition on the grantee nor can a sanction once granted be revoked. KANSHI RAM *v.* MUNICIPAL COMMITTEE, MOGA *Lah.* 893

——— **ss. 172 (1), 188**—*Sanction under s.* 172 (1) —*Form of—Seal of Municipal Committee—Value of.*

Punjab Municipal Act—concld.

The plaintiffs applied to the Municipal Committee to build two *tharras* of certain measurements in front of their shops, abutting on the public street and overhanging a municipal drain. The matter was placed before the Municipal Committee and on July 19, 1930, the following resolution was passed: "Sanctioned as recommended by the Building Sub-Committee. The necessary agreement deed be obtained before issuing the permit." No permit was issued to the plaintiffs, but they were given by the office of the Municipal Committee a copy of the plan which they had filed in the said office. This plan bore the seal of the Municipal Committee with the words "*manzur-shud*" meaning "granted." There was also a reference in their map, to the resolution :

Held, that the plan containing the words quoted above, accompanied with the seal of the Municipal Committee must be considered as permission in writing.

No particular form is prescribed in which the permission is granted under s. 172 (1), Punjab Municipal Act.

The seal of the Municipal Committee when affixed, is equivalent to signature of the Secretary or some other competent Municipal Officer. KANSHI RAM *v.* MUNICIPAL COMMITTEE, MOGA *Lah.* 893

——— **s. 173**—*Municipal Committee if can let out one portion of public street for private purposes*

The Municipal Committee has no right to interfere with the enjoyment of the right of way by the public on a public street by letting out a portion of it to a particular individual for a private purpose. MUNICIPAL COMMITTEE, MULTAN *v.* ABDUL GHAFUR *Lah.* 951

——— **s. 173**— *Scope and applicability of— Structure made with permission of Municipality years ago—Continuance after expiry of period without payment — Offence, if committed—Remedy of Municipal Committee—Civil suit.*

Section 173, Punjab Municipal Act, applies only to encroachments which have recently been made and it is the act of building or erecting the encroachment which has been made punishable and the section does not apply to encroachments or erections which have existed for some years. Where a movable encroachment or projection was made some years ago and with the permission of the Municipal Committee on payment of rent, no offence is committed if the structure is continued after the period fixed without payment of rent. In such a case the relation between the parties is that of landlord and tenant or licensor and licensee and hence the aggrieved party should seek his remedy in the Civil Court. UTTAM SINGH *v.* MUNICIPAL COMMITTEE, RAWALPINDI *Lah.* 384

——— **ss. 189, 172**—*Local body, if can give sanction in contravention of bye-laws—Sanction given on penalty—Penalty paid—Committee, if estopped from withdrawing sanction.*

A local body has no power to grant sanction for a building in contravention of its own bye-laws. But where a Municipality has granted the sanction and accepted the required penalty from the applicant, it is estopped from withdrawing it and requiring the applicant to demolish the structure. FAQIR CHAND *v.* MUNICIPAL COMMITTEE, LUDHIANA *Lah.* 491

——— **s. 221**—Bona fide *dispute of ownership— Obstruction offered to contractor— Held, no offence committed.*

Where there exists a *bona fide* dispute regarding the ownership of a plot of land between the Municipal Committee and the accused and it is doubtful whether the Committee could direct its contracto

to pave the disputed land and thus constitute him a person legally authorised under s. 221, Punjab Municipal Act, the accused will not be guilty of offence under s. 221 of the Act, if he, on the contractor proceeding to pave the site, tells the contractor that the property belonged to him and should not be paved. WAJID ALI SHAH *v.* EMPEROR *Pesh* **548**

Punjab Pre-emption Act (I of 1913), s. 3 (5) (a) —*Sale of insolvent's property by Receiver, whether a sale in execution of order of Court—Whether subject to pre-emption—Provincial Insolvency Act (V of 1920), ss.* 59, 68.

The sale of the property of an insolvent by the Receiver is not a sale in execution of an order of the Court within the meaning of s. 3, sub-s. (5) *(a)*, Punjab Pre-emption Act of 1913 and consequently is subject to the right of pre-emption. GURBAKHSH SINGH *v* SARDAR SINGH *Lah.* **693 F. B.**

Punjab Tenancy Act (XVI of 1887), ss. 5, 6, 8.

SEE Punjab Tenancy Act, 1887, s. 77 (3) **320**

———**ss. 59, 60**—*Widow surrendering her share in occupancy right to landlord two years before her death—Assignee of co-tenant, being stranger to family, if can assail the surrender.*

Under s. 59, sub-s. (3) read with s. 60 of the Punjab Tenancy Act, a surrender, even if assailable can be attacked by the landlords alone and by none else and where the surrender by a widow has taken place in favour of the landlords themselves, it is perfectly valid and unimpeachable. By s. 59, sub-s. (1), cl. *(c)*, on the termination of the widow's interest under s. 59, sub-s. (1) cl. *(b)* it is only the male collateral relatives of the widow's deceased husband who are entitled to succeed to the occupancy rights and an assignee from a co-tenant being a stranger to the family and not falling under that category has no right of succession and consequently no right of attack. Even if it be conceded that the assignee is entitled to inherit the rights by virtue of the rule of survivorship among joint tenants, there is nothing left to be inherited at the time when the widow died, she having already surrendered her interest two years before. HARGOBIND *v* GURDAS MAL *Lah.* **836**

———**ss 77 (3), 5, 6, 8**—*Dispute as to validity of attachment of occupancy rights of judgment-debtor — Jurisdiction of civil Court to determine nature of occupancy rights.*

Where the dispute between the parties is one in execution proceedings and is as to whether occupancy rights of the judgment-debtor fall under s. 5 or s. 6 or 8, Punjab Tenancy Act and are attachable or not, it is not covered by s. 77 (3) of the Act and is, therefore, cognizable by a civil Court. PRABHU *v.* BANWARI *Lah.* **320**

———**ss. 77, 100**—*Scope of s. 77—Suit against defendants as trespassers—Court finding them to be tenants-at-will—Suit becomes cognizable in Revenue Court only—Duty of Civil Court to return plaint for presentation before Collector—Passing of decree without observing provisions for ejectment—Decree, if can be registered as decree of Revenue Court*

All suits by a landlord to eject a tenant can only be instituted and heard and determined by a Revenue Court under s. 77 (3) *(e)* of the Punjab Tenancy Act. Although the defendants are described as trespassers in the plaint, when the Court comes to the conclusion that defendants were holding the land as tenants-at-will, and, therefore, could not claim that they were in adverse possession of the land as against the proprietors, the suit becomes one in which it is necessary to decide a matter which under s. 77 can only be heard and decided by a Revenue Court, and the Civil Court should then return the plaint for presentation to the Collector.

A definite procedure is prescribed for the ejectment of tenants under ss. 41, 42 and 43 of the Punjab Tenancy Act. If a decree is passed in favour of a plaintiff without observing the provisions regarding the ejectment of a tenant, it must be held that the tenant was prejudiced by the mistake as to jurisdiction and it would be inequitable in these circumstances of register the decree of the Civil Court as a decree of the Revenue Court, MUHAMMAD *v.* ALLAH DITTA *Lah.* **242**

Railway.

SEE Crown **395** *(a)*

SEE Tort **631**

———*Railway Company does not insure against negligence of consignor.*

A Railway Company does not insure against the negligence of the consignor. It is the duty of the consignor to have his goods properly packed, such as would be damaged unless properly packed. This is even so where the responsibility of a carrier is much more than that of a Railway Administration. MANNILAL ANANDJI *v.* B N RY. LTD. *Cal.* **1052**

Railways Act (IX of 1890), s 72 (1) (2)—*Liability of Railway Administration—Whether as bailee or insurer or carrier—Misconduct—Rain water entering wagon by great force of wind—Whether amounts to misconduct*

In India the liability of a Railway Administration is not that of a common carrier. It is not an insurer. Its liability is that of a bailee as defined in the Contract Act. If there is no negligence there is no liability. Whatever the term 'misconduct' may imply, the word implies something more than negligence. If rain water enters a wagon by the great force of wind the omission of the Railway Company to provide absolutely water-tight doors, such as would not permit even a drop of water to enter, would not amount to misconduct. To insist on such a high standard would be to make an Indian Railway Administration virtually an insurer and not a bailee MANNILAL ANANDJI *v.* B. N. RY., LTD. *Cal.* **1052**

———**s. 76** — *Scope of— Damages not caused by misconduct and negligence of Railway servants—Consignor, if entitled to benefit of s. 76—Court relying on s. 76—Misdirection as to law—Interfernce in revision.*

The provisions contained in s. 76, Railways Act were made for the protection of plaintiffs who had suffered loss but who were not in a position to prove in what manner the property had been damaged or destroyed after it had been consigned to the Railway, because in the ordinary course of events they are not in a position to know how the loss has been caused. But the Act has not anywhere provided that a plaintiff is absolved from the duty of proving that a Railway Administration is liable for causing the loss or deterioration of the goods. If it is clear that the damage has been caused by the misconduct of the Railway servants, it is not necessary for the plaintiff to prove how their misconduct had caused the loss. But where from the evidence it seems to be highly probable that the goods which were consigned in a damaged condition and remained in the train fr over ten days had deteriorated for this reason and not through any misconduct and negligence on the part of the Railway Administration and the Judge relies entirely on s. 76, the Judge in doing so misdirects himself as to the law on the point and his decision being a result of the misdirection, is liable to be interfered with, SECRETARY OF

Railways Act—concld.

STATE FOR INDIA IN COUNCIL *v.* NARAIN DAS SHYAM LAL *All.* **97**

———s. 114. SEE Criminal Procedure Code, 1898, s. 562 **697 F. B.**

——s. 114 —*Applicability of—Whether applies to transferors alone.*

Section 114, Railways Act, applies to purchasers and transferees of tickets and not to the transferors alone. EMPEROR *v.* KODUMAL OCHIRAM *Sind* **697 F B.**

Receiver—*No attempt made to interfere with his right to property in his care—Receiver, if a necessary party—Civil Procedure Code (V of* 1908), *s.* 47.

The Receiver of the property of a party to litigation, is not a necessary party if no attempt is made thereby to interfere with the right of the Receiver to the property entrusted to his care, where the subject-matter of suit is not in the possession of the Receiver.

A suit was instituted to set aside a Court sale in respect of property not included in the mortgage;

Held, that the suit might be treated as an application under s. 47, Civil Procedure Code, made on the day on which the plaint was presented. PROTIVA SUNDARI DEBI *v.* SARADA CHARAN GOHO *Cal* **848**

———*Propriety of appointment of, in suitable case —Whether can be challenged.*

The propriety of appointing a Receiver in a suitable case cannot be challenged. MA JOO THAN *v.* COLLECTOR OF RANGOON *Rang* **776**

Record of Rights—*Entry of the name of* mahant *in column of owner, whether a proof that property is his private property—Religious endowment.*

The Revenue Authorities can only function through a human agency. They cannot enter into any transaction with a legal entity like an idol installed in a *thakardwara*. The name of the *mahant* or trustee is, therefore, generally entered in the column of owner, so that the Revenue Authorities may have dealings with him in all those matters which concern the *thakardwara* or the religious institution in question. Therefore, the mere entry of the name of the *mahant* in the column of owner does not prove that the property was his private and exclusive property. RAGHUNATH DAS *v.* GAJPAT RAI *Lah.* **554**

Registration—*Security bond filed in Court—No person named as obligee — Registration.*

Where in a security bond filed in Court no person is named as the obligee, the bond is given to the Judge of the Court and therefore, if not presented by the obligors, ought to be presented by the Judge or by a person holding a duly authenticated power of attorney from him. DAW MIN BAW *v.* A. V. P. L. N. CHETTYAR FIRM *Rang.* **511**

Registration Act (XVI of 1908), s. 7 (1) (c). SEE Award **1022**

———s. 17. SEE Registration Act, 1908, s. 49 **47**

———ss. 17 (1), (b), 21—*Sale deed—Property mentioned as existing in district where deed is registered not actually existing but introduced as fictitious item—Deed containing clause making it non-testamentary instrument creating vested rights —Document, whether valid.*

There was a clause in a sale-deed executed by the defendants in favour of the plaintiffs, which ran in these words: "Be it known that if in future owing to any dispute about the above mentioned family arrangement and amicable partition it be found or become divulged that we the executants have not the entire 16 annas right in the properties sold, then of the immovable properties left by our father in the

Registration Act—contd.

District of Dacca and Goalpara and in the Garo hills including the properties given in the schedule below, the total 6 annas 4 *gandas* 9 *kaks* 2 *tils* inherited by us the executants from our father, will be counted as sold to you the recipients of the deed. On the strength of this *kobala* being owner and possessor of our 6 annas 4 *gandas* 9 *kaks* 2 *tils* share in the immovable properties left by our father including the properties given in the schedule below, you either jointly or on partition, will enjoy and possess the same in whatever way you like down to your sons grandsons and other heirs and legal representatives":

Held, that this clause in the document satisfied the requirements of s. 17, sub-s. 1, cl. (*b*), Registration Act, inasmuch as the document by reason of this clause would be a non-testamentary instrument which purported to create or declare, though in future, a right vested or contingent in favour of the plaintiffs. That being the position the document would be registrable in the District of Dacca even though as a *kobala* transferring the three items of property mentioned in the document it would not be so registrable

Held, further that treated as a *kobala* the document could not be registered in any Registration Office in the District of Dacca in view of the fact that the only property which purported to have been covered by it as lying within the District of Dacca was a tin-shed which had no existence whatever and inasmuch as the introduction of a fictitious item of property in the sale deed for the purpose of getting it registered at a particular place would make the registration of the document invalid. But the document regarded as a non-testamentary instrument falling within cl. (*b*), sub-s. 1, s. 17 could be registrable at a Registration Office in the District of Dacca and it was not invalid. NURANNESSA KHATOON *v.* OSMAN GANI *Cal* **926**

———ss. 17, 49—*Agreement executed in* 1879—*Proof that the property was worth more than Rs.* 99 *—Unregistered document, if can be used for proving nature of possession.*

In the absence of reliable evidence on the record to show that the value of the property covered by an agreement executed in 1879 was more than Rs. 99, it is very difficult to hold that, in those days when the value of the property was very small, the property covered by the agreement was worth more than Rs. 99.

Unregistered documents can be used for determining the nature of the claimant's possession. KARTAR SINGH *v.* MEHR NISHAN *Lah.* **1064**

———s. 21. SEE Registration Act, 1908, s. 17 (1) (*b*) **926**

——— s. 21—*Properties sufficiently identifiable— Document registered—Document if operative.*

Section 21, Registration Act, merely lays down certain particulars which have got to be complied with before a document can be accepted for registration. If the properties are sufficiently identifiable, the document, if registered, would be operative in respect of such properties as would be found to answer the description contained in the document. NURANNESSA KHATOON *v.* OSMAN GANI *Cal* **926**

——— —s. 49. SEE Registration Act, 1908, s. 17 **1064**

———s. 49—*Mortgagors basing their claim for possession, on redemption of sub-mortgage—Mortgages unregistered— Maintainability of suit.*

In order that the ruling in *Maung Sin* v. *Maung So Min* (1) 129 Ind. Cas. 511 should be applicable, there must be privity of contract be-

Registration Act—concld.

tween the real owner and the person in possession, under which contract the person in possession has been allowed to obtain possession. When the plaintiffs-mortgagors do not suggest that the mortgagees are in possession of property by their leave and licence, but they base their claim on the fact that they have redeemed the mortgages in favour of the sub-mortgagees and assert that because they have redeemed these mortgages from the sub-mortgagee they are entitled to possession of the lands, their suit is a suit for possession of lands which have been redeemed and of which the person in possession has failed to deliver possession after the redemption, and, therefore, it depends entirely upon proof of the mortgages. If the mortgages are incapable of proof for want of registration, the suit of the plaintiffs must of necessity fail. MA PO *v.* MA BWIN *Rang.* **204**

——ss. 49, 17—*Transfer of Property Act (IV of 1882), s. 55—Unregistered agreement of sale—Deed not operating as transfer of any interest in immovable property—Suit for specific performance—Document, admissibility of.*

An unregistered agreement for sale of immovable property of value of more than one hundred rupees but not operating as a transfer of any interest in the property, can be used in evidence in an action for obtaining specific performance of the contract. ABDUL LATIF MIAN *v.* DEBI MAHTON *Pat.* **47**

Religious endowment. SEE Record of Rights **554**

——Bona fide *endowment—Test.*

One test of a *bona fide* or a nominal endowment is to see how did the founder treat this property, or how have descendants treated it and has the income of the endowed lands been continually applied to the object of dedication. ARUNACHALAM CHETTIAR *v.* OFFICIAL ASSIGNEE, MADRAS *Mad.* **772**

——*Shrine—Surplus income, if belongs to* pujari.

In cases where there is no deed of endowment of lands, or where it is ambiguous, usage is relevant evidence to determine whether lands and the offerings were after their acquisition endowed entirely for the temple or were only burdened with the actual expenses thereof, the surplus being held by the *pujari* for his own benefit. PURAN DAS *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE *Lah.* **324**

Religious institution—Sikhs *and* Udasis *—Distinction.*

The *Sikhs* are a Hindu sect. The first *Guru* preached the unity of God but, apart from that, he was in other respects apparently a Hindu. History of *Sikhs* and *Udasis* and their practices described.

The *Udasis* occupy a position between Hindus proper and *Sikhs* proper, and in some cases where they become heads of *Sikh Gurdwaras*, it is difficult to distinguish them from *Sikhs* proper, except that they may privately worship at the *samadhs* of their predecessors. SUNDAR SINGH *v.* NARAIN DAS *Lah.* **396**

——*Succession from* Guru to chela—*Presumption as to dedication.*

Where natural heirs have been excluded from succession, there is a presumption that the institution has been dedicated to religious uses even though there is no direct evidence of dedication. SUNDAR SINGH *v.* NARAIN DAS *Lah* **396**

Remand—*Point not considered by lower Court—Remand for considering it—Power of High Court to order.*

The High Court has ample power to make a remand in order that a point which has not been considered by the lower Court, may be considered by it. MA FATI *v.* KALIMUTHU *Rang.* **912**

Rent—*Remission of rent—Whether automatically follows from remission of revenue.*

Remission of rent automatically follows the remission of revenue. AKBAR HUSAIN *v.* HUSAIN JAHAN BEGUM *Oudh* **40**

Res judicata.

SEE Civil Procedure Code, 1908, s. 40 **268**
SEE Civil Procedure Code, 1908, O. IX, r. 9 **158**
SEE Decree **571**
SEE Execution **673**
SEE Hindu Law **213**

——*Application rejected—Order not set aside—Second application, if maintainable.*

Where an application for stay is rejected and the order is not set aside, a second application for stay is barred by *res judicata* even if the first order is erroneous. FIRM OF MURLIMAL SANTRAM *v.* BANARSIDAS & SONS *Sind* **895**

——*Title to particular lands not directly and substantially in issue in former suit—Subsequent suit, if barred.*

Where the plaintiff who was in possession of lands in virtue of sale-deeds in favour of his predecessor in-title, filed a suit in respect of the lands and it was held therein that the sale-deeds were bogus and that the real owners were other persons, and he subsequently brought a suit for possession of other lands which he alleged to have leased to the defendants who contended that the plaintiff's title to the lands was extinguished by the decision in the former suit:

Held, that the plaintiff's title to these lands was not directly and substantially in issue in the former suit and that his claim as real owner was not barred by *res judicata.*

Held, also that the tenants-defendants were estopped from denying the plaintiff's title as landlord. KRISHNARAO RAGHUNATH YARDI *v.* GHAMON GHAMA *Bom.* **249** (*b*)

Riwaj-i-am—"Qarabati", *meaning of.*

Whatever the origin of the word "*qarabati*" may have been as used in *Riwaj-i-am*, there is no doubt that it is now used to denote all kinsmen whether near or distant. BEGAN *v.* ALI GOHAR *Lah.* **340**

Sale—*Whole of judgment-debtor's property purchased—No provision made for decree-holder—Purchaser himself not creditor—Part of consideration genuine—Alienation if wholly invalid—Purchaser if can be given charge on property—Extent of charge.*

The plaintiff was not a creditor He had bought property consisting of the whole of the judgment-debtor's immovable properties and no provision was made for payment of the decree debt. The Court found that only a portion of the consideration was genuine:

Held, that an alienation having been made to defeat or delay creditors was wholly invalid even though consideration might have been given for some part and must be set aside in its entirety. The purchaser could however be given a charge on the property to the extent of the encumbrance which he has discharged. SUPPAN ASARI *v.* ALIMA BIBI *Mad.* **17**

Set-off—*Mutual dealings, whether include claim for unliquidated damages.*

The term 'mutual dealing' has been given by the decisions a very extended meaning. It includes not only the case where a person owes a debt to the insolvent but also where there is a claim for unliquidated damages. Damages for breach of covenant

can be set off under the said provisions against a claim for rent. KRISHNA CHANDRA BHOUMICK *v.* PABNA DHANABHANDAR CO. LTD. *Cal.* 991

Shamilat land. SEE Custom (Punjab) 514 (*b*)

Shipping— *Collision — Regulation for preventing collusions at Sea, Art* 16*—Position of vessel, how to be ascertained by another vessel, within the meaning of the Regulation—Importance of implicit obedience to Regulations pointed out.*

In order that the position of a vessel may be ascertained by another vessel within the meaning of the Regulation for preventing collisions at sea she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision. The *data* on which an inference is founded may be so conclusive as to raise the inference to the level of a certainty. But where such inference is taken, the vessel so taking it, takes the chance of her inference being right.

It is important that there should be implicit obedience to the Regulations on whose observance navigators are entitled at all times to rely. If a vessel unjustifiably takes the risk of disregarding one of their injunctions, she must suffer the consequences NIPPON YUSEN KAISHA *v.* CHINA NAVIGATION COMPANY, LTD. P. C. 61

Sikh Gurdwaras Act (VIII of 1925), s. 2 (4)— *Hereditary office-holder, meaning of*—Sikhs *and* Udasis, *differences.*

The definition of the term 'hereditary office-holder' in s. 2 (4) of the Act, contemplates participation in the management or performance of public worship in a *Gurdwara* or in the management or performance of any rituals or ceremonies observed therein. SUNDAR SINGH *v.* NARAIN DAS *Lah.* 396

——— **s. 5**—*Petition under s* 5, *if can be maintained by* benamidar—Benami.

An action can be maintained in the name of the *benamidar* in respect of property, though the beneficial owner was not a party to it, the latter being fully affected by the rule of *res judicata*. In fact the question whether the property is held *benami* by any one arises only between the real owner and a *benamidar* and though consideration moved from the real owner, he can still give a complete title to the *benamidar* and the *benamidar* is entitled to possession as against every one, except the real owner. PURAN DAS *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE *Lah.* 324

——— **ss. 8, 14 (2), 15, 12, 7, 9**—*Petition under s.* 8—*Persons competent to file*—Locus standi.

A petition under s. 8, Sikh Gurdwaras Act, is only competent, if made by (1) any hereditary office-holder or (2) twenty or more worshippers of the *Gurdwara;* and under s. 14 (2) the forwarding of the petition to the Tribunal for disposal is conclusive proof that the petition was received by the Government in time and in the case of a petition forwarded by worshippers of a *Gurdwara* under the provisions of s. 8, that the provisions of s. 8 with respect to such worshippers were duly complied with. Nothing is said about a petition forwarded by a hereditary office-holder under s. 8 except that it must be held to have been presented in time. It follows that the *locus standi* of such a petitioner can be challenged and would have to be decided before the trial can proceed. This position is not affected by s. 16 (1) of the Act, which can only apply to a petition, properly before the Tribunal. SUNDAR SINGH *v.* NARAIN DAS *Lah.* 396

——— **ss. 8, 15, 7**—*Parties to petition—Death of petitioner — Procedure — Dismissal of petition—Effect—S.* 15, *scope of.*

There are no respondents in a petition presented under s. 8, and hence s. 15 has been enacted, empowering the tribunal by advertisement or otherwise, to enquire if any person desires to be made a party and to join any person whom it considers should be made a party. The practice is that the Tribunal ascertains the names of the *Sikh* worshippers who forwarded the petition under s. 7 of the Act and these persons are notified by beat of drum in the locality to come forward while notice is sometimes sent to some of them. The Shromani Gurdwara Parbandhak Committee is also notified. This Committee sometimes is added as respondent, called objector by the Tribunal, but it refuses to be so added as a rule if the original worshippers named in the petition under s. 7 or some of them are prepared to contest the petition under s. 8 and to be made objectors. The intention of s. 15 is to allow the Tribunal to consolidate rival or conflicting claims, if convenient, and to furnish a means of getting respondents or objectors to contest petition and thus to permit of petitions being tried as suits because the petitions themselves name no objectors. There is nothing in this section which can be read as permitting the Tribunal arbitrarily to add or substitute one petitioner for another, while such a course is clearly against the scheme of the Act. A petition can only be put in under s. 8 within 90 days of the notification published under s. 7 (3).

It is not open to a petitioner or petitioners under s. 8 to dispute the existence of a *Gurdwara*, which may be interpreted as meaning place of worship. It can only be claimed that it is not a *Sikh Gurdwara, i. e., Sikh* place of worship. A petition under s. 7 can only be presented by 50 or more worshippers of a *Gurdwara*, and that petition along with a list of all rights, title or interests in immovable properties, inclusive of the *Gurdwara*, and in all monetary endowments, which the petitioners claim to belong to the *Gurdwara*, is published by the Local Government by notification under s. 7 (3). When such a notification is published, an hereditary office-holder, can petition under s. 8 within 90 days that it should be declared not to be a *Sikh Gurdwara*. Further, by virtue of s. 7 (5) the publication of a notification under the provisions of s. 7 (3) shall be conclusive proof that the provisions of sub-ss. 7 (1) (2) (3) and (4) have been duly complied with, that is, that the petition was presented by 50 or more *Sikh* worshippers of the *Gurdwara*, etc., etc. The trial of a petition under s. 8 must thus presuppose that there are at least more than 50 worshippers and that there is a *Gurdwara*, or place of religious worship frequented by them. It cannot be contended in such a petition that there is no *Gurdwara* or place of worship. SUNDAR SINGH *v.* NARAIN DAS *Lah.* 396

——— **s. 16 (2) (iii)**—Gurdwara Baghichi Thakran *in Gujranwala City, if a* Sikh Gurdwara.

Gurdwara Baghichi Thakran in Gujranwala City is not a *Sikh Gurdwara* within the meaning of s. 16 (2) (*iii*), Sikh Gurdwaras Act. SUNDAR SINGH *v.* NARAIN DAS *Lah.* 396

——— **ss. 18 (1) (e), (5)**—*Presumption under, when arises.*

Where the oral evidence on the question as to whether the money came from the *Gurdwara* is unconvincing and unreliable and there is evidence that

Sikh Gurdwaras Act—concld.

the family of the *mahant* has ancestral land, a share of which was given to the *mahant* and the *mahant* could have been given gifts of money and these would certainly not be the property of the *Gurdwara* of which he was the *mahant*, it is clear that he had other sources of income and there is no evidence worth considering that the money was supplied from *Gurdwara* income, there is no presumption under s. 18 (1) (*e*) of the Sikh Gurdwara Act.

In order to bring themselves within the presumption arising from s. 18 (1) (*e*) of the Sikh Gurdwaras Act, the *Gurdwara* have to prove that the acquisition of the right, title or interest in question was made with funds proved to have belonged to the *Gurdwara*. PURAN DAS *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE *Lah.* **324**

Solicitor—*Bill of costs—Taxation — English Law—Applicability in Bombay.*

The law and practice in England relating to Solicitors and to taxation of bills of costs applies in Bombay Presidency, except where that law or practice is inconsistent with the rules or practice of the High Court. D. N. REGE *v.* V. C. VIJAYAKAR *Bom.* **945**

Special Powers Ordinance (X of 1932), s. 17—*Ordinance in force on date when prosecution is begun but not in force on date of conviction—Conviction, legality of—Applicability of s. 6, General Clauses Act (X of 1897), to temporary Statute.*

The provisions of s. 6, General Clauses Act, are not applicable to a temporary Statute, which expires automatically on a given date, but applies only to Statutes which are "repealed" by another enactment, and, therefore, proceedings which are pending under an Ordinance on the date of its expiry could not be continued, in the absence of a clear statutory provision to this effect. Consequently where a prosecution is begun when the Ordinance is in force but it is not in force on date of conviction, conviction is illegal and *ultra vires*. KALYAN DAS *v.* EMPEROR *Lah* **447**

Specific Relief Act (I of 1877), s. 21 (*b*)—*Suit for injunction by Secretary of Local Board in Civil Court—Maintainability*—(Quære).

Quære.—Whether a suit for an injunction by a Secretary of a Local Board filed in a Civil Court is at all maintainable and whether any relief for injunction can be granted in the face of the provisions of s 21 (*b*) of the Specific Relief Act. MUHAMMAD MUSTAFA ALI KHAN *v.* DISTRICT BOARD BAREILLY *All.* **593**

———**s. 39.** SEE Court Fees Act, 1870, s. 7 (*iv*-A) **948**

———**s. 39**—*Suit under—Court's function to order instrument to be cancelled.*

In a suit rightly framed under s. 39, Specific Relief Act, it is the Court's function to order the instrument to be cancelled and to send a copy of its decree to the Registrar. The plaintiff need not pray for it. DASABI NAGABHUSHANAM *v.* KUNAMNENI VENKATAPPAYYA *Mad.* **948**

———**s. 41.** SEE Contract Act, 1872, s. 65 **1017**

———**s. 42**—*Court Fees Act (VII of 1870), s. 7 (iv) (c)—Father referring matter to arbitration—Decree in terms of award—Son filing suit for mere declaration that father had no authority and that proceedings subsequent to reference are null and void—Maintainability—Consequential relief must be asked—Court-fees payable—Civil Procedure Code (Act V of 1908), O VI, r. 17—Plaint, amendment of—If can be allowed at the stage of hearing of appeal.*

The father of the plaintiff had agreed to refer the matter in dispute to arbitration and a decree had been passed in the terms of the award. The son subsequently filed a suit for a mere declaration, that the father had no authority to agree to refer the matter to arbitration and that the proceedings from the date of reference to the date of the decree were null and void:

Held, that the suit was not maintainable. The plaintiff must have asked for consequential relief and such a relief can only be for setting aside the decree which has already been passed by a competent Court and should have paid *ad valorem* court-fee according to the provisions of s. 7 (*iv*), (*c*), Court Fees Act.

Held, also, that the High Court would not be justified in permitting the plaintiff to remodel his plaint and thus alter the frame of the suit at the stage of hearing of the appeal. SRI RAM *v.* KHAWAJU *Lah.* **209**

———**s. 42**—*Declaration under s. 42—Discretion of trial Court—When can be interfered with.*

The matter of granting a declaration claimed under s. 42 of the Specific Relief Act is one within the descretion of the Court. So once the trial Court has, in the exercise of the discretion vested in it under s. 42 of the Specific Relief Act, granted the declaration to the plaintiff under that section, the Appellate Court should not, as a rule, reverse the decree, unless it finds that the discretion has been improperly exercised. SITAL RAUT *v.* ADALAT RAUT *Pat.* **244**

———**s. 42**—*Suit for declaration that plaintiff is daughter's son of deceased—Plaintiff not pressing for relief that deeds executed by deceased's widows were not binding on him—Whether fatal to suit—Pleadings.*

Where the plaintiff is the person who will succeed to the estate of his maternal grandfather *S* and it cannot be seriously argued that the passing of the bulk of the estate into the hands of persons who had no right to it did not involve any danger to the estate, his suit should not be thrown out on the technical ground that the plaintiff while asking for a declaration about his being the son for the daughter of *S* did not press for the further relief that the deed of gift executed by the widows of *S* should be declared to be not binding on him.

Nor can the suit be thrown out merely on the ground that the plaintiff had not stated in so many words in the plaint that the persons in possession, the descendants of the alienees, had either denied or were interested in denying his title. SITAL RAUT *v.* ADALAT RAUT *Pat.* **244**

Stamp Act (II of 1899), s. 6—*Deed both lease and mortgage—Stamp duty payable.*

Where a deed is to be taken both as a lease and as a mortgage, it must bear a stamp leviable in the case of a mortgage, which requires a higher stamp duty. GNANDESIKAM PILLAI *v.* A. B. BOOPALARAYAR *Mad.* **838**

———**Sch. I, Art. 57, Exemption (e)**—Supurddar *acknowledging receipt of attached property from amin, and agreeing to produce same whenever demanded, or on failure, agreeing to be personally liable—Document, whether liable to duty.*

A bond executed by way of security to account for property received by vitue thereof, even though executed by a surety, is a security bond within the meaning of Art. 57, Sch. I, Stamp Act.

The terms of the document executed by *supurddar* were that the *supurddar* acknowledged having received the attached property from the *amin* and agreed to produce the same whenever demanded by the Court or the *amin* and further agreed that in case of failure, the Court would be at liberty to realise

Stamp Act—concld.

the price thereof from his person and property :

Held, that the bond was security bond within the meaning of Art. 57, Stamp Act, but Exemption (*e*) under that Artiele exempted it from the payment of stamp duty. *In re* THE CHARGEABILITY OF STAMP *All.* **1034**

Straits Settlement Ordinance No. 56 (Limitation), ss. 9, 3—*Verbal assignment by attorney to himself of property known to be his principal's —Property vests in him in trust for principal—Purpose of trust must be found in object for which he was appointed—Held, that the purpose for which property vested in attorney as attorney of administrator, was specific.*

Where a verbal assignment was made by the appellant, as attorney of the administrator, to himself, of property known to be his principal's :

Held, that he was in a fiduciary capacity and the only result of the proceeding was that the property became vested in him in trust for the administrator.

Held, also that the appellant dealt with the property in a fiduciary capacity antecedent to such dealing and the purpose for which it became vested in him must be found in the purpose for which that pacity was conferred upon him.

Held, further that the purpose for which the property became vested in the appellant was specific. If he was regarded in the light of a trustee for the administrator, the purpose was specific. But even if it was to administer the estate and account for the residues to the next of kin, the purpose was also specific. KASIVISVANATHAN CHETTIAR *v.* CHOKALINGAM CHETTIAR **P. C. 855**

Succession—*Debts—Priority—Personal debts of deceased take priority to all claims against heirs who are in possession of property.*

When an heir succeeds to the property of the deceased, he takes it subject to the charge of his debts. In other words, that portion of the property does not devolve in fact on the heirs, which is required to satisfy the debts of the deceased and it stands apart, as it were, for the creditors of the deceased. That being so, the personal debts of the deceased being a first charge on the property left by him, takes priority over all claims against the heirs who were then in possession of the property. ATMA RAM *v* MUKHI RAM *Lah.* **847**

Succession Act (XXXIX of 1925), ss. 102, 103. SEE Will **310**

———**s. 109** — *Scope of—Construction — Claim found against defendant No.* 1, *but dismissed due to finding on question of estoppel and s.* 41, *Transfer of Property Act, raised by defendants Nos.* 2, 3—*Issues not raised by defendant No.* 7—*Held, claim against defendant No.* 1 *could not be dismissed.*

All that s. 109, Succession Act XXXIX, provides is that the bequest shall take effect as ifthe death of the legatee had happeneh immediately after the death of the testator. In other words, in order to prevent a lapse it must be assumed that the legatee surrived the testator. The section does not contain any provision that on such assumption being made the bequest is to take effect only in favour of the lineal descendants. To hold that in such a case the bequest is to take effect only in favour of certain heirs and not in favour of others will be putting a construction on the section for which no warrant can be found in the plain and clear language of it.

The operative part of an order said that the plaintiff's claim failed by reason of the findings on issues Nos. 5 and 6. These issues dealt with the question of estoppel and s. 41 of the Transfer of Property Act.

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They were framed on the pleas raised by defendants Nos. 2 and 3. No plea of estoppel was raised by defendant No. 1 and there was nothing on the record to substantiate such a plea on her behalf. There was nothing to show that the defendant No. 1 has in any way changed her position to her detriment on account of any conduct or acquiescence on the part of the plaintiffs:

Held, that the plaintiffs' claim against defendant No. 1 could not be dismissed by reason of findings on issues Nos. 5 and 6. MOHAMMAD YAKUB KHAN *v* AZIZ-UN-NISSA *Oudh* **1076**

———**s. 118.** SEE Will **310**

———**s. 213**—*Whether applies to wills made by Hindus of the Punjab—Legatee, if can sue without probate.*

Section 213, Succession Act, does not apply to wills made by Hindus of the Punjab and relating to immovable property situate in the Punjab. The legatee can therefore claim rights under the will without probate. SOHAN SINGH *v.* BHAG SINGH *Lah.* **309**

———**s 307.** SEE Probate **933**

———**s. 379.** SEE Civil Procedure Code, 1908, s. 141 **1118**

Suits Valuation Act (VII of 1887, s. 9—*Rules framed under, by Lahore High Court, r.* 4—*Suit for perpetual injunction and order to demolish wall—Valuation of—Appeal in suit—Whether lies to District Judge—Punjab Courts Act (VI of* 1918), *s* 38.

A suit, in which the plaintiffs in the plaint seek to establish or to negative any right to maintain or close a door or a widow or raise or alter or demolish a wall, must be valued by the plaintiff at a sum exceeding Rs. 100 and not exceeding Rs. 500, according to r. 4 framed by the Lahore High Court under s. 9 Suits Valuation Act. A suit for issue of a perpetual injunction ordering the defendant to demolish a wall built by him near the plaintiff's ventilator and to restrain him from building a second storey on his shop within five feet of the plaintiffs' windows. falls under this rule and must be valued at a sum exceeding Rs. 100 and not exceeding Rs. 500. In such a suit a first appeal lies only to the District Judge. MUNSHI RAM *v.* RAM SARAN *Lah.* **153**

Surety—*Surety for appearance of judgment-debtor —Execution application dismissed for default of decree-holder and surety discharged—Restoration of execution petition—Liability of surety, if revived.*

Where a judgment-debtor who has been arrested in execution of a decree is released on a surety furnishing security for his appearance but due to the default of the decree-holder to appear on the due date the execution petition is dismissed and the surety is also discharged, the liability of the surety does not automatically revive by the mere restoration of the execution petition. KASHMIRI LAL *v.* CHUNI LAL *Lah.* **503**

Tenants-in-common—*Sole possession by one tenant-in-common continuously for a long period—Ouster —Presumption.*

Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenant-in-common may be presumed. KRISHNA CHANDRA DAS *v.* PURNA CHANDRA DAS *Cal.* **987**

Tort—*Negligence—Contributory negligence—Finding that plaintiff's servants could not have averted damage by any means humanly possible—Failure*

Tort—concld.

of plaintiff to extinguish fire—Whether constitutes contributory negligence.

Where in a suit for damages for loss through fire caused by a spark falling from the ash-pan of a Railway engine, it was found that the servants of the plaintiff could not have averted the damage by adopting such steps as were humanly possible:

Held, that the plaintiff could not be held to be guilty of contributory negligence. B. B. & C. I. RAILWAY Co, *v.* DWARKA NATH *All.* **631**

———*Negligence — Injury by faulty structure of building—Responsibility for safe upkeep—Plaintiffs to prove special circumstances making owner liable.*

The general rule in cases of injury due to the faulty structure of a building is that the person responsible to the general public for the safe upkeep of the building is the occupier rather than the owner, when the owner himself is not in possession. It is for the plaintiffs to show that there were some special circumstances which render the owners liable rather than the lessees.

To make the owner liable he must have been aware at the time of leasing out of the property that the property was in a condition imminently dangerous to the occupiers of the adjoining property. H. D. HIRAMANAOK *v.* BALKISHEN *Lah.* **1035**

———*Negligence—Railway— Damage caused to plaintiff's property by spark from engine—Burden of proof as to whether proper precaution was taken lies on Railway Company.*

In a suit for damages brought against a Railway Company on the allegation that the plaintiff's property adjoining the Railway line was destroyed by a spark from the engine of a running train the burden of proof as to whether proper precaution had been taken to avoid emission of such sparks lay on the Railway Company and the latter would be liable if it failed to take all reasonable precaution. B. B. & C. I. RAILWAY Co *v.* DWARKA NATH *All* **631**

———*Person procuring act of another, when liable for consequences—Motive, whether material.*

There are two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor and is, therefore, not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party. The motive or intention of the person doing the act is *nihil ad rem.* If it is a lawful act, however ill the motive might be, he has a right to do it. If it is an unlawful act, however good his motive be, he would have no right to do it. Motives and intentions in such a question is absolutely irrelevant. NAN KEE *v.* AH FONG *Rang.* **890**

Trade-Mark—*Burden of proof—Defendant using same number as trade-mark as plaintiff—Burden of proving and probability of deception.*

Where the defendants have used an identical number as the plaintiff's on their goods, the burden is upon them to disprove the probability of the deception, and not upon the plaintiffs to prove it. ANGLO INDIAN DRUG Co *v.* SWASTIK OIL Co. LTD. *Bom.* **641**

———*Combination of numerals, if can form a trade-mark.*

Trade-Mark—contd.

A combination of numerals can form a trade-mark, if distinctive. ANGLO INDIAN DRUG Co. *v.* SWASTIK OIL Co. LTD. *Bom.* **641**

———*how assigned.*

A trade-mark is generally transmitted in connection with the goodwill of a business, and can only be assigned in writing. ANGLO INDIAN DRUG Co. *v.* SWASTIK OIL Co. LTD. *Bom.* **641**

———*if can be applied to goods which are not sold.*

A trade-mark must be applied to goods offered for sale and not to those which are neither manufactured nor sold at the date of the suit. ANGLO INDIAN DRUG Co. *v.* SWASTIK OIL Co. LTD. *Bom.* **641**

———*Infringement— Nature of proof required of plaintiff— Reasonable probability and no proof of actual deception required—Plaintiff must establish that particular mark indicates that goods are those of plaintiff.*

In actions for infringement of trade-marks the plaintiff has to prove that his goods were known to the public by some distinct name, marks, badge, get-up, or appearance, and that the defendant's use or imitation of the same is likely to mislead the public into a belief that the defendant's goods are those of the plaintiff. The actual length of time during which a trade-mark is used or employed is not an important element for consideration. It must, however, have been used or employed long enough to render it probable that a reputation in the market has been acquired.

There must be a reasonable probability and not a mere possibility of deception. It is not necessary to prove that the defendants had the intention to deceive. It is also not necessary to give proof of actual instances of deception. Such evidence, namely, evidence of actual instances may often be useful to the Court, though the Court has to exercise its own judgment as to the probability of the deception.

Protection cannot be granted unless a plaintiff establishes that the particular mark indicates not merely a certain quality of goods but also that they are the goods of the plaintiff's manufacture. ANGLO INDIAN DRUG Co. *v.* SWASTIK OIL MILLS Co LTD. *Bom.* **641**

———*"Passing off"—Gist.*

The gist of a passing off action is deceit, for "passing off" is one of the ways whereby the goods of one trader are sold by another in a manner calculated to deceive the purchaser into thinking that they are the goods of the former. ANGLO INDIAN DRUG Co. *v.* SWASTIK OIL Co. LTD. *Bom.* **641**

———*property in—If exists apart from goods.*

There can be no property in a trade-mark apart from the goods of which it has become the symbol. ANGLO INDIAN DRUG Co. *v.* SWASTIK OIL Co. LTD. *Bom.* **641**

———*Right to use particular trade-mark—Limitations in India and England.*

In England a trade-mark is registered not only for a particular article but for a class of goods under which that article falls, and if any one else attempted to put on the market goods which could be included in that class under another trade-mark, the Registrar might refuse to register it. In India the right to use a particular trade-mark is confined to the article to which it is affixed, but it is open to the plaintiffs to establish by proper and sufficient evidence that the particular trade-mark has been so identified and associated with the plaintiffs' products that their name would suggest itself to a purchaser on seeing it on any other product which

the plaintiffs allege is a product "allied" to or of the same description. There is, however, this limitation that the acquisition of an exclusive right to a trade-mark in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark in connection with goods of a totally different character. ANGLO INDIAN DRUG Co. *v.* SWASTIK OIL Co. LTD. *Bom.* **641**

Transfer of Property Act (IV of 1882), s 8.

SEE Deed **776**

—— —— **s. 10**—*Absolute condition or limitation—Property given to son by father on condition that the son will not alienate during father's lifetime—Condition, if void—Hindu Law—Family arrangement.*

Where a Hindu father by way of family arrangement gives certain property to one of his sons but imposes the condition that the son will not alienate some of the said property during the lifetime of the father, the condition is not void under s. 10, Transfer of Property Act, the condition not being absolute. TOOK CHAND *v.* RADHA KISHEN *Lah.* **899**

——— **s. 41**—*Transferee raking on* khasra paimash *or police records of levy of punitive tax—Obligation under s. 41, if discharged.*

The *khasra paimash* is not a record of title but a mere record of survey and carries with it no presumption of correctness so far as the question of ownership is concerned. A Municipality is generally interested more in the assessment of tax than in the determination of ownership, and for its purposes an occupier is as good as an owner. Moreover, in the preparation of documents like *khasra paimash* a Municipality is concerned more with the measurements of the buildings with a view to safeguard its own interest against any encroachment on the public streets than in the ascertainment of the title of persons owning such buildings. In the same way the Police department when taking a census of the houses for the purposes of levying the punitive tax is merely interested in recording the names of the occupants from whom they could levy the contribution. The transferees cannot be said to have discharged their obligation under s. 41 by merely raking out of old records of the Municipality or that of the Police department. KARTAR SINGH *v.* MEHR NISHAN *Lah.* **1064**

——— **s. 41**—*Whether applies to auction-purchasers.*

The transfer referred to in s. 41, Transfer of Property Act, must be a voluntary transfer which is effected by an act of the ostensible owner. It is not, therefore, applicable to an auction-purchaser. PURAN MAL *v.* SHIVA LAL *All* **86**

——— **s. 43.**

SEE Mortgage **880**

SEE Provincial Insolvency Act, 1920, s. 28 (4) **938**

——— **s. 52**—*Lis pendens—Lease of land while proceedings under O. XXI, r. 100 pending—Lessees bound by results.*

Where a lease in favour of defendant No 2 is executed of lands in dispute during the pendency of the proceedings in the Revenue Court by defendant No. 1 consequent on the application made by the plaintiffs under O. XXI, r. 100, Civil Procedure Code, for restoration of possession, the doctrine of *lis pendens* is applicable and the defendan No. 2 is bound by the results of the proceeding and where on defendant No. 1's failure to bring any suit against the plaintiffs to establish the right which he claimed to the possession of the property the order of the Revenue Court, directing that the plaintiffs be put into possession of the property, becomes conclusive under

O. XXI, r. 103, as against defendant No. 1 the landlord, and also becomes conclusive as against defendant No. 2, the lessee. THAKUR BAKHSH SINGH *v.* ABHAIDAT SINGH *Oudh* **1082**

——— **s. 53.** SEE Provincial Insolveney Act, 1920, s. 53 **611**

——— **s. 53**—*Scope of—Gift — Compromise and decree affirming validity of gift deed—Compromise, if can be deemed collusive—'Collusive', significance of.*

Under s. 53, Transfer of Property Act, a deed, unless it was meant by the executant thereof to be fictitious, is only voidable at the option of the creditors; and if it is not avoided by the latter, it is a perfectly valid instrument as between the parties to it.

If the plaintiff and the defendant in an action compromise, and the compromise is given effect to in the decree, it cannot be considered to be collusive, unless it is a fraud on the rights of third persons. The word "collusive" is not a term of art and generally implies an understanding between two persons in fraud of the rights of third persons. As between the parties to a transaction no question of collusion can arise only because they acted in concert—a characteristic which is common to all agreements. A party to it or any one claiming under him is estopped by the compromise and the decree affirming the validity of a deed of gift executed by him. Nor is a third party entitled to raise any question in respect of the binding character of the deed of gift. QUTUBUDDIN *v.* MANGLA DUBEY *All.* **829**

——— **s. 55.** SEE Registration Act, 1908, s. 49 **47**

——— **s. 55**—*Material defects in property and title thereto—Buyer, if bound to complete the sale—Material defect, what constitutes.*

A buyer is not bound to complete the sale if there are defects in the property or in the title to the property which are material and also latent, that is to say, not discoverable by the exercise of ordinary care, or if the title is not free from reasonable doubt. A defect to be material must be of such a nature that it might be reasonably supposed that if the buyer had been aware of it he might not have entered into the contract at all, for he would be getting something different from what he contracted to buy. The liability of property to be compulsorily acquired may be fairly said to amount to a material defect which is not capable of being discovered with ordinary care. LALLUBHAI RUPCHAND *v.* MOHANLAL SAKARCHAND *Bom.* **564**

——— **s. 55**—*Restrictive conditions in the nature of easements, if material defect—Vendor, if bound to disclose—Vendor and vendee*

Restrictive conditions in the nature of easements imposed on the property, are material defects and it is the duty of the vendor to disclose them to the vendee His failure to do so, would entitle the vendee to refuse to complete the sale. LALLUBHAI RUPCHAND *v.* MOHANLAL SAKARCHAND *Bom.* **564**

——— **s. 55**—*Title free from reasonable doubt, meaning of.*

The meaning of a title free from reasonable doubt is a marketable title which can at all times be forced upon an unwilling purchaser. Specific performance should not be allowed even though the Court takes a favourable view of the title if it appears that its opinion may fairly and reasonably be questioned by other competent persons. LALLUBHAI RUPCHAND *v.* MOHANLAL SAKARCHAND *Bom.* **564**

——— **s. 60.** SEE Bihar and Orissa Public Demand Recovery Act, 1914, s. 7 **63s**

Transfer of Property Act—contd.

———s. 60, proviso—*Mortgage—Subsequent lease by mortgagor to mortgagee—If a clog on the equity of redemption.*

A permanent lease by a mortgagor to a mortgagee is not always void as being a clog on the equity of redemption. On the contrary the proviso to s. 60 of the Transfer of Property Act contemplates that the equity of redemption may be extinguished, without limiting the method of extinguishing it by sale of the equity of redemption to the mortgagee. RAMDHANI SAHU *v.* PITAMBAR SINGH *Pat.* 972

———s. 65. SEE Transfer of Property Act, 1882, s. 95 756

———ss. 76 (g), (h), 77—*Mortgagee in possession—Liability to account—Whether exists only in absence of contract to contrary—Circumstances under which no liability exists—Only part of interest to be paid out of usufruct—S. 77, if applies—Mortgage before coming into force of Transfer of Property Act—Liability of mortgagee to account, if recognized before the Act.*

Under s. 76, cls. (*g*) and (*h*), Transfer of Property Act the mortgagee in possession must keep full and accurate accounts, and all his receipts from the mortgage property (subject to allowance for certain specified and permissible expenses) are to be credited in favour of the mortgagor in reduction of the amount due for interest or in reduction of the principal if the receipts exceed the interest due; and if, there is still a *surplus*, it is repayable to the mortgagor. These clauses are not qualified by any such proviso as "in the absence of a contract to the contrary"; therefore they apply in all cases, contract or no contract to the contrary excepting those in which s. 77 makes them inapplicable. Section 77 only comes in where the mortgagor is from the outset safe from being confronted at the time of redemption with a demand for anything more than the principal sum advanced, and does not cover the case in which only a part of the interest is to be paid out of the usufruct; and the omission must have been intentional.

The liability of the mortgagee to render account was well recognised even before the coming into force of the Transfer of Property Act Consequently, even if the document dates from before the Act, these provisions will apply. KAMLA PRASAD *v.* BAMDEO MISSIR *Pat.* 22

———s. 82—*Intention of.*

The intention of s. 82, Transfer of Property Act, is not that the lien of the mortgagee should be divided, but simply to determine the liability of the purchasers of the property *inter se*. DIVAN TAIK YA *v.* M. S. S. CHETTYAR FIRM *Rang.* 954

———s. 92—*Mortgage—Subrogation—Subsequent mortgagee paying off prior mortgage—Presumption as to intention to keep it alive as shield against intermediate mortgagee—Intermediate mortgagee paying nothing towards redemption—Whether can get benefit of redemption of prior mortgage—Agency, doctrine of—Applicability.*

The subsequent mortgagee in paying off a prior mortgage must be presumed to have intended what was to his benefit and he ought to be deemed to have intended to keep alive the prior mortgage to be used as a shield against the intermediate mortgages.

A held a mortgage deed executed by *B* in respect of a plot of land which was included in the property mortgaged under the deed in suit executed by *B* and *C* in favour of the plaintiff. On the strength of his mortgage *A* claimed priority in respect of his mortgage which was earlier in date. The plaintiff claimed that he had redeemed certain prior incumbrances upon the mortgaged property and that he was thereby subrogated to the rights and interests of those prior mortgagees and thus acquired priority as against the intermediate mortgage held by *A*. The consideration for the mortgage deed in suit consisted partly of certain sums of money made payable by the mortgagee plaintiff for the redemption of the prior mortgages. It was proved that the plaintiff had in fact paid off the prior incumbrances;

Held, that as a matter of a justice and equity, there was no reason why the intermediate mortgagee should get the benefit of the redemption of the prior mortgages when he has paid nothing towards such redemption and that the plaintiff could claim to be subrogated to the rights of the mortgagees whom he had paid off.

Held also, that the doctrine of agency could not be applied to deprive the claim of the plaintiff to be subrogated. SUKHRAM DAS *v.* MAHBUB KHAN *Oudh* 905

———s. 92—*Whether safe guide to follow in cases arising before amending act.*

Even if s. 92 Transfer of Property Act, has no retrospective effect, nevertheless the rule laid down by the legislature in s. 92 would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of the amending Act of 1929. SUKHRAM DAS *v.* MAHBUB KHAN *Oudh* 905

———s. 92—*Widow—Purchaser from widow discharging mortgage debt—Reversioner, if entitled to possession only on payment of mortgage debt paid—No allegation of bad faith on part of purchaser—Good faith, if to be proved.*

Where a purchaser from the widow holding a life-estate discharges a mortgage debt out of the consideration for the mortgage and on the death of the widow, the reversioner sues for possession of the property, credit should be given to the mortgage amount paid by the purchaser. In such case, if the plaintiff reversioner does not impute bad faith on the part of the purchaser, the latter is not bound to allege or prove good faith. BABAN MISRA *v.* BISHWANATH PANDE *Pat.* 870

———s. 95—*Redemption of portion of mortgage—Charge, when accrues.*

A charge created by redemption of a mortgage by the holder of a portion of a mortgaged property, does not accrue until payment of the whole mortgage debt. BIRENDRA KESHRI PRASAD *v.* BAHURIA SARASWATI KUER *Pat* 756

———ss. 95, 65—*Subrogation—Interest to be paid to co-mortgagor—Discretion of Court—Co-mortgagor, if can enforce terms of mortgage bond on subrogation.*

The effect of the old s. 95, Transfer of Property Act, was not to place the person claiming to enforce the charge completely in the position of the mortgagee in such a manner that he could enforce the terms of the mortgage deed against those mortgagors who had not borne their share in the redemption. The question of what interest should be payable to the co-mortgagor paying the debts, on what amount, and from what date, is one at the discretion of the Court; and the plaintiff is not entitled to claim as a matter of right that interest should be calculated at the rate specified in the bond. The limited right of subrogation created by s. 95, Transfer of Property Act, must not be treated as if in fact it entitled the co mortgagor to enforce the terms of the mortgage bond. BIRENDRA KESHRI PRASAD *v.* BAHURIA SARASWATI KUER *Pat.* 756

Transfer of Property Act—contd.

——s. 100.
See Bihar and Orissa Public Demands Recovery Act, 1914, s 7 635
See Oudh Rent Act, 1886, s. 7-A 40

——s. 101—*"Or otherwise than subject thereto", meaning and effect of—Subsequent mortgagee seeking foreclosure — Whether can foreclose and obtain possession subject to charge of prior mortgagee in possession.*

The words 'or otherwise than subject thereto' in s. 101, Transfer of Property Act, refer to the second eventuality mentioned in the section, namely, that of the subsequent mortgagee trying to sell the property and not to that of his seeking foreclosure. No doubt, a subsequent mortgagee who has obtained a decree for sale can avail himself of either of the two alternatives provided for in the section, namely, he can either redeem the prior mortgage or sell the property subject to that mortgage but a subsequent mortgagee seeking foreclosure of the property cannot foreclose and obtain possession of the property subject to the charge of the prior mortgagee who is already in possession on the basis of a prior foreclosure decree. In the latter case the subsequent mortgagee has no alternative but to redeem the prior mortgage. Salik Ram *v.* Jangjit Bahadur Singh *Oudh* 498

——s. 116. See Lease 838

—— s. 116—*Tenant holding over after expiry of lease—Institution of suit for rent—Effect—Tenancy from year to year— Whether can be presumed—Bengal Tenancy Act (VIII of 1885), s. 51—Rent to be paid by such tenant.*

If a tenant holds over after the expiry of his lease he ordinarily becomes a trespasser, unless the landlord in some manner signifies his intention of recognizing the continuance of the tenancy. Such intention will be sufficiently indicated by institution of a suit for rent. When the tenant is found to be continuing in possession he will be presumed to be a tenant from year to year, in the absence of any evidence providing that he holds on a different tenure.

As for the amount of rent payable, in the absence of evidence of a special contract varying the amount to be paid, the provisions of s. 51, Bengal Tenancy Act will apply, since those provisions apply to all agricultural tenancies; and from year to year the rent which was payable in the previous year will be presumed to be the rent payable for the holding. In the absence of proof of any contrary arrangement, he must be deemed to be governed by the same conditions as governed his tenancy while he was holding under the *kabuliyat*. Ramsunder Tewari *v.* Dulhin Bataso Kuer *Pat.* 367

——s. 123—*Mere unexpressed intention to dedicate—Effect—Subsequent transfer, whether invalidated.*

A mere unexpressed intention to dedicate certain property cannot have the effect of a formal dedication so as to invalidate the transfer of that property to a third person made after the idea had been formed in the mind of the transferor. Although it may be true that in spite of the provisions of s. 123, Transfer of Property Act, such a dedication may be effective without an instrument in writing, there must be a real dedication whereby the property is completely given away and the owner completely divests himself of his ownership. Birendra Keshri Prasad & Narain Saheb *v.* Bahuria Saraswati Kuer *Pat.* 756

——s. 128. See Gift 303

Transfer of Property Act—concld.

——ss. 130, 134, as amended by Act XX of 1929. See Companies Act, 1913, s 109 (*d*) 193

Transfer of Property Act (Amendment) Supplementary Act (XXI of 1929), s. 10—*Whether in force in North-West Frontier Province.*

The general rule is that an amending Act, unless otherwise stated, is territorially co-extensive with the Act which it amends, and Act XXI of 1929 does not provide any exception to the general rule. As s. 10 of Act XXI of 1929 amends the Registration Act which is in force in North-West Frontier Province, s. 10 of Act XXI of 1929 is also in force in North-West Frontier Province. Abdullah Khan *v.* Behram Khan *Pesh.* 1022

Trust—Purpose of trust—Fiduciary capacity—Trust for administration. See Straits Settlement Ordinance No. 56 (Limitation) ss 9, 3 855

——*Trustee, if authorised to give possession of property before receiving purchase money.*

Trustees are not authorised to give possession of property comprised in a trust for sale before receiving the purchase money. Tirunarayana Pillai *v* Manickavachagam *Mad.* 359

——*Trustee's legal representatives— Breach of trust—Cause of action, if survives against legal representatives of deceased trustee.*

The cause of action for breach of trust survives against the legal representatives of a deceased trustee and legal representatives of a deceased trustee can be proceeded against in respect of breaches of trust by the deceased. Tirunarayana Pillai *v.* Manickavachagam *Mad* 359

——*When effective— Communication to* cestui que *trust.*

The general rule is that a trust to be effective must be communicated to the *cestui que* trust or that he should at least know about it. The question as to whether there has been an irrevocable trust or not must be a question of fact in almost every case.

Where a certain fund is set apart in the books for the purpose of charity and it is so continued for 60 years but there is no evidence that the owners of the fund intended to part with the ownership and control of it, and its existence was never communicated to the general trustees of the temple and there is no document creating the trust except the entry in account book and this fund is treated as an asset in partition, no irrevocable trust fund is created. Arunachalam Chettiar *v.* Official Assignee, Madras *Mad.* 772

Trusts Act (II of 1882), ss 19, 23, 37, 62—*Breach of trust—Suit for, against trustee—Accounts —Nature of proof—Trustees not rendering accounts properly—Liability for interest— Accounts to be taken must be common account and not on footing of wilful default.*

Where in a suit for the breach of trust, the plea is that the trustees have not kept proper accounts or furnished them to the beneficiaries, it is not sufficient to show that the account was not regularly and correctly kept from day to day but was mostly written up for the purpose of being produced in Court What is more important is the question whether the account as far as it goes can be shown to be untrue in the sense that the actual receipts are not entered or the expenditure entered is fictitious or excessive. Thus the faults in the mode of keeping accounts are to be distinguished from the faults involving dishonesty or misconduct.

An accounting party not rendering accounts

Trusts Act—concld.

properly but retaining trust moneys (such as the unpaid purchase moneys due by them on the several *benami* purchases) in their hands must pay interest even if the debt by its nature does not carry interest.

In a suit for breach of trust the account to be taken must be a common account which will give the beneficiaries liberty to surcharge and falsify but not an account on the footing of wilful default. TIRUNARAYANA PILLAI *v.* MANICKAVACHAGAM *Mad* **359**

——— **s. 62**—*Conditional release where trustees have purchased trust property— Power of Court to order.*

Under s 62, Trusts Act, the Court has no power to make an order directing a conditional re-sale conditional on such sale producing a higher price than that for which the trustees themselves bought. TIRUNARAYANA PILLAI *v.* MANICKAVACHAGAM *Mad.* **359**

U P. District Boards Act (X of 1922), s. 48—*Agenda paper mentioning that draft resolution and report regarding dismissal of Secretary would come up for final decision— Whether constitutes sufficient notice under s.* 48.

Where the agenda paper as issued for a meeting of the District Board made it clear that a draft resolution of the members regarding the dismissal of the Secretary together with the explanation and the report of the Sub-committee would come up before the Board on a certain date for final decision:

Held, that this undoubtedly notified that final orders would be passed on the matter and that it necessarily included a resolution adopting the draft resolution as proposed by the members and hence constituted sufficient notice within the meaning of s. 48, U. P. District Boards Act, for a resolution for adopting a resolution for dismissal of the Secretary. MUHAMMAD MUSTAFA ALI KHAN *v.* DISTRICT BOARD, BAREILLY *All.* **593**

U. P. Excise Act (IV of 1910), s. 60 (a)—*Charge for being in possession of liquor in excess of quantity allowed by law—Conviction under s.* 60 (a)—*Conviction for possession of liquor not lawfully obtained —Whether can be made.*

Where the accused was charged for being in possession of country liquor in excess of the quantity than he was allowed by law and was convicted under s. 60 (*a*), U. P. Excise Act of 1910, and it was found on revision that the evidence did not prove that the total quantity in his possession was more than that allowed by law and then the prosecution urged that the conviction was right inasmuch as he was in possession of a bottle of country liquor which was not proved by the accused to have been lawfully obtained :

Held, that the accused could not be convicted for an offence with which he was not charged and hence the conviction was bad and should be set aside. SHEONANDAN *v.* EMPEROR *All.* **492**

U. P. Honorary Munsifs Act (II of 1896), ss. 7, cl. (4), 9. SEE Civil Procedure Code, 1908, s. 102 **95**

U. P. Land Revenue Act (III of 1901), s. 4—*Person acting as* lambardar *and collecting rents— Presumption —Whether he can say that he was not legally appointed.*

Where a person was the *de facto lambardar*, and acted as such and collected rents, he cannot afterwards say that he had not been legally appointed. Having accepted the post of *lambardar*, it must be presumed that he consented to perform the obligations which go with the post. MITTHU LAL *v.* CHAMELI *All.* **800**

——— **s. 34**—*Suit by assignee of profit from co-sharer for profits for certain period—Held, that no report under s.* 34 *was required—Held, also that assignee was entitled to bring such suit in Revenue Court.*

The suit was in respect of the profits for the years 1333 to 1335 *Fasli*. These profits were transferred to the plaintiff after they had accrued. It is obvious that the plaintiff could make no report under s. 34 of the Land Revenue Act. He had obtained no right either in the *mahal* or in any share of it or in the profits of it in respect of the year in which the transfer was made or in respect of any subsequent year. There was no right subsisting in him which could be entered in the register. What was transferred in this case was not a right to the profits in a *mahal* at any time after the transfer but it was a transfer of a sum of money or a debt or any actionable claim which had already accrued to the transferor. There could be no entry in any register of proprietors in respect of this amount and consequently no report could be required and the right to sue could not be based on the making of any such report. In these circumstances an assignee of the right to recover, in a Court of Law, profits which had already accrued to the assignor is entitled to bring a suit in the Revenue Court. ASHFAQ ALI KHAN *v.* INAYAT PEG *All* **1103**

——— **s. 36.** SEE Oudh Rent Act, 1886, s. 7-A **40**

——— **s. 42**—*Scope of—Held, upon facts, that the decision of Revenue Court did not bar the civil suit —Agra Tenancy Act (III of* 1926), *s.* 121.

The scope of s. 42, U. P. Land Revenue Act, is very limited and is limited to the case of a dispute relating to class and tenure. Where the question is, who is the tenant, s 42 has no relation to such a dispute It is a mistake to read into s. 42 all the provisions of s. 121 of the Agra Tenancy Act.

In an application for the correction of *jamabandi*, under s. 42 of the Land Revenue Act, 1901, the relief sought by the applicants was that their names might be entered as "tenant-grove-holders" against the land in dispute. The case in the Revenue Court was fought on the basis of possession. The applicant-defendant stated that he had been in possession over the land in dispute for about 16 years. The application was contested by the plaintiff. He stated in his written statement that he had been in possession over the land in dispute. The Revenue Court framed the following issues : "(1) Whether the defendant No. 2 (plaintiff) holds the grove in suit as proprietor ? (2) Whether the applicant is in possession as a grove-holder ?" The first issue was decided against the defendant (plaintiff in this case) and the second issue was decided in favour of the defendants-applicants (the appellants). No declaration was made by the Revenue Court as to whether the defendants were the tenants of the plaintiff. The only order passed by the Revenue Court was :—"The area shall be recorded as "grove" inside the *abadi* and the applicant as the grove-holder." There was nothing in the whole of the order to show who was the land-holder ;

Held, that though the application was described as one under s. 42 of the Land Revenue Act, yet it could not have been made under it, because the applicants did not state that they were the tenants of the opposite parties. The dispute between the parties was regarding the entries in the annual register. Even if the order of the Revenue Court be regarded as one made under s. 42 of the Land Revenue

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Act, it cannot operate as *res judicata*. Hence the suit by the plaintiff in Civil Court for declaration that he (the plaintiff) was the owner in possession of the plots of land and the tress thereon is not barred. KALP NATH CHAND *v.* SAMAR DHUJ CHAND *All* 1097

——s. 42—*Tenancy admitted—Applicability.*

Section 42 of the Land Revenve Act applies where the tenancy is admitted and the dispute relates to the class or tenure of the tenant. KALP NATH CHAND *v.* SAMAR DHUJ CHAND *All.* 1097

——s. 79. SEE Evidence Act, 1872, s. 115 295

——s. 86. SEE U. P. Local Rates Act, 1914, s. 7 701

——s. 86—Chaukidara *cannot be regarded as ground rent but is a cess—Such cess not recorded in last settlement—Whether recoverable.*

Chaukidara cannot be regarded as ground rent for the houses of the *raiyats* but is apparently a cess. When no such cess has been recorded in the last settlement, it is not recoverable under the provisions of s. 86, U. P. Land Revenue Act. MUHAMMAD-UD-DIN *v.* BHUPAN *All.* 658

——s. 118—*Heap of manure or cattle trough—Whether "a dwelling house or other building" within meaning of s.* 118.

A heap of manure or a cattle trough is not a "dwelling house or other building" within the meaning of s. 118 of the U. P. Land Revenue Act. A co-sharer to whose share a plot of land, over which another co-sharer has made cattle troughs or stores heaps of manure, is allotted in partition, is entitled to actual possession of the plot BRAJ KISHORE UPADHIA *v.* PANCHAITI AKHARA MAHA NIRWANI FIRQA GOSHAIYAN NAGA *All.* 667

——s. 233 (m). SEE Jurisdiction 92

U. P. Local Rates Act (I of 1914), s. 7—*Superior proprietor's right to recover cesses from lessees or under-proprietors—Lease deed by which superior proprietor undertook to pay old* chaukidari *and* patwari *rates—Whether takes away right to recover cesses—U. P. Land Revenue Act (III of* 190'), *s.* 86, *if applies.*

Under s. 7, U. P. Local Rates Act, the superior proprietor has a legal right to recover the cesses from his lessees or under-proprietors. A lease under which the superior proprietor undertook to pay the old *chaukidari* and *patwari* rates that were then recoverable from landlords does not take away that right. Nor does an order of the Settlement Commissioner that the defendants-*pukhtadars* (lessees) were not liable for cesses take away the legal rights conferred upon the plaintiff who is the superior proprietor to recover the local cesses imposed by the Local Government under the U. P. Local Rates Act. Section 86, U. P. Land Revenue Act has no applicability to the case. MOHAMMAD AGHA *v.* BAIJNATH SINGH *Oudh* 701

U. P. Municipalities Act (II of 1916), ss. 186, 307, 318—*District Magistrate making appellate order under s.* 318 *upholding legality of notice issued by Board under s.* 186—*Criminal Court trying case under s.* 30 *for failure to comply with notice—Whether can go into the question of legality, validity, or reasonableness of notice.*

Per *King, C. J.*, and *Srivastava, J.*—When the District Magistrate has made an appellate order under s. 318, U. P. Municipalities Act, upholding the legality or the validity of the notice issued by the Board under s. 186, the Criminal Court which tries a case under s. 307, for failure to comply with the notice, cannot go into the question of the legality, validity or reasonableness of the notice. Where the

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accused has admittedly failed to comply with the notice, he is guilty of an offence under s 307.

Per *Zia-ul-Hasan, J*, (*dissentiente*)—A Criminal Court can, in a prosecution under s. 307 of the Municipalities Act for failure to obey a notice issued by a Municipal Board under s. 186 of the Municipalities Act, go into the question of the legality, validity and reasonableness of the notice. EMPEROR *v.* MUMTAZ HUSAIN *Oudh* 344 F. B.

——s. 321—*Authority in s.* 321, *scope of.*

The word "authority' in s. 321 is sufficiently wide to cover both civil and Criminal Courts EMPEROR *v.* MUMTAZ HUSAIN *Oudh* 344 F. B.

U P. Town Improvement Act (VIII of 1919), s.10 (3) (a). SEE Land Acquisition Act, 1894, s. 23 579

Vendor and purchaser—*Purchaser agreeing to pay vendor's creditor—Creditor's right to sue purchaser —Privity of contract.*

Where a purchaser of mortgaged property agreed with his vendor to pay off the mortgage out of the sale price which was reserved with him for this purpose and he, (the purchaser) wrote to the mortgagee that he will pay the mortgage amount and requested him not to press the mortgagor.

Held, that the purchaser made himself personally liable to pay the mortgage amount and the mortgagee pas entitled to recover the amount personally from the purchaser. MUDALA VENKATAREDDI NAIDU *v.* DHORWADA VENKATA VARAHA NARASIMHARAO *Mad.* 302

Wajib ul arz—*Custom requiring permission of* zemindars *for sale—*Zemindars *constituting a joint Hindu family—Consent of manager—Sufficiency of —Landlord and tenant.*

Where a custom is recorded in the *wajib-ul-arz* under which a tenant's grove can be sold with the permission of the *zemindars*, and the *zamindars* constitute a joint Hindu family, the consent of the managing member or *karta* will be enough to validate the transfer. ANRUDH RAI *v.* SANT PRASAD RAI *All.* 569

Will—*Construction—Benign construction should be used—Intention of testator should be given effect to.*

A will contained, "I appoint my sons *K* and *R* to be the *shebaits* of the *Thacoors* and I direct that upon the death, retirement or refusal to act of any of them or any of the future *shebaits*, the then next eldest male lineal descendant of *K* or *R* shall act as a *shebait* in place of the deceased or retiring *shebait* or *shebait* refusing to act as such—it being my intention that the eldest for the time being in the male line of my said sons shall always remain as joint *shebait*, and in the event of the death or refusal to act of any *shebait*, the then next male member of the branch to which the *shebait* dying or refusing belonged shall act as a *shebait* in his place and stead :"

Held, that the testater wished to provide that *K* and *R* should be the first *shebaits*, and that upon the death, retirement or refusal to act of either of them or of any of the future *shebaits*, the then next eldest male lineal descendants of *K* and of *R* should be the joint *shebaits* representing *K* and *R*'s branches of the family respectively—and that there should be only two *shebaits* at any time.

Held, also that the provision in the will for the succession of the eldest in the male line was invalid, because it excluded some of the founder's heirs according to Hindu Law. Further, the testator did not intend to give to either *K* and *R* an estate of inheritance or an absolute estate, but at most only

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a life-interest, because he provided for the succession on their death, retirement or refusal, of persons who were not their heirs according to Hindu Law.

The attitude to be adopted in construing a Hindu will is that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used though that language be ungrammatical or untechnical, or mistaken as to name or description or in any other manner incorrect, provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows, but effect should be given to the intention of the testator.. LAL BEHARY DHUR *v.* ADMINISTRATOR-GENERAL, BENGAL *Cal* 1071

———*Construction*—"*I give my niece all my personal property and effects*", *meaning of*—*Words, if sufficient to constitute her residuary legatee of the personality of deceased*—*Bequest void under s.* 118, *Succession Act*—*Bequest, if would fall into residue*—*Succession Act* (*XXXIX of* 1925), *ss.* 102, 103, 118.

The testatrix, after devising certain immovable property to Bishop *F* bequeathed also to the Bishop certain personal property of which she was possessed. The will then proceeded; "I give and bequeath to my niece Mrs. *B* of Insein two plots of land near the A. B. M. School, for her sole use and benefit. I also give to my niece Mrs *B* all my personal property and effects":

Held, that the will must be construed as a whole. *Prima facie* the words "I give all my personal property and effects" were sufficient to constitute Mrs. *B* a residuary legatee of the personalty of the deceased within s 102, Succession Act, and hence *prima facie* under s. 103, Mrs. *B* was entitled to all the personal property belonging to the testatrix at the time of her death of which she had not made any other testamentary disposition which was capable of taking effect. The bequest to Bishop *F* was void

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under s. 118 of the Act. The bequest of personality to Bishop *F* would therefore fall into the residue of which Mrs. *B* was the legatee;

Held, also that there was nothing to be found within the four corners of the will, to justify the Court in arriving at a conclusion that the testatrix, who gave all her personal property to Mrs. *B* intended thereby that Mrs *B* should only receive a specific legacy of personal property and effects exclusive of the personal property bequeathed to Bishop *F*, and that in no event should the personality which formed the subject-matter of the legacy to Bishop *F* fall into the residue. ELIZABETH O'DONOGHUE *v.* SUTHERLAND *Rang.* 310

WORDS AND PHRASES:—

———**Cause of action**—*Meaning of.*

It is quite correct to define "cause of action" as meaning all the congeries of facts which it is necessary for the plaintiff to establish before he can ask the Court to grant the relief which he claims in the suit. SAMARENDRANATH MITRA *v.* PYAREECHARAN LAHA *Cal.* 882

Collusive, significance of SEE Transfer of Property Act, 1882, s. 53 829

Drawing, meaning of. SEE Penal Code, 1860, s. 291-A 590

In pursuance of an enactment, meaning of. SEE Limitation Act, 1908, Sch. I, Art. 2 131 F. B.

Movable property, meaning of. SEE Criminal Procedure Code, 1898, s. 386 742

Practicable, meaning of. SEE Bengal Tenancy Act, 1885, s. 30 (*a*), (*b*) 902 S. B.

Qarabati, meaning of. SEE *Riwaj-i-am* 340.

Wages, meaning of. SEE Limitation Act, 1908, Sch. I, Art.. 7 591

Works of Public Utility Companies Act (XXII of 1863), s. 26—Scope of. SEE Public Purposes Land Acquisition Act, 1857 98

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CRIMINAL LAW IN 1934.

The number of important decisions in the past year affecting criminal law has been by no means great, but, as in previous years, a few decided cases have added notably to this branch of the law, and it is proposed here to give a brief review of these.

There are really only two decisions of outstanding importance. The first, *Maxwell* v. *Director of Public Prosecutions* (151 L. T. Rep. 477), was particularly noteworthy, because it was the first case since 1921 to be taken to the House of Lords on the certificate of the Attorney-General that it involved "a point of law of exceptional public importance." The point at issue was the limits of cross-examination of a prisoner as to character under section 1 of the Criminal Evidence Act, 1898—or, to put it more specifically, whether a previous charge resulting in an acquittal is a legitimate means of attacking a prisoner's character. Briefly stated, the facts were as follows: William Maxwell, a herbalist, was charged at the Assizes with the manslaughter of a woman patient, the allegation of the prosecution being that her death was due to treatment by him with the object of procuring a miscarriage. He was also charged with using an instrument for the like purpose upon the same woman on an earlier occasion. Some years previously he had been charged with the manslaughter of another woman patient in similar circumstances, and that charge had terminated in an acquittal. At the trial he put his character in issue, and when he came to be cross-examined it was sought to attack his character on the basis of that previous charge. After the detailed circumstances had been put to him he was asked by Counsel for the Crown: "That matter was inquired into at the Assizes at Leeds, and you were acquitted by a jury?" and his answer was "Yes." The prisoner was convicted on both charges and appealed to the Court of Criminal Appeal on the ground that, as the previous charge had resulted in an acquittal, the above cross-examination was inadmissible. The court dismissed the appeal, holding that the language of section 1 (*f*) of the Criminal Evidence Act, 1898, permitted the cross-examination of a prisoner who had put his character in issue on any previous charge, whether the charge had resulted in an acquittal or not. On appeal by the prisoner, the House of Lords reversed that decision, and in their considered opinion the following principles were enunciated. As a general rule it is not permissible to attack a prisoner's character on the basis of a previous charge which has resulted in an acquittal, for the fact of such a charge having been made is generally irrelevant, in that it neither goes to show that the prisoner did the act for which he is being tried nor does it affect his credibility. In exceptional cases, however, it may be permissible to put to a prisoner in cross-examination a previous charge which has resulted in an acquittal, where the object of the question is to lay the ground for further cross-examination on a statement made or evidence given by the prisoner in the earlier trial which tends to throw doubt on his evidence at the later trial. But, the opinion of the House proceeded to add, even where the question whether a prisoner has been convicted, charged, or acquitted does go to his credibility, it should not be admitted if the jury are likely to be misled into thinking that the question is relevant not to credibility, but to the probability of the prisoner having committed the offence for which they are trying him. It is, perhaps, worthy of comment that in *Rex* v. *Waldman* (24 Cr. App. Rep. 201) a prisoner who was charged with receiving stolen goods put his character in issue, and was cross-examined on two previous charges one of which had resulted in acquittal but

the other in conviction. The above decision of *Maxwell* v. *Director of Public Prosecutions* (*sup.*) was relied on on behalf of the appellant, but the Court of Criminal Appeal distinguished the cases and held that, as in the later case there had in fact been a previous conviction, even assuming the question on the previous charge resulting in acquittal to have been irregular (a matter which they did not expressly decide), no substantial miscarriage of justice had in the circumstances occurred and the appeal should be dismissed under the proviso to section 4 of the Criminal Appeal Act, 1907.

The other outstanding decision—*Rex* v. *Donovan* (152 L. T. Rep. 46; (1934) 2 K. B. 498)—dealt with the question how far, on a charge of assault, consent of the person alleged to have been assaulted can be a defence. In reality, the decision of the Court of Criminal Appeal did little more than reaffirm principles already laid down in *Reg* v. *Coney* (46 L. T. Rep. 307; 8 Q. B. Div. 534), but, prior to the Court's decision, there was some authority for the view that a person might consent to any assault which did not amount to a mayhem. The principles enunciated in *Rex* v. *Donovan* (*sup.*) were that consent can never be a defence to a charge of assault, where the alleged assault consists in an unlawful act, and that, as a general rule, it is an unlawful act to strike another person with such a degree of violence that bodily harm is a probable consequence, that rule being subject only to certain well-recognised exceptions, *e. g.*, in the case of friendly athletic contests or rough but innocent horseplay. The facts of the case were somewhat peculiar. The prisoner was charged with indecent assault and common assault on a girl aged seventeen. It was proved that he was addicted to a form of sexual perversion generally known as flagellation, and that he had adminstered to the girl a number of blows with a cane. These blows had left seven or eight red marks on her body, and the beating was described by a medical witness as "a fairly severe beating." At the trial the prisoner relied on the defence of the girl's consent and the chairman, overruling a submission by the prosecution that consent was not an available defence in such a case, summed up on the basis that consent or non-consent was the real issue for the jury, but omitted to direct them that the onus of negativing consent lay on the prosecution. The jury convicted, and the Court of Criminal Appeal quashed the conviction in view of the unsatisfactory course which the trial had taken. The Court delivered a considered judgment in which they enunciated the principles set out above, and added that the proper direction for the jury in such a case was, first, were the blows struck likely or intended to cause bodily harm? If the jury took the view that they were, then the act of the prisoner was *per se* unlawful and the consent of the girl could not be an available defence. If, however, they took the contrary view, then consent did become an available defence, and they must convict only if they were satisfied that the prosecution had discharged the onus which lay upon them of negativing consent.

The remaining decisions in the year are of less importance and complexity, and may be summarised very briefly. Two small points have arisen with regard to indictments. In *Rex* v. *Walker* (24 Cr. App. Rep. 117) it was laid down that, in an indictment for cruelty to a child under section 1 of the Children and Young Persons Act, 1933, it is better to include the word "wilfully" in the Particulars of Offence, although that word does not appear in the appropriate form in the Forms of Indictment in the Appendix to the Rules made under the Indictments Act, 1915. Again, in *Rex* v. *Hyde* (151 L. T. Rep. 20) it was held that an indictment, for arson of goods in a building, contrary to section 7 of the Malicious Damage Act, 1861, was bad in law in that the words "under such circumstances that if the building had been thereby set fire to, the offence would have amounted to felony" were omitted from the Particulars of Offence.

A point with regard to the proof of the first marriage on a charge of bigamy arose in *Rex* v. *Lamb* (150 L. T. Rep. 519). Under section 42 of the Marriage Act, 1836, a marriage which takes place in a register office by certificate after notice is rendered null and void if persons "knowingly and wilfully intermarry . . . under the provisions of the Act . . . without due notice to the superintendent registrar." In the above case it was proved that the prisoner, with the knowledge and consent of the other party, had given the notice in a false name. The Court held that the notice still remained a "due notice" for the purpose of the above section and that the marriage was not thereby invalidated.

There is one decision which is likely to be of some importance to practitioners and which will serve to correct any wrong

impression which may have gone abroad as a result of the comparatively recent decision in *Rex* v. *Naylor* (147 L. T. Rep. 159; (1933) 1 K. B. 685). In *Rex* v. *Littleboy* (151 L T. Rep. 570; (1934) 2 K. B. 408) the prisoner set up a defence of *alibi* for the first time at the trial and the Judge in his summing-up commented on this, saying that the value of the defence was lessened by reason of the fact that the Police had had no opportunity of testing it. The Court of Criminal Appeal held that, though comments on non-disclosure of defence prior to trial must be made with care and with fairness to the prisoner, comments of the above kind, relating merely to the value of the defence, were not open to objection. They added that all that *Rex* v. *Naylor* (*sup.*) had intended to decide was that it was wrong to refer to the silence of a prisoner when before the magistrates as evidence against him or as possible corroboration of the evidence of an accomplice.

In *Rex* v. *Manser* (25 Cr. App. Rep. 18) the Court of Criminal Appeal had once again to deal with the troublesome question of corroboration of the evidence of a young child, and held that, where the evidence of a young child requires corroboration as a matter either of law or practice, the requisite corroboration cannot be supplied by the unsworn testimony of another child which itself, by statute, requires corroboration.

In *Rex* v. *Holding* and *Rex* v. *Long* (178 L. T. Jour. 330; 25 Cr. App. Rep. 28) emphasis was once again laid on the duties of Courts of quarter sessions in dealing with incorrigible rogues committed for sentence. It was said that there must be an inquiry into the circumstances of the conviction at petty sessions and an opportunity afforded to the prisoner of cross-examining any witness called for the Crown and of addressing the Court before sentence is passed, and that it is by no means to be regarded as a matter of course that the maximum sentence of imprisonment is in all cases appropriate.

Two rather unusual cases of murder may next be noted. In *Rex* v. *Martin*, *Ansell and Ross* (24 Cr. App. Rep. 117) those present in the Court of Criminal Appeal witnessed the rare spectacle of two persons convicted of murder walking out of the dock scot free on the determination of the appeal. The case against Ansell and Ross was a thin one, the only direct evidence against them being that of their alleged accomplice Martin. The judge, after properly warning the jury that they should look for corroboration of Martin's evidence, when dealing with the case against Ansell and Ross, enumerated a number of matters capable of being regarded as corroboration, but, *per incuriam* included in that number a conversation between Martin and one of the Crown witnesses after the commission of the crime. This conversation was not even admissible evidence against Ansell and Ross, and their convictions were, in the circumstances, quashed. In *Rex* v. *Davidson* (25 Cr. App. Rep. 21) the prisoner was convicted of the murder of his young son, and the case was remarkable for the fact that the body had not been found and that there was no direct evidence that the boy was dead, apart from the prisoner's own statement, consisting in confessions made before the trial, retracted on oath at the trial and replaced by sworn evidence as to finding the boy accidentally drowned. The Court, however, held that this amounted to sufficient evidence of the *corpus delicti*.

In conclusion, it may be worth observing that the recent decision of the Court of Criminal Appeal in *Rex* v. *Stringer* (148 L. T. Rep. 503; (1933) 1 K. B. 704) which was regarded by many as to some extent unsatisfactory and difficult to follow, has been now rendered obsolete by the provision in section 34 of the Road Traffic Act, 1934, that upon a charge of manslaughter there may be a conviction for dangerous driving, although the conditions as to notice of intended prosecution, etc., laid down in section 21 of the Act of 1930 have not been fulfilled.—*The Law Times.*

MOTORISTS AND CHILDREN.

A personal injury case of a somewhat unusual nature, and one of interest to the entire motoring community, came before Mr. Justice du Parcq on the first day of this term (*Howard* v. *Pickfords, Limited*), and raised the quesion whether motorists who have left their cars unattended for a short time in a street frequented by children playing ought, on returning and before driving off, to search the vehicle thoroughly for any odd child who may have been misguided or mischievous enough to secrete himself on any part of it! In the case in question a motor van belonging to the defendants, well-known carriers, was driven into a street in the East End where normally there is not a great deal of traffic and where large numbers of chidren were in the habit of playing. Frequently, as is the nature of children, and much to the inconvenience and annoyance of drivers, they played around stationary vehicles and sometimes climbed on to them. On this particular occasion there were a number of children playing about in the street when the driver drew his van up on his off-side of the street and left it while carrying out his duties. A little boy, aged seven years—the infant plaintiff— while the driver was absent, seated himself on the near-side running-board of the van. The driver, on returning, drove off, and, swerving across to the other side of the street to get to his near side, the child was thrown on to the pavement and sustained, among other injuries, a fractured pelvis. The case for the plaintiff was that where the van was left unattended in a place in which the driver knew quite well that children played and had in fact clambered on to motor vehicles, he ought not to have started the van and put it in motion without first having made quite sure that there was no child on it. He ought, it was submitted, to have searched the vehicle and looked all round it. The defendants contended that there no negligence because nobody could say that it was part of the ordinary duty of a driver of a motor vehicle to assume that there may be a child on the running-board and to search the vehicle before driving off. "What," asked counsel for the defendants, "is to be the position of any driver of any motor vehicle in London if my clients are to be held guilty of negligence? Any one of them who, when driving a car stopped for a few minutes to go to a tobacconist's or other place, saw only the one side of the car nearest the kerb when he returned. Would one ever dream of troubling to walk right round the car to see if there was anyone on the other side?"

After hearing the evidence Mr. Justice du Parcq accepted that of the driver to the effect that when he returned to his van he saw no children near it. The position in law on the question of negligence in such cases has been dealt with in a number of authorities. In *Cooke* v. *Midland and Great Western Railway of Ireland* (100 L. T. Rep. 626; (1909) A. C. 229), where a child was injured while playing on a turntable—a machine attractive to children and dangerous as a plaything—it was being used, in the words of Lord Macnaghten, with "tacit permission," and as Lord Atkinson said, "with the leave and licence of the defendants," the railway company. In the present case, while admittedly the driver knew that children did sometimes climb on to his van, it was obviously impossible to maintain on that evidence that there was anything amounting to "tacit permission" or to "leave and licence." The children were neither encourged nor permitted to get on to the van, and nothing the driver did or said could ever have led them to think that they were allowed to do so. "It is quite impossible to say," said Mr. Juslice du Parcq, "that because sometimes children climbed on to the van, and the driver was unable to prevent them, that he was licensing them to do so." As regards the case of trespassers, the general principle is laid down in *Robert Addie and Sons (Collieries) Limited* v. *Dumbreck* (140 L. T. Rep. 650; (1929) A. C. 358) that where children are trespassing on somebody's land they do so at their own risk, and there is no duty to protect them from injury. Nobody, of course, is entitled knowingly to injure a trespasser or to set a trap for one. As was said by Lord Dunedin in *Addie's* case (*sup.*): "If a person is a trespasser, then the only duty the proprietor has towards him is not maliciously to injure him: he may not shoot him; he may not set a spring gun, for that is just to arrange to shoot him without personally firing the shot. Other illustrations of what he may not do might be found, but they all come under the same head—injury either directly malicious or an acting so reckless as to be tantamount to malicious acting." In that case it was held that the conduct was not so reckless as to be "tantamount to malicious acting." In *Excelsior Wire Rope Company, Limited* v. *Callan and others* (142 L. T. Rep. 531; (1930) A. C. 404), however Lord Dunedin expressed the view that in that case there was such negligence that even if the child was a trespasser the

defendants were still liable. "Assuming," he said, "as did Lord Justice Scrutton, that the children were trespassers, I think that, to use the words of Viscount Hailsham in *Addie's* case, the appellants' servants acted 'with reckless disregard of the presence of the trespasser,' or, to use my own, 'that the acting was so reckless as to amount to malicious acting'."

The Court of Appeal in the later case of *Mourton* v. *Poulter* (113 L. T. Rep. 20; (1930) 2 K. B. 183) suggested that there might be some difficulty in reconciling the decisions in *Addie's* and the *Excelsior* case, but, said Mr. Jusice du Parcq, however that might be, "it is plain that there is no contradiction between the principles underlying the decisions in the two cases." *Mourton* v. *Poulter (sup.)* was a case in which it was held that a duty was owed to a trespasser not to do any act that would alter the condition of the land and might injure him without first giving him warning. There the defendant was cutting down a tree and, knowing that it would soon fall, cut the last root without a last warning to children who were near, and one of them was injured. "To me," said Mr. Justice du Parcq, "it is quite plain that that case might well be held to fall within the malicious acting." So, too, no doubt, would the act of the driver in the present case if he had known that a child was on his running-board and had, perhaps, thought to frighten, but not harm him, by driving off without warning. That, however, was not the case; he did not know that the child was there. Giving judgment, Mr. Justice du Parcq said that he had to fulfil the double duty of judge and jury, and he thought that if the jury felt that the circumstances in the present case were such that any reasonable man would have known that there was so high a probability that it could not be ignored that there might be a child somewhere on the van, then the driver was doing a reckless thing if he drove away without looking. Unless they were so satisfied, they ought to find a verdict for the defendants. Applying the law to that view of the facts, he held that there was no negligence on the part of the driver at all. He (his Lordship) must assume that the child knew that he was doing something which would get him into trouble if he was caught. The driver did not see him, and he was quite sure that it did not enter the driver's head that such a thing had happened. He was quite satisfied that there was no negligence at all on the part of the driver, and he gave judgment for the defendants, with costs.—*The Law Times.*

Extracts from Contemporaries.

A Posthumous Child.

Another case in which an appeal from the Court of Appeal was last week allowed by the House of Lords was *Elliot* v. *Joicey and others*: the salient facts in which were very shortly these. Mrs. Rose Elliot who had been given a power of appointment over certain funds by the will of a Mr. John Joicey by her will, executed in 1910, exercised that power by appointing the funds subject thereto in favour of all her children her surviving in equal shares She directed that each share should be retained by Mr. Joicey's trustees and held upon trust, in the event of any child of hers "leaving any issue him or her surviving," for that child absolutely but in the event of such child "not leaving any issue him or her surviving" such share was to accrue by way of addition to the share or shares of her other child or children. The question for decision was whether one of Mrs. Elliot's sons Mr. T. W. H. Elliot, died "without leaving any issue him surviving" having regard to the fact that a posthumous child was born to him alive about a month after his death. Mr. Justice Clauson held that the share passed to the representative of the deceased son's estate, and the Court of Appeal upheld that view. Mr. R. B. Elliot, one of the surviving sons of Mrs. Rose Elliot, appealed.—*The Law Times*, February 23, 1935.

The Judgments.

The contentions put forward on behalf of the appellant were quite shortly (1) that the words "born in the lifetime," "living" and "surviving" did not, in their natural meaning, cover the case of a child *en ventre sa mere* at a relvant date; and (2) that the judgments under appeal had unduly extended the artificial rule of construction under which such words were deemed to

include a posthumous child if there were a gift to such child. Lord Russell of Killowen, giving judgment called attention to the fact that Mrs. Elliot's will was a Scottish will to be interpreted according to Scots law. That fact seemed to have been overlooked by the courts below. How did the matter stand under English law? There had been many cases in England in which posthumous children had been held to be included in gifts to children born in their father's lifetime, or living at his death, but the foundation of those decisions had been, not that the natural meaning of the words used included such children, but that as had been said by Vice-Chancellor Leach "the potential existence of such a child places it plainly within the motive and reason of the gift." His Lordship referred to several cases (which we hope to consider in our Conveyancing columns shortly) and quoted the judgment in the latest House of Lords case on the subject—*Villar* v. *Gilbey* (1907) —where Lord Loreburn said that the construction which included posthumous children was a straining of language, a fiction or indulgence permitted solely on the ground that it was for the unborn child's benefit enabling it to take under a disposition. With the utmost respect for the Court of Appeal he (Lord Russell) could not accept the rule without the limitations which the Lord Justices thought had been removed and in the case before their Lordships the words must bear their ordinary and not their fictional meaning. According to the present law of England this appeal must succeed. The Scots law being certainly not more favourable to the claims of a child *en ventre sa mere* —and if *Burns' Trustees* v. *Burns* (1917. S. C. 117) were rightly decided even less so —this appeal must be equally successful under Scots law. Lord Tomlin and Lord Macmillan gave judgment to the same effect, Lord Tomlin saying cogently that he did not think the enrichment of the parent's estate could amount to a benefit for his child.—*The Law Times.*

Medical Examination Without Consent.

The right of a police surgeon to examine an accused man without his consent was challenged by counsel at a Justice's Court recently. It does not appear that any considered judicial opinion, binding upon a criminal tribunal at first instance, exists, although disapproval of the practice was said to have been expressed by Mr. Justice Swift at Assizes on the Northern Circuit. The question is, of course, part of the larger one as to the powers of the police over the persons of those in custody, but not yet tried and convicted, and, therefore, in the eyes of the law, still to be regarded as innocent citizens. The extent of such powers was incidentally discussed in 1933 by the Justiciary Appeal Court at Edinburgh, when the actual point for decision was whether the police had a right, by common law, to take finger prints forcibly if they could obtain them in no other way. The majority judgment of that Court in favour of the police is obviously not conclusive on the present point, and, of course, it would not be binding south of the Tweed. One of the majority judges (Lord Sands) considered that, so far as the taking of finger prints was concerned, there was no question of the man being compelled to give evidence against himself. He went on to remark that "An Ephraimite who was compelled at the point of a Gileadite's sword to pronounce the word Shibboleth might perhaps have complained that he was compelled to incriminate himself. But not so the man whose finger prints were forcibly taken. He was entirely passive, and was not compelled to do anything by any exercise of his own will or control of his body.— *The Law Journal.*

A Technical Assault.

In the absence of any details as to the nature of the examination objected to last week, it is difficult to offer an opinion upon its legality or otherwise. The case was "a motoring one." The Police Order in such an instance (according to "Taylor's Principles and Practice of Medical Jurisprudence," 9th Edn., p. 59), is that "The services of the divisional surgeon will be at once obtained to certify as to the prisoner's condition, before the charge is entered, irrespective of whether the charge is or is not denied, in every case in which a person is charged with:

(*a*) being drunk while in charge of a vehicle other than a motor vehicle.

(*b*) driving, attempting to drive or being in charge of a motor vehicle while being under the influence of drink to such an extent as to be incapable of having proper control of the vehicle."

The legality of the examination made by a police surgeon called in under such cir-

cumstances would appear to depend entirely upon its nature. If it can be made without committing any technical assault upon the prisoner or compelling him to perform certain actions, it might be held permissible. But if, on the other hand, it goes beyond a mere inspection, and if, in the course of it, the prisoner is compelled to go through certain tests without his free consent, it would clearly be open to grave objections and might well be held an unwarrantable interference with the freedom of the subject.—*The Law Journal*, March 9, 1935.

Imprisonment for Debt, etc.

At a recent luncheon meeting of the Howard League for Penal Reform to hear Sir John Fischer Williams speak on "Imprisonment for Debt," Lord Arnold, who took the chair, referred in course of some preliminary remarks to the recently published report on the work of the Government Committee on the question, and said that in 1934, 20,416 persons were imprisoned: 11,244 for non-payment of fines, 6,089 for wife maintenance and affiliation orders, and 3,083 for non payment of rates. The report, Lord ARNOLD said, was "notable for its humanity" and must not be pigeonholed. Sir John Fischer Williams intimated in regard to imprisonment for non-payment of fines that the fault lay, not with the magistrates, but with the system. In many cases the magistrates did not consider it likely that a fine would not be paid and did not therefore seriously take into consideration the alternative of imprisonment. In such cases the defendant did not come before the Court again, but went automatically to prison. With regard to maintenance orders, Sir John alluded to the fact that, it being left to the wife or mother to enforce the order, payments were often allowed to accumulate until they reached a fantastic amount. At present the Court has no power to cancel a part, it can only wipe off the whole debt or allow it to stand. It was suggested that an officer of the Court be made responsible for the receipt of such payments, and at the end of, say, a month, report the offender to the Court if no payment were made. After some statements concerning non-payment of rates and a commendation of the Scottish system of compounding for rates, Sir John concluded: "If we are to have a proper respect for personal liberty and dignity there should not be imprisonment except after deliberate consideration by authority into the circumstances of each case, and no one should be imprisoned unless it is considered that he has overstepped the line which distinguishes civil from criminal liability." We are indebted to *The Times* for the foregoing information.—*The Solicitors' Journal.*

Imprisonment in Default.

The debate in the House of Lords on 27th February, arising out of the Report of the Departmental Committee on imprisonment in default of payment of fines and other money showed general agreement that there ought to be no delay in implementing the recommendation of the committee. Lord Feversham, who spoke for the Home Office said that so far as the committee's report involved amendments of the law, their proposals had been noted for careful and sympathetic consideration when an opportunity for legislation arose, and the Home Office would bear in mind the fact that the House had emphatically expressed its opinion that legislation should ensue as soon as possible.

Inasmuch as there would probably be no opposition to a Government Bill on the basis of the committee's proposals there would be but little demand on Parliamentary time and the opportunity for legislation ought to arise almost as soon as the Bill can be prepared.

Meantime, it was stated, the Home Secretary was contemplating the issue of a circular calling the attention of justices throughout the country to suggestions in the report which might be adopted, under the existing law, so as to reduce the number of committals to prison. This has been translated by one newspaper poster as "New Orders to J. P.'s", a misleading and quite unfounded suggestion that the executive gives instructions to those exercising judicial office. The Home Office issue no orders to magistrates. Its circulars often convey information and sometimes make proposals, which are of value particularly to those justices in the provinces who, while taking a keen interest in their work have few opportunities of discussion or of obtaining information about present-day views and movements—*Justice of the Peace.*

Circumstantial Evidence.

In delivering the judgment of the Court

of Criminal Appeal in *R.v. Harvey* last week, Mr. Justice Avory said that counsel's argument for the defence seemed one of a kind very familar in cases of circumstantial evidence—that each item by itself was consistent with innocence. That was not the proper way to regard the matter; the proper way was to ask whether all the circumstances taken together made such a chain of evidence as to be only consistent with guilt.

There is, indeed, no need to be distrustful of circumstantial evidence. Often it is more trustworthy than so-called direct evidence. Witnesses are often at fault in recollecting what they saw or heard. Often the chain of circumstantial evidence consists of links about which there is no dispute. When the chain is complete, then as Mr. Justice Avery observed, the question is whether the whole is consistent only with guilt.

The process of examining the evidence is rather like that of testing drunkenness. Each separate symptom might by itself be consistent with sobriety : a smell of liquor may be due to only moderate consumption of drink, a quick pulse may be due to excitement, absence of reflexes may arise from disease, and so on. But the dilemma of the defence may be that the explanation of one symptom is quite incompatible with the explanation of another, and in the end the only explanation that fits in with all the symptoms is drunkenness. So with circumstantial evidence; one item may be explained this way, the next another way, and so on. But if at last it be found that the various explanations cannot all fit in with one another, but that all the items taken together are consistent only with guilt, the conclusion is irresistible—*Justice of the Peace*, March 9, 1935.

REVIEW.

Law of Arbitration in British India : By Mr. P. L. Paruck, B. A., LL. M., Attorney-at-Law, High Court, Bombay : Published by Messrs. N. M. Tripathi and Co., Princess Street, Bombay: 1935: Price Rs. 5.

The book under review is a welcome addition to the existing books on the subject and is a lucid commentary on the Indian Arbitration Act and the Second Schedule of the Civil Procedure Code. Parts I and II deal with these enactments. In Part III mention is made of Acts and Regulations under which arbitration is either directly compulsory or indirectly made compulsory by rules framed. The appendix gives the texts of the Indian and English enactments on the subject including the English Arbitration Act, 1934. The learned author has taken considerable pains to make his book useful alike to the legal profession and the mercantile community. Principles underlying the sections have been aptly illustrated with relevant case-law. The suggestions made about the procedure to be followed by persons appointed arbitrators are sure to be found useful by the mercantile community. We commend this commentary to the legal profession.

Wit & Humour.

A True Dilemma.—Some time ago a Judge was presiding in our Court who was rather hard of hearing. A case was being tried in which the Attorney for plaintiff was very hoarse and found it difficult to talk; one of the Attorneys for the defendant was crippled, having to use a crutch; the Stenographer was having difficulty in taking the evidence and thereupon and Attorney present made the following remark: "Plaintiff's Attorney can't talk, Defendant's Attorney can't walk, Judge can't hear and Stenographer can't read her notes. Therefore, this Court is in a H ... of a fix."—*Case and Comment.*

Suspenders Needed.—A reader writes us: "Objected strenuously during the trial of an action to a question asked a witness by my opposing attorney. It was a question of law involved and I stated to the Judge that my opponent was caught in Court with his pants down. The Judge adjourned Court for five minutes to allow my opponent to get his pants on."—*Case and Comment.*

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Notes and Comments.

Hindu Law of Inheritance—Samanodakas.

The conflict of views between the various High Courts on the important question of Hindu Law as to the exact scope of the expression 'Samanodaka' as used in the Hindu Law of Inheritance, has been set at rest by the recent decision of their Lordships of the Privy Council in *Atmaram* v. *Bajirao*, 155 Ind. Cas. 330. In defining the scope of the expression, their Lordships base their view on the principle that in the event of a conflict between the ancient text writers and the commentators, the opinion of the latter should be accepted, as the commentators, "while professing to interpret the law as laid down in the Smritis, introduced changes in order to bring it into harmony with the usage followed by the people governed by the law." After discussing the texts and the views of the commentators, Sir Shadi Lal, who delivered the judgment of the Board, has laid down that according to the Mitakshara School, "Samanodakas include only those agnates whose relationship to the deceased extends from the eighth to the fourteenth degree, and in the absence of any such agnate, the estate devolves upon his *bandhus*", thus reversing the decision of the Nagpur Judicial Commissioner's Court in *Bajirao* v. *Atmaram* 1930 N. 265: 125 Ind. Cas. 686. It may be noted that in *Bai Devkore* v. *Amritram*, 10 Bom. 372, this word was interpreted to include all agnates without any limit of degree and this view was followed in *Ram Baran* v. *Kamla Prasad*, 32 All. 594: 6 Ind. Cas. 698, a Mitakshara case, although the Bombay case came from a Province where the authority of the Mayukha was supreme. But in *Rama Row* v. *Kuttiya*, 34 Ind. Cas. 294: 40 M. 651 the Madras High Court held that Samanodakas do not include relations beyond the fourteenth degree and this view (See also *Narain* v. *Chandi*, 9 All. 467) has been approved by their Lordships in *Atmaram's case* in 155 Ind. Cas. 330.

Hindu Law: Only adult co-parcener: Right to appoint guardian of co-parcenary property of minor co-parcener.

The question as to the competency of an only adult co-parcener of a Hindu Mitakshara family to appoint by will or otherwise, a trustee, guardian or manager of the co-parcenary property of a minor co-parcener during his minority is the subject of a recent Full Bench decision of the Bombay High Court in *Brijbhukandas* v. *Ghashiram* 155 Ind. Cas. 12. The necessity of a reference arose out of the conflicting views expressed in *Harilal* v. *Bai Mani*, 29 Bom. 351 and *Mahableshwar* v. *Ramchandra*, 38 Bom. 94: 21 Ind. Cas. 350, the former deciding that he had no such power, which the latter held that he had such power and that an alienation by a guardian so appointed would be binding on the minor. The Full Bench of the Bombay High Court has expressed itself in favour of the former view thus bringing itself in conformity with the decision in the Madras Full Bench case of *Chidambara* v. *Rangasami*, 41 Mad. 561: 45 Ind. Cas. 905. The view that a dying father had the power to appoint a guardian for his minor sons is inconsistent with the very basis of the joint family system with the incidence of survivorship, as at the moment of the father's death, the property passes by survivorship to his minor sons and he is not competent to authorise anybody, to deal with the property of the minors. The Bombay case of *Mahableshwar* v. *Ramchandra*, 38 Bom. 94: 21 Ind. Cas. 350 proceeded on the ground of convenience and the argument as to convenience has been met by the

learned Chief Justice in the recent Full Bench case with a quotation from the Madras Full Bench case to the effect that "to put a person in a definite legal relation to property of which he is not the owner, is a step which cannot be taken unless there is legal authority for taking it. Its convenience and justice may be admirable reasons for the legislature to take action," but they cannot suffice to set in motion a Court of law.

Estoppel: Conditions.

The conditions under which estoppel operates have been discussed by their Lordships of the Privy Council in their recent decision in *Dawsons Bank* v. *Japan Cotton Trading Company*, 155 Ind. Cas. 1. It has been pointed out that estoppel is not a cause of action, and if established, it may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact, the existence of which would destroy the cause of action. Their Lordships proceed to point out that: "It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf, (*b*) with the intention that the plaintiff should act upon the faith of the statement, and (*c*) the plaintiff does act upon the faith of the statement". Waiver is distinguished from estoppel by denoting the former as contractual and as capable of constituting a cause of action and as being an agreement to release or not to assert a right. Their Lordships proceed to illustrate the distinction by saying: "If an agent, with authority to make such an agreement on behalf of his principal, agrees to waive his principal's rights, then (subject to any other question such as consideration) the principal will be bound, but he will be bound by contract, not by estoppel." There can be no such thing as estoppel by waiver.

Prisons of the Future.

In an illuminating article on this subject, a learned contributor to the latest number of the Journal of Criminal Law and Criminology discusses what the prison of the future should be like. He quotes the definition of an ideal prison as formulated by Ex-Attorney-General William D. Mitchell to the effect that "The prison of the future should be at once a disciplinary school for those who can be reformed, a place of permanent segregation for the incorrigible and a laboratory for the study of the causes of crime." This definition is brief and to the point. Adopting this definition as the basis, suggestions for prison reform have been made, and though conditions in India are far behind those obtaining in America and other countries, they may be kept in view as pointing out the way to prison reform:

(*i*) "The prison buildings and equipment of the next generation will be so constructed and devised so as to lend themselves to the application of constructive programme of rehabilitation. They will be of strong construction where strength is needed, but will give prominent place to the hospital, the laboratory, the school, the mental hygiene clinic, the workshop and farm and they will have a library as well."

(*ii*) "The prison of the future will be manned by persons who will be trained in the science of human nature". To this we will add that the same principle should be applied in the case of non-official visitors to Jails in India.

(*iii*) "Much attention will be given in the prison of the future to realization that an idle mind is the Devil's Workshop, that idleness in prison is a public menace. Private interest in prison labour is to be abolished. The prisoner must not be exploited."

(*iv*) "Some way must be found to individualize the corrective and protective treatment to be given to the inmates of the prison of the future. This will be the most difficult, yet most hopeful of its functions".

(*v*) "Delete the word prison from the designation of their ideal Institution and substitute therefor a word and concept less opprobrious and less odious".

The suggestions are perhaps too idealistic, but if followed, they will certainly give us ideal prisons, out of which the prisoner will emerge a better man and a useful citizen and there will cease to be any necessity for classifying offenders as first offenders and old offenders.

AGREEMENTS FOR TAX-FREE PAYMENTS.

One of the better-known peculiarities of our law is expressed in the proposition that a gift by will of an annuity of £*x*, free of tax, is valid, and an agreement to pay an annuity of such an amount as, after deduction of income-tax thereon at the standard rate, will leave £*x*, is valid, but an agreement to pay an annuity of £*x*, free of tax, is effectual only to create an annuity of £*x*, subject to tax. This is the result of the enactment—which originated, we believe, as s. 115 of the Income Tax Act, 1806, and now appears as r. 23 (2) of the All-Schedules Rules in the Income Tax Act, 1918—that every agreement for payment of interest, rent or other annual payment in full, without allowing the deduction of tax at the source which the Act provides for, is void.

The general scheme of the Income Tax Acts, it need hardly be said, is that the gross amount of any annual or quasi-annual sum which *A* is legally bound to pay *B* is deducted from the taxable income of *A* and included in that of *B*: the payment is made less tax, and *A* and *B* are respectively debited and credited with the amount of the tax. Thus, if *A* has to pay *B* £100 a year, and income-tax is 4*s*. 6*d*. in the pound, he pays £77 10*s*.; £100 is excluded from his taxable income and included in B's; and the income tax on their respective incomes so ascertained is increased by £22 10*s*. in the case of *A*, and diminished by £22 10*s*. in the case of *B*.

In this scheme an agreement that a particular liability shall be discharged without deduction of tax is out of place. The payment contemplated is the tax on the sum named, in addition to the sum named, less tax, which would have been payable if the agreement had not been made; and if such an agreement were valid, a difficulty would arise in regard to the tax on the amount, equal to the tax so agreed to be paid. Thus, if, in the case just put, *A* agreed with *B* that his £100 should be paid without deduction of tax, and the agreement were valid, a question would at once arise as to whether the £22 10*s*. (representing tax), so agreed to be paid, formed part of the taxable income of *A*, or of *B*; and either result would be in conflict with the scheme of the Acts. If it formed part of the taxable income of B, the payee, the tax on it would have to be collected from *B*, which would be inconsistent with the scheme of deduction of tax at the source. To inculde it, on the other hand, in the taxable income of *A*, would be inconsistent with the system whereby a sum which a man is legally bound to pay is excluded from his taxable income. But if the sum were treated as a voluntary payment, naturally it would be impossible to exclude it from *A's* taxable income or include it in *B's*; and it may be that the provision avoiding agreements to pay without deduction of tax was made with the object of attaining uniformity and certainty as to the incidence of the tax on the tax without causing injustice or dislocating the scheme of the Acts. In other words, the Legislature may be taken to have said: "If *A* being bound to pay *B* £100 a year, agrees to pay it without deduction of tax, the difference between £100 and £100 less tax shall be included in *A's* taxable income, whether *A* pays it or not; but as a corollary to that we will say that the agreement to pay it shall not be enforceable against him." Whether this was the reason or not, the provision, considered in reference to agreements for full discharge of existing liabilities, is reasonable and intelligible.

An agreement to pay, free of tax, a sum not existing before is not an agreement of the kind just mentioned. There is no agreement to discharge without deduction an antecedent liability; on the contrary, the liability is itself created by the agreement, and is in effect defined by reference to the balance remaining after deduction of income-tax as prescribed by the Act. And in this case the liability is different in amount; the intention being that the payee shall be relieved of all tax, and that the payer shall, therefore, pay not only the tax on the sum named, but the tax on that tax and so on *ad infinitum*; in other words, shall pay such a sum as after deduction of income-tax thereon will leave the sum mentioned.

The courts, as is well known, have never made, nor, apparently have they considered any such distinction as is here suggested, but they have applied the provision to all agreements, of whatever nature and however worded, for provision of a sum "free of tax" or without "deduction of tax". Indeed in the case of a sum "free of tax", not existing before, the question appears originally to have been not whether the

provision applied, but whether it did not avoid the agreement *in toto*, so as to relieve from all liability to pay anything whatever: see *Readshaw* v. *Balders* (1811), 4 Taunt. 57.

This leads to the absurd situation mentioned at the beginning of the article. The present writer suggests that the provision was intended to apply solely to agreement not to deduct tax in fulfilling an obligation to make a payment from which tax is deductible under the Act: and was not directed to agreements creating oblibgations for the first time and measuring them, in effect, by reference to the net amount remaining after income tax had been deducted. The present provision (r. 23 (2)) reads thus: "Every agreement for payment of interest, rent or other annual payment in full without allowing any such deduction shall be void". If for "payment of" had been substituted "discharge of a liability for", the present situation might not have arisen, and it could never become necessary for a man who inadvertently agreed to pay "£*x* free of tax" instead of "such a sum as after deduction of income-tax thereon at the standard rate will leave £*x*", to explain to the court, in an action for rectification, that in agreeing to pay £*x* free of tax he intended to become liable, in effect, to provide £*x* free of tax. Mistakes in drafting occur on occasion, and perhaps it is not too much to hope that by some suitable amendment the provision may be placed on what is here suggested to be its proper footing.—*The Solicitors' Journal.*

LIABILITY TO TAX OF INTEREST AWARDED BY JUDGMENT OR AWARD

It is sometimes difficult to determine whether interest awarded under a judgment or other judicial order, or an arbitrator's award, is to be regarded as "interst of money," and liable to tax under Schedule D, para. 1 (*b*) of the Income Tax Act, 1918, which applies *inter alia* to all interest of money, annuities and other annual profits or gains not chargeable under any of the other schedules to the Income Tax Act, 1918.

In the recent case of *Inland Revenue Commissioners* v. *Barnato*, the respondent was entitled under his father's will to, *inter alia*, a share in the partnership business. The respondent brought an action against the turstees of the will for failing to pay the respondent the whole of the sums due to him. The matter was referred by the trial judge to a Special Referee, the Order of Reference directing, *inter alia*, that the inquiries and accounts should be taken on the basis—apparently admitted by the defendants to the action—that the plaintiff was entitled to compound interest on certain items.

The referee made an award for a total sum, without expressly distinguishing between principal and interest; but it was established that part of the sum awarded represented compound interest on the above items of the claim.

Mr. Justice Singleton, differing from the commissioners, held that the sum awarded as interest constituted "interest of money," and was accordingly liable to tax under Schedule D, para. 1 (*b*), of the income Tax Act, 1918.

It may be of advantage to examine the principles established by the case.

To begin with, it would appear from, *inter alia*, the *Barnato* case, that, although there may be a presumption that a lump sum award does not include interest, it may be rebutted by evidence that interest has in fact been included. Furthermore, the fact that a sum is referred to in the award as interest will not necessarily render it "interest of money" for tax purposes.

One of the tests would appear to be whether the interest has a "contractual" origin, or is of a "penal" character. In the former case it would be taxable; in the latter, not.

"Contractual" interest includes that payable by arrangement on moneys due under a contract, but remaining unpaid: and "penal" interest that awarded to a beneficiary against a trustee on the ground of fraudulent conversion or breach of trust, such interest representing the loss or damage suffered by the person who has been wrongfully deprived of his money. An instance of this is afforded by *Re National Bank of Wales* (81 L. T. Rep. 363; (1899) 2 Ch. 629), where the action was based on a misfeasance on the part of a company director in sanctioning the payment of dividends out of capital.

But in some cases it may be very difficult to draw the line between penal and non-penal interest. Thus in *Schulze* v. *Benstead* (7 Tax Cas. 30), where a trustee was ordered to pay interest on a sum representing the purchase price of part of the trust estate which the trustee,

through his negligence, had caused to be lost to the estate, it was held that the interest was not penal, and was accordingly liable to tax. Had the interest in question been awarded on the ground of fraudulent conversion by the trustee, or at a "penal" rate of interest, the position might have been otherwise.

The rate of interest awarded by the court may, therefore, be an important factor.

As the Lord President pointed out in *Schulze* v. *Benstead* (*ibid.*, at p. 34): "Where a pursuer recovers damages with interest from the date of the decree, I do not think that that interest is chargeable. It is part of the damages. But where a sum is due on a definite date, with interest from the date of the advance... the case is different. The interest ought to have been in the creditor's hands on the stipulated date, and is none the less interest when it is recovered along with the principal under the decree."

The date, therefore, from which the interest is directed to run, may accordingly also be of importance.

Reference again may be made to *Simpson* v. *Executors of Bonner Maurice* (14 Tax Cas. 530). In this case an award had been made in favour of a British national against the German Government by the Mixed Arbitral Tribunal. The award provided *inter alia*, for the payment of a sum in respect of the damage or injury to property, rights or interests of the claimant pursuant to Art. 297 (*e*) of the Treaty. It appeared that the claimant had certain securities in a bank in Germany during the war, and that the bank had during the war paid over to the German Custodian of Enemy Property certain sums representing dividends and interest due to the claimant's estate (the claimant having since died). The tribunal awarded, *inter alia*, that a sum representing interest at the rate of 5 per cent. on the amounts thus transferred by the bank, should be paid to the claimant's estate. It was held, however, that this interest was not "interest of money" but represented the compensation payable under the Treaty to the claimant's estate, in respect of the claimant and his estate being deprived of the power of disposition over the property in question in the meantime.

Mr. Justice Rowlatt pointed out in his judgment: "The Treaty did not give [the claimant] any right to interest, nor did it declare the Treuhander (*i. e.*, the German Custodian of Enemy Property) a trustee so as to found any consequential claim for interest; it did not empower the tribunal to give interest as such, or to make any declaration as to the character of the purpose for which the Treuhander had held the money. The Treaty gave compensation, and the tribunal which assessed the principal sum has assessed it on the basis of interest. I think this sum first came into existence by the award, and no previous history or anterior character can be attributed to it. It is exactly like damages for detention of a chattel, and unless it can be said that damages for detention of a chattel can be called rent or hire for the chattel during the period of detention, I do not think this compensation can be called interest."

This case would, therefore, appear to suggest as a test, whether the right to the interest arose solely under the order or judgment, or whether it arose at some anterior time, and as such, was given due effect by the order or judgment.

The above cases appear to contain the salient principle for determining whether interest awarded by a court or a tribunal is or is not interest of money for the purpose, but the reader's attention may at the same time usefully be drawn to such cases as *Sweet* v. *Macdiarmid* (7 Tax Cas. 640) and *Inland Revenue Commissioners* v. *Ballantine* (8 Tax Cas. 595):—*The Law Times.*

Extracts from Contemporaries.

Swift Justice.

A French journalist, writing in *Le Journal* recently, gave unstinted praise to the expeditious methods of English criminal justice. Under the heading :

"*Le record de l'assassin. Vent qui plaidant coupable de vit condamner a la peine capitale en quatre minutes.....Mais c'est aux assises de l'Old Bailey.*"

he compared our procedure very favourably with the dilatory system which across the Channel can prolong a prosecution over a space of two years. But what would the writer have said to the dispatch of the old Old Bailey methods illustrated in a case which the future Hawkins, J., once timed as a young man? The prosecuting counsel examined the first witness. "I think you were walking up Ludgate Hill on Thursday, 25th, about half-past two in the afternoon and suddenly felt a tug at your pocket and missed your handkerchief which the constable now produces. Is it that?" "Yes, sir". "I suppose you have nothing to ask him?" says the judge to the prisoner. "Next witness". This is a policeman. "Were you following the prosecutor on the occasion when he was robbed on Ludgate Hill? Did you see the prisoner put his hand into the prosecutor's pocket and take this handkerchief out of it?" "Yes, sir". "Nothing to say, I suppose"? says the judge to the prisoner. Then to the jury he observes : "Gentlemen I suppose you have no doubt? I have none." "Guilty, my Lord." Then comes sentence : "Jones, we have met before. We shall not meet again for some time. Seven years' transportation. Next case". Time—two minutes fifty-three seconds.—*The Solicitors' Journal, March 2, 1935.*

Truth for a Change.

At the annual dinner of the Flyfishers' Club, Lord Justice Roche, remarking on the presence of Sir Boyd Merriman, P., Hilbery, J., and Judge Lilley, observed what a change it was for them to sit in the veracious company of fishermen instead of in the "Palais de Justice" which was so rarely a "Palace of Truth". Even outside the Divorce Division, which has been called "the Supreme Court of Lies", there is too much ground to fear that the scales of justice have to weigh more questionable matter than the fisherman's scales. One of the best stories in this connection concerns the cross-examination of a certain expert witness by the future Lord Coleridge, C. J., when he was at the Bar. The witness was giving evidence in favour of a proposed harbour. "But, sir, isn't there a reef of rocks that would be a great inconvenience to you? "asked Coleridge. "Oh yes, undoubtedly there is, but we propose to get rid of it in a certain way." "Very good ; but when you have gid rid of it, would there not be a very awkward sand-bank to contend with?" "Certainly, but we shall provide against that." But when you have removed both these obstacles would you not have a great deal of trouble from the current of the river when in flocd?" "Clearly, but we should be able to encounter that difficulty". "You have seen the place, have you not?' "Oh, yes". "Well, I never did. I have invented alike the reef, the sand-bank and the river."—*The Solicitors' Journal.*

Executors and Beneficiaries.

A recent correspondent to *The Times* raises an interesting and, in its way, an important question regarding the duties of executors towards the beneficiaries under a will. The practice of reading the will after the funeral is stated to be obviously open to objection, but "probably better than the state of things to which it has given place." It is pointed out that, through the executors' neglect to give them notice, the beneficiaries are ignorant of the benefits to which they are entitled until the former choose to obtain a grant of probate, and even then the will is not searched by persons who have no reason to suppose that they are beneficiaries. A suggestion is made that the law be altered so that it should be obligatory upon executors "to apprise the beneficiaries within, say, one month of the death, of the benefits confered upon them," and that all executors of small estates should be obliged to apply for a grant of probate within a period of, say, three months of the death, or such other time as the court may direct. The hardship, to which the letter alludes, occasioned by non-disclosure of a benefit at an early date, is undoubtedly often very real—cases may readily be imagined in which a professional or business career might well have been saved by knowledge of the existence of a legacy, etc.—and early information is often particularly desirable when a person is

given a choice of say one from a number of objects. We doubt, however, whether the matter is one for legislation. Obvious difficulties would arise in the case of large estates or where settlements with vested or contingent remainders were created by the will, or again, in cases of a large number of, possibly rival, testamentary instruments. If executors were placed under a legal obligation to supply copious information of this character, it is doubtful if many would be found willing to discharge an office already involving sufficiently onerous duties. Moreover, in cases of small pecuniary legacies, to which the suggested practice seems particularly apposite, the information thus imparted would only, in ordinary circumstances, precede by a sufficiently short space of time the distribution of the legacy, while the information itself would, necessarily, be conditional in character dependent, that is, upon the sufficiency of the estate to meet debts, death duties, prior gifts, etc. Notwithstanding the foregoing difficulties we incline to the view that the imparting of early information in appropriate cases should be regarded as good practice and one to be generally adopted.—*The Solicitors' Journal.*

Sales of "Goods."

We commented last July (78 Law Journ., p. 56) on the decision of Mr. Justice Acton in *Robinson* v. *Graves*, and noticed that it appeared to be well founded on *Lee* v. *Griffin* (30 L.J. Q.B. 252). The question at issue was whether a contract to paint a portrait was a contract for the sale of goods within the Sale of Goods Act, 1893, with the usual consequences as to the necessity for a memorandum in writing. The learned Judge below held that it was such a contract, and Mr. Justice Blackburn's judgment certainly appears to provide a firm foundation for it. Now, however, the Court of Appeal has given a decision in the artist's favour, and founded its judgment on *Clay* v. *Yates* (1 H. & N. 73). The result is that the Court has to look at every contract of this kind and decide whether, on the facts, it is a contract for work and labour or one for the sale of goods. If the skill of the workman is the predominant consideration which induces the buyer to order, and the marble or canvas are merely ancillary, then it is a contract for skill and labour, and there is no need, in the case where the product of both costs more than 10*l.*, for a written contract. The judgment must be accepted with due respect, but may lead to practical inconvenience. In the case in hand no doubt the skill of the artist was the predominant element or ingredient in the product. But it is easy to put cases in which a decision upon the point would not be so easy. Portrait painters may all be on one side of the line; but where are the expert carpenter, mechanic and boat-builder?—*The Law Journal.*

Morals and Law Courts.

Judges and magistrates (lay and stipendary) have often remarkd that "this is not a Court of morals but a Court of law," but it is extraordinarily difficult to find any authority as to what exactly is meant thereby. Within the last week, the declaration was made, and dicta in another Court of equal authority, seemed quite inconsistent with the declaration. We know, of course, that a great part of the Decalogue and other moral rules are part of the common law and of the statute law; and that, on the other hand, infringement of certain of the Ten Commandments or of the unwritten rules of the Regiment for Officers and Gentlemen, does not afford any ground for a criminal prosecution or for the issue of writ or summons in a Civil Court. The Court is concerned with morals only in so far as they have been embodied (broadly speaking) in "Halsbury's Laws of England."

Yet morals will, almost inevitably, intrude. In that civil action for slander *Cox* v. *Rendall*, at Lincoln Assizes, the conduct and duty of one who was not a party to the action were appropriate matters of observation and comment; and we all know how effectively cross-examination as to credit may injure the value of an immoral but law-abiding witness. It is almost impossible to make morals irrelevant in a Court of Law.—*The Law Journal, February 23, 1935.*

When Chancellors Preached.

Although Lord Sankey was once described by an Archbishop as the founder and upholder of the Church in Wales, it has not been alleged that he ever preached a sermon. Yet his predecessors, the Lords Chancellors of olden days, preached many. They were, of course, as a rule persons more versed in religion than in law, drawn as a rule from the ranks of bishops, archbishops and cardinals. On the opening of Parliament, the King would sit in his chair in the Painted Chamber while the L.C.

would give out a text and deliver a sermon thereon, corresponding roughly to the King's Speech of modern times. Lord Campbell, in his "Lives," gives many examples, of which the speech of John Stafford, L.C., is one. When Parliament met after a long interval in 1445, "to sanction the marriage of Margaret of Anjou, daughter of the titular King of Sicily and Jerusalem," the Chancellor, we are informed, "put forth all his strength in painting the felicity of this happy union," selecting for his text, "*Justitia et Pax osculatæ sunt.*"

The first breakaway from the sermonic mode was by Cardinal Morton in the reign of Henry VII, when he first addressed Parliament as Lord Chancellor on November 3, 1488: "The custom of taking a text from the Holy Scripture was dropped by him, and he rather conformed to the modern fashion of a King's Speech, though with more of detail and of reasoning than would now be considered discreet on such an occasion."—*The Law Journal.*

The Man in the Street Appears in Court.

Perhaps the most noteworthy passage in the Mother's Rights case, *In the Matter of Jean Crichton, An Infant*, during the hearing in the King's Bench Division (Talbot and Hilbery, JJ.) of the appeal from the order of Atkinson, J. (described by Talbot, J., as a most able and experienced Judge), was the introduction into our legal book of weights and measures of the Man in The Street. We all know how difficulties are often, in cases tried with or without a jury, solved by reference to the notion called the Reasonable Man; but the Man in The Street is something new, if not strange. Said Talbot, J.: "It is natural that the child should be unwilling to leave Mrs. Hinckes and Mrs. Hinckes unwilling to part with her; but I think the Man in The Street would be surprised to hear that there was any doubt about the matter."

I am told that commercial lawyers are wondering whether a reference to the Man in the Docks would have made any difference to the judgment of MacKinnon, J., in *British Steamship Co., Ltd.* v. *Louis Dreyfus & Co.*—an appeal on an award in the form of a special case under s. 7 of the Arbitration Act, 1889. Having accepted the contentions of Mr. W. McNair on behalf of the shipowners on the main issue and decided that they were entitled to 13*l.* 10*s.* 5*d.*, the cost of putting bulk grain into bags for the purpose of putting the ship into "seaworthy trim" in London, he held that they were not entitled to the 12*l.* claimed for emptying the grain back into bulk for the necessary method of discharge at the second port of discharge at Avonmouth.—*The Law Journal.*

Restriction of Experts.

I am told that practitioners at the "patent" Bar are perturbed by the observations of Lord Tomlin as to the kind of questions one ought not to ask the expert witnesses. The limitation of the number of experts, as under the New Procedure is, they say, understandable and sometimes workable. But given an expert, with a formula or a specification for elucidation, they don't know what will happen if Counsel may not ask him what the thing conveys or means to him as a chemist or an engineer. To Counsel, they say, even to the old hands, it too often conveys, as it were, nothing at all. Furthermore, if the expert is to be deprived of his function as hitherto misapprehended, and is to confine himself to facts unaided by opinions and inferences, the additional burden thrown on Counsel and Judge will be sensibly—indeed in some cases fatally—increased.

As to the medical witnesses commonly called for purposes of proof in "running-down" cases, civil and criminal, the dicta, as reported, of Swift, J., in a criminal case at Bristol were as follows:—

"Everybody agrees that a man is killed, and yet we have a doctor to prove he is dead, a nurse to prove he is dead, and an ambulance driver to prove he is dead. The doctor quite rightly says: 'Before I say he is dead I want 8*l.* 14*s.*'; the nurse says: 'Before I say he is dead I want 5*l.* 11*s.* 6*d.*,'; and what in the world the ambulance man will want I haven't the faintest idea."

The accused had first pleaded "Not Guilty," and the prosecution must prove its case strictly. So it was explained. To which the Judge made answer: "It is an absurd waste of public money. These witnesses could have been bound over conditionally.—*The Law Journal*".

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[*The Editors do not hold themselves responsible for the views expressed by contributors.*]

ENTICING AWAY A SERVANT.

Once again when, on Tuesday and Wednesday of this week, the case of *Stretch* v. *Sim* was tried before Mr. Justice Talbot and a Common Jury, the High Court had to consider an unusual but ancient cause of action, namely, the alleged enticing and procuring of another man's servant. In *Stretch* v. *Sim*, the plaintiff alleged, *inter alia*, that on or prior to April 12, 1934, one Edith Saville was in his service as a housemaid at Applewood, Cookham Dean, Berkshire, and that on that day the defendant wrongfully enticed and procured the said Edith Saville to depart from the said service unlawfully and without the consent and against the will of the plaintiff. The defendant denied that Edith Saville was in the plaintiff's service on April 12; in the alternative he alleged that he did not know that Edith Saville was in the plaintiff's service. The Jury found that the plaintiff had established his case and awarded him 25*l*. damages.

This cause of action became common in the second half of the 14th century, probably as a result of the economic conditions existing in England after the Black Death. Fitzherbert, in his *Abridgement* under the title "Laborers," summarises a number of cases relating to the enticing away of servants. It seems clear that the lawyers of the 15th century distinguished between "taking" and "procuring" and that the action could be framed in three ways: first in trespass *vi et armis*; secondly, on the case; and thirdly, under the Statute of Labourers, 23 Edw. 3.

In the following centuries this cause of action appears with fair regularity in the reports. By the 16th century, the law relating to enticement was more exactly defined and more widely extended. In 1591, in *Adams and Bafealds Case* (1 Leon. 240) the Court considered whether the harbouring of a servant with knowledge of his breach of contract with another employer was actionable; in *Garret* v. *Taylor* (1620, Cro. Jac. 567) the master's remedy against persons who attempted to interfere with his servants was discussed; in *Bird* v. *Randall* (1762, 3 Burr. 1345) it was held that no action lies for enticing a a servant from his master when the servant has paid the stipulated penalties for leaving; in *Nichols* v. *Martyn* (1799, 2 Esp. 732 N. P.) Lord Kenyon, C.J., held that the inducing of a servant to leave his master's service at the expiration of the term for which the servant had hired himself was not actionable.

The economic and social developments of the 19th century introduced further refinements into the law relating to enticement. Complex economic ties invited an answer to the question "Who is a servant ?" Changing political ideas necessitated a judicial definition of "enticing and procuring" a servant to break his contract of employment. The development of Trade Unions brought forward the defence of justification. Finally, the abolition of the old forms of action made it necessary to discover what was the gist of this action.

In *Lumley* v. *Gye* (1853, 2 L.J. Q.B. 463; 2 E. & B. 216) Wightman, Erle and Crompton , JJ., held, Coleridge, J., dissenting, that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain, equally whether the employment has commenced or is only *in fieri*, provided the procurement be during the subsistence of the contract and produces damage; and that, to sustain such action, it is not necessary that the employer and the employed should stand in the strict relationship of master and servant. The dissenting judgment of Coleridge, J.

derogated from this decision. This learned judge held that the action for procuring a servant to depart from his employment is founded on the Statute of Labourers, and is strictly confined to cases where the employer and the employed stand in such a relationship as was within the contemplation of that Statute.

The decision in *Lumley* v. *Gye* was later applied in *Bowen* v. *Hall* (1881, 50 L. J. Q.B. 305; 6 Q.B.D.333) and in *De Francesco* v. *Barnum* (1890, 63 L.T. 514). In this latter case Fry, L.J. specifically repudiated the suggestion that the action was founded upon the Statute of Labourers. The House of Lords reviewed *Lumley* v. *Gye* in *Quinn* v. *Leathem* (70 L.J. P.C. 76; 1901 A.C. 495). Lord Macnaghten in his judgment in that case said that *Lumley* v. *Gye* was relevant and that, speaking for himself, he had no hesitation in saying that he considered that the decision was right, not on the ground of malicious intention but

> "On the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

Two questions remained unanswered: "What is inducement?" and "What is justification?" The authorities do not give a definite answer. In *South Wales Miner's Federation* v. *Glamorgan Coal Co.* (74 L.J. K.B. 525; 1905, A.C. 239) the difficulties surrounding both these questions were indicated, but the learned Lords in their judgments were careful to confine themselves to the facts of the case. The learned editor of the last edition of *Salmond on Torts* (8th Edn. at p. 391) distinguishes advice from inducement. "To induce a breach of contract means to create a reason for breaking it; to advise a breach of contract is to point out the reasons which already exist. The former is certainly actionable; the latter has never been held to be so, and is probably innocent."

The defence of justification is no better defined. In *Read* v. *Friendly Society of Stonemasons* (1902, 2 K.B. 88) it was decided that the justification which will be sufficient to exonerate a person from liability for his interference with the contractual rights of another must be an equal or superior right in himself, and it will not be sufficient for him to show that he acted *bona fide* or without malice or in the best interests of himself or others or on a wrong understanding of his own rights. The principles here indicated have been followed in *Smithies* v. *National Association of Operative Plasterers* (1909, 1 K.B. 310) and in *Pratt* v. *British Medical Association* (1919, 1 K.B. 244, 265). In *Brimelow* v. *Casson* (1924, 1 Ch. 302) Russell, J., held that the defendants, who were members of the Theatrical Joint Protection Committee, were justified in inducing theatre proprietors to break contracts, their object being to improve the status of the theatrical profession and to stop the evils which resulted from underpayment in it. This decision has received the approval of Sir Frederick Pollock (40 L.Q.R. 139), but the editor of the last edition of *Salmond on Torts*, at p. 393, suggests that it is difficult to reconcile this decision with authority.

The damages in enticing actions are at large. In *Gunter* v. *Astor* (1819, 4 Moore C.P. 12) a pianoforte maker brought an action against the defendant for enticing away his workmen. The workmen were employed on piecework, and each man was entitled to leave his employment on completing the task allotted to him. At the trial Dallas, L.C.J., was of the opinion that the plaintiff had fully made out his case and he left the jury to ascertain what damages the plaintiff had sustained by the misconduct of the defendants. The jury assessed the damages at 1,600*l*. On a motion for a new trial on the ground that the damages were excessive, Park, J., said, at p. 14:—

> "It has been said that the plaintiff has only sustained damage for the value of the half-day's labour of his workmen; but it is not for the Court to ascertain the precise damages he is entitled to, as that was most properly left by my Lord Chief Justice to the jury."

In *Exchange Telegraph Co.* v. *Gregory & Co.* (1896, 1 Q.B. 147), where the cause of action was procurement of breach of contract, Lord Esher, M.R. at p. 153, said:

> "In such a case the jury may give any damages. It is not necessary to give proof of specific damage. The damages are damages at large."—*The Law Journal, February 23, 1935.*

LARCENY: INTENT PERMANENTLY TO DEPRIVE OWNER.

A case (unreported) was recently heard at the London Sessions, which raised a point of some interest, as to what is a sufficient "intent permanently to deprive the owner" for the purpose of constituting the offence of larceny.

The evidence in that case was that two persons were charged with stealing timber from a wharf on the Thames. One of the prisoners who was in a boat was seen to remove pieces of timber from the wharf which were allowed to slip into the river. The wood was carried down stream, but was rescued lower down the stream by the other prisoner, who also was in a boat. The rescued timber was thereupon taken by the prisoners and placed on the wharf of the Receiver of Wrecks, apparently with the object of obtaining a reward for their recovery. The prisoners were acquitted in the above case, so that no actual decision fell to be given on what might otherwise have been an interesting point of law, as to whether the above facts, even if the prosecution could have succeeded in establishing them, would have constituted larceny.

Definition of Larceny.

According to the Larceny Act, 1916, a person steals who, without the consent of the owner fraudulently and without a claim of right made in good faith, takes and carries away, anything capable of being stolen with *intent* at the time of such taking, *permanently to deprive the owner thereof*, etc.

What will constitute a sufficient intent to deprive the owner permanently of the chattel taken away?

Authorities Reviewed—Trespass without Larceny.

In such cases it may be that only a trespass has been committed, but no larceny.

Thus in "Hale's Pleas of the Crown," Vol. 2, page 661, it is said: "The taking may amount only to a trespass and the circumstances in such cases must guide the judgment...So where a man takes another's harrow or plough and after ploughing his own land, returns it to the place whence he took it, or tells the owner of his using it. So taking a horse off the common, and after riding returning it there again, is but a trespass. But if the party had sold it, this would be declarative of the first taking being felonious; and in doubtful cases the safest rule is to incline to acquittal rather than conviction." Thus if a person to search another with the intent of robbing him, but finding nothing, were to pull off the bridle of his horse and throw it away, this apparently would not be larceny (*ib.*, at page 661).

In *Phillips* and *Strong's* case (*ib.*, at page 662), two persons entered a stable at night and rode off on a couple of horses which were in the stable at the time. The horses were thus ridden for a distance of thirty-two miles and were then left at an inn, the prisoners subsequently continuing their journey on foot. The jury found that the prisoners merely intended to ride the horses and afterwards leave them. It was held that this was not larceny. This case would appear to be on all fours with the "joy-riding" motor cases of recent times, which did not constitute a larceny, but were eventually made a statutory offence by section 28 of the Road Traffic Act, 1930.

In some cases there may be a larceny of goods which have been taken away, but no larceny of other goods taken at the same time as where a car or other conveyance is taken for the purpose of removing the stolen chattels. Thus in *R.* v. *Crump* (1825), 1 *C. and P.* 658, it was held that if a person stealing other property take a horse, not with intent to steal it, but only to get off more conveniently with the other property, such taking of the horse is not a felony.

Larceny notwithstanding intent to Return Chattel to Owner.

Reference again may be made to *Reg* v. *Richards* (1899), 1 *C. and P.* 532, which appears to indicate that there may be larceny of a chattel, even though it is intended that it should be returned to its owner. In this case A was supplied by his employers with a quantity of pig iron to be put into a furnace and melted, A being remunerated according to the weight of the metal which ran out of the furnace and became puddle bars. A placed into the furnace with the pig iron an iron axle, belonging to his employers, which was not pig iron, the effect of which would be to increase the weight of the metal which would run out of the furnace, and thereby incidentally to increase his remuneration. It was held that if the prisoner put the axle into the furnace with a felonious *intent* to convert it to a purpose for his own profit that was larceny.

Larceny notwithstanding absence of pecuniary advantage to taker.

At the same time, however, it might be pointed out, that a larceny might be constituted, even though no pecuniary benefit is to attach therefrom to the person taking the chattel.

Thus in *R.* v. *Morfit, R. and R. C. C.* 307, it was held to be felony for a servant clandestinely to take his master's corn and to give it to his master's horse. So again in *R.* v. *Cabbage, K. and R. C. C.* 292, it was held to be larceny for a person to take another's horse and destroy it, so that the horse might not contribute to furnish evidence against another person who had stolen it.

Reg v. *Richards* (*supra*) may usefully be contrasted with *Reg* v. *Holloway* (1848), 2 *C. and K.* 942. In the latter case the servant of a tanner took skins from his employer's warehouse to the foreman of the tannery pretending that he had done work on them for which he was to be paid, his intention being to return the skins after he had been paid. It was held, however, that this did not constitute larceny, and that the case was indistinguishable from *R.* v. *Webb and Moyle* (1835) 1 *M. C. C.* 431. In the latter case it was held not to be larceny for miners paid according to the quantity of ore brought to the surface, to remove ore from the heaps of other miners and to add them to their own with a view to increase their wages, since the ore still remained in their employers' possession. On the other hand it would be larceny to take fat belonging to one's employer, with the intent of inducing him to purchase it, and offering it to him for sale, *Reg* v. *Hall* (1849), 2 *C. and K.* 947.

It may be of advantage to quote from Lord Denman's judgment in *Reg* v. *Holloway* (*supra*). "In the case . . . of a horse taken away for a year and then to be returned, it would seem to be rather singular if the law did not make that larceny. But if we were to hold that wrongfully borrowing a thing for a time, with an intention to return it, would constitute a larceny, many very venial offences would be larcenies. In late cases there has been an understanding that, to constitute larceny, it is essential that there should be an intent to deprive the owner *permanently* of his property. It is certainly an odd excuse for a person who is challenged with his master's property that he meant to return it, after having cheated his master . . . in the first place, and his fellow workmen in the second; still a man can hardly do this without committing some offence, although it be not larceny."

In conclusion, reference may be made to *Reg* v. *Poole* (1857), *Dears and B.* 345, in which case *Reg* v. *Holloway* (*supra*) was approved. In that case the prisoner was employed as a glove finisher, and was paid according to the number of gloves finished. The prisoner took a quantity of finished gloves out of a store room on the same premises, and without removing them from the premises laid them on the table, on which it was the practice to lay gloves which were finished so as to obtain payment for the work done, with the intent of obtaining payment for work which in fact had not been done. It was held that the prisoner could not be convicted of larceny.

The test suggested by *Erle*, J., in this case, in order to constitute larceny, was "whether the person who takes the property assumes to exercise dominion over it as owner" as when he offers to sell the goods, even though it may be to the real owner of the goods (as in *Reg* v. *Hall* (*supra*)).

Conclusion.

If one were to apply the principles of these cases to the evidence in the case which was recently tried at the London Sessions, and referred to at the outset of this article, it would certainly be arguable that there was no sufficient intent to constitute larceny, since the prisoners evinced an intention to return the goods to the owner thereof, through the medium of the Receiver of Wrecks, and their sole apparent object was merely to obtain a reward. This, of course, might have constituted an attempt to obtain money by false pretences, if some further steps had been taken by the accused in the furtherance of their plan, *e. g.*, by representing that they had salved the timber and were entitled to a reward, but the links in the chain of their acts did not as it were stretch to a sufficient length to justify the preferring of any such charge.

This question as to whether there is the necessary intent is one that often raises nice problems for solution, but owing to the subtlety of the distinctions made by the law itself, it is one that is often likely to be overlooked.—*Justice of the Peace.*

Extracts from Contemporaries.

The Indian Courts.

We referred recently ..... to the Government of India Bill, and shortly noticed Part IX, which deals with the Judicature. Chap. I establishes and provides for the Federal Court, and Chap. II the High Courts of British India. Judges of the Federal Court are to be appointed by the Crown, and a person will not be qualified for appointment unless he (*a*) has been for at least five years a judge of a High Court in British India or in a Federated State; or (*b*) is a barrister of England or Northern Ireland, or a member of the Faculty of Advocates in Scotland, of at least ten years' standing; or (*c*) has been for at least ten years a pleader of a High Court in British India or in a Federated State. The Court will consist of a Chief Justice of India and such number of other judges as the Crown shall deem necessary, not exceeding six, unless the number is increased on an address presented by the Federal Legislature. The judges will be appointed by the Crown, and this, though not expressly stated, no doubt includes the Chief Justice. The Federal Court will have original jurisdiction in disputes between the Federation or any of the Provinces or of the Federated States, if and so far as the dispute involves a matter of legal right; and an appeal will lie to the Federal Court from a High Court in British India if the High Court certifies that it involves a substantial question of law as to the application or interpretation of this Act, or any Order in Council made thereunder. The Federal Legislature may also provide for appeals from a High Court in British India to the Federal Court in civil cases, and the Federal Legislature may abolish direct appeals from High Courts to the Privy Council. Appeals to the Federal Court from a High Court in a Federated State are apparently to be restricted to questions of law arising on the application or interpretation of the Act or any Order in Council made thereunder.—*The Law Journal.*

A Protest from Calcutta.

The High Courts in British India will be the High Courts in Calcutta, Madras, Bombay, and the other provinces named in Clause 209. Every High Court will consist of a Chief Justice and such other judges as the Crown may from time to time deem it necessary to appoint. Every judge of a High Court will be appointed by the Crown, and will hold office until he attains sixty, but provision is made for resignation or removal. The qualifications of a judge are, as to English barristers and Scottish advocates and Indian pleaders, similar to those for judges of the Federal Court; but there is also added the qualification of being "a member of the Indian Civil Service of at least ten years' standing who has for at least three years served as, or exercised the power of, a district judge." We have received a copy of a Representation which has been made by the Calcutta Bar, the Bar Association, and the Incorporated Law Society with respect to the appointment of Civil Service Judges. The Representation is based on the proposals of the Joint Parliamentary Committee as to the High Court in India, but these proposals are now, we believe, incorporated in the Bill. The Bar and these societies are not opposed altogether to the eligibility of Civil Service Judges for a High Court, but they are opposed, for reasons which they state in detail, to Civil Service Judges being eligible for appointment as Chief Justices; and they are of opinion that lawyer judges should not be less than two-thirds of the whole number. The Representation appears to be eminently reasonable. As regards the Chief Justiceship, it is pointed out, among other things, that the appointment of a Civil Service Judge "will impair public confidence in the High Court, both on account of his lack of legal training and of his service associations with the Executive"; and the plea for at least two-thirds of the judges to be lawyer judges is properly based on the technical legal requirements for the Bench. The Representation will, we hope, be considered when this part of the Bill is taken in Committee. It also urges the entire separation of the Subordinate Civil Judiciary from Executive control.—*The Law Journal.*

Income Tax and "Actual Cost" of works.

The salient facts in the case of *Birmingham Corporation* v. *Barnes* (*Inspector of Taxes*)—an interesting revenue case disposed of by the House of Lords on Friday of last week—were very shortly as follows: Some years ago the Corporation laid a new

tramway track between Erdington and the works of the Dunlop Rubber Company. The company agreed to pay £10,000 and further dispatch moneys under certain conditions, and the Corporation treated the moneys so paid as receipts of the tramway undertaking, their expenditure on the permanent-way showing the actual sums expended less the sums paid to them by the Dunlop Company. A little later the Corporation started to reconstruct certain other tracks on which they expended upwards of a quarter of a million pounds, and in respect of this reconstruction they received from the Unemployment Grants Committee grants which amounted to more than £46,000. The question which arose was as to the amount which the Corporation was entitled to receive as an allowance for wear and tear under rule 6 of the rules of Cases I. and II. of Sched. D. Sub-rule (1) of that rule provides for the deduction from profits of a just and reasonable allowance, and sub-rule (6) says in effect that no deduction for wear and tear shall be allowed which, if added to deductions previously allowed to the person by whom the trade is carried on, will make the aggregate allowances exceed the "*actual cost to that person*" of the machinery and plant in question, including capital expenditure thereon by way of renewal, improvement, or reinstatement. The life of the tramways was computed at twelve years, and in the tenth year of their existence the question as to the limit of the aggregate fell to be determined. Were the dispatch moneys and the grants to be deemed a part of the cost to the Corporation of the works in question, or were they to be deducted from such costs as constituting expenditure borne by others? As Lord Atkin said in giving judgment, the case had evoked an equal division of judicial opinion, Mr. Justice Finlay having decided in favour of the Corporation and the Court of Appeal (Lords Justices Slesser and Romer; the Master of the Rolls dissenting) having taken the alternative view.—*The Law Times, March 16, 1935.*

The Judgment.

At the start of his judgment in the above case Lord Atkin said that, in view of the division of opinion above mentioned, no one would be inclined to give an opinion as one not admitting of doubt. In his opinion "the actual cost to the person by whom the trade is carried on" had no relation to the source from which that person had received the money. If the word "actual" had any effect it merely emphasised the word cost, and meant that such cost must be accurately ascertained and not merely estimated. But it was said that the words "to the person" in the phrase "actual cost to the person" indicated that the section was intending to confine the relief to an aggregate sum which the person carrying on the trade had defrayed out of his own resources, the burden of which had to be borne by him. He (his Lordship) confessed he did not think that that was the natural meaning of the words. What a man paid for the construction or purchase of works seemed to him (his Lordship) to be the cost to him whether or not someone else had given him the money before or had promised him to pay it after the event. The actual cost to the person was the same thing as the amount expended by the person, and the Corporation's appeal must be allowed. The other noble and learned lords concurred. Now although the case was of importance owing to the amounts at stake, its history in the Courts does emphasise the waste of judicial time due to want of definition in the drafting of statutes and rules. There were so few effective arguments either way, and the decision might so easily have been different. The purpose of rule 6 was to relieve traders from taxation when they had expended their resources in a certain way. A man says to his friend, "If you will insure your life, I will agree with the insurance company to be solely liable for the premiums." Is the insured entitled to relief in respect of the premiums? He would be if the gift were one towards meeting the friend's yearly expenses, made conditionally on an insurance being effected. But in the case in question there was no choice as to how the contributions were to be expended, and the amounts contributed to the cost were determined by the amount of the cost itself. The decision might easily have gone the other way. —*The Law Times.*

Mr. Justice Singleton.

A correspondent writes: The elevation to the Bench of Mr. Justice Singleton reminds me of a slender and delightful book in blue—"Conduct at the Bar and Some Problems of Advocacy, Being Two Lectures by J. E. Singleton, K.C."—published only two years ago. It was indeed

a high compliment to be invited by the Council of Legal Education to expound before those proceeding to the Bar the method in which their professional duties ought to be discharged. The exposition combines in a marked degree lucidity with felicity of expression and practical help with loftiness of purpose. Mr. A. M. Langdon, K.C. (Director of Legal Education) remarks in the Introduction:

> "But of correct behaviour, of the true professional spirit, of the proper understanding and wise use of the tools of the craft, every aspirant at the Bar should make himself the master."

May I respectfully say that of these qualities the new Judge is an exemplar of his time.—*The Law Journal.*

* * *

The Duty of the Advocate.

It is difficult to select from this little book of forty pages, for it contains so many wise hints valuable to members of the Bar—the ripe experience of the acknowledged leaders of modern advocacy, including the learned author himself. But perhaps those words cited from "The Ethics of Advocacy," by Lord Macmillan, at the beginning of the second lecture, express in the concinnity of a sentence, and in words difficult to improve, the answer to the question, *What is the duty of the Advocate?*

> "The code of honour of the Bar is at once its most cherished possession and the most valued safeguard of the public. In the discharge of his office the advocate has a duty to his client, a duty to his opponent, a duty to the Court, a duty to the State and a duty to himself. To maintain a perfect poise amidst these various and sometimes conflicting claims is no easy feat."

These lectures are the answer to this question, "writ large." The Lord Chancellor recently said that "the Law" must be as a rock upon which a man may set his feet and be firm. The Bench and the Bar are the supreme body in the State whose professional and public purpose is the endless "quest of justice." Mr. Justice Singleton declared with truth:

> "The greatest safeguard against revolution, riot and the like is that the public should have confidence in judicial tribunals and in their decisions."—*The Law Journal.*

Legal Research.

If the call for legal research fails to touch a responsive chord in the minds of many of the profession the blame cannot certainly be attributed to Lord Macmillan, whose advocacy of the subject is untiring and ever eloquent. Again, last week, at the annual dinner of the University of London Law Society, he adverted to the subject and expressed the hope that it would be possible to inaugurate an institute of legal research which, besides helping to make better known the early development of legal ideas and the growth of the system such as we have it to-day, would reveal the extraordinary fascination which the law can exercise on the mind of the student. Lord Macmillan declared that it was preposterous to think of the law as dry as dust. Long ago Lord Bramwell, a practical man if ever there was one, said: "The law is so dry? I deny it. Of the four volumes of Blackstone's Commentaries three, to my mind, are most agreeable reading." Research is in the air at the moment. In Scotland the Stair Society, intended to do for that country what the Selden Society has done, and is doing, for England, has been successfully launched and has issued a programme of its intended publications which should not only be interesting in themselves but likewise useful in throwing light on present-day problems. Not all members of the solicitor branch of the profession, we venture to hope, resemble him in whose office Sir Harold Morris spent some part of his legal youth, and who said to him on leaving, "I hope you will do well at the Bar. I can't say that I have any particular advice to give you, but if you want to please solicitors always bear in mind that though the love of the law is a great thing, costs are even more important." No doubt costs are important, being sometimes facetiously termed the real merits of litigation, but there is a grandeur about the law itself to which legal research will more fully testify; —*The Solicitors' Journal, March 16, 1935.*

An Unusual Appeal.

The Court of Criminal Appeal in *R. v. Vent* (the *Times*, 5th March) dealt with a rather unusual type of application for leave to appeal. The defendant had pleaded guilty at his trial for murder, and he now sought leave to appeal against his conviction. He could not, of course, appeal against sentence, since that was fixed by law. He could, however, appeal against conviction on any ground which involves a question of law alone; and, with leave, on a ground which involves a question of mixed law and fact on any other ground deemed by the court to be sufficient.

There may be an appeal against conviction even after a plea of guilty. Thus in *R.* v. *Ingleson* (1914), 11 *Cr. App. Rep.* 21, such a plea was accepted in circumstances which ought to have led to its being refused, and the Court of Criminal Appeal sent the case back for a rehearing.

In *R.* v. *Vent*, the learned judge at the trial asked counsel to see the prisoner and explain to him the effect of his plea. Counsel came to the conclusion that there was some question as to the state of mind of the prisoner and so informed the judge. A doctor gave his opinion that the prisoner was fit to plead, and the prisoner then again pleaded guilty and refused legal aid. Counsel invited the Court of Criminal Appeal to order a medical examination, and also to consider whether a jury should not have been empanelled to try the question whether the prisoner was fit to plead.

The court refused leave to appeal and declined to investigate the state of the prisoner's mind, which was now a matter for the proper authorities.

The case does, however, show once more that the court will entertain an application for leave to appeal against conviction even after a plea of guilty. But, as was said by the Lord Chief Justice in *R.* v. *Lucas* (1908), 1 *Cr. App. Rep.* 60, "It will require a very strong case and exceptional circumstances to induce the court to give leave to re-open a case in which the prisoner has pleaded guilty:—*Justice of the Peace.*

Constructive Murder.

When medical men commit a felonious operation and death follows, and then a charge of murder, the exact wording of the charge to the jury is a matter of importance and of some nicety. Mr. Justice Singleton had such a charge before him at Liverpool recently, and, according to the lay report, said, in his charge, that anyone who performed an illegal operation, and in so doing used violence causing death, was guilty of murder; but that if the jury did not think that violence was used and believed that the operation had been carried out with skill, they should find manslaughter. This they did. With all due respect, we submit that the use of force and the use of skill are not the vital tests in this matter. The proper test, in our view, will be found in Mr. Justice Avory's charge to the jury in *Rex* v. *Lumley* (22 Cox, at p. 635). The question is whether the prisoner, when he did the act, contemplated, or must as a reasonable man have contemplated, that either death or grievous bodily harm would ensue to his patient from the operation. If the answer on either point be yes, then a verdict of guilty of murder is correct. It seems to us to result from this decision that the jury must be told to consider the state of the prisoner's mind and of a reasonable man's mind when in his position. Violence of action and the skill used may be relevant as showing the prisoner's state of mind, but cannot themselves determine this grave issue:—*The Law Journal.*

Wit & Humour.

Against the Law.—He—"When I marry I shall lead a handsome girl and a wonderful cook to the altar."

She—"Heavens! That would be bigamy!"—*Case and Comment.*

Disguise.—"What's the idea of that cross-eyed man for a store detective?"

"Well, look at him. Can you tell who he is watching?"—*Case and Comment.*

True of Most Fish Stories.—Lawyer Fisherman—"I tell you it was that long. I never saw such a fish!"

Friend—"I believe you."

—*Case and Comment.*

They Were Beauties, Too.—Magistrate—"The policeman says that you and your wife had some words."

Accused—"I had some, sir, but I didn't get a chance to use them."

—*Case and Comment*

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[*The Editors do not hold themselves responsible for the views expressed by contributors.*]

HANDWRITING PROBLEMS*

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(*Specially written for* "**Indian Cases and Criminal Law Journal**")

FORGERIES.

1. Now, that we have got some idea how handwriting is produced, and the causes that produce it, we may usefully turn our attention to the subject of forgeries, more especially the forgery of signatures, as they are, by far, the most common. Before we do so, however, it is necessary to consider some psychological aspects of the problem.

2. When a normal writer sits down to make his signature, he does so in the manner that he has acquired by constant repetition and practice. It is to him a semi-automatic act, requiring no conscious thought or volition. He merely reproduces in a semi-automatic manner the brain-picture that is recorded on his sub-conscious mind. He has not to think of the form or the design he has to put on paper. It comes as natural and easy to him, as the act of walking, or the faculty of speech. In producing a signature, the genuine writer does so with all those personal traits, and all those personal idiosyncrasies, which he has learnt and stored up in the brain. As I have already explained, a signature is made as the result of a very complex series of harmonious mental and muscular actions, which are brought about by repeated practice. There are exceptionally few writers who, once they have acquired any degree of fluency in writing, can suddenly and at will write a completely different design of signature. Our "Brownies" must be educated before such an act can be accomplished, and, of course that takes time, and patience.

3. The forger is in quite a different position. Usually he has no qualifications at all for the task he undertakes. He is also an opportunist, in that he must perform his task at a particular, and perhaps, limited time, or forego the opportunity. The forging of a signature is an entirely new and unfamiliar act, and as a consequence the mental and muscular co-ordination to produce a perfect imitation is almost wholly lacking. The act is not a semi-automatic, or unconscious, act as with the genuine writer, but is purely a self-conscious proceeding, which requires considerable concentration and fixity of purpose. The design, or brain picture, is not contained in the mind, but has to be evolved suddenly from the model at hand. The forger has also to get rid of his own personal habits, so far as he can, and to assume those of the person whose signature he is imitating. He cannot write with the speed of the genuine writer, even though he may make a fairly accurate reproduction of the forms of the letters.

4. In addition to being an opportunist, the forger is frequently hampered by bein g obliged to reproduce his handiwork on a particular piece of paper, and he must also be familiar with the personal, and other affairs of the person whose signature

* The previous Articles on the subject appeared in 154 Ind. Cas. pages 1, 9, 33 41, 49—[*Ed.*]

he is imitating. In many instances, also, he must be aware of the routine, or the procedure, followed by his potential victim. Further he has to have accurate knowledge of the victim's whereabouts on a given date, and very often also the whereabouts of the victim's friends and acquaintances.

5 Last, but not by any means least, is the fact that the act of forgery is a criminal act, the consequences of which may be serious if the malefactor is caught. This fact is, perhaps, more important than any other, for it is well known that there are many skilful penmen who can imitate a signature tolerably well when the imitation is done as an exhibition of skill, but who would fail utterly if they were required to make a spurious signature that might land them in jail. This fear of punishment, therefore, urges the forger to take every possible precaution to ensure that his handiwork shall pass muster, and in taking such precautions he has to concentrate his attention in such a way that his work is laboured, awkward, and in many instances, crude. In this regard I should like to draw attention to the following extract from Osborn's "Questioned Documents", 2nd Edn.:—

"Realization of the fact that forgery is a criminal act, the fear of discovery, and the painful anxiety to do the work well, all combine to bring about a mental and muscular condition in the writer that make it very difficult, if not impossible, to do the work in a skilful manner. An actual criminal forgery undoubtedly is a poorer piece of work than could be executed by the same writer merely as an exhibition of skill".

As a consequence most forgeries betray themselves by their slowdrawn, bedraggled appearance, and, indeed, it would be more correct to say that many of them are *drawings*, and not writings.

6. In view of what I have already stated, it is not difficult to perceive that it is an almost superhuman task to reproduce successfully a particular signature, so that it will escape detection when examined by a competent examiner. In most instances, the forger concentrates only on the general form of the signature, and if he considers that he has reproduced that fairly well, he is satisfied. In concentrating on the form of the signature, he altogether neglects (if he ever thought of them) of such things as the speed of the writing, the many little inconspicuous features of the signature he is imitating; the position of the pen in relation to the line of writing; the proportion of one letter to another; the places where shading exists in the original, and the condition or state of the stroke edges. Sometimes also he selects a pen altogether different from that which the genuine writer is in the habit of using. To put it briefly, there are so many things to think about, and to do, at the same moment, that it is practically impossible to think, or to do, all of them. Try the task, and you will find this to be true.

7. I wish it to be clearly understood I am not for a moment suggesting that every forged signature must fail in all the respects I have indicated. Some are, in fact, so good that their detection is not an easy matter, and can only be accomplished by painstaking care, combined with the knowledge and experience of what to look for. Detection is also sometimes rendered difficult if the forged signature is a short one, consisting of a few strokes, and if it is written with a broad pen and viscous ink.

8. I am, of course, aware of the alleged exploits of the celebrated "Jim, the Penman", and what a marvellous forger he was supposed to be, but so far as I can determine from what I have read, his *temporary* success (and I underline (italicise) the word "temporary") was entirely due, not to his ability with the pen, but to a series of fortuitous circumstances that materially assisted him in his nefarious practices. If he were really so clever as he is alleged to be, how is that he was caught? Clever though he may have been, his downfall was brought about by one of those gross acts of stupidity which so many forgers commit.

9. I am also well aware that there are said to be some clever professional forgers in India. I have seen and examined many examples of their alleged handiwork, which I had not the slightest difficulty in detecting. Perhaps this was due to that carelessness which seems to be the inevitable lot of those who forge more than once. It must also be remembered that the professional forger (if he exists) is much more immune from detection and punishment than the non-professional forger, and, consequently, it is theoretically possible that his product should be much the better of the two. Even so, however, I have not, as I have already stated, seen a single example over many years of practice, of a forgery that was said to have been done by a professional forger that I had any difficulty in detecting.

10. So far as I remember, the best forgery that I have ever seen was done by an almost uneducated youth, who practised for a long period before committing the actual forgery, the English signature of a person who could write his name only. When a search was made, hundreds of sheets of paper were found in his desk on which he had been practising the signature.

11. Forgeries of signatures are chiefly of two kinds, namely by tracing, or by copying. Let us deal with the traced forgery first. A genuine signature is obtained and used as the model. There are various ways by which the tracing can be done. One way is to put the model up against a window pane, to place above it the paper on which the forgery is to appear, and then to trace on it the outline of the model below. This is a crude and unsatisfactory method, first, because there is no support for the hand, and secondly, if a pen is used it has to be held in such a way that the ink will not flow. Instead of using a pen and ink, a pencil may be used to trace the outline, which is afterwards inked over, but such a procedure is fatal. If done in this way the strokes in the forgery are thick and muddy, and it is always possible to see parts of the pencil outline projecting beyond the ink strokes. It is not by any means a simple operation to ink over a pencil outliue so that it is completety covered with ink. Even assuming that this can be done, it is easily possible to discover the pencil outline by bleaching out some of the ink, that is, if an ironbase ink has been used. If a carbon ink, such as the common "country" ink, is used, the ink cannot be bleached, as carbon is impervious to any known chemical. A variation of this method is to use a stylus to trace the outline, and then to ink it over, but if a stylus is used, there will be nearly always a raised outline on the back of the paper. I recently had an enquiry of this kind, which it was easy to prove by photographing the back of the paper with a reversed plate.

12. Another method that is sometimes adopted is to place the paper on which the forgery is to appear on a table; to place on top of it a carbon paper; above the carbon paper is placed the model, and then the outline of the model is traced on to the paper below. The result is a thin outline of the model, which must, of course, be inked over. As with a pencil outline, the carbon outline is nearly always visible here and there, or it can be discovered by bleaching out the ink. I have in my hands at the moment of writing, an extremely interesting example of this method. The outline was made by means of a carbon paper but instead of ink being used, the outline was covered with an indelible pencil. Viewed under low power, the difference between the carbon particles of the outline, and of the indelible pencil, was easy to see. The reason why an indelible pencil was used was because the genuine writer signed all his business letters with such a pencil, for the purpose of press copying. The forged documents had also been press-copied.

13. There is yet another method that is sometimes employed. This consists of placing the model on a glass-topped table, under which there is a strong light, and then tracing the outline on to the paper on which the forgery is to appear. This is a most dangerous method, because the paper being quite flat, and the outline easily visible, the ink flows readily, and it is possible in these conditions to *write*, instead of being obliged to *draw*. With an apparatus of this kind, which is quite easy to make, it is possible to simulate the pressure and shading of the model extraordinarily well, and there is an absence of that drawn, tremulous, appearance which characterises so many traced forgeries. I have in my hands at the moment a series of eleven forged documents which were prepared in this way. At the first glance it was difficult to imagine that they could be forged, so well were they done, but like most of his tribe, the forger had committed almost unbelievable stupidities. As I think it would not be in the interests of public policy to disclose the method by which it is possible to demonstrate the fact of a tracing over a glass-topped table, I regret that I cannot do so.

14. A curious thing about many traced forgeries is that the actual model is often produced in Court as "evidence"! Presumably the idea is that as it is *just like* the admitted signature, it must, therefore, be genuine! No greater folly could be committed for in such circumstances, the degree of coincidence between the genuine article and the forged product is the most absolute form of proof that can be

had. No further proof is needed. Let me explain this.

15. The human hand (and the brain) is not capable of reproducing writing, or signatures, like a machine. In all genuine writing there is always some natural variation, which is always within well defined limits. No person can in the normal manner of writing, make his signature twice exactly alike. Try it and see. Therefore, when two signatures coincide, in length, in the position and location of the several strokes, it is absolutely certain that one of them is a forgery by tracing. This has been proved over and over again.

16. It is necessary to be cautious about this doctrine of superimposition. The doctrine does *not* apply in every instance. There are a few writers of short signatures who often sign in such a way that one signature is almost an exact replica of another. So close is the degree of superimposition that to one who does not know one might be considered a tracing from another. I have had several instances of this kind to deal with. In one instance several short signatures known to be genuine coincided in a most extraordinary way with one another. More or less exact coincidence in genuine signatures is likely to appear in short names, such as "Ram Das" in Urdu; "P. Roy" in Bengali, or "M. Day" in English. It is unlikely in the extreme that coincidence of any kind will appear in lengthy signatures, such as Madrasis write. Where, however, coincidence does appear in short signatures, there is usually a complete absence of that drawing effect which is so often found in traced forgeries.

17. It is well to bear in mind that absolutely exact and microscopic coincidence will not be found even in the most carefully executed tracing. This is because of the great difficulty of going exactly over an outline, as it requires a high degree of skill to follow exactly the path of any but the simplest of strokes. There are bound to be very slight divergences here and there, but such divergencies do not alter the fact that a tracing has been made, but rather do they strengthen it, for the reason just explained.

18. There is another circumstance that must be mentioned in regard to traced forgeries. Sometimes, either by accident or by design, one of the papers is moved in the act of tracing, when, of course, the forgery will not fit the model *as a whole*. It will, however, usually be found in such circumstances that if one part of the tracing fits the model, the other will not, but if the paper is moved it will be found that the second part will then fit. In some quarters the danger of exact coincidence is well known, and accordingly, one of the papers is designedly moved by the operator to avoid leaving dangerous evidence of his handiwork. It is seldom, however, that the paper is moved more than once, so that the two parts of the forgery will fit the model exactly if they are moved into appropriate positions.

19. The doctrine of superimposition has been carried to ridiculous lengths by at least one of the many so-called "experts". In one trial one of them had the impudence to say that a signature was a traced forgery because if the alleged forgery and the alleged model were placed in position *for each separate letter*, the two signatures would coincide exactly. There were twelve letters in the signature, which meant that the papers were supposed to have been moved twelve times.

20. It often occurs, especially in connection with Wills, that the alleged executant's signature is traced in three or more places, and in such an event it is easily possible to prove definitely the fact of the tracing, even though the model is not forthcoming.

21. There are two satisfactory methods by which a forgery can be proved to be a tracing if the model is present, or if two or more were traced from the same model. One is to photograph all the signatures *exactly* to the same scale, and to make positives, or transparencies, which, when superimposed, one upon the other, will readily show the exact degree of coincidence. The other is to photograph all the signatures under ruled squares drawn on glass. Either, or both the methods, may be utilised, when they will show with startling clearness the fact of tracing. The ruled glass method, however, needs a good deal of patience and technical skill, and for that reason probably it is never used by any of the numerous handwriting "Professors". At least it has never been used by any of them so far as my knowledge goes.

22. The lawyer, or the Judge, who wishes to satisfy himself as to whether a signature is traced from another, can easily do so without the aid of photography. Nowadays, it is possible to obtain in

[redacted]dia, a trans- "cellophane" for wrapping d, and similar placed over a e made on it, must be used. be placed over en the degree of nce evident, I use ly in chamber work, ation in Court, If cele" is not available, transparent drawing first be rubbed over that ordinary writing fluid "take".

23. Of course, it is not always that the model is produced, and then the investigator has to confine himself to an examination of the physical facts, as disclosed in the writing itself. The following summarised hints will, I hope, be useful to those dealing with a traced forgery :—

(1). Does the signature appear unnatural and drawn in appearance? A traced forgery is usually a drawing, and not a writing, and the drawing action results in a dull, lifeless, inert product

(2). Look at the width of the strokes As a rule, the strokes in a traced forgery are of uniform width and there is no natural shading. The lack of shading may be made up by retouching, or penpainting, as it is sometimes called.

(3). See if there are sudden, abnormal, or numerous changes of direction in the strokes. Owing to the concentration requisite to adhere to the outline or model, which is not always clearly visible to the eye, the forger deviates slightly here and there from the intended path.

(4). Look for traces of pencil, carbon, or ink outline, and also for indentations made by a stylus Examine the back of the paper for a raised outline.

(5). See if there are any unnecessary pen-lifts, or lifts in unlikely places. An unnatural pen-lift often occurs in the middle of a stroke or curve which the genuine writer would make in one single sweep of the pen. Note if the pen was put down again exactly at the spot where it was lifted. Court the number of such pen lifts.

(6). Are the beginnings and ends of free strokes blunt or tapering. The tracing movement is usually co-terminous with the movement of the pen, resulting in blunt initial and final parts of strokes.

(7). Does the signature follow a model of the period in which it purports to have been made? Sometimes a signature of a wrong period is chosen as the model.

(8). Examine for superimposition, in the manner already explained. Great caution must be exercised if the signature is a short one of a few letters.

(9). Thin papers are always suspicious because a tracing is more easily done on them than on a paper which is opaque Of course a tracing may appear on any kind of paper, but the use of thin paper is suspicious because of the comparative ease by which a tracing can be made on it owing to its transparency.

24. It has more than once been offered as an explanation for the presence of a pencil outline in a signature, that the pencil signature was first written, but when this was objected to, and a pen and ink signature called for, the alleged writer then covered up the pencil outline in ink. Such an "explanation" may seem to be very plausible, but it is highly fallacious. In such an altogether unusual circumstance, a genuine writer would not carefully and meticulously go over the pencil outline in such a way as to hide as best he could all traces of the pencil outline, but it is just what the forger does. The genuine writer would probably do one of two things. Either he would score out the pencil outline and make his signature afresh in ink, or if he did attempt to go over the pencil outline, it would be done in such a careless manner that most, if not all, of the pencil outline would be easily visible. I have on hand at the moment an investigation in which the genuine writer almost wholly neglected a pencil outline or draft, he had first written in a lengthy document.

25. Several instances have occurred in which a whole document has been traced from another, the most common form of this kind of fraud concerning receipts, promissory notes, or short endorsements. In almost all such instances the wording is the same, except for the rate, the amount, and the date, which are filled in by the manipulator to suit his immediate purpose, and quite frequently he commits the colossal stupidity of producing the actual model he used.

IMPERIAL ACTS, 19

ACT NO. IV OF 1935.

THE SALT ADDITIONAL IMPORT DUTY (EXTENDING) ACT, 1935.

Received the assent of the Governor-General on the 21st April 1935, and is published in the Gazette of India, Part 4, dated April 27, 1935.

An Act further to extend the operation of the Salt (Additional Import Duty) Act, 1931.

Whereas it is expedient further to extend the operation of the Salt (Additional Import Duty) Act, 1931; It is hereby enacted as follows:—

1. *Short title.*

This Act may be called the Salt Additional Import Duty (Extending) Act, 1935.

2. *Amendment of section 1, Act XIV of 1931.*

In sub-section (*3*) of section 1 of the Salt (Additional Import Duty) Act, 1931, for the figures "1935" the figures "1936" shall be substituted.

ACT NO. V OF 1935.

THE INDIAN MINES (AMENDMENT) ACT 1935.

Received the assent of the Governor-General on the 21st April, 1935, and is published in the Gazette of India, Part 4, dated April 27, 1935.

An Act further to amend the Indian Mines Act, 1923, for certain purposes.

Whereas it is expedient further to amend the Indian Mines Act, 1923, for the purposes hereinafter appearing; It is hereby enacted as follows:—

1. *Short title and commencement.*

(*1*) This Act may be called the Indian Mines (Amendment) Act, 1935.

(*2*) It shall come into force on the 1st day of October, 1935.

2. *Amendment of section 3, Act IV of 1923.*

In section 3 of the Indian Mines Act, 1923 (hereinafter referred to as the said Act),—

(*a*) for clause (*c*) the following clause shall be substituted, namely:—

"(*c*) 'child' means a person who has not completed his fifteenth year;"

(*b*) clause (*cc*) shall be re-lettered as clause (*ccc*) and before that clause as so re-lettered the following clause shall be inserted, namely:—

"(*cc*) 'day' means a period of twenty-four hours beginning at midnight;" and

(*c*) after clause (*j*) the following clause shall be inserted, namely:—

"(*jj*) where work of the same kind is carried out by two or more sets of workers working during different periods of the day, each of such sets is called a 'relay';".

3. *Amendme*
1923.

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(*2*) To sub-sectio
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added, namely:—

"(*e*) two persons t
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in accordance with
provisions:—

(*i*) if there are one or more registered trade unions having in the aggregate as members not less than one-quarter of the miners, the said persons shall be nominated by such trade union or trade unions in such manner as may be prescribed;

(*ii*) if sub-clause (*i*) is not applicable and there are one or more registered trade unions having in the aggregate as members not less than 1,000 miners, one of the said persons shall be nominated by such trade union or trade unions in such manner as may be prescribed and the other by the Local Government;

(*iii*) if neither sub-clause (*i*) nor sub-clause (*ii*) is applicable, the said persons shall be nominated by the Local Government.

Explanation.—In this clause 'miner' means a person employed, otherwise than in a position of supervision or management, in any of the mines for which the Mining Board is constituted."

4. *Amendment of section 20, Act IV of 1923.*

Section 20 of the said Act shall be renumbered as sub-section (*1*) of section 20 and to that section as so re-numbered the following sub-sections shall be added, namely:—

"(*2*) The Local Government may, by notification in the local official Gazette, direct that accidents other than those specified in sub section (*1*) which cause bodily injury resulting in the enforced absence from work of the person injured for a period exceeding forty-eight hours shall be entered in a register

in the prescribed form or shall be subject to the provisions of sub-section (*1*).

(*3*) A copy of the entries in the register referred to in sub-section (*2*) shall be sent by the owner, agent, or manager of the mine, within fourteen days after the 30th day of June and the 31st day of December in each year, to the Chief Inspector."

5. *Amendment of section 22, Act IV of 1923.*

In section 22 of the said Act, for the word "or" the words "and shall cause every report submitted" shall be substituted.

6. *Insertion of new sections 22-A, 22-B, 22-C and 22-D in Act IV of 1923.*

In Chapter VI of the said Act, before section 23 the following sections shall be inserted, namely :—

"22-A. *Weekly day of rest.*

No person shall be allowed to work in a mine on more than six days in any one week.

22B. *Hours of work above ground.*

(*1*) A person employed above ground in a mine shall not be allowed to work for more than fifty-four hours in any week or for more than ten hours in any day.

(*2*) The periods of work of any such person shall be so arranged that, along with his intervals for rest, they shall not in any day spread over more than twelve hours, and that he shall not work for more than six hours before he has had an interval for rest of at least one hour.

(*3*) Persons belonging to two or more relays shall not be allowed to do work of the same kind above ground at the same moment :

Provided that for the purposes of this sub-section persons shall not be deemed to belong to separate relays by reason only of the fact that they receive their intervals for rest at different times.

22-C. *Hours of work below ground.*

(*1*) A person employed below ground in a mine shall not be allowed to work for more than nine hours in any day.

(*2*) Work of the same kind shall not be carried on below ground in any mine for a period spreading over more than nine hours in any day except by a system of relays so arranged that the periods of work for each relay are not spread over more than nine hours.

(*3*) No person employed in a mine shall be allowed to be in any part of the mine below ground except during the periods of work shown in respect of him in the register kept under sub-section (*1*) of section 28.

22-D. *Special provision for night relays.*

Where a worker works in a relay whose period of work extends over midnight, the ensuing day for him shall be deemed to be the period of twenty-four hours beginning at the end of the period of work fixed for the relay, and the hours he has worked after midnight shall be counted towards the previous day."

7. *Substitution of new section for section 23, Act IV of 1923.*

For section 23 of the said Act the following section shall be substituted, namely :—

"23. *Prohibition of employment of certain persons.*

No person shall be allowed to work in a mine who has already been working in any other mine within the preceding twelve hours."

8. *Repeal of section 23-A, Act IV of 1923.*

Section 23-A of the said Act is hereby repealed.

9. *Amendment of section 23-B, Act IV of 1923.*

In section 23-B of the said Act,—

(*a*) in sub-section (*1*),—

(*i*) for the word "shifts" the word "relays" and for the word "shift" the word "relay" shall be substituted, and

(*ii*) after the word "relay" as so substituted the following sentence shall be inserted, namely:—

"The notice shall also state the time of the commencement and of the end of the intervals for rest fixed for persons employed above ground.";

(*b*) in sub-section (*3*), for the word "shift" the words "relay or in the rest intervals fixed for persons employed above ground" shall be substituted, and the comma and all the words after the words "before such change" shall be omitted ; and

(c after sub-section (*3*) the following sub-section shall be inserted, namely :—

"(*4*) No person shall be allowed to work in a mine otherwise than in accordance with the notice required by sub-section (*1*)."

10. *Amendment of section 24, Act IV of 1923.*

In section 24 of the said Act, for the words, figures and letter "section 23 or section 23-A", the words, figures and letters "section 22-A, section 22-B, section 22-C, section 23, or sub-section (4) of section 23B" shall be substituted.

11. *Amendment of section 25, Act IV of 1923.*

In section 25 of the said Act, for the words, figures and letter "section 23 or section 23-A" the words, figures and letters "section 22-A, section 22-B, section 22-C, section 23, or sub-section (4) of section 23B" shall be substituted.

12. *Insertion of new section 26-A in Act IV of 1923.*

Before section 27 of the said Act the following section shall be inserted, namely:—

"26-A. *Young persons not to be allowed underground without certificates of fitness.*

No person who has not completed his seventeenth year shall be allowed to be present in any part of a mine which is below ground, unless—

(*a*) a certificate of fitness in the prescribed form and granted to him by a qualified medical practitioner is in the custody of the manager of the mine, and

(*b*) he carries while at work a token giving a reference to such certificate."

13. *Amendment of section 27, Act IV of 1923.*

In section 27 of the said Act, after the word "child" the words "or has not completed his seventeenth year" shall be inserted.

14. *Substitution of new section for section 28, Act IV of 1923.*

For section 28 of the said Act, the following section shall be substituted, namely:—

"28. *Register of employees.*

(*1*) For every mine there shall be kept in the prescribed form and place a register of all persons employed in the mine showing, in respect of each such person,—

(*a*) the nature of his employment.

(*b*) the periods of work fixed for him,

(*c*) the intervals for rest, if any, to which he is entitled,

(*d*) the days of rest to which he is entitled, and

(*e*) where work is carried on by a system of relays, the relay to which he belongs.

(*2*) The entries in the register prescribed by sub-section (*1*) shall be such that workers working in accordance therewith would not be working in contravention of any of the provisions of this Chapter.

(*3*) No person shall be employed in a mine until the particulars required by sub-section (*1*) have been recorded in the register in respect of such person and no person shall be employed except during the periods of work shown in respect of him in the register.

(*4*) For every mine to which the Local Government may, by general or special order, declare this sub-section to be applicable, there shall be kept in the prescribed form and place a register which shall show at any moment the name of every person then working below ground in the mine."

15. *Amendment of section 30, Act IV of 1923.*

In section 30 of the said Act,—

(*a*) after clause (*a*) the following clause shall be inserted, namely:—

"(*aa*) for prescribing the form of the register referred to in sub-section (*2*) of section 20;";

(*b*) in clause (*e*), for the words "to be more than thirteen years of age" the words "to have completed their fifteenth year" shall be substituted;

(*c*) after clause (*e*) the following clause shall be inserted, namely:—

"(*ee*) for prescribing the form of the certificates of fitness required by section 26-A and the circumstances in which such certificates may be granted and revoked;"; and

(*d*) in clause (*f*), for the word "register" the word "registers" shall be substituted.

16. *Amendment of section 31, Act IV of 1923.*

In sub-section (*3*) of section 31 of the said Act, after the words "British India" the words "which is, in the opinion of the Governor-General in Council, concerned with the subject dealt with by the regulation" shall be inserted.

(To be continued.)

AN CASES

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emselves responsible for the views expressed by contributors.]

HANDWRITING PROBLEMS*

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(*Specially written for* "**Indian Cases and Criminal Law Journal**")

FORGERIES.

1. Before leaving the subject of traced forgeries, I should like to mention another example in which the tracing method is employed. This consists of tracing a whole document from words, or sentences, in one or more genuine writings. This form of fraudulent document is most likely to be found in wills, and in anonymous letters, though, of course, it may appear in any kind of spurious document. If the model (or models) is produced, as it very often is, it is not very difficult to prove the fact, but if it is not, the evidence of tracing will be evident by one or more of the signs already indicated, but in addition it is probable that the words or sentences will be irregularly aligned.

2. Let us now turn our attention to copied, or freehand, forgeries. This form of fraud occurs most frequently with signatures. The manipulator secures a genuine signature, and after perhaps, one or two feeble attempts to practise it, he makes the signature on a piece of paper. It is not often that a forger has the patience, or the opportunity, to practise his nefarious work until he becomes thoroughly proficient. Often, also, many forgers have not the manipulative ability to succeed in the task they set themselves. Remember that it takes perseverance, time and patience to get the 'brownies of the brain" to work harmoniously together to perform a new act.

3. It should also be remembered that the less the forger has to do the more likely he is to be successful. The shorter a signature is, the greater the chance of success for the forger, though much will depend upon his dexterity with the pen. Some of those who forge even the shortest of signatures have practically no ability whatever for the task. In short signatures it is obvious that the traces of forgery may not be so clear, or so many in number, as in a long signature. It is easier to make a single stroke than four connected ones.

There are some persons who write illegible, bizarre, signatures that no one can read, and many of them write in this way because they imagine that such signatures are more difficult to forge than others. That is not true. The more flourishes and meaningless curves there are, the better the chance of success for the forger. The most difficult kind of signature to forge successfully is one that is written in one single and continuous movement of the pen from beginning to end, and, in which there are fine, or hair, strokes, combined with graceful shading and complete legibility. In many of the Indian scripts, a person signing his name adds that of his father, and also his residence. This is an excellent practice, and a good protection against the forger. All documents of any importance should always be signed in this way. No important

* The previous Articles on the subject appeared in 154 Ind. Cas. pages 1, 9, 33, 41, 49 and 155 Ind. Cas. 33—[*Ed.*]

document, and particularly a will, should ever be signed without an attestation clause of some kind, such as, "I, John Henry Augustus, hereby state in my own handwriting that I have read and understood the contents of this will, and accordingly write my usual signature, thus:"

5. The signatures of those who write but little, such as many of the peasant class, are often written in a very crude way. Such signatures offer the greatest chance of success to the forger because they are produced in much the same way that the forger works, that is, more or less in the fashion of a drawing. Even so, most, if not all, genuine writers of this type, *write*, however poorly they may do so, and they do not *draw* as the forger usually does. Some peasants, especially in the Punjab, write with a thick ink and a broad pen in such a way that their signatures are thick, heavy-looking, or even bedaubed. The course heavy paper so often used in the Punjab makes the work of the forger still easier, and it is sometimes impossible to say whether a disputed signature of this type is genuine or spurious. Such signatures are comparatively easy to imitate, if the imitator is at all capable.

6. If a signature is slowly written in the way that many peasants write, and if, at the same time, it is short in length, it is *theoretically* possible to forge it successfully, though there is a vast difference between theory and practice. Many signatures of the kind indicated are written purely with the action of the fingers, and as this is the action nearly always used by the forger, it is easy to understand that the task of imitation is thereby rendered all the easier. It frequently happens, however, in forgeries of this kind that the imitator possessss greater skill with the pen than the genuine writer, which will be evident by the firmer strokes in the imitation.

7. Once the finger movement is left behind, the task of the forger becomes proportionately greater, that is to say, the successful forgery of a wrist movement writer is much more difficult than the forgery of a finger movement writer, and the successful reproduction of a forearm movement writing is still more difficult.

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but one where the pen was *lifted* in
the paper, and put down again almo
exactly on the same spot, giving a superficial appearance of continuous writing, when in fact, the imitation may be made in several separate movements of the pen. Sometimes these fraudulent pen-lifts are so carefully and meticulously done that they cannot be seen with the naked eye, but they are usually easily visible under a hand lens, or a miscroscope.

9. A defect very often found in freehand, or copied forgeries, is that they are longer in length than the genuine signature. The reason seems to be that the imitator is unable to make the connecting strokes of the same length as the genuine writer, because of concentration on the model he is copying. A question that is sometimes asked in cross-examination is whether the forger had a model before him at the time, or if he made the forgery from memory. It is impossible to answer a question of this kind definitely, but the probability is that in most forgeries the model is kept in view, since, as already explained, the forger is generally a novice who makes no preparation for the task he undertakes.

10. Where natural tremor exists in a signature, however poor it may be, it is practically impossible to imitate it successfully, and naturally, the more pronounced the tremor is, the greater the difficulty. Natural tremor is rhythmic, and usually occurs throughout a signature, though it is curious thing that one or more strokes may sometimes not show a trace of it. Natural tremor usually consists of short strokes to the right and left of a given path, and if I may so express it, are

regular in their irregularity. Another curious thing about writing with natural tremor is that the most complicated character will be made in a single movement of the pen, and if the pen is lifted from the paper, it is put down again at some distance from where it was lifted, or the second stroke is jumbled up with the stroke first written. Unnatural, or fraudulent tremor, is quite different, and once it is understood, it is not difficult to recognise. Generally, it is not regular, or rhythmic, the divergences from the main path of the stroke are longer than in natural tremor, or they may be a series of short strokes all carefully joined together. Further, it will usually be found that even the most simple character will be made with carefully concealed pen-lifts.

11. Quite a common fault with the forger is that he does not know when to leave well alone. Many otherwise possible forgeries as first done are made to look just what they are by being carefully retouched, or gone over. This retouching may be caused by the necessity of giving shading to the forgery in the place, or places, where it exists in the model, or it may be due to an intense desire not to leave undone anything by which the forgery could be detected at sight. Here let me remark, that it is not true, as some "experts" wrongly state that retouching can be common to both forged and genuine writings and signatures, and therefore, their presence in a signature is no evidence of forgery. Statements of this kind are both unjustifiable and unwarrantable. There is a vast difference between genuine and fraudulent retouching. It is true that there are some writers, microscopic in number, who *occasionally* add a stroke to a writing or signature, usually for the purpose of remedying a defect. such as when the ink fails to flow. Such retouching is usually quite obvious and can be easily seen, whereas the retouching of the forger is meticulously done, and is not always easy to see. Another great point of difference is that the number of times a genuine writer will retouch is far less than the number of times the forger touches up his handiwork. It follows, therefore, that there is a difference in retouching both in nature and number, in genuine and forged writings and signatures. I must not be understood as saying that in every forgery there must be retouching; some are quite free from it.

12. Another indication of a genuine signature is that sometimes a writer will omit something, such as a dot; or short stroke, but it is very seldom such things are omitted by the forger, whose object is to omit nothing, for fear that his handiwork may be thereby discovered. It is a matter of complete indifference to most genuine writers whether a small detail is left out of a signature now and then. When dots are put in by a forger, they are almost invariably in the form of a nearly perfect circle, which may be made by more than one circular movement of a pen. Most genuine writers, on the other hand, do not make the dot in the form of a perfect circle, but in the form of a short stroke, the beginning of which may be thicker than the end, that is wedge-shaped. Further, most, if not all, genuine writers are quite careless as to where they place a dot, so long as it is fairly near to the letter with which it is concerned. The forger, on the other hand, is generally careful to see that the dot is placed as correctly as possible.

13. Not only do most forgeries fail in the matter of speed, but they also fail in regard to line quality, or the condition of the stroke edges. As already stated, the slower a stroke is made the more rough, or uneven, generally will be the state of the edges. As a forger usually draws, it follows that the stroke edges are more likely to be rougher than a signature which is really written. As a general proposition, it may be said that the faster one writes, the cleaner and smoother will be the state of the line quality. Much nonsense has been written and spoken by some of the "characteristic" experts on the subject of line quality. It has been incorrectly stated that:—

> "For purposes of identity or otherwise, and that is the precise purpose required in respect of handwritings in Law Courts, it is clear, therefore, that line quality is not a reliable criterion, much less a writing characteristic for proving or disproving that a certain writing is or is not in a certain person's handwriting... and experts who vaunt a lot about line quality, are only sounding a term which really has no definite bearing on handwriting identification."

This long-winded statement is typical of the incorrect utterances made by irresponsible "experts", whose only object seems to be to mislead, but it is only fair to say that the statement quoted was

made many years ago. That the statement is quite wrong will be evident from the following quotation from "Questioned Documents" by A. S. Osborn, 2nd Edition, who is regarded by all unprejudiced persons, as the world's leading authority.

> "The fundamental and usual defect in a forgery is, however, not divergence in form, but a quality of line like that shown in Figure 158. *Close scrutiny of line quality alone often furnishes the basis for grave suspicion that a signature is not genuine,*" (The italics are mine).

14. In connection with this matter of line quality, I think it is advisable to consider the matter of reed pens, which are so extensively used in the Punjab. It is always difficult to generalise, but I think it is not incorrect to say that writing with reed pens is generally more rough at the edges of strokes than the writing with metallic pens. I have, however, seen writing with reed pens which was quite as smooth and clean as that done with a metallic pen. Now, the greater roughness of reed pen writing does not by any means imply that the line quality produced is precisely the same as that in a forgery. Far from it. The two are usually distinct and separate. It is difficult to describe the appearance of the two, but a little practice will soon enable one to distinguish one from the other. If an attempt must be made to give a description, I should say that in genuine reed pen writing, although the line quality may be rougher that in writing with metaltic pens, yet the roughness is consistent throughout the stroke, and at the same time, there are usually none of those deviations so common in forgery. In a forgery, also, there may be blunt ended strokes, and also carefully concealed pen lifts. The best thing to do in order to understand the difference, is to write normally with various widths of reed pens, and then to try and imitate the signature of another. The difference in the line quality of the two will not be difficult to discern.

15. In a lengthy piece of writing made with a reed pen, it is possible that the pen may need to be trimmed at some stage or another. When this happens, the spot at which the newly trimmed pen was applied will usually be obvious because of the difference in the widths of the strokes before and after trimming. The trimming or non-trimming, *per se*. does not cause either the new or the old writing to have a line quality like that generally found in forgeries. A reed pen with a loose particle of the wood at the nib points would make a stroke something similar to that made by a metallic pen with a hair, or fibre, but it is highly probable that if the pen were in such a condition the impediment would be removed the moment its presence was detected.

16. In order to assist the lawyer or the Judge who may have a problem in hand to arrive at a correct conclusion the following summarised hints, which are taken chiefly from my book "Contested Documents and Forgeries" are given.

First. Note the writing ability displayed, that is, whether the movement shown in the signature is easy and rapid, cramped and strained, or vigorous or lethargic. Look for evidence of hestitation, labour or awkwardness, as shown by heavy or unequal strokes, or by deviations from what should be a straight line or a symmetrical curve. Although a forger may simulate the *form* of each letter in a signature tolerably well, he almost invariably fails in reproducing a signature at the correct speed.

Second. Observe closely the line quality, whether rough or smooth, uniform or divergent, or inconsistent in parts. In many forgeries the stroke is not a clean one lying in the shortest path between two points, but consists of a series of short irregular, or wedge-shaped, strokes, all haltingly joined together without lifting the pen from the paper. As stated above, line qualify is usually the fundamental defect in a forgery, even if it is otherwise a good imitation of the form of the genuine signature.

Third. Note the frequency of the shading, and the places where it occurs. Many forgeries lack completely the graduated shading of the genuine signature, and very often it will be found that there is no perceptible variation of stroke anywhere, all the strokes being practically of the same width.

Fourth, Look for evidence of retouching, or overwriting. Because of inability of reproduce in a natural way the shading habits of the genuine writer, the forger is obliged to thicken the strokes at the appropriate places by a second application of the pen, so as to approximate to the habits shown in the genuine signature that is imitated.

Fifth. Look carefully for concealed pen-lifts and count the number of them. Note also, whether such pen-lifts occur in the middle of what should be a continuous straight stroke, or in the middle of what should be a continuous curve. Examine also the beginning and ends of strokes comprising parts of a particular letter. A genuine writer generally makes them in a continuous operation but the forger is often obliged to make them in two or more.

Sixth. Compare the length. A common failing

of freehand forgeries is that they are longer in length than the genuine signature.

Seventh. Look for blunt ends at the terminals of down and horizontal strokes. Owing to the drawing motion employed, many (if not all) of the terminals are co-terminous with the movement of the pen, which causes the ends of the strokes to be of the same width, or even wider, than any other part.

Eighth. Most writers who are good, or even moderately good, penman, commence their signatures with a short initial impulse movement that is not transmitted on to the paper, but which is nevertheless recognisable by the presence of a fine, or tapering, initial stroke. If the signature in dispute shows at any part of the initial stroke, or character, that it is as broad or broader than the remainder, then there is cause for suspicion.

Ninth. Observe the beginning and end parts of signature Many instances are known where the consciousness of the fraudulent act so obsesses the forger, that at the commencement of his attempt he betrays himself by indications of tremor, or want of firmness. As he gains confidence the strokes become firmer, and more rapidly made, but towards the end of his task the consciousness of guilt again assumes command and there is doubt and hesitancy. This psychological process inevitably causes the middle portion of the signature to be better than the initial and final parts. Any inconsistency of this kind denotes a performance that is incompatible with the work of a genuine writer.

Tenth. Consider the presence or absence of tremor. Natural and fraudulent tremor differ considerably. The former is likely to be even and rhythmic, but the latter will probably be uneven and irregular, or it may occur in any place. Look for inconsistency. The forger may put tremor in the first stroke, but frequently forgets his assumed role, and may make other strokes firm and straight.

Eleventh. See whether the disputed signature contains evidence of better control of the pen than that of the genuine writer. This will be evident by the presence of firmer strokes than the genuine writer is capable of making.

Twelfth Consider the matter of the pen used. Most writers favour of particular kind of pen, and feel uncomfortable if a strange pen is used. The forger is likely to use a pen of a different kind It may be too broad or too fine.

Thirteenth. Note the exact point of contact of the connecting strokes in cursive writing. A genuine writer may persistently run a connecting stroke from the base of one letter to the top of another, but the forger may make the connnection at the base.

Fourteenth. Observe the alignment, that is the relation of the character with regard to a line, whether real or imaginary. Some writers have a rise or fall in alignment in a combination of two or more characters, whenever they precede or follow particular letters, that is very characteristic.

17. There are many other points which the specialist would consider according to the nature of the problem in hand, but if the lawyer or Judge carefully considers the fourteen above stated, it is most likely he will not fail to arrive at a right decision. From a study of the fourteen points stated, it will be quite evident that the so-called "characteristic" tests so frequently said to be followed in this country would afford no assistance whatever, and here I may remark that in a book which is considered to be an authority by followers of the "characteristic" cult, there is given an illustration showing that nine out of ten "characteristic" were effectively disguised in a particular signature by the same writer. This alone shows how absurd is the so-called "characteristic" tests, for if they are so permanent and immutable as they are said to be, how is that nine out of ten of them can be changed at will, leave alone one of them? Perhaps it is because, as has been impertinently stated, that they are "based on such scientific principles that the reasonings cannot be appreciated, much less understood, by the average mind". Apparently, then, the protagonists of the "characteristic" theory must have super-minds! Arrogance could scarcely go further.

18 I will deal with another common form of forgery in my next article.

"PUBLIC NUISANCE AND SPECIAL DAMAGE"

By M. Shafi, Esq., B. A., LL. B., Pleader, Ludhiana.

In the case of a 'public nuisance' (obstruction to public way is certainly a public nuisance). There are four remedies open in India. They are:—

I. Under the Criminal Law:—

1. Proceedings under s. 133 of the Criminal Procedure Code.

2. Criminal prosecution under Indian Penal Code.

II. Under the Civil Law:—

3. A suit under s. 91, Civil Procedure Code. With the consent of the Advocate-General.

4. A suit at the instance of a private individual who has suffered 'special damage' by reason of the nuisance.

That the fourth proposition has been the established law in India since 1877 and even before nobody can deny. This proposition was laid down after a review of all the authorities of English Law in *Satku* v. *Ibrahim*, 2 B. 457. This is the basic ruling and all the other High Courts in India have, while laying down the proposition that no action is maintainable without proof of 'special damage' in cases of public nuisance, have followed this authority or English authorities. For instance, *Bhawan Singh* v. *Narotam Singh*, 2 Ind. Cas. 365; 31 A. 444; *Muhammad Raza Khan* v. *Muhammad Askari Khan*, 85 Ind. Cas. 304; 46 A. 470; *Manilal Jibhai* v. *Ishvarbhai Samalbhai*, 87 Ind. Cas. 934; A I. R. 1925 Bom. 367 at p. 368; *Raj Kumar Singh* v. *Saheb Zada*, *Ray* 3 C. 20; *Lallu* v. *Jamiyat*, 72 P. R. 1877; *Chhajju Mal* v. *Ganda Mal*, 4 P. R. 1895; *Ardeshir Jivanji* v. *Aimai Kuvarji*, 117 Ind. Cas. 513; 53 B. 187. But in *Manzur Hassan* v. *Muhammad Zaman*, 86 Ind. Cas. 236; 47 A. 151. Their Lordships of the Privy Council have disapproved of the principle laid down in *Satku* v. *Ibrahim*, 2 B. 457 and the reasonings given therein. Their Lordships at page 237 observe with regard to this ruling. "The judgment really proceeds entirely on English authorities which lay down the difference between proceedings by indictment and by civil action".

In their Lordships' opinion such a way of deciding the case was not proper. "The distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English Law and ought not to be applied in India."

With this pronouncement by the highest tribunal in the British Empire it can no longer be asserted now that the principle enunciated by *Satku* v. *Ibrahim*, 2 B. 457, is still good law in India. This ruling having been disapproved by their Lordships, of the Privy Council, rulings based upon this case, *viz.*, *Satku* v. *Ibrahim*, 2 B. 457 must be deemed to be no longer binding upon the Courts in India. The Hon'ble Judges of the Lahore High Court in *Municipal Committee of Delhi* v. *Mohamad Ibrahim*, 152 Ind. Cas. 850; A. I. R 1935 Lah. 196, remarked with regard to *Satku* v. *Ibrahim*, 2 B. 457 and the rulings based upon this "if the foundation fails the superstructure must fall". In *Chhajju Mal* v. *Ganda Mal*, 4 P. R. 1895 which was based upon *Satku* v. *Ibrahim*, 2 B. 457 has been held to be no longer good law . . . . and we have no hesitation, therefore, in holding that in face of the Privy Council ruling mentioned above, *i. e.*, *Manzur Hassan* v. *Muhammad Zaman*, 86 Ind. Cas. 236; 47A 151 the Punjab Chief Court judgment is no longer good law."

The result of all this is that now in India any individual person can bring a suit for removal of obstruction to a public way (obstruction to a public way is certainly a public nuisance) without proof of special damage. This principle now has the authority behind it of at least three High Courts in India, *viz.* *Shiv Narain* v. *Din Dayal*, 134 Ind. Cas. 673; A. I. R. 1931 Nag. 189, *Mandakinee Debee* v. *Basanta Kamaree Debee*, 147 Ind. Cas. 811; 60 C. 1003 and *Municipal Committee of Delhi* v. *Mohamad Ibrahim*, 152 Ind. Cas. 850; A. I. R. 1935 Lah. 196. The Hon'ble Judges of the Lahore High Court say at p. 853, as follows:—

"The question of special damage is very simple. In such cases it is not necessary to prove that any special injury has taken place, before a person wronged by the Committee can take action against it . ." ". . The principle of English law which requires proof of special damage in such cases is not applicable to India."

The Calcutta High Court relying on the Privy Council authorities *Manzur Hassan* v. *Muhammad Zaman*, 86 Ind. Cas. 236; 47 A. 151 in *Mandakinee Debee* v. *Basanta KamareeDebee*, 147 Ind. Cas. 811; 60 C. 1003, has laid down the law as follows:—

"A member of the public can maintain a suit for removal of obstruction of a public high way if his right of passage through it is obstructed without proof of special damage," and further it was held "That the principle of English Law which requires proof of special damage is not applicable to India."

The result of these authorities is that the proof of special damage in the case of public nuisance as a condition precedent to the maintainability of the suit is no longer required and any person whose right of way is obstructed can bring a suit for removal of the obstruction.

The next question is whether there should be an actual obstruction to the person suing.

Public nuisance has not been defined in the Code of Civil Procedure but by virtue of s. 3c (44) of the General Clause Act, the definition given in s. 268, Indian Penal Code is to be applied to Civil Law. In *Sheikh Chand* v. *Laxman* 36 Ind. Cas. 534 at p. 536 it is remarked: that this is the definition that is to be applied in Civil Law.

Under s. 268, Indian Penal Code "a public nuisance is an act or illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

The principle is well established that encroachment on a public way, however, small it may be, must necessarily result in obstruction to persons who may have occasion to use that way, *vide Emperar* v. *Nisar Muhammad* 86 Ind. Cas. 1006; 6 L. 203 *Queen-Empress* v. *KidarNath*, 23 A. 159 at p. 162; *Queen-Empress v. Virappa Chetty*, 20 M 433.

On the basis of these authorities quoted above it is suggested to the Hon'ble Members of the Legislative Assembly to amend s. 91, Civil Procedure Code, so that the words 'though no special damage has been caused' be omitted.

Extracts from Contemporaries.

Oliver Wendell Holmes.

Probably no other event during the current year will more forcibly direct the attention of lawyers to the debt they owe to the great men of the past who have assisted in making the Common Law what it is to day than the death of the Honourable Oliver Wendell Holmes, which occurred in Washington during the first week of the present month. Speaking of his retirement from the Bench of the Supreme Court of the United States in the year 1932 at the great age of ninety-one, we ventured to say of him :

"When he pays the inevitable debt of nature he will need no orator or poet to hand on his fame to posterity; by his great series of judgments he has placed himself among the unforgettable men in judicial history."

The high estimate of his qualities and achievements expressed on every hand since the announcement of his death convince us that in speaking of him as we then did our words were free of exaggeration.

But Oliver Wendell Holmes did not have to wait until his retirement and death for a just appraisal of his worth. Of the many tributes to him while he was in the midst of his activities we shall only mention that of Lord Chancellor Haldane on the occasion of the visit of the American and Canadian Bars to London in 1924, and that of Sir William Holdsworth at the Dedication of the Northwestern University Law School Buildings, Chicago, in 1927.

Lord Haldane said :

"Most of us have been brought up on his book on the Common Law, and we recognize it as the work of one who is not only a consummate master of the Common Law, but who is also a ripe and finished scholar."

Sir William Holdsworth said :

"Mr. Justice Holmes's book on the Common Law is as well known to all our law schools and lawyers as it is on this side of the Atlantic. We do not, it is true know so well as you his long series of judgments on all branches of your law; but we know enough of these to admire that combination of legal learning, statesmanship and literary quality, which is the mark of mastery of the law to which few lawyers have ever attained in the course of its long history. . . . . I think that it would be equally true to say that just as Coke by his decisions and his writings helped the English law through the difficult transition from mediaeval to modern, so Mr. Justice Holmes, by his decisions, is helping to adjust your law to modern conditions."

It is perhaps worthy of mention that the present-day realist school of juristic thought has seized upon Holmes's definition of law as "What the Courts do" to support the contention that the law is perennially uncertain because the judge in deciding a case reaches his decision on 'emotive' rather than on logical grounds. But is that 'definition' essentially different in meaning from the old law that "The Judge is the

voice of the law?" Dr. A. L. Goodhart has recently pointed out that when Holmes so described the law in his essay on "The Path of the law" he was not attempting a complete philosophical analysis of the law but merely used his definition to distinguish law from ethics. Indeed so far from denying the importance of logic in the frame-work of law Holmes, in the essay referred to, does not hesitate to say that "in the broadest sense it is true that the law is a logical development, like everything else." The realists are said to favour the theory of the behaviourists as to the physical basis of the emotions, and while Holmes would have been alert to assign bowels of mercy to the law it is difficult to think of him admitting that any emotive process that might lead a judge to temper justice with mercy would find its stimulus in intestinal glandular activity.

Oliver Wendell Holmes lived a long life and before it closed could look back with satisfaction upon the way he had used it. One could have no greater happiness. *Hoc est vivere bis, vita posse priore frui.—The Canadian Bar Review, March* 1935.

Counsel and the Law's Delay.

At a special generel meeting of the (English) Law Society held In London on the 25th January, Mr. C. L. Norton brought up for consideration the time-worn problem of delay in the hearing of actions by reason of Counsel being engaged in another Court than that in which some particular cause is set down for trial. In speaking to his motion Mr. Norton said :

"Every solicitor knew the nightmare of uncertainty whether learned counsel to whom brief had been delivered and fee paid would actually be present to conduct the case. The Bar had secured a monoply by immemorial custom. The litigant was compelled to employ a barrister, and it was reasonable that the barrister's attention and attendance should be enforceable. Only too frequently, at 5 o'clock in the evening before the case came on, the clerk to the counsel who was briefed would telephone that Mr. Blank found himself in a difficulty, and wanted the solicitor either to leave the case in the able hands of his junior or to take back the brief. . . . The Judge would not postpone the action, but would simply say that someone else should have been briefed. The solicitor could not explain his difficulty to the Judge but must remain deaf-mute; he and his client were simply treated as if they did not exist."

If the problem is really as vexatious as Mr. Norton repreeents it to be, its solution ought not to be long delayed. To this end he suggested that causes should be set down some reasonable time before the actual date of hearing—which seems to us a very obvious means for enabling counsel to arrange his several engagements with convenience. Another suggestion was that there should be a return to the system which had prevailed in the Chancery Division under which counsel had to attach themselves to particular courts. A third suggestion was that the courts should be on the telephone so that solicitors could be informed when their attendance would be actually required. Fourthly, Mr. Norton suggested that the courts should sit all the year round, holidays being so allocated that the individual Judges would have reasonable resting periods. This, of course, would depend on the number of Judges being sufficient to keep the business going throughout the year. Lastly, he declared that a litigant should have an absolute right to have his case postponed if his counsel were not ready to conduct it. But the force of this contention was somewhat impaired by Mr. Norton's ealier statement in the course of his remarks, that "it was not in the interests of litigation that there should be a small number of super-men whom every solicitor ran after, so that the other men, who would be quite as good if they had the experience and the opportunity, never had a chance." Isn't that a matter that is wholly under the control of the solicitors themselves —is there any embargo upon a solicitor's freedom to brief any counsel he thinks proper?

Mr. Norton's motion that the Council of the Law Society be urged to make such representations as would "lead to the appropriate remedy" met with criticism to the effect that it was faulty in not indicating the nature of the representations that the Council should make in order to secure the appropriate remedy, and that he erred in imputing the blame to the Bar for the existing state of affairs when it was really attributable to the way the cause lists were framed in the courts. The motion however, passed by a substantial majority, and while vague in its terms may suffice to set the proper machinery of reform in motion.—*The Canadian Bar Review, March* 1935.

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HANDWRITING PROBLEMS*

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(*Specially written for* "**Indian Cases and Criminal Law Journal**")

FORGERIES.

1. An exceedingly common form of forgery is by means of an addition, an alteration, an interpolation, an interlineation, or by substitution. The various forms of this kind of forgery are almost legion. Some of them are very crudely done and can be detected at sight, while others may be so carefully executed that it is sometimes difficult to detect them, or if they can be detected, it is not easy to prove the fact in a Court of law. This difficulty is enhanced if the point in contest is a small, or a microscopic one, and if its presence is sought to be explained from the other side by disingenuous explanations, or even by perjury. A good many of these problems are concerned with the identity or difference of the ink used in the disputed portion, and in the other parts of a document, and, therefore, it is to ink we shall first direct our attention. The subject of ink in relation to contested documents is nearly always a highly technical one. Many jurists have no scientific knowledge, or training, and it is an exceedingly difficult task to demonstrate satisfactorily minute difference between two inks in a crowded Court. Moreover, many Courts fight shy of the lengthy explanation, or demonstration, that may sometimes be necessary, and, consequently, what should be a scientific proceeding is often a mere statement by a witness which the Court records without really understanding what has been said. It naturally follows that when judgment has to be pronounced the Court is in a quandary. As a consequence, frequently it places no value on the technical evidence on the record, particularly if one specialist is opposed by another, but relies entirely on the statements of other witnesses, many of whom may be deeply interested. It seems to me, therefore, desirable to study the matter of inks first, so that we may have some substantial grounds for coming to a decision.

2. In India there are two chief kinds of ink in use, namely, (1), the common "*deshi*" or "country" ink, and (2), inks made from iron, logwood, or aniline dyes. Let us deal with the "*deshi*" ink first. This is a pure carbon ink, consisting of granules of carbon suspended in water, with perhaps the addition of gum. The carbon particles can be purchased in small packets in the bazar, and the ink is then made up by adding the prescribed quantity of water, and gum. The ink is almost invariably used with a reed pen, and is common in the Punjab, United Provinces, and in other parts of the country also. There is very little difference in the "powders" as made by different manufacturers, except that one may be coarser than another. Even the same powder in the hands of two different persons, may not yield the same tinge of ink on paper, because of the addition of more or less water than is prescribed. Further, it is a common sight

* The previous Articles on the subject appeared in 154 I. C. pages 1, 9, 33, 41, 49 and 155 I. C. 33 & 41.—[*Ed.*]

to see scribes haphazardly adding a dollop of water to an inkpot, the "ink" in which has already seen its best days, and is already far too tenuous. There is also another circumstance which has some bearing on the appearance of a carbon ink on paper, and that is the addition of gum, or some other resinous substance. The general effect of the addition of gum is that the ink is thicker, or more muddy, than when it is not added, and when the ink is thoroughly dry on the paper the gum can often be seen under the microscope in the form of thin, dry, flakes in various parts of the writing. The more numerous the flakes, the greater the quantity of gum.

3. Theoretically, writing with carbon ink should normally be quite black in appearance, but as pointed out above, we know that it is not always so. Except in very old documents, and not always in those, it is exceptional to find that the ink is really a dead black. As a rule, if carefully examined, such ink will be found to have a tinge of brown colour in it, and some writings are so pale-brown in colour that they appear as if they had been made with a decoction of tea, or coffee. As a broad generalisation, it is perhaps, not incorrect to say that in really old documents, the carbon ink will be found to be a really dense black, because in those days scribes appear to have taken greater pains in the preparation of the ink than they do now, and also perhaps the carbon of olden days was purer than the present-day product.

4. There is another phenomenon connected with carbon ink to which I must refer. Carbon can be found, or can be made, in various states. If it is made from an unsuitable base, such as charred wood, it may be that, what seems to be a carbon residue, is not in fact carbon at all. If, then, writing is made with such a supposed carbon, it will at first appear to be quite black, but in the course of time it is likely to become brown. The explanation is that when the writing was first made it was practically black, but as, in fact, it contained little or no free carbon, but a mixture of compounds of a tarry nature, possibly impregnated with a small amount of iron, it became brown in the course of time, chiefly due to the small amount of carbon in the composition of the ink, and the action of oxygen on any iron that may be present.

5. A really good carbon ink has the advantage that it is immediately black, or nearly so, and that it will remain in that condition for an almost indefinite period. No change of any kind occurs, because of its physical properties, but it has the disadvantage that it lies only on the surface of the paper, and does not form a compound with it. Consequently, as it does not penetrate the fibres of the paper, it is not difficult to wash off. I do not think it would be in the public interest to state the methods by which this can be done, but I may say that the longer the ink has been on the paper the more difficult is the task of removal. Even if a carbon ink has been completely removed from a paper, its removal can be detected without much difficulty, by a particular chemical process, which I do not propose to reveal. Such a chemical process cannot be applied in a Court, but must be done in a laboratory, and, consequently, when papers are not permitted to be examined where proper facilities are available, fraud often succeeds. In fact, most ink problems cannot satisfactorily be dealt with in a Court room. A laboratory is essential.

6. A peculiarity of carbon ink writing is that it cannot be affected by any known chemical, and it is, therefore, impossible to differentiate one carbon ink writing from another by chemical means. The only resource open to the investigator is by examination under the microscope in a good light, and with various magnifications, though in many instances one carbon ink can be differentiated from another by means of the naked eye, or a good hand lens. Endeavour should be made to determine the manner in which the carbon particles are distributed; their size, and whether coarse or fine. The presence of gum flakes should also be looked for. As such ink is often "sanded", particles of "sand" may be present. Such "sand" is easily recognisable, as it appears in the form of comparatively large granules, of a black, or deep blue-black, colour. Also examine the back of the paper to see how far, if at all, the ink appears to be semi-visible. Study the colour also, and if the page examined is part of a book, look carefully at the back of the previous page to see whether or not there is an "offset". Sometimes, carbon inks contain a small amount of iron. This can be tested for, by using a solution of potassium ferrocyanide, but it must be determined whether the iron is in the paper and not in the ink, as in some papers there may be an iron residue.

7. Notwithstanding the spurious claims of those who pose as "experts", I say, most emphatically, that it is impossible from an examination of the carbon ink alone, to say what the age of a writing is. The most that can be done is to decide whether one ink has the same composition as another, and from that premise to draw any conclusion that may be permissible. In many instances, there are surrounding facts that will enable one to say definitely that one carbon ink writing was not made at the same time as another. Thus, if the problem is to determine the age of a carbon ink writing, this cannot be answered by merely examining the ink. It may, however, be possible to say that the ink of a particular portion, (such as an addition or an alteration) is not in the same physical condition as the ink in the other portions, and it may also be possible to point to differences in colour, or tinge. Particularly where there is an alteration, or addition, it is quite likely that the width of the pen may be different. This difference can be accurately measured with an instrument known as a "Line Measure". Should the question be whether the ink in one portion of a writing is the same as, or different from, the ink in another part of the same document, it is necessary to be extremely cautious, for, as I have already shown, the same carbon ink may be in two different states on different occasions. All that can be said is that the physical condition is, or is not, the same. If it is found that the composition of the ink in an added part is different from that in the other parts of a document, it is usually safe to conclude this clearly proves that the two writings were not made at the same time.

8. Another problem that sometimes arises is whether documents of different dates, or a succession of book entries, were made in the normal course, or whether they were all made at the same time, and not on different dates as the entriers suggest. Problems of this kind can only be solved by careful and patient examination of the ink, coupled with a measurement of the width of the strokes. I should like to make it quite clear that there is a variety of questions regarding the subject of ink, which give the pretender plenty of scope for his fertile imagination, but which no competent and honest specialist, who has the slightest self-respect, will attempt to answer. Each problem, therefore, has to be decided on its merits, according to the physical facts available. Let me give two recent instances, in which such carbon-ink problems were successfully solved.

9. There was a family quarrel, and accounts were called for. These were duly prepared in a *bahi*. Later on, the scribe who had prepared the accounts was "persuaded" to remove half of a particular page, and to insert in its place half a page taken from another part of the same book. The new half was joined to the old half by means of gummed strips of paper, and suitable entries were then made. The tampering had occurred not long after the original entry, and as it was done by the same scribe, it presented a most formidable problem. There was a slight difference in the width of the strokes in the entries in the old and the new halves but not sufficient to justify a conclusion that the two had been made at different times. The investigator was not satisfied, so he removed the gummed strips of paper, when he at once discovered that the serrations of the two edges of the old and the new halves did not match. A suitable photograph easily demonstrated the fraud.

10. A document written in Urdu on three sheets of stamped paper was in dispute, the point at issue being whether some words on the last sheet had been interpolated, after the document was written and signed. In the first two sheets, the lines of writing were more than two inches apart. The last sheet had three lines of writing. The first and third lines were also about two inches apart, but the second line was at about an equal distance from the first and third. Further, the ink was of a different tinge, being darker than the writing elsewhere, and a different pen had been used. The addition was made by the scribe who prepared the original document, shortly after it had been signed.

11. Many mistakes have been made by ignorant persons in mistaking a carbon ink for some other kind of ink. This mistake occurs by using a chemical reagent, and then applying blotting paper. When the blotting paper is applied, the ink on the stroke tested partly, or wholly, disappears, and if the reagent happens to be one that also bleaches, those who are not familiar with the subject, hastily and wrongly, conclude that the colour has been bleached and, therefore, consider the ink is not a carbon ink. What really happens is that the carbon particles are loosened and absorbed mechanically by the blotting paper. *If the chemical really did cause*

the change, it would do so without the application of the blotting paper.

12. From what has been stated above, it will be readily understood that problems relating to carbon ink are usually difficult, and that it is sometimes impossible to solve them, either in or out of Court, particularly in the former circumstance. Much will depend on the nature of the problem and the amount of physical evidence available. In any event, the best possible course to follow is to have the document thoroughly examined at the *earliest possible* moment by a specialist who knows his business, and who is thoroughly qualified technically.

13. *Logwood ink.* Logwood ink is made from the Logwood tree, which is indigenous to Central America. The ink is usually made from an extract of logwood chips, and not from the chips themselves. There are various forms of logwood inks in combination with other substances, but the special characteristic of most of them is their immediate dense colour on paper; their great freedom of flow, and the fact that they do not readily corrode steel pens. They are easy to make and are comparatively cheap, and are mostly used in schools, where permanency of writing is not essential. A solution of hydrochloric acid will conclusively determine logwood ink, which becomes a distinct red, or purple red on the application of the chemical. Inks made from aniline dyes have practically "killed" logwood ink.

14. *Aniline inks.* These are made from various coloured powders obtained from coal-tar derivatives. They can be obtained in a variety of shades, with which to clothe writing in many-hued vestments. Many of them are of the most delicate tints, and are in extensive use in India, because of the brilliant colours they give, and the cheapness with which ink can be made from them. Most aniline dyes are readily soluble in water, and need only an extremely small proportion of powder to water to give a satisfactory writing fluid. Some of them yield a satisfactory ink even if mixed in the proportion of 1 to 200 parts of water. They are particularly suitable, and are in wide use, for fountain pens. Who has not seen many lawyers in the Bar Room with a battery of fountains stuck in their pockets, each of them filled with ink of different colours, such as purple, green, blue and black? When made up into a solution these inks keep well, and because of their extreme solubility practically no suspended matter is in evidence. Although the writing with such inks is not readily affected by different chemical reagents, yet it can be removed or smudged by water. The great drawback, however, is their extreme fugitiveness, as when exposed to light and air, they rapidly fade, and, moreover, they lack the permanency of good iron-gall ink, even when kept secluded from light and air. Lawyers would be well advised to eschew the use of such inks, because they are dangerous, and certainly no important document of any kind should be written or signed with them. In fact, it would be a wise ordinance if the use of such inks for legal documents of any kind were prohibited altogether. I recently had to investigate a number of documents, including "Minute Books", which were written in aniline ink, and although the writing was comparatively recent, the ink had percolated into the paper beyond the edges of the stroke proper, which had the appearance of having a definite shadow on either side of it. This spreading rendered it difficult to ascertain exactly the edges of the stroke proper. Also some of the writing was so faint as to be almost illegible.

15. *Aniline black, or nigrosine.* Ink made from this dye makes a blue-black, or purple-black, stroke on paper. The ink does not become darker as time goes on, but it is easily smudged by water, or affected by dampness. It can be washed off the paper, even after a considerable lapse of time. Writing done with this ink is readily distinguishable, because the strokes have a characteristic microscopic dark edge on both sides, and in this respect differ radically from the stroke edges of writing made with carbon ink. Moreover, carbon ink is not affected by any chemical, whereas aniline, or nigrosine ink is affected by water or chemicals. Then also, almost all the aniline inks rearly always have a peculiar metallic lustre, and sometimes show a clear second colour. When both the primary and the secondary colours are visible, the ink is said to be dichroic.

16. *Coloured aniline inks.* Almost any conceivable coloured ink can now be made from coal-tar derivatives. The principal aniline dyes used for the manufacture of coloured inks are as follows:

Red. Eosine: Erythrosine; Ponceau Scarlet Cotton Scarlet, and Scarlet.

Green. Neptune Green S. G.; Light Green S. F. (Yellowish); Light Green S. F. (Blueish), and Diamond Green G & B.

Blue. Methylene Blue; Acid Blue; Pure Blue; Soluble Blue T, and Indigo Carmine.
Violet Acid Violet 4. B. L., Methyl Violet
Yellow. Fast Yellow and Tartrazine.

Typewriter ribbons are almost invariably impregnated with an aniline dye, which is thickened by glycerine, or other medium, so that the dye may be retained in the ribbon. Appropriate chemical tests will readily distinguish any one of the above named dyes from any other, but it would be too long and too technical to detail the process here. Suffice it to say, for example, that if the body of a document is written with one kind of aniline blue ink and the other part in another kind of aniline blue, suitable tests will distinguish the two, although they may appear to be the same to the naked eye, or even under the microscope.

17. *Iron-gall inks.* These are, perhaps the most impotant of all writing fluids, and consequently deserve close attention. As the name implies, their chief basis is a chemical combination of iron, and tannic acid. The two principal components of such inks are an iron salt of some kind, such as farrous sulphate, in combination with the tannin extracted from gall nuts, myrobalans, or any suitable tannin bearing substance. When such iron-gall inks are used in a fresh condition, and if not exposed to the air for any time, the marks they make on paper are quite colourless, and almost invisible, until such time as they are acted upon by the oxygen in the air. If partially oxidised by exposure to the air, and of sufficient blackness to be immediately legible, such inks have the drawback that they do not act with the same vigour as when not oxidised, and they do not penetrate the fibres of the paper to the same extent. Moreover, such partially oxidised iron-gall inks may be removed from the paper, simply by washing.

18. The general invisibility of the marks made with freshly made iron-galls inks is overcome by introducing what is known as a "provisional colour." A colour of some kind, such as indigo, but nowadays an aniline dye, is incorporated in the ink at the time of manufacture, and this provisional colour at once causes the writing to become clearly and distinctly visible. Hence the general name of "blue-black", a familar example of which is "Stephen's Blue-Black." According as the writing is exposed to the air, so the provisional colour gradually disappears, but at the same time, the iron, acted upon by the oxygen in the air, gradually develops into a dense and permanent black. It will be easily understood that the provisional colour will remain in evidence for a length of time, depending upon the amount of the colour introduced, and the proportions of tannin and iron. This matter of the development of the eventual permanent black-colour is of considerable interest to the investigator, for obviously, an ink in which the provisional colour is still clearly visible, cannot be as old as an ink that is quite black, and in which no trace of the provisional colour can be seen. In this, as in other matters, caution is necessary. It has hitherto been universally accepted that any ink containing evidence of a provisional colouring could not possibly be say, fifteen, or more, years old, but recent research has shown that this doctrine is no longer tenable in every instance

19. It is most important to understand what occurs when writing is done with an iron-gall ink containing a provisional colour. When the writing is first made what is seen is primarily the provisional colour. Then, as the ink is acted upon by the oxygen in the air, the provisional colour gradually vanishes, while the mixture of tannin and iron turn black, and at the same time the ink eats into the fibres of the paper, and forms a chemical compound with it. The time taken for an iron-gall ink to become *apparently* black varies according to the composition of the ink. Some inks will become apparently black in about two years, but others will take as long as about four years. I have used the word "apparently" advisedly, for the first apparent blackness is not really blackness at all, but a deep purple in the densest parts. As the process of oxidation goes on, the purple gradually fades, until eventually a dead black appears, which stage may not be reached until the ink has been on the paper for about eight, or more, years, since the writing was first made. The ink will then remain in this condition for a number of years, until eventually there appears a slight yellow discolouration on the edges of the strokes.

20. The importance of the phenomenon just described will be readily understood when forged documents, alterations, additions, etc., of an alleged old date are produced, for, if it can be shown that the condition of the ink is incompatible with the condition of a really old ink, then there is clear proof of fraud. Wills, for example,

are sometimes produced, that are alleged to have been written many years before, but which, when carefully examined, will show that even the stage of the first apparent blackness has not been reached. The phenomenon is also important where alterations, or additions, are the subject of enquiry. The average individual, and I include the forger, has not the least idea that two apparently similar black inks are quite different when viewed closely by a skilled observer. One ink may show a distinct gray tinge, whereas another will show a tinge of green, yellow or even purple. Just as "All coons look alike" to most persons, so any two black inks seem to be the same to the forger.

21. To determine the age of a writing from the ink alone is a problem that the careful specialist always fights shy of. By this I mean, that given a piece of writing, and asked to state whether it is two, three, or ten years old, by an examination of the ink alone, the competent specialist will not undertake to answer the question. It is, however, altogether a different proposition to make a microscopical examination of two inks, and to determine whether one of them has been on the paper longer than the other. In most instances, this can be done, though where there is a comparatively short interval of time between the two writings, nothing can be done.

22. If there is one direction more than another which seems to offer scope for the activities of pretenders, it is in regard to matters concerning ink. Some of these ignorant performers will unblushingly swear that (1) a writing is not more than one or two years old; (2) that one writing was written ten days before another, or (3) that the carbon ink is so many weeks old, and so on. There seems to be no limit to their colossal effrontery. I cannot imagine, however, a more glaring instance of brazen impudence and hypocritical humbug than that which occurred in one of our Courts about the middle of 1934. A mere youth posed as an "expert" who claimed to be such after six months' alleged training. In the course of his evidence he stated that the ink on one of the documents could not be more than about nine months old. He further stated that his conclusions were based on the photographs he had taken (and not on the original documents, mark you!), most of which were about as useless as photographs could well be. Asked in cross-examination for the reasons which led him to speak of the age of the writing, he said that this was because the process of oxidation was not complete. Pressed still further, he made the astonishing statement that from the photographs he could see that the oxidation process was still going on!!! Comment is superfluous, though it may be remarked that this sort of "expert" evidence is on a par with that of the alleged finger-print expert who testified in Court that a finger print was so many months old. Dishonest performers of this type can be easily exposed, if the cross-examiner knows his business.

23. My experience over many years is that problems relating to additions, interlineations, alterations, and the age of a document, are often left until it is too late to profit by any changes that may occur in the ink used for the writing. As explained above, all iron-gall inks undergo change from the moment they are put on paper. The first steps in the darkening process are much more repaid than the latter ones. It will, therefore, be obvious that if the document can be put into the hands of a specialist soon after it is written there is a greater chance of quickly detecting the rapid changes in the first stage, than the slower changes in the later stage. These early changes can be detected, either by microscopical examination, chemical examination, or by means of the Colour Microscope, devised by Osborn. I, therefore, strongly impress upon all lawyers that in problems of this kind, it is to their interest to have them examined by a competent specialist at the earliest possible moment, and in fact, the same advice holds good for all classes of problems concerning disputed documents, but it is specially applicable to ink problems.

24. There are many other matters concerning, alterations etc., which I think it is desirable that jurists should know about, but as this article is already long enough, I will defer them for a future article.

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IMPERIAL ACTS, 1935.

(*Concluded from page 40, (Journal) Ind. Cas., Vol. 155.*)

17. *Amendment of section 38, Act IV of 1923.*

Section 38 of the said Act shall be re-numbered as sub-section (*1*) of section 38, and

(*a*) in the said section as so re-numbered, after the word "provisions" the words, brackets and figure "of sub-section (*1*)" shall be inserted; and

(*b*) to the said section as so re-numbered and amended the following sub-section shall be added, namely:—

"(*2*) Whoever in contravention of a direction made by the Local Government under sub-section (*2*) of section 20 fails to record in the prescribed register or to give notice of any accidental occurrence shall be punishable with fine which may extend to five hundred rupees."

18. *Amendment of section 46, Act IV of 1923.*

In sub-section (*1*) of section 46 of the said Act, after the word "exempt" the words "either absolutely or subject to any specified conditions" shall be inserted.

Extracts from Contemporaries.

Income Tax.

When we read that a taxpayer having been defeated by the tax collector in the Court of Appeal, has bravely gone on to the House of Lords and won, we feel it difficult to repress feelings of unholy joy. This has lately happened (*Astor* v. *Perry*, p. 222 *post*). The appellant made a revocable settlement of his property in New York State to a trust company, who had to pay or apply the income to or for his use for his life. The question in issue was a simple one. Was the whole of the income chargeable to British income tax whilst the appellant was resident amongst us, or only such part of it as actually came to his hands here. With the distinguished exception of the Court of Appeal, all the Courts decided that the second was the right view. The issue depended on the meaning to be attached to the words "any income" and "deemed" in sec. 20 of the Finance Act, 1922. It was a great battle and a notable victory, but, with the decision of Finlay, J., in *Marchioness of Ormonde* v. *Brown* (17, Tax Cas. 33) to rely on, the appellant must, we think, always have had good hopes of success.—*The Law Journal.*

Vagrancy.

The Vagrancy Act of 1824 is one of the older criminal laws which still remain on the Statute Book; and we notice that a private bill was introduced this week in the Commons to amend one of its provisions. A person may be charged and dealt with as a rogue and vagabond under s. 4 if he commits any one of a great number of offences. One is committed if he is found "wandering abroad and lodging" in a barn or outhouse, etc., even in the open air, "not having any visible means of subsistence and not giving a good account of himself." A well-to-do citizen, with money in his pocket, may sleep out by the roadside if it suits his tastes; but if he is a poor man and cannot give "a good account" (whatever that may be) of himself, he may soon be in a police court and have to go to prison. No doubt the lawgivers of King George IV's day thought that the penniless tramp under a hedge was a potential danger, whereas the well-to-do man in this position was a mere curiosity. The law worked fairly well for a century; but cases have occurred where it led to hardship and even, as the proposer showed, to tragedy. The House therefore gave ear to this proposal, of which we shall soon hear more.—*The Law Journal, March 30, 1935*

Assessments on Married Women.

That a married woman may be ordinarily resident in this country and yet escape liability to tax would appear to be the purport of a somewhat curious case which came recently before Mr. Justice Finlay (*Browning* v. *Duckworth*, p. 79 *ante*). In this case the husband

was admittedly not resident in the United Kingdom, and the matrimonial home was in Alexandria. The wife, however, made regular visits to England each year, the period of her stay varying from between 4½ to 5½ months. In the circumstances she was considered by the Special Commissioners to be ordinarily resident here even though her husband was not so resident. But, on the other hand, as she was clearly living with her husband, the provisions of r. 16 of the General Rules of the Income Tax Act, 1918, applied to her case. According to that Rule the profits of a married woman *living with her husband* are to be deemed to be the profits of her husband and are to be assessed and charged in his name and not in her name or in the name of her trustee. The position therefore was, that the Revenue was not entitled to make in this case any assessment upon her in respect of certain War Loan interest to which she was entitled. The assessment which in fact had been made upon her was accordingly held to be bad. The income-tax machinery clearly failed in this case, since the only person on whom the assessment could be made, if at all, was the husband, but he was a person not resident in this country, and no assessment could be made upon him even in the circumstances:—*The Law Journal, March 30, 1935.*

Actio Personalis.

At Birmingham Assizes this week, the effect of the new law as to the survival of rights of action was considered by Mr. Justice Humphreys. A father recovered from a motorist two sums in damages for his daughter's death—300*l.* under Lord Campbell's Act and 500*l.* for the pain and suffering caused to his daughter before her death. There is to be an appeal as to the second sum; but on a true reading of the new law we may submit that the respondent is in a strong position. The learned Judge ruled that the effect of the new Act was that if a complete cause of action came to the deceased before her death, her administrator could recover whatever, had she lived, she could have recovered herself. This view was submitted in these columns last year (78 Law Journ. p. 320), and we are gratified to see that the learned Judge has endorsed it. It is to be regretted, however, that no further claim was made in respect of a shortened expectation of life as outlined by Mr. Terrell in his article. That this is a head of damage is in accordance with the views of the Court of Appeal in *Flint* v. *Lovell* (51 T. L. R. 127), though in that case the injured person was, fortunately, alive to recover for himself. But the principle there once admitted, the bereaved plaintiff at Birmingham had, it seems, a good case on this point.—*The Law Journal, March 30, 1935.*

"Goods": Artist and Artisan.

It may be that the judgment of the Court of Appeal in *Robinson* v. *Graves* threw some illumination on that dark passage in our legal system wherein distinctions are said to have been drawn between the "future" goods of the artist and the artisan, or rather between the products of some artists and some others. Would the sale of a lady's frock before its making cease to be a sale of goods within the meaning of s. 4 of the Sale of Goods Act, 1893, if the designer and maker were an artist of such eminence that the value of the material were as small, in comparison with the artistry, as the value of the canvas, colouring matter, oils and brushes, in the portrait of Miss Finnegan, completed in accordance with the order of Mr. Graves as given at the cocktail party in or about July, 1932? One supposes that the answer is in the affirmative.

Yet if the bargain was made on completion of the work the sale would presumably be within s. 4, as the sale of Cleopatra's Needle or any Old Master would be. "I can imagine nothing more surprising to a client," said Greer, L. J., "who went to an eminent artist to have a portrait painted, than to be told that he was making a bargain with the artist about the sale of goods." But might there not be some ill-feeling or a little surprise if he was told it was a labouring job—a contract for work and labour? In any case I am not sure about the distinction. Would it be different if the artis were not "eminent"? Might not the future shoe or the future sea-chest be as much a work of art as the future bust? I suppose the answer is that it might; in the words of Baron Martin (*Clay* v. *Yates* 1 H. & N. 73, at p. 79): "Every case must be judged by itself."—*The Law Journal.*

THE END.